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¹ Term expired May 16, 1906.

² Term began May 10, 1906.

AMENDMENTS TO RULES.

SUPREME COURT OF LOUISIANA.

RULE IV, SECTION 3, AMENDED.*

It is ordered that rule IV, section 3, of this court be amended to read as follows:	mitted, or after final decree therein made
"No transcript shall be withdrawn from the clerk's office after a cause has been sub-	has become executory, except in cases covered by section 3 of rule 1."
	Adopted Monday, April 23, 1906.

* For rule as originally adopted, see 48 La. Ann. xvi, §21 South. viii.

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THE
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RUNT et al. v. ILLINOIS CENT. R. CO.
(Supreme Court of Mississippi. May 7, 1908.)

1. DEATH—ACTION—WHAT LAW GOVERNS.

No action can be maintained in Mississippi for the death of one killed in Louisiana owing to the alleged negligence of defendant, unless such a right of action is given by the law of Louisiana.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 50.]

2. SAME—PARTIES ENTITLED TO SUE.

Under Merrick's Rev. Civ. Code La. 1900, art. 2315, giving the surviving father and mother, or either of them, an action for the death of a minor child, and article 3556, cl. 8, providing that natural children, though recognized, make no part of the children properly so called, unless legitimized, neither the mother nor administrator of a bastard not legitimized can maintain an action for his death.

Appeal from Circuit Court, Pike County;
M. H. Wilkinson, Judge.

Action by Cicely Runt against the Illinois Central Railroad Company, with which an action by Marsh Holden, as administrator of Haley Williams, was consolidated. From a judgment sustaining demurrers to the declarations, plaintiffs appeal. Affirmed.

Green & Green, for appellants.

Mayes & Longstreet, for appellee, cited, *inter alia*, *Hubgh v. Railroad Co.*, 6 La. Ann. 495; *Herman v. Railroad Co.*, 11 La. Ann. 5; *Walton v. Booth*, 34 La. Ann. 913; *Mobile Life Ins. Co. v. Brame*, 95 U. S. 758, 24 L. Ed. 580; *The Harrisburg v. Rickards*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; *Railway v. Williams*, 78 Miss. 215, 28 South. 853, 51 L. R. A. 836, 84 Am. St. Rep. 624.

CALHOON, J. Haley Williams, a minor 18 years of age, was killed, as it is alleged by the gross negligence of appellee's servants in charge of a train; the disaster occurring in the state of Louisiana, the death of Williams caused by it occurring in that state the next day after it. Cicely Runt, averring herself to have been his mother, sued in this state for compensatory and punitive damages. A plea to this declaration was that Williams was a bastard, never legitimized, to which a demurrer was overruled. Another declara-

tion was filed by Marsh Holden, administrator of Williams, for both actual and punitive damages, on the same tort, which declaration avers that he was without lawful father or mother or brothers or sisters, and was never married. A demurrer to this was sustained. There was an order, by consent, consolidating the two actions, and it was agreed that the court "take judicial notice of the statutes, laws, and decisions of the Supreme Court of the state of Louisiana" in deciding the questions arising in the case. On the action on the two demurrers, plaintiffs below declined to plead further, and appeal.

The question is whether, by the laws of Louisiana, any right of action survives to the natural mother, or to the administrator of the deceased, or to both. The laws of Mississippi have no pertinency whatever to the case, since the accident occurred in Louisiana. A right of action for damages is transitory, of course; but, if there was no right of action at all by the law of the place, there is nothing to be transitory. This is the precise question before us. At common law there was no remedy. This is too clear for debate. Lord Campbell's act gives no right to the kin of illegitimates. This is too clear for debate. This was the law in Mississippi until there was legislative provision for bastards. Louisiana has no provision for succession to claims for damages resulting in death to illegitimates. By all statutes the word "children" means legitimate children, unless the contrary be expressed. This is uniformly held by the courts. In Louisiana, as at common law, until statutes intervened, the right of action for tort died with the person injured, regardless of purity of birth. Merrick's Rev. Civ. Code La. 1900, Art. 2315, gives the right of survivorship for action to "the minor children, or widow of the deceased, and in default of these, in favor of the surviving father and mother or either of them." This cannot be availed of in this case, as its reference is to legitimates only. Deceased, in fact, had no children nor wife, and, in the eye of the law, he had neither father nor mother.

Merrick's Rev. Civ. Code, art. 3556, cl. 8,

expressly says: "Natural children, even though recognized, make no part of the children properly so called, unless they have been legitimated." There is no pretense of any legitimation here, and article 240 of that Code provides how legitimation may be effected, and that is by solemn act before a notary and two witnesses declarative of the intention.

Even if there was a question of inheritable estate, it would go to the father or mother of the bastard only if they had "acknowledged him," under article 922 of that Code, and by article 203 such acknowledgment must be by "declaration executed before a notary in presence of two witnesses." But there is no question of inheritable estate in this case. The only question is that of the right of the mother of a natural child, or the administrator of his estate, to sue for damages resulting in his death. The judicial decisions of the state of Louisiana, with all their statutes before them, and of the Supreme Court of the United States construing the same laws, accord with our view that appellants cannot sue. The cases are cited in the brief for appellee, and the citations will appear in the statement of the reporter, so they need not be set out in this opinion. In *Railway v. Williams*, 78 Miss., on page 216, 28 South. 853, 51 L. R. A. 836, 84 Am. St. Rep. 624, this court referred to *Marshall v. Railroad*, 120 Mo. 275, 25 S. W. 179, holding a contrary view, and stated that the opinion was expressly grounded on two statutes of that state, one declaring the mother to be the natural guardian of her illegitimate child, and the other declaring that she might inherit from it; and we said there were no such statutes in Mississippi. The trouble is that, if both these statutes existed in Louisiana, nevertheless, on the decisions there, and on the statutes, there is not any survivorship, in this sort of a case, to the right to sue for damages for a tort resulting in death.

Affirmed.

ELLEDGE v. GRAY et al.

(Supreme Court of Mississippi. May 28, 1906.)
BILLS AND NOTES—NATURE OF TRANSFER—
CONFLICTING EVIDENCE—QUESTION FOR
JURY.

The evidence in an action against the makers and payee of a note, indorsed in blank by the payee and left by him at a bank, from which plaintiff received it, on payment of his debt to the bank, being conflicting as to whether the payee placed it in the bank as collateral merely for plaintiff's debt, and so was entitled to receive it on payment of such debt from other sources, or whether it had been transferred to plaintiff by the payee as a payment for certain accounts, so that it was properly turned over to plaintiff, the case should be left to the jury.

Appeal from Circuit Court, Tishomingo County; E. O. Sykes, Judge.

Action by M. M. Elledge against J. Z.

Gray and others. Judgment for defendants. Plaintiff appeals. Reversed and remanded.

Suit by M. M. Elledge against J. Z. and J. W. Gray and W. L. Madden on a note given by the Grays to Madden, and indorsed in blank by Madden, and held by Elledge, who claims to be the owner by assignment. The record shows that M. M. Elledge was indebted to the Tishomingo Savings Institution, and the president of said institution had insisted on the payment of this indebtedness. W. L. Madden carried to said institution a note given to him by J. Z. and J. W. Gray, and requested the president of said institution to let him have money on the note, which request was denied. Madden then said that he would leave the note with the bank "for the benefit of Elledge," to whom he was indebted. The president of the bank agreed to take this note and to credit the proceeds thereof, when paid, to Elledge's account. Madden then indorsed the note in blank and left it with the bank. The Grays had not paid the note at the time Elledge settled his indebtedness to the bank, and the president of the bank then turned the note over to Elledge, who brought suit against the Grays and Madden. The Grays in a special plea denied liability, stating that they paid to Madden the amount of said note. Defendant Madden alleged that he only agreed to pay the plaintiff, out of the proceeds of this note, an amount due plaintiff by one Shelton, which amount was only equal to a part of the proceeds of the Grays' note, and tendered this amount. The plaintiff testified that Madden owed him more than the amount of the note, and that it was understood that the entire proceeds of the Grays' note should be applied on the payment of this indebtedness. The court found that Madden had deposited the note with the Tishomingo Savings Institution as collateral security to Elledge's debt, and instructed the jury to find for the defendants; and Elledge appeals.

Candler & Sawyer, for appellant. J. M. Boone and W. J. Lamb, for appellees.

MAYES, J. We think the court should have left it to the jury to determine whether or not the note, placed at the Tishomingo Savings Bank as collateral to the debt owed there by M. M. Elledge, was placed there by Madden merely as a security to the account, or was in reality intended to be transferred to Elledge as his property. Elledge had testified that the note was given him by Mr. Madden in payment for certain accounts owing to him by the mill hands of Madden, which Madden had agreed to pay, and we think that a peremptory instruction should not have been given. If it be true that the note was placed at the bank as collateral merely, and the principal debt had been paid from other sources, of course the note belongs to Mr. Madden after said payment. But if, in reality, it was transferred to El-

ledge by Madden as a payment of the accounts owing Elledge by Madden's hands, then the note was properly turned over to Mr. Elledge, and he had a right to bring this suit.

Reversed and remanded.

POINDEXTER v. CUNNINGHAM BROS.*
(Supreme Court of Mississippi. June 4, 1906.)

1. LANDLORD AND TENANT—ADVANCES—SUBLEASE.

Where a lessee subleases land, agreeing to stand good for the rent of the sublessee, but not to be responsible for advances to the sublessee, and the lessor charged the goods advanced to the sublessee separately in an account in which the lessee was named as security, without his consent, the lessee is not liable for the goods advanced to the sublessee.

2. SAME.

Where the only heir of a deceased lessee assented to the taking of goods to pay indebtedness of the lessee to the lessor, the lessor is not entitled to retain any part of the goods for indebtedness of a sublessee.

Appeal from Chancery Court, Noxubee County; J. F. McCool, Chancellor.

Action by J. Q. Poindexter, administrator, against Cunningham Bros. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded.

Cunningham Bros. leased certain land to Jim Davis for the year 1904 and agreed to furnish him with supplies during that year, and Davis thereafter subleased part of the land to one Strong. During that year Cunningham Bros. made advances to both Davis and Strong, running a separate account for each. The words "Jim Davis, Security," are written beneath Strong's account; but it is not shown that these words were put there with Davis' knowledge or consent, or at the time the account was opened. There was no written evidence anywhere that Davis agreed in any way to be responsible for Strong's account. The proceeds of the crop raised by Davis during the year 1904 were applied to the payment of his account and rent both for the land worked by himself and that worked by Strong, and he took receipts from Cunningham Bros. showing payment in full of his account. Davis died, leaving as his only heir his wife, Emma Davis. The estate consisted of five bales of cotton, some cotton seed, and mules, which were all in Davis' possession at the time of his death. Cunningham Bros. took possession of the cotton, claiming that Davis was responsible for the debt of Strong. Appellant, Poindexter, afterwards qualified as administrator and made demand of Cunningham Bros. to deliver to him the cotton which they had taken; but they refused, and Poindexter filed a bill in chancery as administrator, praying for an accounting and that Cunningham Bros. be required in their answer to show what items of indebtedness they held against the estate of Davis, and

that they be charged with the proceeds of all property received from Davis of his estate.

J. E. Rives, for appellant. Allgood & Tyson and Brame & Barnes, for appellees.

MAYES, J. The testimony in this case fails to show any valid obligations on the part of Jim Davis to pay the account of Strong. Cunningham Bros. have no sort of claim against the estate of Jim Davis for the amount due them for the goods which they let Strong have. Jim Davis' account is charged to him separately, and Strong's account is charged to him separately, save for the fact that there is written underneath the account of Strong the words "Jim Davis, Security," which, from the testimony in the case, seems to have been placed there long after the account was made. Even if it possess any value as testimony in this case, which it does not, it tends to prove that, if Jim Davis was liable for Strong's account, it was only collaterally, under a verbal agreement, void under the statute of frauds. There was no written obligation on the part of Jim Davis to become security for Bill Strong, and this was expressly testified to by A. B. Cunningham, one of the defendants in the case.

But it is attempted to be shown that Emma Davis, the only heir of Jim Davis, assented to the taking of the cotton seed and cotton by Cunningham Bros., and made an assignment of the cotton and cotton seed to them; but the assignment made by her specifically says that it is to pay "Jim Davis' indebtedness," not Strong's, and, since Jim Davis did not legally bind himself to pay the Strong account, this cotton, assigned by Emma Davis, sole heir of Jim Davis, cannot be used for that purpose. Under these circumstances, we think that appellant is entitled to an accounting with Cunningham Bros., and that the estate of Jim Davis should be charged with the individual account of Jim Davis, and that any indebtedness on account of Strong should be eliminated from the account, and Jim Davis' account should be credited with all cotton, cotton seed, and anything else of value taken by Cunningham Bros., or which came into their hands in any way, and which belonged to the estate of Jim Davis, and that if, upon this accounting, the Jim Davis account is overpaid, a judgment should be had over against Cunningham Bros. for the amount so found to be due, if any.

For this reason, this cause is reversed, and remanded to be proceeded with in accordance with this opinion. *Wray v. Cox*, 86 Miss. 638, 38 South. 344.

HYATT et al. v. SOUTHERN RY. CO.
(Supreme Court of Mississippi. June 4, 1906.)
MASTER AND SERVANT—INJURY TO EMPLOYE—NEGLIGENCE—DECLARATION.
A declaration for death of a locomotive fireman, charging merely negligence of the en-

*Suggestion of error overruled June 25, 1906.

gineer in running his engine over a rough road at an unusual, dangerous, and high rate of speed, shows no liability on the part of the railroad company.

Appeal from Circuit Court, Lowndes County; E. O. Sykes, Judge.

Action by Ellas Hyatt and others against the Southern Railway Company. Judgment for defendant. Plaintiffs appeal. Affirmed.

The appellants brought suit as heirs at law for the killing by the appellee of their son, Edmund Hyatt, who was a fireman on an engine of the appellee and was killed while in the discharge of his duty as fireman by being thrown from the engine. The declaration alleges "that said Edmund, while engaged in his duty, under the command and authority and control of the said conductor, and of the said engineer, each of them being his superior officer, with the right to control and direct his services, the engineer running his engine and tender at an unusual, dangerous, and high rate of speed, and the roadbed being very much out of order, rough, uneven, and in very much neglected condition, it so jarred, jerked, and threw the tender that the said Edmund was suddenly and without warning precipitated in between the engine and tender, the said Edmund was so bruised, mangled, and mashed by the fall, and car wheels and trucks and machinery, that six days thereafter he died from the effects of said wound." The court sustained a demurrer to the declaration, and Hyatt appeals.

J. A. Orr, for appellants. Catchings & Catchings, for appellee.

MAYES, J. When the declaration is carefully analyzed, it will be seen that the suit is based solely upon the alleged negligence of the engineer in running his engine and tender over a rough roadbed at an unusual, dangerous, and high rate of speed. A great deal more is said in the declaration, but the negligence and carelessness of the engineer in running his engine and tender over a rough and bad road at an unusual, dangerous, and high rate of speed constitutes the sole cause of action.

Under the case as made by the declaration, no cause of liability is shown on the part of appellee, and, the judgment of the court below in sustaining the demurrer and dismissing the suit being correct, the case is affirmed.

DONALD v. STATE.

(Supreme Court of Mississippi, May 7, 1906. Rehearing Denied June 4, 1906.)

1. CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESS—AFFIDAVIT.

An affidavit for continuance for absence of a witness is fatally defective in not giving his residence, so that the court may know he is not out of its jurisdiction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1353.]

2. SAME—HARMLESS ERROR.

Permitting the introduction of a letter on a motion for continuance cannot be held prejudicial; it not appearing what its contents was, or that it was ever offered or read to the jury.

3. INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE.

The question on a prosecution for unlawfully selling intoxicating liquors being whether there was a sale of liquor in the instance charged, evidence that defendant kept liquors on storage belonging to various persons, subject to withdrawal by them at their pleasure, is immaterial, so that there is no error in its rejection.

4. CRIMINAL LAW—PENALTY—DISCRETION.

The exercise of the court's discretion in imposing the maximum penalty is not illegal, though influenced by information obtained outside the trial.

Appeal from Circuit Court, Rankin County.

J. E. Donald appeals from a conviction. Affirmed.

Appellant was convicted of unlawful retelling of intoxicants and sentenced to the extreme penalty of the law. On appeal he alleges that the court erred in refusing his application for a continuance, which application set out the absence of a material witness, one Davis, but did not allege his residence or whereabouts, nor whether he could be reached by process of the court; that on the motion for continuance the court permitted the introduction for evidence of a letter from the sheriff of Simpson county, but the contents of the letter are not shown in the record, nor is it shown that the jury heard the letter read. He alleges error, also, in the refusal by the court to permit the appellant to introduce testimony tending to prove that he kept liquors on storage belonging to various parties, one of whom was the absent witness, Davis, which liquors could be withdrawn by the owners at their pleasure. He alleges as error the imposition of the maximum penalty of the law by the court, which penalty was alleged to have been given on account of information within the knowledge of the trial judge.

Wm. Buchanan and Garrard Harris, for appellant. R. V. Fletcher, Asst. Atty. Gen., for the State.

CALHOON, J. The affidavit for continuance is fatally defective in not giving the residence of the witness. For all the court knew he might have been out of its jurisdiction. *Lamar v. State*, 63 Miss. 265.

There is nothing to show that the letter objected to was ever offered or read to the jury. Its contents do not even appear. It may have been harmless.

The exact question being whether there was a sale of liquor in the particular instance charged, there was no error in the action of the court on the introduction of testimony. It could throw no light on that, in this case, to show that many kept their private liquors on storage with defendant,

which they could and did call for as they wished.

We cannot reverse because the court imposed the maximum penalty because of information the judge had before the trial. The exercise of discretion in sentencing is not illegal, if influenced by outside knowledge of the character of the accused, or information of violation of law as to the offense charged.

Affirmed.

POWELL v. RUSSELL.

(Supreme Court of Mississippi. May 7, 1906.
Suggestion of Error Overruled June 4, 1906.)

CONTRACTS—CONSTRUCTION.

The parties to a contract of employment having dealt with it as a divisible one, such construction doing no violence to its terms will be sanctioned by the court, so that the employé, though leaving the employment before the end of the term, may recover his salary to date of leaving.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 753.]

Appeal from Circuit Court, Yazoo County; D. M. Miller, Judge.

Action by W. E. Russell against J. F. Powell. Judgment for plaintiff. Defendant appeals. Affirmed.

Action for debt based upon a contract entered into between the parties which is as follows: "This contract, made and entered into this the first day of August, 1903, by and between J. F. Powell, employer, and W. E. Russell, employé, witnesseth, that the said J. F. Powell employs the said W. E. Russell to work for him at Roseneath, Mississippi; said Russell to work under the direction and instructions of said Powell. In consideration of the above stipulated conditions being fully and faithfully carried out, the said Powell agrees to pay said Russell as salary from the date August 1st, 1903, until January 1, 1904, at the rate of \$700.00 (seven hundred dollars) per year and for the twelve months beginning January 1st, 1904, and ending December 31, 1904, the rate of \$75.00 (seventy-five dollars) per month." On the trial of the case in the court below a demurrer was filed to the declaration, which demurrer raised the question as to the character of the contract sued on; the demurrant contending that it was an indivisible contract, and that, since the appellee had breached the contract by leaving the employment of the appellant, he thereby forfeited his right to claim for services performed for the portion of the time contracted for. The demurrer was overruled, and the case went to a jury, who found for the plaintiff after deducting certain credits claimed by the defendant.

Campbell & Campbell, for appellant. E. R. Holmes, for appellee.

TRULY, J. It is unnecessary to notice in detail the numerous assignments of error

relied upon by the appellant, for the reason that, in our judgment, it is perfectly manifest, from the construction placed upon the contract of employment by the parties themselves, that they dealt with it as a divisible one. The construction mutually adopted doing no violence to the express terms of the contract, the interpretation placed upon it by the parties will be thereafter sanctioned by the courts. Being a divisible contract, appellee was, of course, entitled to his salary to the date when he left the employment of the appellant. This case is clearly governed by the principles announced by this court in *Ramsey v. Brown*, 77 Miss. 124, 25 South. 151, 78 Am. St. Rep. 520.

As to the several items which appellant now seeks to have deducted from the amount awarded the appellee, it is sufficient to say that as to some of them the jury found the issue of fact against him, and as to others the record fails to show his right to receive credit therefor. The right result was manifestly reached in the court below upon instructions more liberal, and a theory of law more favorable, to the appellant than he was entitled to.

The judgment is affirmed.

PRESIDENT, ETC., OF INSURANCE CO. OF NORTH AMERICA v. PITTS.

(Supreme Court of Mississippi. June 4, 1906.)

1. INSURANCE—CONSTRUCTION OF POLICY—INTEREST OF OWNER IN PROPERTY.

A person holding a conveyance of land in fee simple is the sole and unconditional owner, within a provision of a fire policy that it should be void if the interest of the insured were other than unconditional and sole ownership, though there are payments still due for the property, for which the vendor has a lien.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 605, 606, 618, 619.]

2. SAME—OCCUPANCY OF PROPERTY.

Under a provision of a fire policy that it should be void if the building be or become vacant or unoccupied and so remain for 10 days, where the building was occupied for more than 10 days, but a fire occurred afterwards during its occupancy, the policy did not become void.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 764-767.]

Appeal from Circuit Court, Tallahatchie County; Sam C. Cook, Judge.

Action by D. W. Pitts against the president and directors of the Insurance Company of North America to recover the proceeds of a policy of fire insurance. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Williamson, Wells & Peyton, for appellant. Dudley & Boatner and Harris & Powell, for appellee.

CALHOON, J. The insurance company sought to defeat recovery of a fire loss because of two clauses in the policy, declaring that it should be void: (1) "If the interest

of the insured be other than unconditional and sole ownership." (2) If the building "be or become vacant or unoccupied, and so remain for ten days."

As to the first, the facts are that at the date of the policy Pitts was in possession under a conveyance of title in fee simple. But the conveyance recites a cash payment of \$200 and four deferred annual payments of \$200 each. It does not expressly reserve a vendor's lien to secure the deferred payments, but our law gives that. It is to be noted in this record that there was no written application for the insurance, nor any representations made. The policy was issued pursuant to telephonic request to an agent, and so the reliance of the company is on the terms of the policy itself, with no pretense of any misrepresentations. We have no trouble in taking alignment with those decisions holding that Mr. Pitts was sole and unconditional owner in the purview of the law, notwithstanding there was a debt for purchase price. *Union Ins. Co. v. Nalls* (Va.) 44 S. E. 896; *Milwaukee Insurance Co. v. Rhea*, 123 Fed. 9, 60 C. C. A. 103; *Ellis v. Insurance Co. (C. C.)* 32 Fed. 646; 19 Cyc. 693; *Morotock Ins. Co. v. Rodefer* (Va.) 53 Am. St. Rep. 846, and notes. Strict construction as against the insurer is the rule, and the clause relates to the legal character of the title. In *Insurance Co. v. Cochran*, 77 Miss. 348, 26 South. 932, there was a written application for the insurance, and in it a deliberate misstatement that the applicants were the sole and unconditional owners, whereas, in fact, they owned only an undivided one-half interest. This case can have no influence on that at bar. The decision was clearly correct. In *Rosenstock v. Insurance Co.*, 82 Miss. 674, 35 South. 309, *Rosenstock*, the insured, was the vendor of the property, not in his possession, but of which he had put his vendee in possession, to whom he was under written agreement to convey on payment of a purchase price of which he had actually received much more than one-half. He could not be regarded as unconditional owner. He was owner only on the express condition to convey. This decision does not affect the case before us, as its reasoning demonstrates.

On the second contention the facts are that, pending the policy, the premises were at one time vacant for more than 10 days, but actual possession was resumed, and some time afterwards, and while occupied, the fire occurred. If the loss had occurred during the prohibited vacancy, there could be no recovery. This is everywhere held, and so decided by our own court in *Insurance Co. v. Scales*, 71 Miss. 975, 15 South. 134. Authorities are not wanting to sustain the views of learned counsel for appellant, and they are sustained also by Mr. Ostrander on *Fire Insurance* (2d Ed., 1897) § 145, and the numerical weight of the decisions he cites in

note 5. We prefer to stand on the manifest trend and weight of modern authority, *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 676, and on *Freeman's* note to that case in 80 Am. St. Rep. 310, *Elliot* on Insurance, § 205, and the other citations of the briefs for appellee. If the insurance had been for three years or more, and the premium paid, and the vacancy during the first or last month, and the fire afterwards and during occupancy, it would be very unfair to deprive the insured protection. The common people who insure should not be entrapped by a harsh construction of a technical word. The insurance is revived by occupancy, though suspended during the vacancy.

Affirmed.

ALEXANDER v. PORTER et al.

(Supreme Court of Mississippi. June 11, 1906.)

APPEAL—OBJECTION NOT MADE BELOW—VOID JUDGMENT.

A judgment by default, rendered at the return term on constructive notice against a nonresident in an action commenced by attachment, being void on its face, will be reversed, though the invalidity of the judgment is urged for the first time on appeal.

Appeal from Circuit Court, Pike County; M. H. Wilkinson, Judge.

Action for debt by J. E. Porter and others against Mrs. F. J. Alexander, begun by attachment proceedings. Service was had by publication, and judgment by default taken at the return term, from which this appeal is prosecuted. Reversed and remanded.

R. W. Cutrer, for appellant. H. V. Wall, for appellee.

MAYES, J. The record in this case shows that the judgment entered by the circuit court is a void judgment. Suit was commenced in July, 1905, by an attachment against Mrs. Alexander; she being a nonresident at the time. Publication was duly made requiring her to appear at the September term, 1905, and at the September term, 1905, judgment by default was rendered against the defendant on this constructive service. On the motion to set aside the judgment in the lower court the invalidity of the judgment was not assigned as one of the reasons why the court should vacate the judgment, and this point is made for the first time here. While it is true that this court has decided that it will not take notice of any objection which is urged for the first time in the Supreme Court, yet it will not affirm a judgment void on its face, when appealed to this court, even though this objection was not made in the lower court. There is no judgment for this court to affirm. The suit is merely a pending suit in the lower court.

The cause is reversed and remanded.

RENO et al. v. STATE.

(Supreme Court of Mississippi. June 11, 1906.)

GAMING—JOINT OFFENSE—EVIDENCE.

Evidence that defendants played a joint game is necessary for their conviction under an indictment charging them with having played a game together.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, §§ 274, 278.]

Appeal from Circuit Court, Lafayette County; J. B. Boothe, Judge.

Will Reno and others appeal from a conviction. Reversed and remanded.

The four appellants were convicted jointly of gaming. The indictment charged that they played at a certain game together, and the instructions of the court charged the jury that, unless they believed that all four of the accused played in the same game together, they should acquit. The jury convicted them all, and they appeal.

Falkner & Russell, for appellants. R. V. Fletcher, Asst. Atty. Gen., for the State.

WHITFIELD, C. J. There is not a particle of evidence in the case to show that the four parties, charged in the indictment specifically with having played a joint game, ever at any time played such joint game.

Reversed and remanded.

VICE v. HOLLEY.

(Supreme Court of Mississippi. June 11, 1906.)

FALSE IMPRISONMENT—ARREST WITHOUT WARRANT.

An officer who arrests a person, having no warrant for him, but mistaking him for one wanted for a crime, and over his protest puts him in jail, he making no misstatements or misrepresentations leading to his arrest, is liable therefor.

Appeal from Circuit Court, Harrison County; W. H. Hardy, Judge.

"To be officially reported."

Action by L. E. Vice against Ed Holley. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

On February 9th the appellant was on a passenger train on his way to New Orleans. After he had passed Pass Christian, the appellee, who was town marshal of Pass Christian, and who had boarded the train at that point, approached him and asked if he had not been in Pass Christian the week before, to which he answered in the negative. Appellee in no other manner molested appellant, but after appellant had disembarked in New Orleans, appellee, accompanied by a policeman of the city of New Orleans, arrested the appellant, telling him that he was wanted in Pass Christian on a charge of grand larceny. Appellant offered to give names of persons who could identify him, but the request was denied. He was taken to the police station, where his description was compared with the

description of one Kelly, who was wanted in Pass Christian on a charge of grand larceny, and he was thereafter placed in jail in New Orleans and kept until the next day, when he was taken to Pass Christian and there placed in jail, though protesting his innocence of any crime and offering to secure witnesses by telephone who could identify him. On February 11th he was discharged. He brought this suit for false imprisonment. The court below gave a peremptory instruction for the defendant, and this appeal is prosecuted.

Harper & Harper, for appellant. Jno. J. Curtis, for appellee.

MAYES, J. It was error in the circuit judge to give a peremptory instruction to find for defendant. At the time the arrest is said to have been made, Holley had no warrant for the arrest of Vice, and his incarceration was in another state from that in which the offense was charged to have been committed. Kelly was the man charged with crime at Pass Christian, Miss., and not Vice. Vice was locked up in jail in New Orleans 1 day, and again in Pass Christian for about 24 hours, protesting, as he says, all the while that he was not the man wanted, and giving the officer the names of various parties from whom he might ascertain his mistake; but no attention seems to have been paid to it by Holley. Any officer, in making an arrest, acts at his own peril in arresting the right person, and if he makes a mistake, and arrests the wrong person, however innocently he may have acted, he is liable, unless the party complaining has brought the injury upon himself by misstatements and misrepresentations which led to the arrest. If Vice voluntarily went to the police station and submitted to have himself locked up until the next morning to await the return of Holley to Pass Christian, and then voluntarily went with the officer to Pass Christian and again submitted voluntarily to being locked up for 24 hours, without any compulsion being used, either actual or constructive, knowing at the time his right to refuse, then Holley is not liable; but it was for the jury to pass on the facts, and to say whether or not this was the case.

This is not a suit for malicious prosecution. This is a suit for false arrest of a party without warrant, beyond the jurisdiction of the state, by an officer of the state—a person not charged with crime nor suspected of any offense. In a suit for false imprisonment, mistake as to the identity of the party arrested may be considered in mitigation of damages and on the question of malice; but it can never defeat the action. *Hays v. Creary*, 60 Tex. 445; *Formwalt v. Hylton*, 66 Tex. 288, 1 S. W. 376; *Landrum v. Wells* (Tex. Civ. App.) 26 S. W. 1001; 12 Ency. of Law (2d Ed.) 768; 19 Cyc. 342; 3 *Walt's Action and Defenses*, 316.

Reversed and remanded.

STATE v. WALKER.

SAME v. STARLING.

(Supreme Court of Mississippi. June 11, 1906.)

INDICTMENT—JOINDER OF OFFENSES IN SINGLE COUNT—RECEIPT OF DEPOSIT BY INSOLVENT BANK.

Under Code 1892, § 1089, forbidding an officer of a bank conducting the business of receiving money on deposit from receiving any deposit, knowing or having good reason to believe the bank insolvent, without informing the depositor of such condition, a count of an indictment charging a violation of the statute by receiving deposits from divers persons without informing such persons and depositors of the insolvent condition of the bank and a count charging that deposits were received from several persons named were demurrable for joinder of separate offenses in single count.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 393.]

Appeal from Circuit Court, Washington County; A. McC. Kimbrough, Judge.

"To be officially reported."

Indictments against J. S. Walker, the president, and William Starling, the cashier, of the Merchants' & Planters' Bank, Greenville, for receiving deposits in an insolvent bank. From a judgment sustaining a demurrer to the indictment in each case, the state appeals. Affirmed.

R. N. Miller and R. V. Fletcher, Asst. Atty. Gen., for the State. J. H. Wynn, Shields & Boddie, and Percy & Campbell, for appellees.

MAYES, J. Walker was indicted under section 1089 of the Code of 1892, which is as follows, viz.: "If the president, manager, cashier, teller, assistant, clerk, or other employé or agent of any bank or broker's office or establishment, conducting the business of receiving on deposit the money or other valuable things of other persons, shall remove or secrete or conceal the assets or effects of such establishment for the purpose of defrauding any of the creditors of the establishment, or shall receive any deposit knowing, or having good reason to believe the establishment insolvent, without informing the depositor of such condition, on conviction, he shall be imprisoned in the penitentiary not longer than five years." The first count of the indictment, after setting out the fact that Walker was the president of a bank, engaged in the business of receiving money on deposit for other persons, proceeds to charge that the bank was insolvent, and that Walker well knew it was insolvent, and that he "did, on divers dates and times aforesaid, unlawfully, willfully, and feloniously receive on deposit from divers persons, whose names are to the grand jurors unknown, without then and there informing such persons and depositors of the insolvent condition of the bank." The second count is a duplicate of the first, except that, instead of charging that Walker "well knew that the bank was insolvent," it charges "that

he had good reason to believe" it was insolvent. The third count is identical with the first count, except that it names five persons from whom Walker received the deposits.

It is manifest from the statute that each and every time a deposit is made, when the condition exists which requires the president, manager, etc., to notify the depositor, and the notice is not given, an offense is committed under the statute, and each offense so committed is a separate and distinct offense. The crime created by the statute can only be committed by the "president, manager, etc., of a bank, or broker's office, or establishment conducting the business of receiving on deposit the money or other valuable things of other persons"; but, when it is shown that the person of the designated class is "conducting the business," etc., a single act of receiving one deposit completes the crime, and the crime is committed just as often as the act is repeated. The statute plainly says he shall be guilty of the crime while conducting the business named by the statute if he receive "any deposit" without notifying "the depositor"; using such language as clearly indicates that every single act of receiving any deposit is a separate and distinct offense. "Conducting the business" is one of the necessary links in the chain of facts necessary to constitute the crime. A person not "conducting the business" cannot commit the crime. Therefore, as a matter of necessary description, it must be alleged that the person charged was "conducting the business"; but the crime made by the statute is the receiving of "any deposit" without notifying "the depositor" by a person so engaged. The one single criminal act necessary to constitute the crime is the receiving of "any deposit" without notifying "the depositor." There is nothing criminal in "conducting the business" and receiving deposits, even when the bank is in an insolvent condition. It becomes criminal only when the president, manager, etc., fails to inform the depositor. The first and second counts in the indictment are bad for the reason that they charge "divers" separate and distinct felonies in the same count. The third count of the indictment is bad for the reason that it charges as many separate and distinct felonies as there are parties named in the count.

It is argued by counsel for the state that the offense created by the statute is the "conducting of the business of receiving deposits," and that the offense is not committed by the single act of receiving one deposit, but that it is a continuing crime, committed "conducting the business of receiving deposits," and, no matter how many deposits are made, there is but one crime. The statute does not say this. It says, if the president, manager, etc., of a bank, etc., conducting the business of receiving on deposit money, etc., shall receive "any deposit" with-

out informing the depositor, on conviction, he shall be punished, etc. While conducting the business of receiving deposits, if he shall receive any deposit without notifying the depositor, he has committed the crime named by the statute. We think the action of the lower court was correct in sustaining the demurrer to the indictment, and after a careful research of the authorities we can find no authority that holds that separate and distinct felonies may be charged in the same count. Since the indictments are the same, we treat the two cases together. *Sprouse v. Commonwealth*, 81 Va. 374; *Fisher v. State*, 33 Tex. 792; *Hill v. State*, 72 Miss. 527, 17 South. 375; *Burges v. State*, 81 Miss. 484, 33 South. 499; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Strawhern v. State*, 87 Miss. 422.

SOUTHWESTERN ALABAMA RY. CO. v. W. C. MADDOX & SON.

(Supreme Court of Alabama. April 20, 1906.)

1. CARRIERS—RECOVERY OF OVERCHARGES—ACTION, NATURE OF.

An action against a carrier by a consignee for overcharges in freight which he was required to pay in order to obtain the freight was in the nature of action for money had and received.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 906.]

2. APPEAL—PRESUMPTIONS—FACTS NOT SHOWN BY RECORD.

Where the questions put to witnesses do not appear on appeal, it will be presumed that the answers were responsive thereto.

3. TRIAL—EVIDENCE—TIME FOR OBJECTION.

An objection to a responsive answer by a witness is too late, where the question was not objected to.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 183.]

4. CARRIERS—OVERCHARGE—ACTION TO RECOVER—EVIDENCE—ADMISSIBILITY.

In an action against a terminal carrier by a consignee to recover overcharges on freight, the bill of lading issued by the initial carrier, which showed the proper freight rate, having been introduced in evidence, it was proper to permit the treasurer of the shipper to detail his efforts to collect the overcharges and to admit correspondence between the witness and defendant's agents in regard to the overcharges, as the defendant was the agent of the carrier issuing the bill.

5. SAME—EXCESSIVE CHARGES.

Where a carrier withheld goods from the consignee and refused to deliver them without the payment of excessive freight, the payment could not be regarded as voluntary.

Appeal from Circuit Court, Coffee County; John P. Hubbard, Judge.

"To be officially reported."

Action by W. C. Maddox & Son against the Southwestern Alabama Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The witness Smith, answering an interrogatory, said: "I am the treasurer of the Continental Gin Company, and was such on the 9th day of September, 1901. Maddox & Sons purchased a gin outfit from said gin company. My knowledge of this is derived

from the papers on file in my office. The machinery consisted of two 50-saw Winship gins, with feeders, one battery condenser, lint and dust flues, one single-box screw press, one 9-inch elevator, one 9x16 engine, one 47x10 tubular boiler, with shafting, pulleys, etc. The machinery was shipped by freight over railroad from Atlanta, Ga., to Maddox & Son, at Brockton, Ala. It was delivered to the Southern Railroad Company, who issued bill of lading therefor. The machinery was not weighed before delivery to the railroad company, but the gin company estimated the weight from its previous knowledge and experience in shipping and handling the same and this estimated weight was inserted in the bill of lading. The estimated weight of the machinery was 22,452 pounds, and in my best judgment that was the approximate weight of the machinery. The freight charges for transporting the machinery from Atlantic to Brockton was 49 cents for each 100 pounds of weight, and an additional \$3.20 for advance charges, and this rate of freight was agreed upon and inserted in the bill of lading. I have not the original bill of lading, it having been forwarded to the general freight agent of the Plant System of railway at Savannah, Ga., attached to a claim against the Plant System for an overcharge of freight; said overcharge amounting to \$89.12. The amount of freight charges, based on the rate and weight, and including the advance charges, makes a total of \$113.21. I represented plaintiffs by filing claim for the plaintiffs for the total charge in freight, by mailing the claim with the bill of lading attached to the Plant System's general freight agent at Savannah, Ga., on December 16th. On February 25th I wrote Mr. Mengies, and on March 14th I received a reply, and on March 18th I replied to him, and on March 22d I received a reply. Hearing nothing further from him, I wrote him again on May 22d, and had a reply dated May 27th. On July 19th I wrote Mr. Winship. On September 9th I wrote Mr. Wolff, and on the same day wrote Inspector Armistead. On November 18, 1902, I again wrote Mr. Mengies. On December 12th I received a reply. On January 14, 1903, I wrote Mr. Mengies. On February 9th I wrote him again. Under date of February 12th he replied." None of these letters, except the one containing the claim, the original bill of lading, and the expense bill are set out in the record; hence it cannot be stated what their contents were.

Riley & Wilkerson, A. A. Wiley, and J. M. Chilton, for appellant. J. F. Sanders, for appellee.

DOWDELL, J. The demurrer to the third count of the complaint proceeds upon the theory that said count declares upon a contract, whereas, in fact, it does not. Said count is more in the nature of an action for money had and received. The foundation

of it is a claim for overcharges in freight which the plaintiff was required to pay in order to get his goods. There was no error in overruling the demurrer to this count.

Many of the exceptions reserved by the defendant to the rulings of the court on the introduction of evidence were based on objections of the defendant to answers of the witness. No objections were made to the questions calling for the answers that were objected to. Indeed, the record does not show what the questions were, and for aught that appears the answers which were objected to were responsive to the questions, and, nothing appearing to the contrary, it will be presumed on appeal that they were, and in such case, the question not having been objected to, the objection to the answer comes too late, when such answer is responsive to the question.

The introduction of the bill of lading rendered competent the evidence of the witness Smith relative to his connection with the transaction in his efforts to collect the overcharges in freight, which had been paid by the plaintiffs, and also made competent in evidence the correspondence between said Smith and the agents of the railroad company in reference to said overcharges. The defendant company, as a connecting line at the point of destination and place of the delivery of the goods, was the agent of the initial company issuing the bill of lading. The evidence without dispute showed that the defendant held the plaintiffs' goods and refused to deliver them without the payment of the money. This being true, the payment cannot be said to have been voluntary. 22 Am. & Eng. Ency. Law (2d Ed.) p. 617.

We find no reversible error in the record, and the judgment appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

Ex parte NATIONAL LUMBER MFG. CO.
(Supreme Court of Alabama. April 28, 1906.)

1. GARNISHMENT — JUDGMENT NISI — VALIDITY.

As a final judgment in garnishment proceedings is a confirmation of the conditional judgment nisi, a valid judgment nisi is necessary to support a valid final judgment.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 336.]

2. CORPORATIONS — ACTIONS — PROCESS — SERVICE.

To authorize a judgment by default against a corporation, the record must show that proof was made that the person upon whom process was served was such an officer as by law was authorized to receive service on behalf of the corporation.

3. CERTIORARI — REVIEW OF FINAL JUDGMENT IN GARNISHMENT PROCEEDINGS.

Certiorari is the proper remedy to review a final judgment against a garnishee confirming a void judgment nisi.

"To be officially reported."

Certiorari by the National Lumber Manufacturing Company to review a judgment against it as garnishee in a cause wherein the Dixie Grain Company was plaintiff and the Powe Logging Company defendant. Motion to quash the writ overruled, and judgment rendered.

It was shown that judgment nisi was rendered against the movant as garnishee, and it nowhere appears that proof was made that proper service had been had on one of the officers of this corporation upon whom service could be legally made, and it is without such proof at a subsequent term of the court the judgment nisi was made final against this movant. There was motion made by the Dixie Grain Company, which was made party defendant to this motion for certiorari, to dismiss, quash, or supersede the writ of certiorari issued out of the Supreme Court at the instance of the National Lumber Manufacturing Company. The cause was submitted on the motion for certiorari and on the motion to quash and dismiss the motion for certiorari. It was shown by the records and proceedings of the circuit court that a judgment nisi or by default was entered against this petition, and the record falls to show that proof was made that the person upon whom process was served was, at the time of the service, such an agent or officer as was by law authorized to receive service for and on behalf of the corporation.

Stevens & Lyons, for movant. W. C. Fitts, McIntosh & Rich, contra.

DOWDELL, J. A final judgment in garnishment proceedings is merely a confirmation of the judgment nisi, which is a conditional judgment. A valid judgment nisi is therefore necessary to support a valid final judgment. If the judgment nisi is for any reason void, there can be no confirmation of it, and hence no valid final judgment can be predicated on it. Goode v. Holcombe, 37 Ala. 94; Drane v. King, 21 Ala. 558; Spence v. Simmons, 16 Ala. 828; Lowry v. Clements, 9 Ala. 422; Dickerson v. Walker, 1 Ala. 48.

To authorize a judgment by default against a corporation, the record must show that proof was made that the person upon whom process was served was, at the time of the service, such an agent or officer as by law was authorized to receive service for and on behalf of the corporation. This has been the rule of practice in this state since the case of Huntsville v. Walker, Minor, 391. This rule had been followed in numerous cases decided by this court, and has become too firmly established to be now overturned. St. John v. Tombeckbee Bank, 3 Stew. 146; Wetumpka & Coosa R. R. Co. v. Cole, 6 Ala. 656; Oxford Iron Co. v. Spradley, 42 Ala. 24; Southern Express Co. v. Carroll, 42 Ala. 437; M. & E. R. R. Co. v. Hartwell, 43 Ala. 508;

Independent Pub. Co. v. Amer. Press Association, 102 Ala. 475, 15 South. 947; Hoffman v. Ala. Distillery & Feeding Co., 124 Ala. 542, 27 South. 485.

The record falls to show that at the time of the rendition of the judgment nisi that the necessary proof of service on the defendant in order to support such judgment was made. The judgment nisi, therefore, was a nullity, and the final judgment based on it was likewise void. That the common-law writ of certiorari in such a case is the proper remedy, see *Beach v. Lavender Bros.*, 138 Ala. 406, 35 South. 352, and other authorities cited above.

The motion to quash the writ must be overruled, and a judgment will be here rendered, quashing the judgment in the lower court brought under review by the writ.

WEAKLEY, O. J., and HARALSON and DENSON, JJ., concur.

SCHLOSS & KAHN v. MCINTYRE et al.
(Supreme Court of Alabama. May 8, 1906.)

OFFICERS—CONTRACTS—PERSONAL LIABILITY. Commissioners acting under color of Acts 1900-01, p. 800, establishing a liquor dispensary, bought liquors for the dispensary. Subsequently the act was declared unconstitutional. The commissioners made no promise to pay for the liquors, nor did they derive any personal benefit, nor make any representations to the seller, who had all the opportunity to know the invalidity of the act which the commissioners possessed. *Held*, that the commissioners were not personally liable.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Officers, § 191.]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

"To be officially reported."

Action by Schloss & Kahn against J. W. McIntyre and others. From a judgment sustaining a demurrer to a count of the complaint, plaintiff appeals. Affirmed.

This was an action to fasten an individual liability upon the commissioners of the Ashford dispensary for liquors and other things purchased for use and sale in the dispensary. The fourth count is in the following words: "Plaintiffs claim of the defendants the sum for \$514.05 for goods sold by plaintiffs to them on or about the 1st of November, 1904, under the following circumstances: The defendants were acting as a board of dispensary commissioners of Ashford, Ala., under and by virtue of the power and authority supposed to be conferred by an act of the General Assembly of Alabama approved February 6, 1901, and as such board of commissioners the defendants were operating and conducting a dispensary at Ashford, Ala., and in order to do so it was necessary to buy whisky and other malt liquors, and as such board of commissioners defendants bought from plaintiffs said goods on and about said date, and said goods were received

by the manager of the said Ashford dispensary, who was elected and conducting said dispensary by the directions and orders of the defendants; that said act was in fact null and void, and conferred no authority on the defendants to establish or run said dispensary; and that the defendants are liable personally for said goods so sold." There were demurrers to this count: (1) The failure to allege that the defendants have been guilty of a wrong or omission of duty, depriving plaintiffs of the benefit of the liability of defendants' principal, the Ashford dispensary; (2) the count alleges no fact showing that defendants exceeded the authority conferred by the act of the Legislature, and in such a manner or to the extent that a wrong or injury was done to the plaintiffs, or that defendants' conduct in and about the buying of said goods amounted to an omission of duty; (3) that the count shows that the plaintiffs contracted with and sold the goods to the Ashford dispensary with the knowledge that the act of the Legislature was void and conferred no authority upon the defendants; and other demurrers raising practically the same question. On a trial of the case counts 1, 2, and 3 were stricken from the complaint on motion of the plaintiffs, and the court sustained a demurrer to the fourth count of the complaint, whereupon the plaintiffs took an appeal to test the rulings on demurrer.

Espy & Farmer, for appellants. Reid & Hill, for appellees.

WEAKLEY, C. J. The contention of appellants is that, inasmuch as the act of 1901 purporting to establish a dispensary at Ashford (Acts 1900-01, p. 800) is, upon principles settled in *Mitchell v. State ex rel. Florence Dispensary*, 134 Ala. 394, 32 South. 687, and subsequent cases, unconstitutional, the defendants, who acted as commissioners under color of said act, and who as commissioners purchased liquors for the dispensary from appellants, are personally liable to them for the price. The only authority cited in support of the action is *Codding v. Munson* (Neb.) 72 N. W. 846, 66 Am. St. Rep. 524, which states the general rule relied on to the effect "that one who assumes to act as agent for a principal who has no legal status or existence renders himself individually liable on contracts so made." The opinion in that case, however, proceeds to say: "This doctrine receives its most frequent application in cases like the present, where a person or committee incurs obligations as the result of instructions given by a body gathered together informally for a special purpose, and possessing no definite membership or continued power of existence. The rule is founded upon a presumption of fact, and is not the expression of any positive or rigid legal principle. The presumption referred to is that the parties to a contract contemplate the creation

of a legal obligation capable of enforcement, and that therefore it is understood that the obligation shall rest on the individuals who actively participate in the making of the contract, because of the difficulty in all cases, the impossibility in many, of fixing it upon the persons taking part in or submitting to the action of the evanescent assemblage. If, however, the person with whom the contract is made expressly agrees to look to another source for the performance of its obligation, or if the circumstances be such as to disclose an intention not to charge the agent, as where the other agrees to accept the proceeds of a particular fund, there is no longer reason to indulge the presumption, and it may be rebutted by proof of such facts." It was there held that, under the facts of the case, it should have been submitted to the jury to determine whether the plaintiff did not look to defendant personally, but was to receive merely the subscription notes, or their proceeds, donated by those attending the public meeting. The case is not similar to this, and does not support this action. Assuming for the sake of the argument that an action in a proper case would lie against the defendants on the contract, although they made the purchases only in their official character, yet we are of the opinion that they are not individually liable for the purchases of liquor for the dispensary.

In *Smout v. Ilbery*, 10 M. & W. 1, Mr. Baron Alderson, after an examination of the authorities, said that in all the cases in which an agent has been held personally responsible "it will be found that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act." In *Ware v. Morgan*, 67 Ala. 461, 408, it was said by Brickell, C. J., upon the authority of the leading English case above cited, that the liability of the agent rests upon the fact "that he has been guilty of a wrong or omission, depriving the party dealing with him of the benefit of the liability of the principal for which he contracts." "When he is guilty of no wrong or omission, when there is a full and honest disclosure of the nature and extent of his authority, when the party dealing with him has all the knowledge and information which the agent possesses, there is no liability resting on him, though his act or contract proves to be ultra vires." Furthermore, "where all the facts are known to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be bound is no ground for charging the agent." 1 Am. & Eng. Ency. Law (2d Ed.) p. 1127; *Humphrey v. Jones*, 71 Mo. 62; *Michael v. Jones*, 84 Mo. 578. "It is held that where the officers of a public or munic-

ipal corporation acted officially and under an innocent mistake of the law, in which the other contracting party equally participated, with equal opportunities for knowledge, neither party at the time looking to personal liability, the officers are not, in such case, personally liable, nor is the corporation liable." 1 Dillon on Munl. Cor. (4th Ed.) § 237, note p. 323. In *Humphrey v. Jones*, supra, the Supreme Court of Missouri applied the foregoing principles to defeat a suit upon a note executed by the defendant as director of a school district, acting officially under the supposed authority of a school law, although in reality under that law no such corporation as that mentioned in the note actually existed.

In this case, both parties were mistaken in supposing that the dispensary had a legal existence. It had been established under color of a statute duly enacted according to constitutional forms, although invalid because of the nature of some of its provisions, and the plaintiffs had all the opportunity to know this infirmity which the defendants possessed. The defendants made no promise to pay for the liquors. It is not averred that from them they derived any personal benefit, and they neither made misrepresentations to the plaintiffs nor perpetrated any fraud upon them. The demurrer was properly sustained.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

PELHAM v. CHATTAHOOCHEE GROCERY CO.

(Supreme Court of Alabama. May 9, 1906.)

1. SALES—REMEDIES OF SELLER—RESCISSION—RECOVERY OF GOODS.

To authorize a rescission of a sale and a recovery of the goods on the ground of fraud on the part of the buyer, the seller must prove that the buyer at the time of the purchase was insolvent, that he either had a design not to pay for the goods or no reasonable expectation of being able to do so, that he intentionally concealed such facts or made a fraudulent representation in regard to them, and that the sale was induced by the fraudulent representations or concealment.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 93, 94, 265.]

2. SAME—BURDEN OF PROOF.

A seller, seeking to rescind a sale and to recover the goods on the ground of fraud, has the burden of proving that the buyer at the time of the transaction was insolvent, that he either had a preconceived design not to pay for the goods or no reasonable expectation of being able to do so, that he intentionally concealed the facts or made a fraudulent representation, and that the sale was induced by the fraudulent representation or concealment.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 281, 905.]

3. SAME—PURCHASERS FROM BUYER.

One claiming under a buyer guilty of conduct justifying the seller in rescinding the sale.

and recovering the goods must show that he is a purchaser from the buyer and that he paid value for the goods or took them in payment of a debt.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 674.]

4. SAME.

Where one claiming under a buyer guilty of conduct justifying the seller in rescinding the sale and recovering the goods held the goods under a secret trust for the buyer, the seller was entitled to recover against him on proving facts necessary to enable him to recover against the buyer.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 607, 608.]

5. SAME—GOOD FAITH OF PURCHASER—BURDEN OF PROOF.

Where one claiming under a buyer guilty of conduct justifying the seller in rescinding the sale and recovering the goods shows that he paid value for the goods, the seller has the burden of proving that he had notice of the fraud of the buyer at the time he purchased the goods or before he paid the purchase price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 701.]

6. SAME—CONSIDERATION.

Where one bought goods for value without notice of the fraudulent conduct of his seller in buying the goods from a third person, it is immaterial that the consideration was cash, or that the price paid was less than the value of the goods, provided the consideration was a valuable one.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 687.]

7. SAME.

Where a buyer committed no fraud in his purchase, the fact that a purchase by a third person from him was made with intent to defraud the creditors of the buyer did not authorize the seller to rescind the sale and recover the goods.

8. SAME—SALES AT VARIOUS TIMES—FRAUD—EFFECT.

Where a seller sold goods at various times, a fraud justifying a rescission of the sale of goods bought at one time was not sufficient to authorize a recovery of goods bought at another time, free from fraudulent concealment or representation.

9. SAME—INSTRUCTIONS.

In an action by a seller to rescind the contract and recover the goods because of the buyer's fraud, an instruction authorizing a recovery without reference to the solvency or insolvency of the buyer at the time of the transaction was erroneous, for one of the essentials of a right to rescind a sale is that the buyer was insolvent.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 282, 309.]

10. SAME.

Instruction, given for the plaintiff, premitting inquiry into whether the alleged fraud of the buyer induced the seller to sell, held improper and erroneous.

11. SAME.

An instruction, in an action to rescind a sale and to recover the goods, that on finding that the purchase by the buyer was fraudulent the burden was on the third person claiming the goods to reasonably satisfy the jury that he paid value for them was proper, though it failed to define the elements constituting a fraudulent sale, since such defect might have been obviated by a requested explanatory charge.

12. SAME—ESTOPPEL.

A seller, requesting a payment from the buyer, does not thereby waive his right to rescind the sale and recover the goods in the

hands of a third person on the ground of the fraud of the buyer.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 897.]

Appeal from Circuit Court, Geneva County; John P. Hubbard, Judge.

"To be officially reported."

Action by the Chattahoochee Grocery Company against A. Pelham. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The facts necessary to an understanding of the case are sufficiently stated in the opinion. In his oral charge to the jury the court said: "If you are reasonably satisfied from the evidence that at the time Reeves purchased the goods in question he had no reasonable expectation of being able to pay for them, and did not intend to, then this would be a fraud upon the plaintiff, entitling it to rescind the sale and reclaim the goods, without reference to the question of the solvency or insolvency of Reeves." The plaintiff requested the court to give the following charges in writing: "(1) The court charges the jury that, if they believe from the evidence that at the time of the purchase from the plaintiff C. W. Reeves was insolvent, or in failing circumstances, and if you further find that said Reeves knew at the time he was insolvent and could not as a reasonable man expect to pay, or that he was insolvent and intended not to pay, and did not disclose these facts, then the plaintiff is entitled to recover, unless the evidence reasonably satisfies your mind that Pelham was a bona fide purchaser without notice. * * * (3) The court charges the jury that an intentional concealment on the part of Reeves of his insolvency or financial condition is per se fraudulent, and that if they are reasonably satisfied from all the evidence that Reeves intentionally concealed his financial condition at the time of his purchase of the goods from plaintiff, and was in failing circumstances, and had no just expectation of paying for the goods, then you must find for the plaintiff, unless you are reasonably satisfied from the evidence that Pelham was a bona fide purchaser and without notice of such insolvency or of plaintiff's claim. (4) The court charges the jury that the intent to pay, in the absence of a reasonable expectation so to do, will not prevent rescission, if Reeves was insolvent or in failing circumstances at the time of the purchase, and if Pelham was not a purchaser for value of the goods in controversy. * * * (10) The court charges the jury that, if from the evidence they find that the purchase by Reeves was fraudulent, then the burden is upon Pelham to reasonably satisfy you that he paid value for the goods."

W. O. Mulkey, for appellant. W. L. Lee and C. D. Carmichael, for appellee.

WEAKLEY, C. J. The action is detinue, to recover divers articles of merchandise such as may usually be found for sale in a grocery store. The plaintiff prevailed in the court below as to all the goods sued for, and the defendant appeals. The claim of the plaintiff was rested on the contention that such fraud was committed by one Reeves, the original vendee, in the purchase of the goods, that as vendor it had the right to rescind the sale and reclaim the goods. The defendant resisted a recovery upon the claim that the proof did not satisfactorily establish fraud in the purchase, or, if it did, that he was a purchaser for value and without notice either of the fraud or of facts sufficient to put him on inquiry which, if prosecuted, would have given him such notice. The rules of law which apply in a case of this kind—a controversy between a vendor seeking to reclaim goods and an alleged subvendee, claiming to be an innocent purchaser for value without notice—have been announced by this court in a series of cases which seem to plainly settle the law on the subject and to indicate the scope and nature of the inquiry. Those cases also furnish a sufficient guide as to the burden of proof, and its shifting from one side to the other, as the jury, in the consideration of evidence tending to support the one party or the other, passes from issue to issue in reaching a conclusion upon the facts. As the principles settled by our previous decisions were not observed upon the trial, we will announce the rules which, under the tendencies of the evidence in this case, should be held steadily in mind by the court when admitting evidence or delivering instructions to the jury:

To authorize the rescission of a sale of chattels on the ground of fraud on the part of the vendee, so that a recovery may be had in detinue or trover against the first purchaser or a subpurchaser, these conditions or facts must be combined: (1) The purchaser must at the time of the transaction have been insolvent or in failing circumstances. (2) The first purchaser must have had either a preconceived design not to pay for the goods or no reasonable expectation of being able to pay for them. (3) The purchaser must have intentionally concealed these facts or made a fraudulent representation in regard to them. (4) The sale must have been induced by the fraudulent representation or concealment. And the burden of proof, in the first instance, rests upon the plaintiff to reasonably satisfy the jury of the existence of each of the foregoing requirements. If a plaintiff fails to carry this burden in any of the four particulars, a recovery cannot be had, either against the original vendee or another claiming under him, whether a bona fide or a mala fide purchaser, or even a stranger. If the evidence reasonably satisfies the jury of the existence of each of the essentials above stated, it is

incumbent upon one claiming to be a subvendee to show that he is in fact a purchaser from the original vendee and that he paid value for the goods; and whether he paid cash, in whole or in part, for the chattels, or took them in payment of a debt due to him from his debtor, he would be a purchaser for value within the meaning of this rule. If the jury should believe from the evidence, including all the facts and circumstances, that what appeared in form to be a sale and conveyance to the defendant was in secret trust for the original purchaser, then the same principles, and those only, would apply that arise in this class of cases against such original purchaser, since one holding goods under a pretended sale in secret trust for the original purchaser must stand in the shoes of such purchaser. If the defendant successfully carries the burden as above indicated, then the onus is shifted to the plaintiff to prove to the reasonable satisfaction of the jury that the defendant, a subpurchaser, had notice of the fraud when he purchased, or before he paid the purchase money or parted with the consideration, or had knowledge of facts putting him on inquiry which, if diligently prosecuted, would have brought him to a knowledge of the plaintiff's claim.

The principles of law which obtain in a contest between a creditor, on the one hand, and a purchaser from his failing debtor, on the other, are not applicable in this case and similar cases. The motives of the parties are not material. If the defendant be a purchaser for value without notice or knowledge of facts that would lead to notice, it is not important that the consideration was in part cash, or even that the price paid was greatly less than the value of the property, provided he parted with a consideration of some value as distinguished from a merely good consideration. There might be an absence of good faith, in that the purchase by the defendant was made to defraud the creditors of the original vendee; yet, if the latter committed no fraud in the first purchase, or if the defendant was a purchaser for value without notice, as above defined, the plaintiff could not recover. These rules are the result of all of our previous decisions, although they will not be found stated exactly in the foregoing form; and it may be these principles will not all be found to have been announced in any one case. We collect the cases from which the principles applicable have been derived: *Loeb v. Flash*, 65 Ala. 526; *Spira v. Hornthall*, 77 Ala. 137; *Hornthall v. Schonfeld*, 79 Ala. 107; *Kyle v. Ward*, 81 Ala. 120, 1 South. 468; *Le Grand v. National Bank*, 81 Ala. 123, 1 South. 460, 60 Am. Rep. 140; *Robinson v. Levi*, 81 Ala. 134, 1 South. 554; *Darby v. Kroell*, 92 Ala. 607, 8 South. 384; *Johnston v. Bent*, 93 Ala. 160, 9 South. 581; *Traywick v. Keeble*, 93 Ala. 498, 8 South. 573; *Wilk v. Key*, 117 Ala. 285, 23 South. 6.

The earlier cases do not in terms require that the sale must have been induced by the fraudulent representation, or must have resulted from a want of knowledge on the part of the vendor of some material fact which the purchaser fraudulently concealed; but this omission is explained in *Darby v. Kroell*, 92 Ala. 607, 8 South. 384, where it was said: "This absence of reference to the familiar doctrine that fraud for which a contract may be rescinded must have conduced to its execution is due to the fact that the exigencies of those cases did not require a consideration of that question; there being no evidence in any of them which tended to show that the seller did not rely on the statements of the purchaser, and not to the idea that the general rule was not applicable to this class of cases. There is, and can be, indeed, no reason why it should not fully obtain in a case like this, and defeat rescission and recovery, when the jury find that, though false representations have been made and fraudulent concealments have been resorted to, the seller did not rely or act on such representation, and was not influenced by a state of facts which the purchaser's concealment induced him to believe existed."

Before treating of such of the instructions to the jury as we propose to specially consider, it may be well to direct attention to the tendencies of the evidence. The goods sued for and recovered were not all sold at the same time. The plaintiff began to extend credit to Reeves, the original purchaser, about August 1, 1902, and the goods were sold to him from time to time during the period intervening between that date and April, 1903, when the last purchase was made. The course of dealing was that plaintiff's representative would visit Reeves about every two weeks, collect money on account, and sell him other goods, if he desired to buy. For some months before his failure Reeves had owed the plaintiff as a result of their method of dealing, and at one time owed more than the amount of the indebtedness which existed when he failed. At no time prior to the date of the last purchase, about April 1, 1903, did Reeves make, or was he asked to make, any statement as to his financial condition to the plaintiff. On several occasions plaintiff's salesman tried to sell Reeves more goods than the latter wanted, and this was true on the occasion of the last purchase, at which time Reeves paid him more money on account than the amount of the then purchase. Reeves denied having made any statement as to his condition at any time; but plaintiff's representative testified that about April 1, 1903, and prior to the last sale, "Reeves stated to him that April 18th would be pay day with some mill hands near there and that he could pay him some considerable sum on his account, that he was getting along well, that his home was paid for, that he owned two houses and was making money, and that the mill hands owed

him." There seems to have been no effort by testimony to identify any of the goods sued for as having been a part of the last purchase, or to show when and in how many separate transactions the particular goods were bought, except by the general statement that Reeves purchased the goods from August 1, 1902, to April 1, 1903. The failure of Reeves occurred about two or three weeks after his last purchase of goods, he being insolvent, and took the form, according to the defendant's evidence, of a sale by Reeves to him of his stock of goods, exclusive of book accounts, at the sum of \$500, of which the sum of \$150 was claimed to have been paid in currency, and for the balance of the purchase price a past-due note of Reeves for \$350 was testified to have been surrendered. The evidence conflicted as to the value of the stock, and the plaintiff introduced evidence of a statement of defendant that his purchase included the book accounts also. There was evidence that after the failure Reeves was collecting the accounts, and that, after being absent a few days, he returned to the store and was engaged there; the defendant claiming that he was employed as a clerk merely. The plaintiff's evidence showed that Reeves started in business with a small stock, which gradually increased; that the stock was open to plaintiff's salesman, and that he could plainly see what Reeves had, although he knew nothing about the book accounts; and Reeves testified that he did not conceal or make any effort to conceal his condition from Mays, the plaintiff's agent, who dealt with him; that Mays visited his store every two weeks before the failure, for 2½ years, and knew what he had; that his property consisted of a small homestead worth \$300, his stock of goods and book accounts, and that Mays often desired to sell him more goods than he would buy.

We have already stated the rules of law applicable to a controversy of this character. Situated as this case is, it is obvious that account should be taken of the circumstance that the court is not dealing with a single purchase, but with numerous separate purchases covering a period of nine months, and that to obtain a proper result application of the true principles must be made to each transaction. There might be fraud justifying rescission in one and not in another, and if there were fraud in one purchase, at the time it was made, and yet the purchase price was thereafter paid, most clearly there could be no rescission of that particular sale. Moreover, if there was a fraudulent concealment or misrepresentation, and this was not relied on and did not induce the sale, there could be no recovery; and this principle might operate in one instance to defeat recovery of goods then sold, and not do so in another.

The charges asked on both sides were framed without reference to the separateness of the several purchases, and were formulated

as if the jury were dealing with the last purchase alone, at the time of which there was proof of representations as to the financial condition of Reeves. We will not undertake to criticise each charge given and refused, as what we have said will constitute a sufficient guide for another trial. We are not prepared to say the general charge should have been given for the defendant on the whole case, and it was upon the whole case that it was asked. Whether, under the evidence, there was in reality a sale to Pelham, or whether the sale was in secret trust for Reeves, was a question of fact for the jury, and will be an inquiry of importance if a case justifying rescission as to any of the goods be made out in accordance with the principles of law herein announced. It was likewise a question for the jury whether Pelham was a purchaser for value and without notice.

That portion of the court's general charge to which an exception was reserved was erroneous in declaring that upon the hypothesis stated a right of rescission existed, without reference to the solvency or insolvency of Reeves. One of the essentials of a right to rescind is that the purchaser must have been insolvent or in failing circumstances.

Charges 1, 3, and 4, given for the plaintiff, pretermitted inquiry whether the alleged fraud of the vendee induced the vendor to sell to him, and were improperly given.

Charge 10, and others like it, postulating a finding by the jury that the purchase was fraudulent, might well have been refused, because not defining to the jury the elements constituting a fraudulent sale, but were not for that reason positively erroneous, since their misleading tendency might have been obviated by an explanatory charge.

It was not an error to disallow defendant to prove that plaintiff had sought to collect the debt from Reeves, or to compromise with him, before bringing this suit. A creditor may well request his debtor to pay for goods purchased, and, if payment be refused, may seek a rescission, if the conditions justify it. A creditor does not waive his right of rescission by requesting payment from his debtor. The creditor took no legal action against Reeves, and did nothing inconsistent with the exercise of his right of rescission, if such right existed.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

WESTERN UNION TELEGRAPH CO. v. KRICHBAUM.

(Supreme Court of Alabama. May 10, 1906.)

1. TELEGRAPHS—MESSAGES—TRANSMISSION—FAILURE TO DELIVER—NEGLIGENCE—EVIDENCE.

Defendant telegraph company kept a book in its office at B. for patrons thereof to enter their addresses in order to facilitate and insure

the delivery of messages to them. Plaintiff's name was registered in such book at the time defendant received the message in question directed to him, which had been sent by plaintiff's agent for delivery to plaintiff at B., but the message was never delivered. *Held*, that such facts were sufficient to establish negligence on the part of the telegraph company, entitling plaintiff to recover, though defendant's agent at B., after receiving the message, wired the sending office for a better address.

2. SAME—DAMAGES—MENTAL SUFFERING.

Where, in an action against a telegraph company for failure to deliver a message sent to plaintiff by his agent, it was proved that the agent paid the charges for plaintiff, plaintiff sustained damage in his estate to the extent of the amount of such charges and was therefore entitled to recover for mental suffering in addition thereto.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 60, 70.]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"To be officially reported."

Action by John W. Krichbaum against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Walker, Tillman, Campbell & Walker, for appellant. Lane & White, for appellee.

MCCLELLAN, C. J. The uncontroverted evidence was that the defendant kept a book in its Birmingham office for the patrons of that office to set down their particular addresses in it, so as to facilitate and insure the delivery of messages to them. It is further shown without conflict that plaintiff's name and address were registered in this book at the time the telegram involved in this case was received at that office for delivery to him. That the telegram was delivered to the defendant at another of its offices by plaintiff's agent, who for plaintiff paid the toll, for transmission to Birmingham and delivery there to plaintiff, and was in due time transmitted to the Birmingham office, addressed to plaintiff, but was never delivered to the plaintiff, was also proved beyond dispute. These undisputed facts entitled the plaintiff to the affirmative charge. This is none the less true for the fact—assuming it to be a fact—that after receiving the message the Birmingham office wired the initial office to "get street address," or "get some address," or "get better address," and plaintiff's agent negligently failed upon being apprised by defendant's agent at the forwarding office, to give a better or any other address, and assuming, also, that but for this negligence the message would have been delivered to plaintiff. After this negligent omission of plaintiff's agent as well as before the duty of delivery rested on the defendant, and before and after by the exercise of due care and diligence by the defendant's employes at Birmingham the message could and would have been delivered. The transcript does not show that the affirmative charge was given for plaintiff, or

even requested by him; but that is immaterial. The plaintiff being thus entitled to the affirmative charge on the undisputed evidence, other rulings bearing upon incidental or collateral matters—as, for instance, the issue whether plaintiff's agent was at fault in not supplying a more particular address, the contention that defendant must be held to have known plaintiff's street address because it had a short time before delivered another message there for him, etc.—must not be reviewed, since, even if erroneous, they did not prejudice the defendant.

We have assumed that recoverable damages were proved on the trial, or, at least, that there was evidence tending to prove such damages. Of course, if there was no such evidence, the general charge should have been given for the defendant, instead of for the plaintiff. But there was such evidence. The complaint claims damages alleged to have been sustained by the plaintiff in mind, body, and estate. There is no proof of physical injury. There is proof of mental suffering. And there was proof in loss in estate to the extent of the toll paid for the transmission and delivery of the telegram. In our opinion, this fee was lost to the plaintiff by reason of and in that he was deprived by defendant's wrong of the benefit for which it was paid, or, in other words, its loss to him resulted from the wrong of the defendant counted on in the complaint and established by the evidence, and that the amount of this fee is therefore recoverable in this action on the case. Being thus entitled to recover for injury in this way to his estate, plaintiff was also entitled to recover damages for mental suffering; the damages to his estate being a basis for the superimposition of damages for lacerated feelings, of which there was evidence.

The foregoing views cover all the points raised on this appeal, and serve to show the grounds of our conclusion that the circuit court committed no error prejudicial to the defendant.

Affirmed.

PER CURIAM. The foregoing opinion was prepared by the late Chief Justice, and has been examined, in connection with the record. It is now approved and adopted as the opinion of the court.

WEAKLEY, C. J., and TYSON, SIMPSON, and ANDERSON, JJ., concur.

MOBILE & O. R. CO. v. CHRISTIAN MOERLEIN BREWING CO.

(Supreme Court of Alabama. May 10, 1906.)

1. NEGLIGENCE—PROXIMATE CAUSE—INJURIES TO ANIMALS.

The negligence of defendant in permitting plaintiff's animals to escape from an inclosure was not the proximate cause of the killing of the animals on a railroad track, over which the

defendant had no control, at some distance from the inclosure.

2. SAME—NOTICE OF USE OF PREMISES.

Where mules and horses were inclosed in a warehouse used as a beer depot, defendant was not liable for permitting their escape therefrom, in the absence of evidence charging it with knowledge that the inclosure was used as a horse lot.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by the Christian Moerlein Brewing Company against the Mobile & Ohio Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

This was an action to recover for the killing of three mules and two horses. The case made by the testimony for appellee was: That they operated a warehouse contiguous to the tracks of the Mobile & Ohio Railroad Company in the city of Mobile. That in this warehouse a considerable number of horses and mules were kept when not engaged in delivering beer throughout the city. There were two openings to the warehouse, inclosed by shutters or gates, one of which was used by the delivery wagon of the company, and the other of which contained a spur track operated by the Mobile & Ohio Railroad Company for the purpose of loading and unloading beer. That on a certain Saturday night three mules and two horses were turned loose in the warehouse, and the wagon entrance was closed. At the time they were turned loose the spur track entrance was closed by a box car, so that the gate could not be shut, but while the car remained in the opening the stock could not escape. This opening remained in this condition from Saturday night to some time during the following Sunday night. On Monday morning following, these mules and horses were found at the crossing of the Louisville & Nashville Railroad Company track over One Mile creek in the suburbs of the city, three of them dead, and two so badly injured that they were afterwards killed. There was a great deal of switching in the daytime over the tracks to the west of the warehouse, and some of the tracks were used as storage tracks, and there was much passage of locomotives and cars over the tracks on the east, the Mobile & Ohio Railroad doing all its business there. The Mobile & Ohio Railroad and the Southern Railway Company have piers on the river just east of the easternmost track, and much switching is done over the tracks leading to those piers in the daytime. Goods are delivered and carried away from the piers after discharge of ships over these tracks, and there was evidence that a great deal of business was done over those piers, though the witnesses did not know what was done after dark. The defendant requested the court to give the affirmative charge after motion to exclude the testimony as incompetent and immaterial. The court overruled the motion and refused to

give the charge. The evidence further disclosed that at the point where the stock was killed, the Mobile & Ohio Railroad Company had no tracks, but that the track near which they were found was owned by the Louisville & Nashville Railroad, and that the Louisville & Nashville alone operated trains over these tracks. It was further shown by the testimony that no other railroad operated trains over the spur track entering the inclosure of appellee's warehouse, and that the switching crew of the Mobile & Ohio Railroad Company, who alone operated trains over this spur track, removed the car from the opening without closing the gate, which permitted the stock to escape. There was verdict for appellee, and judgment thereon.

E. L. Russell and Sydney R. Prince, for appellant. Pillans, Hanaw & Pillans, for appellee.

ANDERSON, J. In discussing what is or is not proximate cause in contemplation of law, our court lays down the rule for its determination to be, quoted from Mr. Cooley and others: "If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries safely," etc. And we adopt what Addison says on the subject: "If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and damage are not sufficiently conjoined and concatenated as cause and effect to support an action." Cooley on Torts, p. 73, § 60. Mr. Bishop, in stating the same principle, says: "If, after the cause in question has been in operation, some independent force comes in and produces an injury, not in its natural or probable effect, the author of the cause is not responsible." Bishop on Noncontract Law, §§ 41, 42; Wharton on Law of Neg. § 75; Shearman & Red. on Neg. § 26. Again, it has been held that "the cause of an injury is in contemplation that which immediately produces it in its natural consequences; and therefore, if a party be guilty of an act of negligence which would naturally produce an injury to another, but before such injury actually results a third person does some act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is not responsible, even though

the injury would not have occurred but for his negligence." 16 Am. & Eng. Ency. Law, 436, 446, note. Many cases are referred to by these authors as illustrative of these rules; and in *Lewis v. Flint*, 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790, Cooley, C. J., discusses at length and refers to many adjudged cases on the subject in a case similar to the one we have before us; and this is the doctrine of this court. In *Western R. Co. v. Mutch*, 97 Ala. 194, 11 South. 834, 21 L. R. A. 316, 38 Am. St. Rep. 179, the principles above referred to and quoted were there also quoted and approved, the court, by Stone, C. J., adding: "The authorities from which we have quoted are everywhere regarded as standard. What they assert is but the condensation of the utterances of a very great number of the highest judicial tribunals, wherever the principles of the common law prevail," citing a number of these authorities. The same principles are recognized in our late case of *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 26 South. 349, where it is said: "The logical rule in this connection, the rule of common sense and human experience, as well, * * * is that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would, at the time of the negligent act, have thought reasonably possible to follow, if they had occurred to his mind"—citing *Shear. & Red. Neg. § 29*. See, also, *Ala. Gr. So. R. Co. v. Arnold*, 80 Ala. 600, 2 South. 337; *L. & N. R. Co. v. Quick*, 125 Ala. 553, 28 South. 14.

Applying the foregoing rule to the case at bar, the injury to the stock in question was through or by the means of an intervening cause and the law refers the damage to the last proximate cause, which the proof shows to have been produced by an engine or car on the track of the Louisville & Nashville Railroad Company at the creek, and some distance from the place of escape and the network of tracks. The defendant's act may have been the remote cause of the destruction of the stock; but the law does not trace consequences through successive steps to a remote cause, when the injury can be ascribed to some intervening proximate cause. The fact that the stock were at large with the knowledge and consent of the owner would not deprive the owner of the right to recover for their wrongful destruction. *L. & N. R. Co. v. Kesley*, 89 Ala. 287, 7 South. 648; *S. & N. R. R. Co. v. Williams*, 65 Ala. 74; *A. G. S. R. R. Co. v. Jones*, 71 Ala. 487. In the *Kesley Case*, supra, this court says: "However the horse came to be at large, the mere fact that he was allowed to go at large was not the direct, moving, proximate cause of his death; and the fact of negligence vel non in allowing him to be at large is one with which the jury has no concern, since no determination of that issue could

have defeated a recovery on the one hand or increased plaintiff's damages on the other. It was a matter beyond the issue. In other words, the court properly refused to submit it to the jury in any form." Therefore, if the act of the owner in permitting the stock to be there was not the proximate cause of the injury, we are unable to perceive upon what theory the act of defendant in permitting them to escape from the inclosure can be ascribed as the proximate cause of their destruction. We need not consider the question of the surrounding conditions at the opening through which they escaped, as affecting the application of the foregoing principles to the case at bar, as the injury occurred beyond and after the stock had gotten over the net work of tracks. Besides, while there was evidence of considerable passage and switching of trains opposite this opening in the daytime, there was nothing to indicate that this went on at night. Furthermore there is not a particle of evidence to charge the defendant with any knowledge that the opening made would enable the stock to escape, or that it knew the stock were there, or that the lot was used as a horse lot. The place inclosed was a warehouse, used by plaintiff as a beer depot, and in the absence of evidence to the contrary the inference could hardly be possible that it was used as a horse lot. The rule of contemplation of consequences seems to be "that a defendant is not liable in negligence where no injurious consequences could reasonably have been contemplated as the result of the act or omission complained of, but is liable where injuries might have been anticipated or foreseen." 21 Am. & Eng. Ency. Law (2d Ed.) 486.

Since the trial court erred in refusing the general affirmative charge requested by defendant, we need not consider the other assignments of error. The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

NEWTON et al. v. STATE.

(Supreme Court of Florida, Division B. April 24, 1906.)

1. INDICTMENT—SUFFICIENCY—HOMICIDE.

An indictment for murder, in which a person is charged as principal in the second degree, though not in the form prescribed by accepted precedents, if the charge is set forth in such language and form as to enable a person of common understanding to know what was intended, and the person thus charged was not thereby prejudiced or embarrassed in his trial, and runs no risk, because thereof, of a second indictment for the same offense, is, under the operation of our curative statutes, sufficient to withstand a motion in arrest of judgment.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 182.]

2. HOMICIDE—DYING DECLARATIONS.

Where, in a trial for murder, a witness testified that he had a conversation with the de-

ceased two or three days after he was shot, and five or six days before he died, in which the deceased said to the witness: "Oh! Mr. Cade, I am going to die. Sarah Newton shot me, and I am going to die"—to which the witness replied, "I don't think you are going to die," and the deceased said to him, "Yes, I know I will," and the deceased further said that James Newton was fixing to shoot him, and that he was watching Sarah Newton, and Sarah shot him from the side, and that Sarah shot him first, and where it also appears from the testimony of the attending physician that deceased was in a very critical condition, the statements of the deceased to the witness were properly admitted in evidence as dying declarations.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 437.]

3. SAME—INSTRUCTIONS.

In charging a jury upon the law of murder, the separate elements essential to constitute the crime should be clearly stated to the jury, and in such manner as not to render it possible for the jury to think that any disputed fact is thereby assumed to be true.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 585.]

4. SAME—DEGREES OF CRIME.

When the evidence is such that the jury might reasonably convict the defendants of a lower degree of unlawful homicide than murder in the first degree, it is erroneous to so charge the jury as practically to restrict them to a verdict of murder in the first degree or to one of acquittal.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 641.]

(Syllabus by the Court.)

Error to Circuit Court, Volusia County; Minor S. Jones, Judge.

Sarah Newton and another were convicted of murder, and bring error. Reversed and remanded.

U. M. Bennett, for plaintiffs in error. W. H. Ellis, Atty. Gen., for the State.

HOCKER, J. On the 10th day of November, 1905, at the fall term of the circuit court of Volusia county, Sarah Newton, alias Sarah Van Dyke, and James Newton, were indicted in that court for the murder of one Will Jones, the said Sarah as principal in the first degree, and the said James as principal in the second degree. After stating the assault by Sarah with a shotgun on the 29th of September, 1905, in Volusia county, thereby inflicting upon Jones one mortal wound, in the usual form, it alleges: "Of which said mortal wound, inflicted in manner and form aforesaid, the said Will Jones did languish, and languishing did live, from the 29th day of September, 1905, to the 8th day of October, 1905, on which said 8th day of October, 1905, the said Will Jones of the said mortal wound, inflicted in manner and form aforesaid, then and there died, the said James Newton being then and there feloniously present at the commission of the said felony and murder from a premeditated design to effect the death of the said Will Jones, aiding, abetting, assisting, inciting, comforting, counseling and procuring the said Sarah Newton, alias Sarah Van Dyke, unlawfully, feloniously, and from a

premeditated design to effect the death of the said Will Jones, the said Will Jones to kill and murder in the manner and form and by the means aforesaid." The indictment then concludes in the usual form charging both of the parties with the murder of Will Jones. On the same day the court appointed a member of the bar to represent the defendants, and, being arraigned, they pleaded not guilty. On the 15th of November, 1905, the defendants were put on trial, and just before the conclusion of the testimony the court removed the attorney who had been appointed to represent the defendants, for a good and sufficient reason and appointed the attorney to represent them who has brought their case on writ of error to this court. The defendants were both convicted of murder in the first degree without recommendation to mercy, and sentenced to be hung. From this sentence and judgment the writ of error was sued out.

There was no demurrer to the indictment or motion to quash the same, but after conviction a motion in arrest of judgment was made and overruled by the court, which ruling was excepted to and is the basis of one of the assignments of error. In the able brief of the counsel of the plaintiffs in error the fourth and fifth grounds of the motion in arrest are the only ones which are argued here. These grounds are: "4th. Because the said indictment contains no sufficient allegations charging the defendants Sarah Newton (alias Sarah Van Dyke) and James Newton with any offense against the statute laws of Florida, all the statements of said indictment relative to the said James Newton being merely by way of recital," and "5th. Because it does not appear by said indictment that the defendant James Newton committed any offense within the county of Volusia and state of Florida."

There can be no question but that the allegations of the indictment connecting James Newton with the unlawful homicide are a departure and an unnecessary one, from all the forms which at common law were regarded as essential to charge a principal in the second degree with the crime of murder. The record does not afford any apology for such a departure, and consequently for the burden thus laid upon the courts of attempting to reconcile it with the precedents and forms which are easily accessible to every prosecuting officer, and which, when followed, save all debate and all temptation to afford a defendant anything less than the most accurate statement of facts constituting the crime with which he is charged. It will be noticed that this indictment instead of using the indicative to indicate his presence at the commission of the crime, as is always usual, uses the present participle "being," and that although there are two dates in the indictment, the one indicating the day when the assault was committed, and the other when Jones died from the effects

of the assault, when the alleged murder was consummated, yet that James Newton was connected with the alleged murder only by the phrase "then and there." While the former departure might not have been absolutely vicious at common law (1 Bishop's New Crim. Proc. §§ 566 and 557), the last was regarded as insufficient and repugnant as to the allegation of time. 2 Hawkins' Pleas of the Crown, c. 23, §§ 88 and 89. It is in this authority stated that when this form of indicting a principal in the second degree is used, under these circumstances, that it should be alleged he "was present aiding," etc., in the manner alleged. But it is unnecessary under our law to allege the crime in this form. Principals in the first and second degree may both be indicted as principals, and these difficulties are avoided. 2 Bishop's New Crim. Proc. § 3; Bishop's Directions and Forms (2d Ed.) §§ 114, 115; Myers v. State, 43 Fla. 500, text 520, 31 South. 275. The question which we must determine in this case is whether the indictment charges James Newton with the crime of murder "so plainly that the nature of the offense may be easily understood by the jury" (section 2892, Rev. St. 1892), or whether it "is so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense" (section 2893, Rev. St. 1892). For if the indictment be insufficient in the particulars thus indicated it could not be regarded as sufficient under sections 10 and 11 of the Bill of Rights which require that an indictment shall inform the accused of "the nature and cause of the accusation." If a demurrer had been interposed to this indictment at the proper time, the trial judge would probably have sustained it, and required the pleader to frame one in accordance with the settled precedents, and thus have avoided the difficulty of a judicial application of the very general and indefinite language of the quoted sections of the statute law, for it must be apparent if the settled forms of indictments are to be capriciously ignored by pleaders who substitute therefor, in charging crime, whatever form of expression may suggest itself, it will be well nigh impossible for the courts to formulate any certain rules for applying the statutes. The evident truth of this statement becomes manifest when we consider that the varying opinions of the best minds upon speculative questions are largely due to different understandings of the meaning of words and phrases. Inasmuch, however, as the questions before us are presented in a motion in arrest of judgment, we are compelled to make an application of the quoted sections of the statute. In the case of Adams v. State, 28 Fla. 511, 10 South. 106, it is said: "In an indictment for murder it is essentially necessary to set forth par-

ticularly the manner of the death and means by which it was effected, but in stating the facts which constitute the offense no technical terms are required, and an averment of the manner and means by which the deceased came to his death in concise and ordinary language, and in such a way as to enable a person of common understanding to know what was intended, is sufficient." The doctrine of this case is quoted and applied in *Michael v. State*, 40 Fla. 265, 23 South. 944. Although there are other criminal cases in which we have endeavored to apply these curative sections of the statute law, yet as none of our cases afford an analogy to the one at bar, it is unnecessary to refer to them. It seems to us that a person of common understanding would interpret the language of the indictment to mean that James Newton was present aiding, etc. Sarah Newton when she made the assault on Will Jones, and not that he was present after that time aiding, etc. Jones to languish and die; that James Newton was not prejudiced or embarrassed in his trial, and runs no risk of a second indictment for the same offense, and taking this view of it we hold that the indictment was sufficient to withstand a motion in arrest of judgment.

An assignment of error is based on the refusal of the court to strike out the testimony of J. E. Cade as to the dying declaration of Will Jones. Mr. Cade testified that he had a conversation with Jones on Monday after he was shot (which was two of three days afterwards) in which Jones in answer to a question as to how he felt, stated: "Oh, I am going to die, Mr. Cade, I am going to die. Sarah Newton shot me, and I am going to die." Mr. Cade said to him: "I don't think you are going to die." Jones replied, "Yes, I know I will." Jones further stated to Mr. Cade that James Newton was fixing to shoot him, and that he was watching Sarah Newton, and Sarah shot him from the side, and that Sarah shot him first. It is evident from the testimony of the physician who attended Jones on the Saturday previous that he was in a very critical condition. Mr. Bennet moved to strike out this testimony of Mr. Cade on the ground that it was nothing but the verbal statements of a man, a very weak man, and one very badly injured, and that he was not under oath, and the defendants were not present at the time. The motion was denied, and the defendants excepted. We are of the opinion that applying the doctrine of *Dixon v. State*, 13 Fla. 636, there was no error committed in denying the motion as under the circumstances as shown, the trial judge had sufficient cause to be satisfied that at the time Jones made these statements to Cade he (Jones) evidently believed he was without hope of recovery. *Clemmons v. State*, 43 Fla. 200, 30 South. 699.

The court charged the jury "If you believe from the evidence beyond a reasonable doubt

that the defendant Sarah Newton, alias Sarah Van Dyke fired the fatal shot from a premeditated design to effect the death of the said Will Jones, you will find her guilty of murder in the first degree as charged in the indictment." The objection to this charge is that it assumes that Sarah Newton fired the fatal shot, a fact which she denied. We think it unnecessary to say more than that it would undoubtedly have presented their duty to the jury in a clearer form to have instructed them to the effect, if they believed from the evidence beyond a reasonable doubt that Sarah Newton shot Will Jones, and that he died from the effects of said shooting as alleged in the indictment, and that she shot Jones from a premeditated design to effect his death, they should find her guilty of murder in the first degree. The two prominent facts essential to constitute murder in the first degree in this case, viz.: the shooting and killing, and the shooting and killing from a premeditated design, would thus be presented to the jury, and all difficulty of construction avoided. The same remarks are applicable to the sixth charge given by the trial judge.

The trial judge charged the jury as follows: "If you find both defendants guilty, the form of your verdict will be 'we, the jury, find both defendants guilty of murder in the first degree as charged in the indictment,' " and, also, "If you find one of the defendants guilty, and the other not guilty, the form of your verdict will be 'we, the jury, find the defendant (naming him or her) guilty of murder in the first degree, as charged in the indictment, and the defendant (naming the other defendant) not guilty.'" These charges are assigned as error. The trial judge did not charge the jury upon any degree of homicide except murder in the first degree, and by these charges and by one instructing the jury to acquit if they were not satisfied of the guilt of the defendants or either of them beyond a reasonable doubt, the jury were practically instructed to convict the defendants of murder in the first degree or acquit them. We have carefully examined the testimony, and are satisfied that there was ample reason why the jury should not have been thus restricted as to the degree of unlawful homicide of which they might find the defendants guilty. These charges were, therefore, injurious to the defendants, and erroneous.

We do not think it necessary to notice any other assignment of error. Because of the errors which have been indicated the judgment of the circuit court in the case of each of the defendants is reversed at the cost of the county of Volusia, and the cause remanded for further proceedings in accordance with law.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

MERCANTILE EXCH. BANK v. TAYLOR
et al.

(Supreme Court of Florida, Division B. April 6, 1906.)

1. FRAUDULENT CONVEYANCES — CHATTEL MORTGAGE—POWER OF MARRIED WOMAN TO MAKE.

A married woman, engaged in a mercantile business in her own name, and owning merchandise which is her separate statutory property, valued at \$18,000, and indebted to a bank in the sum of \$4,400, for which she had given her notes for moneys borrowed by her and used in purchasing and replenishing her said stock of merchandise, executed on the 26th of May, 1903, a mortgage to the bank on said stock of merchandise, and a lease of her storeroom to secure the payment of said borrowed moneys, costs, etc., in which mortgage the husband of the married woman joined, and therein himself covenanted to pay the said money. By the terms of the mortgage the bank was authorized to take immediate possession of the mortgaged property, and to sell and dispose of the same and to pay the debt secured, costs, etc. The bank went into immediate possession of the mortgaged property and was proceeding to sell and dispose of the said mortgaged property, when enjoined by a creditor of the married woman. In a proceeding in chancery brought by a creditor of the married woman, attacking the mortgage to the bank it is held:

(a) That the married woman was authorized under the Constitution and laws to execute such a mortgage, that it was bona fide, and supported by a valuable consideration.

(b) That as it does not appear what was the extent of the indebtedness of the married woman which could be charged in equity upon her separate statutory property, nor how much property she owned, nor the value at the time she executed the mortgage, it cannot be held void as hindering, delaying, or defrauding other creditors.

2. SAME—EVIDENCE.

The fact that a mortgage is made on \$18,000 worth of property, to secure a debt of \$4,400, is not of itself sufficient to establish a fraudulent intent in the execution of the mortgage.

(Syllabus by the Court.)

Appeal from Circuit Court, Duval County:
R. M. Call, Judge.

Bill by Aitken, Son & Co. against Ruth E. MacDonald, Malcolm G. MacDonald and the Mercantile Exchange Bank. Decree for plaintiff, and the bank appeals. Reversed.

On the 1st day of September, 1903, Aitken, Son & Co. filed a bill in the circuit court of Duval county, Fla., against Ruth E. MacDonald, Malcolm G. MacDonald, her husband, and the Mercantile Exchange Bank, a corporation organized under the laws of Florida and having its place of business in the city of Jacksonville, wherein complainants allege that they are engaged in business in the city of New York and have been for many years last past, and that they sold to the defendant Ruth E. MacDonald certain goods, wares, and merchandise shown by a statement attached to the bill, on which there is due for purchase money the sum of \$599.93, which was due and unpaid, and that said goods, wares, and merchandise were purchased by the said Ruth E. MacDonald and

delivered to her for the benefit of her separate property and to be sold by her in the conduct of her business conducted in the city of Jacksonville, Fla. That at the time the said goods were sold, and some time prior thereto, Ruth E. MacDonald was the wife of Malcolm G. MacDonald and was conducting a business of buying and selling dry goods, millinery, and other merchandise in the city of Jacksonville, and personally had charge, management, and control of her said business, under the name and style of Mrs. M. G. MacDonald, and that the said business was of considerable value, to wit, \$7,000, and was the separate and statutory property of the said Ruth E. MacDonald. That the said goods were sold to the said Ruth E. MacDonald upon her promise to pay for the same, and were sold upon her sole credit and to become her sole and separate statutory property, and were sold upon the sole credit of her statutory property and for the benefit thereof for the purpose of replenishing her stock of merchandise in the usual course of carrying on her business, and the said goods became and were a part of the said statutory property and went into the benefit of her said business, of which she was the sole owner, and that the amount due the complainants is a just claim and is a charge in equity upon the said separate statutory property of the said Ruth E. MacDonald or so much thereof as may be necessary to satisfy complainant's demands with interest, costs, and solicitor's fees.

That on, to wit, the 26th of May, 1903, the said Ruth E. MacDonald and Malcolm G. MacDonald, her husband, executed and delivered to the Mercantile Exchange Bank, defendant herein, a certain alleged mortgage to secure the payment of certain promissory notes set forth in said mortgage, to wit: A note dated May 25, 1903, for \$1,300, with interest and costs, payable 10 days after the date thereof to the said bank; a note dated March 6, 1903, for \$1,300, with interest and costs, payable 90 days after the date thereof to the said bank; a note dated April 9, 1903, for \$1,000, with interest and costs, payable 60 days after the date thereof to the said bank; a note dated April 14, 1903, for \$800, with interest and costs, payable 60 days after the date thereof to the said bank—all of which notes are signed and executed by the said Ruth E. MacDonald under the name and style of Mrs. M. G. MacDonald. That said alleged mortgagee granted, bargained, sold, assigned, transferred, released, conveyed, and confirmed unto the said Mercantile Bank, its successors, assigns, and transferees, a certain lease held by the said defendant Ruth E. MacDonald on a storeroom numbered 102 West Forsyth street in Jacksonville, Fla., in which said defendant was doing business, also all the personal property of the said defendant

Ruth E. MacDonald contained in said store-room, as shown by the certified copy of the said mortgage attached and made a part of the bill as Exhibit B. That said mortgage was filed for record in the office of the clerk of the circuit court of Duval county on, to wit, the 27th day of May, 1903, and the bill alleges that the Mercantile Exchange Bank on the 27th day of May, 1903, entered into and took possession of the said store and business of Ruth E. MacDonald and continued in full and absolute management and control of said store and business until the appointment of a receiver therefor. That the Mercantile Exchange Bank has been disposing of said stock of goods and other personal property of considerable value, to wit, \$5,500 or more, and would have continued to dispose of said stock of goods and personal property, and upon information and belief would have applied these proceeds of the said notes and claims of the said bank, unless the said bank had been restrained and enjoined from doing so, to wit, on July 16, 1903, when N. P. Bryan was appointed receiver of the said business.

The bill alleges that the notes given to the bank by the defendant Ruth E. MacDonald are void and invalid, because made and executed by a married woman; that the mortgage to secure the same, under which the bank is in possession of the goods and other personal property of Ruth E. MacDonald, is invalid and void, does not constitute a lien upon the property of the defendant Ruth E. MacDonald, and does not constitute a valid claim which can be enforced against the said Ruth E. MacDonald either in law or equity; that on June 11, 1903, the Mercantile Exchange Bank commenced a suit in the circuit court of Duval county, whereby it seeks to foreclose said alleged mortgage and to make a sale of said property for their interest, costs, charges, and expenses, including attorney's fees which the said bank had incurred in the foreclosing and enforcement of the mortgage; that the said suit is improperly brought by reason of the fact that the said notes and the alleged mortgage are void, and that said suit should be enjoined and restrained; that said bank has in its possession certain accounts and demands of the said Ruth E. MacDonald against various persons amounting to a considerable sum to be applied to the indebtedness due to the said bank.

And the bill alleges that the notes and mortgage given by Ruth E. MacDonald to the Mercantile Exchange Bank hinder, delay, and defraud other creditors of the said Ruth E. MacDonald; that the mortgage was not given upon good consideration and bona fide; that the goods and property were not conveyed or assured to the said bank upon good consideration and bona fide, the said bank at the time of the said conveyance or assurance to them made not having any

manner of notice or knowledge of the hindrance, delay, and fraud upon the creditor of the said Ruth E. MacDonald; that Ruth E. MacDonald and Malcolm G. MacDonald, her husband, have left the state of Florida and are now in New York, and that they have abandoned the said business of the said Ruth E. MacDonald and left the same in the possession, management, and control of the defendant the Mercantile Exchange Bank; and that said Ruth E. MacDonald is insolvent and unable to pay the just liabilities, damages, and claims against her, and that said business should be wound up and the assets thereof distributed in this proceeding. The bill prays that the defendants may be required to answer the bill, but not under oath; that the demands found to be due the orators upon an accounting be decreed to be a charge upon the separate and statutory property of Ruth E. MacDonald described in the bill, and that so much thereof be sold as will be necessary to pay the orators' claim, interest, costs, and solicitor's fees; that the said notes and the alleged mortgage given by the bank may be decreed null, void, and invalid, and that the said defendant bank be perpetually enjoined and restrained from a further prosecution of its suit to foreclose said mortgage and be required to account for all moneys, property, goods, or merchandise turned over and delivered to it by the said defendant Ruth E. MacDonald, and that the proceeds derived from all sales and distributions of the property be paid into the registry of the court; that the orators be decreed to have a lien upon the said funds, proceeds, and property now in the hands of the receiver from the date of the appointment of the receiver herein, and that such lien be decreed prior in dignity to all liens, except the lien of Armstrong, Cator & Co.; that a master be appointed to state a proper account between Ruth E. MacDonald and the orators and to ascertain the assets, credits, and liabilities of the said defendant; that N. P. Bryan, receiver, as aforesaid, be ordered to take into his possession all the property of Ruth E. MacDonald, as hereinbefore set forth, and to convert all the said property into money at the earliest possible moment, collect the debts due the said Ruth E. MacDonald, bring suits, and to do all other things necessary to protect the assets of the said Ruth E. MacDonald and for general relief.

The foregoing contains the substance of the bill.

Copies of the notes and the mortgage referred to in the bill are attached thereto as exhibits. On the 1st of September, 1903, the circuit judge made an order enjoining the Mercantile Exchange Bank from prosecuting its suit for the foreclosure of its mortgage and notes until the further order of the court and extending the receivership of N.

P. Bryan, who had before been appointed receiver in the case of Armstrong, Cator & Co. against the defendants to this case. On the 2d of November, 1903, the Mercantile Exchange Bank filed its answer to the bill, alleging that it had no knowledge or information in reference to the purchase of goods by Ruth E. MacDonald from the complainants and does not admit said allegation, but requires proof of it. It admits that Ruth E. MacDonald was and still is the wife of Malcolm G. MacDonald, as alleged; that Ruth E. MacDonald was conducting a business of buying and selling dry goods and millinery, as alleged; that she controlled said business under the name of Mrs. Malcolm G. MacDonald; that the business was of considerable value and believes it was fully of the value of \$7,000; that it was the separate statutory property of Ruth E. MacDonald; that it has no knowledge or information whether the goods sold by the complainant went into her stock of merchandise and were separate statutory property of her, or that the indebtedness alleged was a charge in equity upon said goods or stock of merchandise, but requires strict proof. The answer alleges that, if said claims are liens in equity upon the statutory property of Ruth E. MacDonald, they were such without notice actual or constructive to the defendant bank, and that the said property is subject to the first lien of the defendant's mortgage. The answer admits the execution of the notes and mortgage described in the bill to the defendant. It admits that the defendant, about the time alleged in the bill, did enter into and take possession of the store and other property of the defendant Ruth E. MacDonald, described in the said mortgage, and continued in the control and possession of the same and engaged in selling and disposing of the said goods and other property up to the time of the order of this court made on the 13th July appointing a receiver in the suit of Armstrong, Cator & Co. against the defendants; denies that it has continued in the possession of any part of said property or was disposing of and selling the same at the time of the filing of the bill in this case; and alleges that it delivered all the property remaining in its possession to N. P. Bryan, the receiver appointed in said cause. It denies that the notes and mortgage given the defendant by Ruth E. MacDonald are void or invalid, but avers that the said notes and mortgage constitute a valid claim against separate statutory property of the said Ruth E. MacDonald. The answer avers that the said notes and mortgage are given for the indebtedness incurred by Ruth E. MacDonald for money borrowed from the defendant furnished and advanced to her for the benefit of her separate statutory property, to wit, for the purchase and replenishing of her stock of merchandise, in paying bills incurred therefor, and in conducting and carrying on her business as set

forth in the said mortgage. The answer admits that the defendant, about June 11, 1903, commenced a foreclosure suit of the said mortgage, but denies that the suit was improperly brought, and that it had no right to the relief prayed, and avers that at the time of the commencement of the said suit the mortgage was due, subject to foreclosure, and a large sum was due thereon to the defendant. The answer denies that the said notes and mortgage hinder, delay, and defraud other creditors of the said Ruth E. MacDonald. It denies the allegation of the bill that the mortgage was not given upon good consideration and bona fide, but alleges that the transaction was bona fide and upon good consideration, to wit, money furnished and advanced to the said Ruth E. MacDonald for the use and benefit of her separate statutory property which was the subject of the said mortgage and assignment. The defendant alleges that it has no knowledge of whether at the time of the filing of this bill Ruth E. MacDonald was insolvent and unable to pay her just liabilities, and therefore neither admits nor denies the same. The answer alleges that the defendant obeyed the order of the court in all respects in turning over and delivering to N. P. Bryan the property which it was therein directed to do. The answer denies that the moneys received by it from the sale of the said property of the said Ruth E. MacDonald are trust moneys, or that the same should be accounted for to the receiver and held by him for the creditors of Ruth E. MacDonald, and denies that any creditors of the said Ruth E. MacDonald, except the defendant, have any right or interest in and to the moneys received by this defendant from the sale of the said property when in its possession, and avers that said moneys were received by it in payment of the said mortgage under the terms thereof. The answer alleges that, having taken possession of the property under the terms of the said mortgage and the accounts turned over to it, it proceeded with due diligence in the exercise of economy, and to the best advantage, to make a sale of the goods and collect said accounts; that, up to the time when it surrendered and delivered possession of said property and chose in action remaining in its possession to the receiver, it had realized thereon the sum of \$5,541.87 net after paying expenses; that, while the said sum in the case of this defendant is more than sufficient to cover the indebtedness to it by the said Ruth E. MacDonald at the time of the execution of the said mortgage and accrued interest thereon, that this defendant has had to incur large expenses and liabilities in the employment of attorneys and solicitors and court costs in the foreclosure suit and in defending the said mortgage in this suit and in the suit of Armstrong, Cator & Co. and certain other suits brought by James J. Johnson and others against this defendant on the chancery side of this court, and

seeking similar relief to that sought in this case; also in the petition of involuntary bankruptcy instituted against Ruth E. MacDonald by Tefft, Weller & Co. and others in the District Court of the United States for the Southern District of Florida, based upon the said mortgage as a fraudulent preference of a creditor and as being an act of bankruptcy. The answer avers that all the costs, charges, and attorney's fees are secured to be paid by the said mortgage and prays that the same may be allowed, and is advised that they will not be any less than \$1,500. The answer avers that the said sum in its hands is not sufficient to pay the indebtedness secured by the said mortgage, together with the said costs, charges, and attorney's fees. The answer contains a general denial of all other matters in the bill not therein sufficiently confessed, traversed, avoided, or denied. The answer also contains a demurrer to the bill for want of equity.

A replication was filed to the answer and testimony taken by an examiner. The cause was then heard, and a decree entered, in which the equities were found to be with the complainants, fixing the amount due them at \$599.93, with interest amounting to \$91.56 as the price of goods, wares, and merchandise purchased by Ruth E. MacDonald, in the conduct of her mercantile business, as set forth in the bill, and which complainants were entitled to have charged in equity on said property, and declaring a lien thereon for the same and costs upon said separate statutory property, describing the same property covered by the mortgage of the defendant bank to commence from the appointment of the receiver on September 1, 1903, and declaring a lien in favor of complainants upon the proceeds of said property sold by said bank, declaring the mortgage of the bank null and void, and canceling and setting aside the same, requiring the defendant bank to pay said proceeds, viz., \$5,541.87, instantan into the registry of the court. It also declares the lien of Armstrong, Cator & Co. a prior lien on the same property, and that the complainant must therefore resort to the fund deposited by the Mercantile Bank with the clerk of the court. The decree also perpetually enjoins the bank from prosecuting the suit for foreclosure of its mortgage, and contains other details not necessary to be stated in order to the understanding of the questions presented here. The defendant the Mercantile Exchange Bank, appeals from this decree. Such other facts as may be necessary to be considered will be given in the opinion.

Fleming & Fleming, for appellant. John W. Dodge, for appellees.

HOCKER, J. (after stating the facts). There are 10 assignments of error; the first based on the interlocutory order of the chancellor enjoining the Mercantile Exchange Bank from foreclosing its mortgage against

the property of Ruth E. MacDonald, and the remainder based on the final decree, and upon the several features of that decree. The contention made here by the appellees to support the decree, both orally and in their briefs, may be divided into two propositions: First, that the mortgage of the bank was not given upon good consideration, was not bona fide, and was void; and, second, that the notes and mortgage hindered, delayed, and defrauded other creditors of Ruth E. MacDonald.

The testimony establishes the following facts: That Mrs. M. G. MacDonald, who was a married woman, the wife of M. G. MacDonald, for several years before the notes and mortgage were executed to the bank, had been engaged in carrying on in her own name, and for her own benefit, a mercantile business in Jacksonville, Fla., buying and selling millinery and other goods; that she had during that time kept an account with the Mercantile Exchange Bank, and had been in the habit from time to time of borrowing money from the bank with which to pay for goods used by her in her said business; that she had given the business her personal experience and attention; that the property thus acquired by her was her separate statutory property; that about the time of the execution of the notes described in the bill she had become indebted to the bank on account of moneys borrowed by her for use and used in her said business in paying for merchandise which went into her stock to the extent of \$4,400, evidenced by the said notes; that to secure the payment of this indebtedness she and her husband executed the mortgage which the bill seeks to have annulled; that the mortgage itself in the plainest terms states that the money which was so borrowed was used by Mrs. MacDonald in carrying on her said mercantile business, and contains a covenant by both Mrs. M. G. MacDonald and her husband to pay the indebtedness evidenced by the said notes, and provides for the delivery of possession of the mortgaged property, which was clearly the separate statutory property of Mrs. MacDonald, to the bank, and authorizes it to sell and dispose of the same and apply the proceeds to the payment of the costs of selling and disposing of the same, and to the payment of the indebtedness to the bank, and provides for attorney's fees for collecting and enforcing the rights of the mortgagee.

The mortgage was recorded in Duval county on May 27, 1903. The bank immediately took possession of the mortgaged property, Mrs. MacDonald being in poor health, and began to dispose of it, and up to the time it was enjoined and the property put in the hands of a receiver, in the suit of Armstrong, Cator & Co. against the defendants, viz., on the 16th of July, 1903, the bank had realized the net sum of \$5,541.87 from the property.

On June 11, 1903, the Mercantile Exchange Bank filed a bill to foreclose its mortgage, which by its terms was then due and payable.

On June 12, 1903, one of the creditors of Mrs. MacDonald filed an involuntary petition in bankruptcy against her in the United States court, charging that said mortgage was a preference, and an act of bankruptcy, and that she was insolvent. It appears from some of the testimony that, upon a hearing of this petition upon the testimony, it was denied on the ground that Mrs. MacDonald was not insolvent. It appears from the testimony that the stock of goods about the time the mortgage was executed was worth \$18,000, but it does not clearly appear what amount of money Mrs. MacDonald owed at that time. One of the witnesses, F. P. Fleming, Jr., who was of counsel for the bank, states that under the directions of his firm an inventory was made of Mrs. MacDonald's stock, and a list of her assets and liabilities made up, which enabled the firm to conclude that she was at that time solvent. This evidence was objected to, but no ruling was ever made upon this objection. We cannot discover from the evidence any lack of good faith in the transactions between Mrs. MacDonald and the Mercantile Exchange Bank, culminating in the execution of the notes and mortgage, or in the delivery of the possession of the mortgaged property to the bank for disposition in accordance with the terms of the mortgage. The appellees, however, contend, as we understand the contention, that the mortgage was void because the notes of Mrs. MacDonald which it was given to secure were void, and there was no consideration for said mortgage such as is contemplated in section 2, article 11, of the Constitution of Florida of 1885, as affording a basis for a charge in equity upon the separate statutory property of a married woman, and that there is no authority under the laws of Florida for the execution of such a mortgage. This section of the Constitution has been examined several times by this court, beginning with the case of *Halle v. Einstein*, 34 Fla. 589, 16 South. 554, and has never been construed, so far as we are informed, as a limitation upon the power of a married woman to dispose of her separate statutory property on her own motion for any purpose which is lawful under the statute laws of Florida, and, in construing the Constitution and statutes relating to this question, we should always keep in mind that the statutes permit a married woman at her discretion to mortgage her real estate (section 1956, Rev. St. 1892) and to make sales, transfers, and conveyances of any of her separate statutory property (section 2072, Rev. St. 1892), under the conditions there given, while section 2, art. 11, of the Constitution gives a court of equity the power in invitam to declare liens upon her separate property in the cases there enumerated. The first section of article 11 contains a limitation upon her power of encumbering her separate property with liability for the payment of her husband's debts. It provides that, in order for it to be so

liable, she must have given consent by some instrument in writing executed according to the law respecting conveyances by married women. Therefore such a liability cannot be created in any other manner. But, as we understand the case of *Halle v. Einstein*, supra, the second section of said article does contain a limitation upon the power of courts of equity to subject her separate statutory property to the payment of obligations or debts contracted by a married woman (page 602 of 34 Fla., page 558 of 16 South.). The right of a married woman, at her own instance, to dispose of her separate statutory personal property by sale, transfer, and conveyance, under the authority of the statute (section 2070, Rev. St. 1892), is recognized as existing in *Walling v. Christian & Craft Grocery Co.*, 41 Fla. 479, 27 South. 46, 47 L. R. A. 608, decided several years after the case of *Halle v. Einstein*, and this doctrine has been recognized by this court ever since the case of *Tunno v. Robert*, 16 Fla. 738, was decided. It is held in these cases that the statute should be liberally construed in giving effect to the transfers of the wife. It was applied as embracing a pledge of the wife's stock in a corporation as security for her husband's debts in the case of *Springfield Company v. Ely*, 44 Fla. 319, 32 South. 892. If a married woman may lawfully, under the terms of the statute (section 2070, Rev. St. 1892) pledge her stock in a corporation to secure her husband's debt, we can perceive no reason why she may not lawfully mortgage her separate statutory personal property to secure the payment of money which she declares in the mortgage itself was used for the benefit of her separate property, and which the husband by his covenant in the mortgage binds himself personally to pay. The notes given by Mrs. MacDonald could not be made the basis of a personal judgment against her, and, because of this fact, we understand the appellee to contend that the mortgage was without a present consideration and void. But it seems to us there are several objections to this contention: First, the husband's obligation to pay the debt contained in the mortgage is secured by the mortgage; and, secondly, the mortgaged property was delivered to the mortgagee bank which took possession of it and was proceeding to execute and carry out the provisions of the mortgage when its possession was interrupted by the receivership. These were present considerations for the mortgage. *Jones on Chattel Mortgages* (3d Ed.) § 80. In addition there was the equitable consideration that the money represented by the notes was actually used by Mrs. MacDonald for the benefit of her separate statutory property. *First National Bank of Pensacola v. Hirschowitz*, 46 Fla. 588, 35 South. 22. We are therefore of opinion that the mortgage executed by Mrs. MacDonald and her husband in favor of the Mercantile Exchange Bank upon her personal statutory property, which

mortgage was properly recorded, was authorized by section 2070 of the Revised Statutes of 1892, and was founded upon a good, valuable, and sufficient consideration, and, the mortgaged property having been delivered into the possession of the mortgagee, as provided by section 1983 of the Revised Statutes of 1892, a valid lien was thereby created on said property, by the lawful act of the parties themselves.

We will now consider the second contention—that this mortgage was not bona fide, and that it hindered, delayed, and defrauded other creditors of Mrs. MacDonald. To sustain this contention the appellees quote in their brief at some length the testimony of the cashier of the bank, with the view of showing that the bank, in lending money to Mrs. MacDonald, did not rely for security on her separate statutory property, but upon her personal integrity and ability. This, even if it were satisfactorily shown, about which there is doubt, does not seem to be material.

It is also contended that there is such a discrepancy between the amount secured, \$4,400, and the value of the property mortgaged, which was inventoried at \$18,000, as shows it to be fraudulent. Such a discrepancy is sometimes said to be a badge of fraud, as in section 58, *Bump on Fraudulent Conveyances* (4th Ed.). We have, however, examined all the cases referred to by *Bump* in this connection (note 5), and in no one of them is it held that such a discrepancy is of itself conclusive evidence of fraud. In each of these cases there were other circumstances tending to establish fraud independent of the question of the excessive security. In the case of *Downs v. Kissam*, 10 How. (U. S.) 102, 13 L. Ed. 346, the Supreme Court of the United States held that "it is no badge of fraud for a mortgage, which is a mere security, to cover more property than will secure the debt due. Any creditor may pay the mortgage debt and proceed against the property, or he may subject it to the payment of his debt by other modes of proceeding." This doctrine was applied in the case of *Davis v. Schwartz*, 155 U. S. 631, text 641, 15 Sup. Ct. 237, 39 L. Ed. 289, and also in the cases of *First Nat. Bank v. North*, 2 S. D. 480, text 494, 51 N. W. 96; *Black Hills Mercantile Co. v. Gardiner*, 5 S. D. 246, text 247, 58 N. W. 557; *Clement v. Hartzell*, 57 Kan. 482, 46 Pac. 961. In the case of *Black Hills Mercantile Co. v. Gardiner*, supra, a debt of \$1,700 was secured by a mortgage on a stock of goods worth \$10,000, and it was held that this circumstance alone was not any evidence of a fraudulent intent; that defendants had a right to give a mortgage to reasonably secure their indebtedness to the bank; and that it would have been impracticable to give it on an undivided portion of the stock, and equally so on certain enumerated articles.

If the facts of this case required it, we might be expected to extend this investigation to the question whether the giving of the mortgage to the bank was not such a preference of the bank as would make the mortgage void under the assignment laws of this state (section 2307 et seq., Rev. St. 1892), and in such an investigation the first proposition involved would be whether these laws apply to a married woman at all, who is not *sui juris*, and who can make no transfer, conveyance, or incumbrance of her separate statutory property without the consent and joinder of her husband in such transfer or conveyance. But we do not think the facts of this case require such an inquiry. There is no proof here that, when the mortgage was executed to the bank, Mrs. MacDonald was insolvent. The fact of her insolvency was alleged in the bill and denied in the answer. It was therefore necessary for the complainant to show by some evidence the fact of the insolvency. On the contrary, there is some proof that at that time she was not insolvent. We are not informed as to how much property Mrs. MacDonald then owned, or of its value; nor are we informed as to the extent of her indebtedness, nor as to how much of such indebtedness could, under the Constitution, be made a charge upon her separate property involved herein. The transaction between herself and husband and the bank appears to have been absolutely bona fide upon a valuable consideration, and free from fraud. Under these circumstances, we are of opinion that the chancellor erred in his orders enjoining the foreclosure suit of the Mercantile Exchange Bank and appointing the receiver of the mortgaged property, and also in his final decree, wherein the equities are found to be with the complainants *Aitken, Son & Co.* Of course, the Mercantile Exchange Bank, having taken possession of the mortgaged property under the terms of the mortgage, and having proceeded to sell and dispose of the same, would be liable to account to Mrs. MacDonald and such of her creditors as have liens on said property adjudged to be such by a court of equity, in the exercise of the power conferred on it by the second section of article 11 of the Constitution of 1883, for the proceeds of the mortgaged property over and above the debt due the bank which has priority, and the reasonable costs, expenses, and attorney's and solicitor's fees incurred by it in disposing of the property and in defending and foreclosing the mortgage. What particular items or how much should be allowed the bank for such costs and attorney's fees are matters which cannot be adjudicated in this suit, but fall properly to be settled in the foreclosure suit of the Mercantile Exchange Bank.

The decree and order appealed from are reversed, at the cost of the appellees, with directions that such further proceedings be

had as may be consistent with the law and this opinion.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

SKINNER MFG. CO. v. WRIGHT.

(Supreme Court of Florida, Division A. April 10, 1906.)

TRIAL—DEMURRER TO EVIDENCE.

A party demurring to the evidence must set forth on the record all of the evidence intended to be admitted thereby, and, if this is not done, the opposing party cannot be required to join therein.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 351.]

(Syllabus by the Court.)

Error to Circuit Court, Santa Rosa County; Charles B. Parkhill, Judge.

Action by the Skinner Manufacturing Company against Lum Wright. Judgment for defendant, and plaintiff brings error. Reversed.

Amos & West, for plaintiff in error.
Blount & Blount, for defendant in error.

SHACKLEFORD, C. J. This is an action of ejectment instituted by the plaintiff in error, as plaintiff, against the defendant in error, as defendant, in the circuit court for Santa Rosa county to recover the possession of a certain parcel of land and for mesne profits. At the close of all the plaintiff's evidence the defendant filed what purported to be a demurrer thereto. The plaintiff objected to joining therein, but the court made an order requiring it to do so, which the plaintiff then did, and, after argument by the respective counsel, the court made an order sustaining the demurrer to the evidence and rendered a judgment in favor of the defendant. To this judgment the plaintiff took a writ of error returnable to the present term. Three errors are assigned, based, respectively, upon the order requiring the plaintiff to join in the demurrer to the evidence, the order sustaining the demurrer, and the order overruling the plaintiff's motion for a new trial.

The demurrer in question was as follows:

"The defendant demurs to the evidence in this case, and for ground of demurrer says that it is insufficient to warrant the finding of a verdict or the rendition of a judgment in favor of the plaintiff."

We are of the opinion that all the errors are well assigned.

It is settled law in this court that the party demurring to the evidence must set forth on the record all of the evidence intended to be admitted thereby, and, if this is not done, the opposing party cannot be required to join therein, and, even if he should join

therein voluntarily, the court can give no judgment upon the demurrer, but must award a venire de novo. See *Higgs v. Shehee*, 4 Fla. 382; *Morrison v. McKinnon*, 12 Fla. 552; *Hinote v. Simpson & Co.*, 17 Fla. 444; *Hanover Fire Insurance Co. v. Lewis*, 23 Fla. 193, 1 South. 863; *Duncan v. State*, 29 Fla. 439, 10 South. 815; *Wilkinson v. Pensacola & Atlantic R. R. Co.*, 35 Fla. 82, 17 South. 71; *Fee v. Florida Sugar Manufacturing Company*, 36 Fla. 612, 18 South. 853; *Holland v. State*, 39 Fla. 178, 22 South. 298; *Ingram v. Jacksonville St. R. R. Co.*, 43 Fla. 324, 30 South. 800; *Lowe v. State*, 44 Fla. 449, 32 South. 956, 103 Am. St. Rep. 171; *Mugge v. Jackson (Fla.)* 39 South. 157; *Atlantic Coast Line R. R. Co. v. Dexter (Fla.)* 39 South. 634. Also see *Gould's Pleading* (5th Ed.) 446 et seq.; *Gibson and Johnson v. Hunter*, 2 H. Blackstone, 187, text 205 et seq.; 6 Ency. Pl. & Pr. 446 et seq.

None of the evidence in the instant case, which was partly documentary and partly parol, was reduced to writing, and no facts were admitted or stated on the record by the demurrer.

Further discussion is unnecessary. The judgment must be reversed, and it is so ordered, at the cost of the defendant in error.

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR and HOCKER, JJ., concur in the opinion.

PARKHILL, J., disqualified.

BRYSON v. BRIDGES.

(Supreme Court of Florida, Division A. April 24, 1906.)

CANCELLATION OF INSTRUMENTS — DEED — FRAUD.

Questions of fact only are involved. A deed that was not delivered voluntarily, and was obtained by deception, was properly set aside upon prompt application.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Cancellation of Instruments, § 1.]

(Syllabus by the Court.)

Appeal from Circuit Court, Suwannee County; B. H. Palmer, Judge.

Action by M. A. Bridges against Conner Bryson. Decree for plaintiff, and defendant appeals. Affirmed.

Ira J. & H. E. Carter, for appellant. J. B. Johnson (A. E. Leslie, on the brief), for appellee.

COCKRELL, J. The appellee, as complainant, filed her bill to cancel a deed to a certain lot in Bryson's addition to Live Oak, upon the ground of fraud in the procurement thereof by Conner Bryson. No questions of law are raised, but the appellant relies solely and wholly upon the weight of the evidence which he asserts is insufficient to overcome the effects of the sworn answer, and that

therefore the decree of cancellation was error.

Our reading of the evidence, which has been carefully studied, leads us to the conclusion that the decree was correct, either upon the theory that there was no delivery of the deed in the sense of a voluntary surrender by the grantor, or upon the theory that there was such deception practiced both actively and passively by the would-be grantee as to entitle the complainant to relief.

It is not thought necessary to detail the evidence. Mrs. Bridges is fortified and corroborated by other witnesses in every substantial allegation of the bill and her testimony bears the earmarks of truth, while that of the defendant is impeached by his own contradictions and evasions and by the mouths of others. The haste on his part to get the deed and have it recorded, and utter indifference thereafter to remedy a description only too clearly disclosed, as also the promptness with which the complainant sought her legal remedy, are noteworthy. We are not dealing with a case of a mere failure to fulfill a promise, but a deception as to an existing fact, and the citations for appellant do not apply.

The decree is manifestly correct, and will be affirmed.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(116 La.)

No. 15,949.

BORAH et al. v. O'NIELL.

In re BORAH et al.

(Supreme Court of Louisiana. Feb. 26, 1906.
On Rehearing, March 26, 1906.)

1. PARTNERSHIP—SUIT TO DISSOLVE—PLEADING.

A petition which alleges a partnership, and alleges good reasons why it should be dissolved, and alleges that it should be liquidated, and alleges that the defendant partner owes the petitioners certain specific debts by reason of his failure to contribute his share of the expenses of the partnership, and prays that the partnership be dissolved, and prays judgment against the defendant partner for the specific debts, "or, in the event that the court should fail to find that these specific amounts are due, then for a judgment for whatever amount the court may find to be due, and further prays for such other and further remedy and relief as the nature of the case may require and law and equity permit," shows a cause of action.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 769-771.]

2. SAME—NATURE OF PETITION.

An allegation in such a petition referring to certain debts as having accrued after the dissolution of the partnership, and reserving the right to recover these debts in another proceeding, does not change the nature of the petition as one in settlement of partnership.

3. SAME—DISSOLUTION.

A partnership for the cultivation of a plantation is dissolved by the seizure of an

undivided interest in the plantation, whereby the partnership is deprived of the control of the plantation.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 608, 614-616.]

(Syllabus by the Court.)

Action by Charles F. Borah and John A. Landen against Charles O'Niell. An exception of no cause of action was overruled by the district court, and judgment was sustained by the Court of Appeal, and the suit dismissed, and plaintiff brings certiorari.

Foster, Milling, Godchaux & Sanders and Henry Meyer, for applicants. Charles O'Niell (D. Caffery & Son, of counsel), for respondent.

PROVOSTY, J. In the district court this case was tried on the merits. In the Court of Appeal an exception of no cause of action, which had been overruled by the district court, was sustained, and the suit was dismissed. The case is before this court on writ of review to the Court of Appeal.

The petition reads as follows:

"That they are the owners in indivision with Charles A. O'Niell of a certain sugar plantation situated in the parish of St. Mary, known as the Daisy or St. Mary Plantation; that after acquiring said plantation they entered into a verbal agreement of partnership by which they formed a partnership under the firm name of O'Niell, Landen & Borah, for the purpose of carrying on planting operations upon said plantation. It was distinctly agreed and understood, that one of your petitioners, John A. Landen, should be general manager and superintendent of the said plantation for the said partnership, with full power for it to enter into all contracts and especially to contract all such obligations as might be necessary for the growing and harvesting of crops on said plantation.

"Your petitioners show that under this agreement the said Landen took possession of said plantation as the agent of the said partnership. He grew and harvested the crop there during the year 1902, and there was a profit of several hundred dollars, which, by agreement of parties, was used for the joint account of the said members of the said partnership by paying for mules purchased for said plantation; that it then became necessary, for the purpose of growing the crops upon the plantation for the year 1903, to borrow money and incur debts for fertilizers and supplies to carry on said planting operations.

"Your petitioners show that the said John A. Landen, manager, as such, at the beginning of the crop year 1903, and up to May 12th of that year, secured money to run said place by borrowing first from himself and then from C. F. Borah, and thus carried on the planting operations for said firm to the date aforesaid, May 12th, at a cost to said firm of \$2,110.79; that at this time the interest of the said O'Niell in the said plantation was seized by the sheriff of the parish of St. Mary under a certain executory process entitled Charles F. Borah v. C. A. O'Niell, No. 130 of the docket of this honorable court; and, there being no funds available at that time for the purpose of carrying on said planting operations, your petitioners joined, by the sheriff who then had the one-third of said O'Niell under seizure, executed in favor of the St. Mary Bank of this place, a pledge upon the crop then being grown; and upon your petitioners solidarily guarantying the payment of the \$2,500 represented by said pledge note, secured advances with which to

finish cultivating and harvesting said crops; and one of your petitioners, John A. Landen, having been appointed as keeper of the interest seized by said sheriff, and instructed as such to go on with said crop, finished cultivating and harvesting the same at an additional cost of \$2,553.60; that the note thus given and secured by said pledge was paid after its maturity by one of your petitioners, Charles F. Borah.

"Your petitioners show that the crop season of the year 1903 proved disastrous, and that there was a loss on account of the raising and harvesting of said crop, and outside of the amount paid for mules, as hereinafter recited, of \$3,236.17, the said amount of money being expended in raising and harvesting said crop being the sum of \$4,664.89; and the amount realized from the sale of the same and other credits amount to the sum of \$1,428.23 leaving a shortage, as aforesaid and as will appear by reference to a statement hereto attached, marked 'A' and made a part thereof. In addition to this shortage, and the loss from said crop, there was a note in favor of J. D. Sims & Sons for mules purchased, maturing January 1, 1904, amounting in principal and interest to maturity, to \$772.96.

"Your petitioners show that of the amount expended up to the seizure of May 12, 1903, to wit, \$2,110.79, or thereabouts, the said C. A. O'Niell has not paid any part thereof and is due his one-third to your petitioners, they having advanced the money or paid the debts of said partnership to said amount, and that they are entitled to a judgment against the said C. A. O'Niell for one-third of the above named amount or whatever is shown to have been expended for said firm to the date of seizure, with 5 per cent. per annum interest thereon from May 12, 1903.

"They further aver that after the seizure of the one-third interest of the said O'Niell by the said sheriff there were further expenses incurred up to December 10, 1903, the time at which said crop was harvested, in the sum of \$2,553.60; that this amount has been paid by your petitioners and advanced for the purpose of making said crop; but that the one-third, which would otherwise be due by said O'Niell, should be taxed as costs and paid by preference out of the sale of the said plantation when sold, and however sold, and they reserve the right to have the same so taxed, or to claim the same in future litigation, as the expense is still going on and will continue until the property seized is sold and the partnership finally dissolved and liquidated.

"Petitioners aver that the mules purchased, as above referred to, were settled for by a note drawn in solidio by C. A. O'Niell, John A. Landen, and C. F. Borah in favor of J. D. Simms & Sons, bearing 8 per cent. interest per annum from February 7, 1903, and conditioned for the payment of attorney's fees at 10 per cent. which note in principal and interest to its maturity, aggregated the sum of \$772.96, as shown by said note attached, and which was paid by petitioners, and of which amount they are entitled to recover one-third from the said O'Niell with 8 per cent. per annum interest thereon from January 1, 1904, and 10 per cent. attorney's fees.

"Your petitioners show that these mules were purchased for the purpose of carrying on farming operations for the year 1903 on said plantation and that the note as executed by your petitioners with the said O'Niell was due one-third by each; and that your petitioners having paid the said note the said O'Niell is due one-third of same to your petitioners, to wit, \$257.65, with 8 per cent. per annum interest thereon from January 1, 1904, and 10 per cent. attorney's fees.

"Petitioners further aver that the partnership existing between them should be dissolved and liquidated; that the said C. A. O'Niell, during the entire year of 1903, failed and neglected to make good any of his part of the obliga-

tions contracted by or for the said partnership, and still fails to do so, claiming he is unable so to do; that he has paid no part of the running expenses of the said partnership, and for these and others reasons your petitioners are entitled to have the partnership dissolved and liquidated.

"They aver that in dissolving this partnership, and adjusting the accounts of the said partnership, and determining the amount which proceeds realized from the sale of the crop grown during the past year should be credited, and, after so directing the credits from said crop, then your petitioners should have, and they hereby specially reserve the right to have, one-third of whatever may have been expended since the said seizure taxed as costs of court in the suit of Charles F. Borah v. Charles A. O'Niell, as whatever indebtedness has been incurred since the seizure has been incurred by the sheriff by operation of law, and that while the same has been paid by one of your petitioners, C. F. Borah, and is due by the said C. A. O'Niell, the same should be taxed as costs.

"Wherefore petitioners pray for service hereof and citation on the said C. A. O'Niell according to law, and on final trial they pray for a judgment decreeing the dissolution of the partnership existing between them and the said C. A. O'Niell as set forth in the foregoing petition, and, on final trial, they pray for a judgment against the said C. A. O'Niell jointly in favor of your petitioners, C. F. Borah and John A. Landen, for the full sum of \$703.59, it being one-third of the amount advanced and which is due by the said C. A. O'Niell for amounts expended in raising the crop up to the date of seizure of his interest in said property, with 5 per cent. per annum interest thereon from May 12, 1903.

"Petitioners further pray for judgment jointly in their favor, and against the said C. A. O'Niell, for one-third of the amount expended for mules, to wit, the sum of \$257.65 with 8 per cent. per annum interest thereon from January 1, 1904, and 10 per cent. attorney's fees; or, in the event that the court should fail to find that these specific amounts are due, then for a judgment for whatever amount the court may find to be due your petitioners by the said C. A. O'Niell after directing the manner in which the proceeds from the sale of the said crop should be credited.

"They further pray that the right of the plaintiffs herein be reserved to demand one-third of all amounts expended since the seizure of the interest of the said C. A. O'Niell, and to have one-third of the same taxed as costs in said executory process, upon the termination thereof.

"They further pray for such other and further remedy and relief as the nature of the case may require and law and equity permit."

This petition appears to us to show a cause of action. While it is vague, involved, and unsatisfactory, it sufficiently shows that a partnership was formed between plaintiffs and defendant for cultivating a plantation they owned in indivision, one-third each; that the third of defendant has been seized, and continues to be under seizure, so that the plantation has been since the seizure, and is still being, operated, not by the partnership, but by the plaintiffs and the sheriff; and that the partnership has been thereby dissolved; and that plaintiffs desire to have a settlement of it.

Partnership ends by the extinction of the thing, or the consummation of the business. Civ. Code, art. 2876. In this case, the thing was not extinguished nor the business con-

summated, but the partnership was just as effectually put out of business by the seizure as it could have been by either of these events: It was deprived of the control of the plantation whose cultivation formed the sole object and purpose of its existence. A partnership entered into for running a steamboat, is put an end to by the destruction of the boat. *Clalborne v. Creditors*, 18 La. 501. On the same principle, a corporation comes to an end when permanently deprived of the work which formed the sole purpose of its organization. *Succession of Hutchinson*, 112 La. 656, 36 South. 639.

There is also the allegation that defendant has failed to furnish his share of the expenses of the partnership, and has declared his inability to do so. This is good ground for demanding a dissolution. Civ. Code, art. 2888.

The special reason for which the court of appeal thought the petition failed to show a cause of action was that it did not distinctly pray for a full and final settlement of the partnership. True, it does not; but, taking the petition as a whole, the purpose of having a settlement of the partnership sufficiently appears. *Smith v. Corcoran*, 7 La. 46; *Bradford's Heirs v. Clark*, 7 La. 147; *Independent Ice Co. v. Anderson*, 106 La. 55, 30 South. 270; *Id.*, 106 La. 95, 30 South. 272; *Police Jury v. Shreveport*, 5 La. Ann. 661.

There is the allegation that the partnership should be liquidated, and there is the prayer that defendant be condemned for whatever amount may be found to be due, in case he is not found to owe the specific amounts claimed. There is also the very full prayer for general relief, which, taken in connection with the allegation that the partnership should be liquidated, goes very far towards helping out the situation.

The suggestion is made that if the suit is one for the settlement of the partnership, then, the court of appeal has not jurisdiction of it; because the amount involved, or sum to be distributed, would exceed \$2,000. That is a question on which the Court of Appeal has not yet pronounced itself. If it finds that the amount involved exceeds its jurisdiction, it can take appropriate action in the premises.

The reference in the petition to the debt incurred under the joint management of the sheriff and plaintiffs, and the reserve of the right to claim the amount in another suit, do not detract from the petition; they are mere surplusage. Any debts incurred after the seizure, and after the consequent dissolution of the partnership, are not involved in its settlement of the partnership.

The judgment of the Court of Appeal is set aside, and the case is remanded to that court to be proceeded with according to law; defendant to pay the costs of the proceedings in this court.

On Rehearing.

PER CURIAM. It may be conceded that a partnership is not, ipso facto, dissolved by the seizure of the interest of one of the members. In the instant case, the seizure appears to have been maintained quod the plantation upon which the operations of the firm were conducted and was set aside only as to the crop and the movables which had been placed upon the plantation by the partnership. Apart from this, and without reference to the question of dissolution, *vel non*, we are of opinion that the petition discloses a cause of action. The rehearing is accordingly refused.

(116 La.)

No. 15,972.

LEWIS v. D'ALBOR.

In re LEWIS.

(Supreme Court of Louisiana. Jan. 29, 1906.
Rehearing Denied March 26, 1906.)

1. MANDAMUS—COMPELLING GRANTING OF INJUNCTION.

Mandamus will not lie to compel the district judge to issue an injunction against the further prosecution of a suit between the same parties in the same or another court.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 81.]

2. INJUNCTION—ENFORCEMENT OF JUDGMENT—PREMATURE SUIT.

Where the court of appeal rendered judgment in favor of A., granting him a right of passage over the lands of B. to the nearest public road, and remanded the cause for further evidence on the question of damages, *held*, that the judgment was in abeyance, and it would be time enough when it became executory to consider B.'s right to enjoin its enforcement on the ground of abatement by reason of the alleged opening of another public road extending to lands of A.

(Syllabus by the Court.)

Application by John B. Lewis for a writ of mandamus and certiorari to compel the granting of an injunction restraining the prosecution of a suit by G. D'Albor against the applicant. Application dismissed.

Foster, Milling, Godchaux & Sanders, for relator. Respondent Judge, pro se.

LAND, J. Relator applies for a mandamus to compel the respondent judge to grant an order of injunction in the case of John B. Lewis v. G. D'Albor filed in the district court in and for the parish of Iberia.

It appears from relator's allegations that G. D'Albor sued John B. Lewis for a right of way, or passage, over certain lands to the nearest public road, and on appeal from an adverse judgment to the Court of Appeal for the parish of Iberia, succeeded in obtaining a decree of reversal and granting him a right of way or passage over relator's lands, as indicated by letters on a certain map filed in evidence, and remanding the cause to the district court for the assessment of damages sustained by the relator by reason of the expropriation of said right of passage.

Relator represents that before the question of the assessment of damages was tried, the police jury opened a public road 28 feet in width to the property of D'Albor, and that thereupon the relator applied to the respondent judge for an injunction to prohibit said D'Albor from taking possession of the right of passage granted by the decree of the Court of Appeal and to prohibit him from further proceeding towards the assessment of damages in his suit in the district court.

Relator further represents that the district judge heard argument on the said application for an injunction, and that relator in open court offered to withdraw his application if said judge would order the consolidation of the two suits; but said judge not only refused to grant the injunction but also refused to order the consolidation of the suit. Whereupon the relator filed the petition now before the court.

The answer of the respondent judge may be summarized as follows:

That the Court of Appeal had rendered a decree granting to D'Albor a certain designated right of passage over the estate of the relator and has remanded the case for the reception of additional evidence on the question of the amount of indemnification to which the relator might be entitled.

That the relator seeking to set aside the decree of the Court of Appeal, sought to raise new issues after rendition, but that the judge restricted relator to the issue of damages, and that thereupon the latter applied to the Supreme Court for writs of certiorari and prohibition, which were denied.

That the case was fixed several times for trial on the issue of damages, but for various reasons could not be taken up and tried.

That relator then applied for an injunction against further proceedings in the cause as well as against D'Albor to prevent him from entering into the enjoyment of the right of way granted him by the judgment.

That the respondent judge refused to grant the order for an injunction as prayed for, because the prosecution of the suit cannot be arrested by an injunction, nor does an injunction lie to prevent a litigant from enforcing a lawful judgment which he may obtain in a pending suit.

The respondent judge submits that, if since the decree of the Court of Appeal was rendered, conditions have arisen which abrogate the right of way granted, then relator's remedy is by suit to set aside the grant, but that while this issue is being controverted, D'Albor should not be denied the right of prosecuting the first suit.

The petition for an injunction alleges that since the rendition of the decree of the Court of Appeal there has been opened by the police jury a public road leading from another established public road to the property of D'Albor, and that therefore there is no longer a necessity of a right of passage across relator's property on the line fixed by the decree of the court.

The petition contains the following further allegations, to wit:

"That this public road runs to the quarter section of his property, and petitioner tenders him a right of passage over the other lands he may own (which passage is indicated on a certain map), which enables him to get to other small tracts in that section and connect them with the tract of land which is reached by the public road.

"Your petitioner shows that this right of passage would be a great deal less inconvenient to him; that if it is not changed but permitted to stand as originally decreed it would cause him great irreparable injury and would amount to a cutting in two of his entire plantation, thereby inclosing part of his land by the land of others."

Plaintiff in injunction alleged that he had a legal right to have the right of passage changed to a point where it would be less inconvenient to him, provided it be so changed as to allow D'Albor to reach a public road. The prayer of his petition is for judgment changing the location of the right of way as originally granted by the judgment of the Court of Appeal so as to decree that the same should run on certain described lines to the new public road.

Petitioner prayed that D'Albor be prohibited and restrained from entering upon relator's land or attempting to take possession of the right of way indicated on the map "G, H," until final determination of the same, and from taking any further action in the original suit until the final determination of relator's application to change the right of way so as to be less inconvenient to him, unless the two actions be consolidated.

In short, relator sought to enjoin D'Albor from prosecuting his suit and from taking possession of the right of way decreed in his favor, pending the suit of the relator to change the location. As stated by the respondent judge the application for the writ does not rest upon any allegation that D'Albor was seeking to take possession by force or otherwise than by virtue of a decree of court.

D'Albor's right to take possession under the judgment of the Court of Appeal remains in abeyance until the quantum of compensation due relator is fixed by final decree of the court and paid.

Relator seems to apprehend that the prosecution of D'Albor's suit to final judgment and execution will impair or destroy his asserted legal right to have the location of the servitude changed so as to be less inconvenient to him.

In *Brott v. Eager, Ellerman & Co.*, 28 La. Ann. 262, the court said:

"The right to claim and the right to prosecute a suit in court, are rights which can be denied to no one. They are protected by article 10 of the Constitution."

In *Bonin v. Monot*, 28 La. Ann. 597, the police jury had enjoined the plaintiff by suit in the parish court from closing a public road. Bonin then obtained an injunction in the district court arresting the process and

writs of the parish court. The Supreme Court held that the parish had the constitutional right to sue out the injunction in the parish court and that the district court had no right to interfere by injunction. The same court had previously decided that a party could not be enjoined from prosecuting claims whether well founded or not. *Butchers' Benevolent Association v. Cutler*, 28 La. Ann. 500. In *State ex rel. Sweeney v. Judge*, 39 La. Ann. 619, 2 South. 385, it was held that a court was without power to prevent by injunction a person from bringing a suit before another court of competent jurisdiction.

In that case the court pointed out the fact that under our judicial system all courts possess equally law and equity powers, and therefore, the doctrine in other states that a court of equity may in some instances enjoin a party from resorting to a suit at law to prosecute his demand, had no application. See, also, *State ex rel. Sweeney v. Judge*, 40 La. Ann. 1, 3 South. 460.

All of these decisions rest on the constitutional guaranty that courts shall be open, and every person, for injury, shall have adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay. Const. 1898, art. 6. This principle applies to all suits and to all injunctions whether in the same or another court.

In *Darcantel v. Slaughter House Co.*, 44 La. Ann. 645, 11 South. 239, the court said:

"The general dictum quoted from various authorities to the effect that a party can always prevent by injunction the doing of an act which would give him a claim for damages obviously refers, and must be confined to unlawful acts."

It is well settled that if the law gives the judge discretion to grant or refuse the injunction, mandamus will not lie, and that he has discretion in cases arising under article 303 of the Code of Practice. *Breaux's Digest*, p. 508. It is equally well settled that he has no such discretion in cases provided for by article 298 and others similar where the law provides that "the injunction must be granted." *State ex rel. Yale v. Judge*, 41 La. Ann. 518, 6 South. 512.

The prosecution of a suit is a lawful act and affords no ground for an injunction. The enforcement of the judgment of a competent court cannot be considered as a trespass. Both parties have the legal right to prosecute their respective suits to final judgment. If the relator succeeds in obtaining judgment changing the location of the right of way, any judgment rendered or that may be rendered in the original suit will be to that extent vacated or rendered no longer operative. Neither party can be enjoined from prosecuting their respective demands before the courts, and the rights of neither can be prejudged. It may be that, in the interest of both parties, the two cases should be consolidated in order to prevent conflicting judgments,

but this is a matter left to the discretion of the district judge.

We note that in the case of *D'Albor v. Lewis*, the relator offered to file an amended answer raising practically the same issues presented in the petition for injunction. It is true that the district judge refused to permit the relator to file such answer, and he took a formal bill of exceptions to the ruling on the court. On appeal, the relator will have an opportunity of presenting to a higher court the question of his right to have the judgment in favor of *D'Albor* changed or modified for the reasons stated in his amended answer. Relator can appeal suspensively from any final judgment in the *D'Albor* suit.

We have read with pleasure the able brief submitted by counsel for relator, and concur with them in the view that he should be afforded an opportunity to present his contention of abatement to the court either in the original suit or by separate action, but we cannot hold that relator has the legal right to enjoin the prosecution of the original suit while he is prosecuting his own suit. If it should be finally determined that relator had no right to urge the alleged abatement of the right of passage in the original suit, and a final judgment should be rendered therein in favor of *D'Albor*, it will be time enough to consider relator's right to enjoin its execution. As it is, the decree of the Court of Appeal is in abeyance and cannot be executed.

It is therefore ordered that the writs nisi herein issued be recalled, and that relator's application be dismissed, with costs.

(116 La.)

No. 15,850.

CITY OF NEW ORLEANS v. SMYTHE.

(Supreme Court of Louisiana, Feb. 12, 1906.

Rehearing Denied March 28, 1906.)

1. INTOXICATING LIQUORS—BARROOM PERMITS—VALIDITY OF ORDINANCE.

Ordinance No. 12,636, relative to saloon and barroom permits, adopted by council of the city of New Orleans pursuant to section 21 of the city charter of 1896 (Act No. 45, p. 55 of 1896), is not unconstitutional as conferring arbitrary powers on the property holders and council or as discriminating in favor of saloons and barrooms already opened and established at the date of the ordinance. *City of New Orleans v. Macheca*, 36 South. 590, 112 La. 559, reaffirmed.

2. SAME—PROHIBITION.

There is no inherent right in a citizen to sell intoxicating liquors by retail, and the business may be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. *Crowley v. Christensen*, 11 Sup. Ct. 13, 34 L. Ed. 620, 127 U. S. 86.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 1.]

3. SAME—ARBITRARY REFUSAL—REMEDY OF APPLICANT.

Section 21 of the city charter of 1896 (Act No. 45, p. 55, of 1896) does not vest in the city council absolute control over barrooms, and saloon permits, and, where the refusal to grant

such a permit is arbitrary, discriminatory, and unjust, the applicant has his remedy by mandamus. To that extent *State ex rel. Galle v. City of New Orleans*, 36 South. 999, 113 La. 371, 67 L. R. A. 70 is reaffirmed.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 75.]

Monroe, J., dissenting.

(Syllabus by the Court.)

Appeal from First Recorder's Court of City of New Orleans; John Joseph Fogarty, Judge.

Charles Smythe was convicted of setting up a barroom without a permit, and appeals. Affirmed.

Michael Dracos Dimitry, for appellant. Henry Garland Dupré, Asst. City Atty., for appellee.

LAND, J. Defendant was charged on affidavit in the first recorder's court of the city of New Orleans with violating Ordinance No. 12,636, C. S., relative to setting up and establishing a barroom without a permit from the city council.

The defendant demurred to the affidavit and charge on the ground that said ordinance is "unconstitutional, illegal, null and void, and in violation of articles 2 and 181 of the Constitution of the state of Louisiana, and that said ordinance is arbitrary, discriminatory, and unjust, and deprives appearer of liberty and property without the process of law." This demurrer was overruled, and the case was tried and the defendant was found guilty and sentenced to pay a fine of \$10, or, in default thereof, to serve 15 days in the parish prison.

Defendant appealed to the Supreme Court and to the criminal district court.

The evidence adduced on the trial was reduced to writing and appears in the transcript, but is not annexed to any bill of exception. Hence this court cannot review the action of the court a qua on such evidence. See *State v. Hagan*, 45 La. Ann. 840, 12 South. 929; *State v. Carr*, 111 La. 716, 35 South. 839.

The only questions of law that this court can properly consider on this appeal are such as are raised by the demurrer.

The ordinance was passed in September, 1896, and was expressly authorized by section 21 of the city charter (Act No. 45, p. 55, of 1896), which reads as follows:

"The council shall not grant any privileges for the opening of any bar-room, saloon, concert saloon or dance hall, except upon the written consent of a majority of the bona fide householders or property holders within three hundred feet, measured along the street front, of the proposed location of such bar-room, saloon, concert saloon, or dance hall; and it shall revoke any privilege on the petition of a like number of such persons, any prior license or privilege to the contrary notwithstanding."

The ordinance, in part, reads as follows:

"That hereafter it shall not be lawful for any one to set up or establish any bar-room, saloon, concert saloon, dance hall, beer house or place where liquor is sold at retail by the glass, to be then consumed, without permission of the city

council previously applied for in writing, which shall be accompanied by the written consent of a majority of the bona fide property holders within three hundred feet, measured along the street fronts, of the proposed location of such bar-room, saloon, concert hall, dance hall, beer house or place where liquors are sold at retail by the glass," etc.

The second section of the ordinance provides that such consent of the property holders shall be shown by the certificate of the city engineer; and the third authorizes a fee of \$5 for each certificate.

The fourth section prescribes a penalty for any violation of the provisions of the ordinance, and the last section provides that all privileges hereafter issued under the ordinance shall be revocable at the pleasure of the council.

In *City of New Orleans v. Macheca*, 112 La. 559, 36 South. 590, this court held that section 21 of Act No. 45, p. 55, of 1896, was a constitutional exercise of a legislative power, and that City Ordinance No. 12,636, passed pursuant to that section, was not illegal as conferring arbitrary powers on the property holders and on the city council. The doctrine of that case is in accord with the recognized general jurisprudence on the same subject-matter, which has been enunciated as follows, viz.:

"It is ordinarily provided by the statutes that before an application for a license to sell intoxicating liquors shall be granted, the applicant must procure the consent or recommendation of a designated number of persons living in the vicinity of the place for which the license is sought; these persons usually being voters of the district, township, or ward in which the proposed saloon is to be located, or residents or taxpayers in such district, township, ward, or city block. The validity of these statutes has been frequently assailed on constitutional grounds, but they have been uniformly upheld as being a valid exercise of the police power. They are not in violation of any clause of the fourteenth amendment. It has also been urged that provisions of this nature are unconstitutional as delegating legislative power to the classes of person whose consent or recommendation must be obtained. This contention has likewise been held untenable." 17 Am. & Eng. Ency. Law (2d Ed.) 209, 210.

In *State ex rel. Galle v. City of New Orleans*, 113 La. 371, 36 South. 999, 67 L. R. A. 70, the relator alleged that he had complied with the provisions of the ordinance in question, and that the city council had arbitrarily refused to grant him a permit to open and conduct a barroom. Relator thereupon applied for a writ of mandamus, which was made peremptory, and the city appealed. The judgment was affirmed; two of the justices concurring on the ground that, under the statute, the discretion as to granting or withholding permits was confided to the property holders.

It is apparent that the decree in that case assumed the legality and constitutionality of the ordinance which it ordered to be enforced, and that the real point involved was as to the character of the discretion vested in the city council.

It is, however, argued in the case at bar that the ordinance discriminates in favor of persons conducting barrooms, saloons, etc., already established at the date of its adoption.

This argument denies to the Legislature the power to discriminate between persons already lawfully pursuing an occupation subject to the police power and persons who may thereafter seek to engage in the same occupation. Such a contention, if admitted, would prevent the Legislature from requiring additional qualifications for persons desiring to engage in many callings and professions which cannot be carried on without a previous permit or license. A number of statutes in this state, requiring persons to procure a permit before engaging in certain pursuits, exempt those already actually so engaged. A cursory examination of our statutes shows that this exemption has been extended to physicians, pharmacists, and pilots. We are not aware that statutes of this kind have ever been declared void as denying the equal protection of the law. They recognize the distinction between persons actually engaged in certain callings from which they obtain a livelihood and in which they may have invested capital, and persons not so engaged. The two classes are not similarly situated; the one having rights already vested or at least recognized by law, and the other a mere hope or expectation of embarking in the same calling at a future day.

The main object of the legislation now under consideration was to put some restriction on the opening of saloons, barrooms, etc., in the residential sections of the city. It must be remembered that no person has a vested constitutional right to retail intoxicating liquors, and that the power of the lawmaker to prohibit or regulate such an occupation is practically unlimited. It has been held that the Legislature may confine the sale of intoxicating liquors to certain places, and may limit the number of licenses in any given locality. 17 Am. & Eng. Ency. Law (2d Ed.) 209.

In the case of *Mandeville v. Band*, 111 La. 808, 35 South. 915, this court held that an ordinance was void which prohibited the establishment of any more saloons within certain designated limits, leaving those already established therein in undisturbed operation. In the case at bar any person can set up a saloon in any part of the city on complying with the provisions of the statute. The difference between prohibition and regulation is manifest. In the *Garibaldi Case*, 44 La. Ann. 809, 11 South. 38, this court held that the Legislature had not delegated to the city of New Orleans the power to delegate to property holders the right to control the establishment of private markets.

The city ordinance in question has been in operation for nearly 10 years, and has hitherto been held by this court to be con-

stitutional, legal, and valid. To reverse our former decision, and to now hold that section 21 of the city charter of 1896 and the city ordinance passed pursuant to its warrant are null and void, would be, in our opinion, little short of a public calamity, as it would leave all sections of the city wide open to the intrusion of barrooms, concert saloons, dance halls, and beerhouses.

If relator has complied with the provisions of the ordinance, and the city council has arbitrarily refused him a permit, he has his remedy by mandamus, as pointed out in the *Galle Case*, cited, *supra*.

Judgment affirmed.

THE CHIEF JUSTICE and PROVOSTY, J., concur in the decree.

MONROE, J. (dissenting). Defendant, having been charged with violating City Ordinance No. 12,636, C. S., on or about August 16, 1905, by setting up and establishing a barroom without a "permit" from the city authorities, demurred, on the ground that the ordinance is arbitrary, discriminatory, and unjust; that it deprives him of liberty and property without due process of law, and that it contravenes articles 2 and 181 of the Constitution of the state. The demurrer was overruled; defendant was tried, convicted, and sentenced to pay a fine, and he has appealed on the question of the constitutionality of the ordinance. The transcript is rather imperfect, but it shows that, in 1901, the city engineer reported to the proper authorities that defendant's application for a "permit" to establish a barroom had been approved by a majority of the property holders within a radius of 300 feet of the proposed location, and that the proper committee reported favorably thereon, but that the council, in effect, refused the desired "permit," by indefinitely postponing consideration of the ordinance granting the same. It is not in the record, but will hardly be denied, that there are hundreds, not to say thousands, of barrooms in this city, some established prior to the adoption of Ordinance 12,636, C. S., and others subsequently. That ordinance, so far as it need be quoted, reads as follows:

"Be it ordained, that hereafter it shall not be lawful for any one to set up or establish any bar-room * * * without permission of the council, previously applied for, in writing, which shall be accompanied by a written consent of the majority of the bona fide property holders within 300 * * * feet of the proposed location. * * *

"That the petitions of all applicants for the privileges above enumerated shall be accompanied by a certificate of the city engineer's office, showing that a majority of the bona fide property holders within 300 feet * * * have signed said petition. * * * That all privileges hereafter issued under this ordinance shall be revocable at the pleasure of the council."

There are other provisions, including one fixing a penalty for the violation of the ordinance, which need not be further noted.

By the operation of this ordinance (if it be competent legislation), the people of New Orleans, in so far as the business of bar-keeping is concerned, are divided, primarily, into two classes: First, those who were in the business prior to the adoption of the ordinance; second, those who were not. The members of the first class conducted their barrooms like other citizens who enjoy the inherent and inalienable right to earn their bread by any means which may be authorized by law, asking permission of no one, beholden to no one, and fearing molestation from no one; whilst the members of the second class must needs "crook the pregnant hinges of the knee that thrift may follow fawning," only, when that resource is exhausted, and at the discretion of the city authorities, that they may hear the dread sentence, "too late, too late, ye cannot enter here."

Did the ancestors of the members of the first class shed their blood or lay down their lives that the country should be free, and is the privilege which their posterity thus enjoy accorded to them in recognition of the sacrifices of those ancestors? No. Have they by their virtues and ability, so lifted themselves above the level of mankind that, by common consent, they have been accorded, whilst living, a sort of business valhalla from which they may look down, with pride and profit, upon less worthy and less successful members of the human race? No. Have they distinguished themselves above their fellow barkeepers in the art of ministering to those who thirst or to those whose thirst had been quenched? No. And, if they possessed all these qualifications and had done all these things, it would make no difference for the purposes of the present question, since, unless the fundamental law be amended, there is no authority in this country which can be invoked to confer on them a monopoly of the business of selling intoxicating liquors at retail.

Under the law as it now stands, that business may be prohibited in any community the members of which so determine, but in that case it becomes unlawful for all, for the proud as well as the humble, for the rich as well as the poor, and for the man who has influence as well as for him who has none, and neither the people of New Orleans nor of any other community in this state nor of the state at large have the power to declare, whether at any election held for that purpose or otherwise, that such business shall be lawful for one class of citizens, having no particular qualifications, and unlawful for all others.

By the operation of Ordinance No. 12,636, C. S., the members of what has been termed the first class have, and need, no other pretense of right to the exceptional privilege which they enjoy, in the matter of conducting a business authorized by law, than such as they derive from the bare fact that they engaged in that business before the adoption

of the ordinance, but the right of the members of the second class, including the entire population of the city and state, to engage in the same business, is made dependent upon the caprice of perhaps a single individual, who may cast the deciding vote in the city council. Well may the defendant say that the discrimination is unjust and unwarranted, and that he is thereby deprived of his liberty and denied the equal protection of the law. The Court of Appeals of New York, and other high authorities, have said (and no one disputes it) that:

"Liberty, in its broad sense, as understood in this country, means the right, not only to freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood in any lawful calling; and to pursue any lawful trade or vocation." In the Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 386, 2 N. E. 29, 52 Am. Rep. 34; Ex parte Virginia, 100 U. S. 339, 28 L. Ed. 676.

In State v. Mahner et al., 43 La. Ann. 496, 9 South. 480, this court, having occasion to consider an ordinance prohibiting the maintenance of dairies within certain limits, save by the permission of the council, said:

"The ordinance is not general in its operation. It does not affect all citizens alike, who follow the same occupation which it attempts to regulate. * * * The discretion vested by the ordinance in the city council is in no way regulated or controlled. There are no conditions imposed upon which the permit may be granted. It is within the power of the city council to grant the privilege to some; to deny it to others. The discretion vested in the council is purely arbitrary. It may be exercised in the interest of a favored few. It may be controlled by partisan considerations and race prejudices, or by personal animosities. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented."

The language thus used is entirely applicable to the case before the court, for, although the occupation affected by the ordinance there referred to is authorized by law, it belongs to a class, the regulation of which, like the regulation of retail liquor selling, is within the police power of the city. There is, however, a limit to what may be done, in the exercise, or pretended exercise, of the police power. That power cannot be used, at the discretion of those to whom it is intrusted, for the profit of one, and the oppression of another, citizen. It must be applied equably to all, in the same class.

In Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, the Supreme Court of the United States said:

"It belongs to that department [the legislative] to exert what are known as the 'police powers' of the state, and to determine what measures are appropriate, or needful, for the protection of the public morals, the public health, or the public welfare. It does not at all follow that every statute enacted for those ends is to be accepted as a legitimate exercise of the police power of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * The courts are not bound by mere forms, nor are they to be misled by mere

pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things wherever they enter into an inquiry whether the Legislature has transcended its authority.”

It was in the discharge of the duty thus referred to that this court held, in the case cited, that the city ordinance regulating dairies was void; that in *State v. Garibaldi*, 44 La. Ann. 809, 11 South. 38, it decreed the nullity of an ordinance prohibiting the establishment of a private market, without permission, previously obtained, on petition accompanied by the consent of a majority of the persons holding property within 600 feet of the proposed site of the market; that in *State v. Sarradat*, 46 La. Ann. 700, 15 South. 87, 24 L. R. A. 584, it held that “market regulations must be impartial, affording the same rights to all, avoiding the creation of monopolies in one or several persons and the prohibition of trade in any article or an undue restraint of trade”; that in *Town of Crowley v. West*, 52 La. Ann. 526, 27 South. 53, it decreed null an ordinance, the effect of which was to permit four livery stables, already established, to be maintained in the business part of the town, and relegated those thereafter to be established to the suburbs; that in *Town of Mandaville v. Band*, 111 La. 806, 35 South. 915, it decreed the nullity of an ordinance which permitted barrooms already in existence to continue, and prohibited the establishment of others within the same territory. In the case of *State ex rel. Galle v. City*, 113 La. 371, 36 South. 990, 67 L. R. A. 70, the present writer, as the organ of a divided court, said:

“A statute of the state imposing conditions upon the business of selling intoxicating liquors, though those conditions be more onerous than are imposed upon other businesses, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals, and general welfare of the public than other businesses, but, where, as in this case, the state legalizes such business, and the individual citizen is denied the right to engage in it in a place and under conditions where and under which others having no better qualifications than he are so engaged, the law, if any there be, authorizing such denial, has no just foundation in reason or in the police power of the state, for it deprives the citizen of the right to earn his livelihood by means of a lawful calling, whilst according that right to others similarly situated, and, in so doing, deprives him of the equal protection of the law, and of his liberty, without due process of law, and oversteps those restrictions upon legislation which are said to be inherent in the nature of American institutions.”

The opinion from which the foregoing excerpt is taken contains, also, the following, from an opinion of the Supreme Court of Illinois, which is here reproduced as applicable to the questions at issue, to wit:

“Under a general ordinance of the city for licensing dramshops, the city authorities have no right to make an arbitrary discrimination in granting licenses. They cannot grant the same to a favored few, and refuse it to another who has in all respects complied with the ordinance and laws of the state, and who is admitted to be in every respect a suitable person.

The business of dealing in liquor is recognized by the Constitution as being a legitimate business, and a license to keep a grocery or dramshop is placed in the same category with any other lawful business, and must be dealt with according to law, and special privileges are not to be granted to particular persons. * * * Ordinances must be general in their character and operate equally upon all persons within the municipality, of the same class to whom they relate. They must not be in violation of any law, contrary to public policy, or unnecessarily oppressive, and must not unjustly and arbitrarily discriminate between citizens of the same class.” *Zanone v. Mound City*, 103 Ill. 552.

Applying the views thus expressed to the instant case, and considering that the law of this state vests the option of allowing, or prohibiting, the sale of liquor, in the voters of the respective communities, and requires that the matter be determined at elections to be held for that purpose, it seems to me that the ordinance under which the defendant is prosecuted is particularly objectionable, since the logic of the argument presented in its support leads, as we have seen, to the conclusion that the city council, which is without power, entirely, to prohibit the sale of liquor, may, agreeably to its provisions, permit such traffic to some and prohibit it to others, as the persons concerned may, or may not have been engaged therein at a particular date, or as between members of what I have called the second class (which includes the whole population of the city and state, not included in the first class), without any rule or reason whatever; from which it follows that, in a smaller community than New Orleans, or even in New Orleans, a single barkeeper, by reason of his being already established in business, or, by reason of his being subsequently selected by the council, may be secured in the enjoyment of a most valuable monopoly.

Finally, if it be conceded that, because the liquor traffic is subject to regulation under the police power, one person may be allowed to engage in it, and another, with equal qualifications, prohibited from so doing, at the discretion of the city council, there is no reason why the same rule should not be applied to any other occupation or act, such as dairy keeping, soap boiling, oyster opening, cattle killing, powder selling, or the building of frame houses, which may be under the dominion of the police power, but which, nevertheless, is usually governed by established rules, bearing upon all alike, a construction of the law which is likely to lead to oppression upon the one hand, and demoralization upon the other.

My conclusion, then, is that the ordinance in question is discriminatory and unjust; that it denies to the defendant the equal protection of the law, and deprives him of his liberty without due process of law, and hence, that it is void as in contravention of the Constitutions of the United States and of this state, and I am of opinion that it should be so decreed by this court. If the city council thinks it advisable to reduce the

number of barrooms, beer saloons, dance-houses, etc., throughout the city, it can readily do so by imposing higher licenses. If it thinks it advisable to exclude those establishments from particular sections of the city and to confine them to other sections, it has only to adopt an ordinance to that effect. But when the owners of property upon three of the corners of two intersecting streets are allowed to use the same for the purposes of barrooms, why it should be considered likely to breed calamity that the owner of the property on the fourth corner should be allowed to use it for a like purpose, I am unable to understand. The denial of the right, if the owner of the fourth corner is otherwise as eligible as the others, seems to me to be merely injustice and unconstitutional discrimination.

For these reasons, I respectfully dissent from the opinion and decree handed down in this case.

(116 La.)

No. 15,876.

WHANN v. WHANN.

(Supreme Court of Louisiana. March 28, 1906.)

TRADE-MARKS—EXTINGUISHMENT.

Where, during the life of a monopoly created by a patent, a trade-mark has been used to identify the patented article, all exclusive right to the trade-mark ceases with the expiration of the patent.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 15, 36.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by B. L. Whann against M. R. Whann. Judgment for defendant, and plaintiff appeals. Reversed, and judgment rendered against defendant, and case remanded for an accounting.

J. Zach. Spearing, for appellant. Charles Louque, for appellee.

PROVOSTY, J. It is an admitted fact in the case that the plaintiff and his brother, now dead, and his sister, the defendant, entered into a compromise for the settlement of the successions of their parents. The terms of that compromise are admitted to this extent that plaintiff was to have one-third of the movables, including the proprietary rights in a certain patent medicine and one-third of the net profits on the future sales of the medicine; that the preparation and sale of the medicine was to be attended to by the brother. It is further admitted that the medicine was protected by patent, and by a duly registered trade-mark, this trade-mark consisting of a pictorial symbol and the arbitrarily selected word symbol, "Chewalla"; and it is further admitted that the profits of the sale of the medicine were accounted for to plaintiff up to within three months of the death of the brother, and not there-

after, and that defendant is the universal legatee of the deceased brother. After this compromise the two brothers transferred to their sister, by a sale absolute on its face, their interest in the real estate.

Plaintiff contends that the transfer was in reality made conditionally; the condition being that the interest of the brothers should revert to them at the death or marriage of their sister, and that this condition was part of the compromise, and that the transfer was made in pursuance of the compromise.

Defendant denies that such condition was to be, or was, attached to the transfer.

Plaintiff alleges that the compromise was evidenced by a writing, and that he is not in possession of either the original or a copy of the document, and that the defendant, his sister, refuses to deliver to him either the original or a copy of the document, if in her possession, and denies his said eventual rights; that she is going on preparing and selling the medicine, and denies that he has any right in the premises.

He prays for an injunction restraining and prohibiting his sister from preparing and selling the medicine, and declaring the aforesaid compromise to be in full force, whereby petitioner was recognized to be the owner of one undivided third of all the effects described in the inventories taken in the successions of their said deceased parents, including the said medicine, and patent, and trade-mark, and real estate; this last subject to the condition aforesaid. Finally, he prays that she be ordered to render him an account of the business of preparing and selling said medicine from the time the last account was rendered.

The trade-mark was registered in 1891, and from that time was used in the sale of the medicine. Whether it had been theretofore used is not shown. The patent expired in 1897. The brother died on November 16, 1901. This suit was filed April 17, 1903.

Defendant contends that the contract between plaintiff and herself and their brother for the preparation and sale of the medicine terminated with the death of the brother, that the trade-mark rights expired with the patent, and that since then the medicine has been public property, with the full right to any and all freely to prepare and sell it.

The decided preponderance of the testimony shows the compromise to have been as stated by plaintiff. Mr. Hughes, Mr. Stewart, disinterested witnesses, and plaintiff testify positively to that effect; and against this there is nothing but the testimony of Mr. Suthon, who does not unequivocally say the opposite. Defendant did not testify.

The trade-mark having been used during the existence of the patent to identify the medicine to the public, all exclusive rights expired with the patent. In the case of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 185, 16 Sup. Ct. 1014 (41 L. Ed. 118), the Supreme Court of the United States said:

"Where, during the life of a monopoly created by patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created; and where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements, and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact."

The agreement between plaintiff and defendant and the deceased brother for the preparation and sale of the medicine came to an end, as a matter of course, with the death of the brother. Plaintiff is entitled, however, to an accounting for the three months between the last accounting and the death of the brother.

Defendant's learned counsel argues that the petition shows no cause of action as to the real estate because the alleged condition on which the property was to revert to plaintiff, namely, the marriage or death of the defendant, is not alleged to have taken place. The answer is that plaintiff is not asking anything more than that the existence of the condition be recognized. To this he is, we think, entitled; and therefore his petition shows a cause of action on that ground.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that the plaintiff, Beauregard L. Whann, have judgment against the defendant, Marguerite R. Whann, decreeing to be in full force and effect an agreement of compromise by which the said plaintiff is recognized to be the owner of one-third undivided of the household effects described in the inventories taken in the succession of William Whann, No. 44,609, and the succession of Mrs. Mary C. Whann, No. 44,610, of the

docket of the civil district court, parish of Orleans, and by which the sale made by the said plaintiff, Beauregard L. Whann, to the said Marguerite R. Whann, before Fred Zengel, notary public, on April 13, 1895, of his one-third interest, undivided, in the following described property, to wit:

"A certain portion of ground, with the rights, ways, servitudes, privileges, and advantages thereunto belonging or in any wise appertaining, situated in the Sixth district of this city, formerly Faubourg West Bouigny, city and parish of Jefferson, forming part of square sixty-five, bounded by Upper Line, Apollo (now Carondelet), Bordeaux and Nayades (now St. Charles) streets, commencing at the intersection of the line between the land of Mrs. Julia A. Whann and that of D. O. Aldrich on St. Charles street, and running thence along St. Charles street in a westerly direction fifty feet, thence northerly and easterly on a line parallel with Upper Line street one hundred and forty-five feet six inches, thence easterly thirty-five feet to said division line of said Mrs. Julia A. Whann and Aldrich's land, and thence southerly along said division line to the place of beginning. The whole as per sketch drawn and approved by H. C. Brown, city surveyor of the city of Jefferson, dated the 9th April, 1869, and annexed to an act passed before Edward Barnett, late notary, on May 10th, 1869,"

was in reality a conditional sale, the condition being that at the death or marriage of the said Marguerite R. Whann the one-third interest in said property is to revert to the said Beauregard L. Whann, the said Marguerite R. Whann to have in the meantime the full use and enjoyment of same and all the fruits of same as owner.

And it is further ordered, adjudged, and decreed that this case be remanded for an accounting by the defendant to the plaintiff for the profits of the sale of the medicine Chewalla from the time of the last account rendered to plaintiff to the time of the death of the brother of the said plaintiff, James McC. Whann.

It is further ordered, adjudged, and decreed that the defendant pay the costs of this suit to date, and that the costs of the further trial of the suit await its final determination.

(116 La.)
No. 15,753.

JACKSON v. BURNS.

(Supreme Court of Louisiana. Jan. 15, 1906.
Rehearing Denied March 26, 1906.)

1. DIVORCE—ALIMONY—PROPERTY—INCOME.

Alimony can be allowed to the wife after she obtains a divorce, under Civ. Code, art. 160, only from the property, and not in excess of one-third of the income, of the husband. The word "property," as used in the article, does not mean earning capacity, nor does the word "income" mean current earnings, resulting from labor.

2. SAME—MAINTENANCE DURING LITIGATION.

Where the wife, in her petition for divorce, prays for alimony from judicial demand, she may, in the final judgment, be awarded a lump sum as the amount to which she was entitled for her maintenance during the litigation.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 640, 679.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durlieve King, Judge.

Action by Louisa Jackson against Henry J. Burns. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Benjamin Rice Forman, for appellant.
Francis Rivers Richardson, for appellee.

MONROE, J. Plaintiff sued for divorce and prayed that she be allowed alimony at the rate of \$25 per month, from judicial demand. The divorce was granted, and the alimony was allowed, at a lower rate, from the rendition of the judgment. Defendant appealed, and plaintiff answered, praying for an annulment of the judgment. In this court it was said, "Defendant does not complain of the judgment of divorce. He accepts the situation brought about by the judgment, except that portion which decreed that he must pay alimony to his wife." But, the record being silent as to the plaintiff's necessities, the court, without specifically acting upon the question of divorce, annulled the judgment appealed from, in so far as it awarded alimony, and remanded the case, "to receive evidence regarding the means vel non of the plaintiff, and for decision regarding alimony by the district court, after further evidence will have been admitted." The present appeal is prosecuted by defendant from a judgment awarding the plaintiff alimony at the rate of \$15 a month, from the rendition of the judgment, and the plaintiff answers, praying that she be allowed the alimony as claimed in the petition. From the evidence now before us, it appears that the defendant has regular employment, as a long-shoreman, in which he earns an average amount of \$47.21, a month, but it is not shown that he owns any property or has any income outside of his daily earnings. It also appears that plaintiff is without means (that is to say, "property"), and that she maintains herself, and a son of the marriage (a boy about 17 years old, who is said to be learning a trade at a school in Tennessee),

by working, as a cook or house servant, for \$16 a month.

The law, upon the subject of the alimony that may be allowed to women who are suing for, and to those who obtain, judgments of separation and divorce, is found in articles 148 and 160 of the Civil Code, as follows:

"Art. 148. If the wife has not sufficient *income* for her maintenance, during the suit for separation, the judge *shall* allow her a sum for her support proportioned to the means of the husband," etc.

"Art. 160. If the wife, who has obtained the divorce, has not sufficient means for her maintenance, the court *may allow her, in its discretion, out of the property* of her husband, alimony, which shall not exceed one-third of his *income*. This alimony shall be revokable in case it should become unnecessary and in case the wife should contract a second marriage." (Italics by the court.)

It will be observed that these articles are expressed in very different terms. Thus under article 148, it is made the mandatory duty of the judge, if he finds that the wife has not sufficient income to maintain her, pending the suit, to allow her alimony, proportioned to the "means" of her husband. On the other hand, under article 160, it is made discretionary with the court, after the decree has been obtained, to allow alimony "out of the property of the husband," not, however, to exceed one-third of his "income," and subject to withdrawal under certain circumstances.

It will hardly be contended that, upon an application under article 148, the husband could escape the payment of alimony by showing that his wife was capable of earning an "income" by her own labor. We must, therefore, infer that, for the purposes of that article, the word "income" refers to a revenue derived from some other source than the labor of the recipient. If, however, it has that meaning, as used in article 148, why has it not the same meaning, as used in article 160? And, if we give to the word "property," as used in article 160, the ordinary meaning, and, to the word "income," the meaning that we have given to it in article 148, the plaintiff can recover no alimony for time subsequent to that at which she obtains her divorce, since it does not appear that the defendant has any property or that he has any "income," in the sense which we are attributing to that word (on the contrary it seems reasonably certain that he has neither). There are, besides, other considerations which should influence the conclusion to be reached on this subject, to wit, article 119, of the Civil Code, provides that "the husband and wife owe to each other mutual fidelity, support, and assistance," and, this as the result of a civil contract. But the wife, in this case, has chosen (for good reasons, as the courts have found) to have the contract between herself and her husband dissolved and set aside, so that she, now, owes him nothing, and ordinarily he would owe her nothing. The lawmaker has however established a special rule upon the subject of the marriage con-

tract, as the result of which, notwithstanding the discharge of the wife from her obligations thereunder, the husband may still be compelled to respond to his obligations, by paying alimony to his former wife, to the extent of one-third of the "income" which he may enjoy from his "property." This is as far as the lawmaker has gone, and our courts can hardly go farther, nor, so far as we are able to discover, have they done so. We have been referred to no case in our jurisprudence, and we have found none, in which alimony such as is here claimed has been demanded, and, in *Suberville v. Adams*, 48 La. Ann. 124, 14 South. 521, this court, speaking through Watkins, J., after quoting Civ. Code, art. 160, said:

"It is evident that this species of alimony—for the maintenance of the divorced wife—is an incident of the settlement of the 'matrimonial community,' etc.

Our conclusion, then, is that the plaintiff, upon the case presented, cannot recover alimony for any time subsequent to that at which the judgment of divorce becomes final. It seems to have been assumed that the judgment was made final by the decree rendered by this court when the matter was here on a previous occasion, but we do not find this to have been the case, since that decree reads: "The judgment appealed from is avoided, annulled and reversed, as relates to alimony, and the case is remanded," etc., but there is no affirmation of the judgment appealed from in any respect. Upon the other hand, we know of no reason why the plaintiff should not be allowed alimony from judicial demand, since she prayed for it in her petition. *State ex rel. Malady v. Judge*, 22 La. Ann. 284; *Lauber v. Mast*, 15 La. Ann. 593. In view, however, of the fact that she lived apart from her husband for five years before the bringing of this suit, and of the fact that they are both laboring people without means we are of the opinion that an allowance of a lump sum of \$300 as for her maintenance pendente lite would fairly meet the demands of justice.

It is therefore ordered, adjudged, and decreed that the judgment of divorce between the parties litigant be now affirmed and that said judgment, in so far as it relates to alimony, be amended to the extent that plaintiff be allowed a lump sum of \$300, as the alimony to which she was and is entitled pendente lite, and that, as thus amended, said judgment be affirmed; the plaintiff to pay the costs of the appeal.

(116 La.)

No. 15,751.

LUZENBERG v. O'MALLEY et al.

(Supreme Court of Louisiana. Jan. 29, 1906.
Rehearing Denied March 26, 1906.)

1. LIBEL—PUBLICATION AS TO CANDIDATE FOR OFFICE.

Defendants published that for reasons too numerous to mention plaintiff was unfit to be district attorney, or even to practice law.

Challenged to name these reasons, defendants gave them in the form of self-answering questions, putting at the head of the list the question whether plaintiff's brother had not done thus and so, referring to reprehensible conduct on the part of the brother. *Held*, that the brother's misconduct could render plaintiff unfit to be district attorney or to practice law only if he had participated therein, and that therefore the imputation contained in the question was that plaintiff had participated in some way in this misconduct of the brother. *Held*, secondly, that the facts from which it must be supposed the authors of the publication intended that the reader should draw his conclusions are those stated in the publication, and not others not stated or alluded to therein.

2. SAME—JUSTIFICATION—SUFFICIENCY.

Justification of a different charge from that complained of as libelous is no justification at all. Where the charge is that plaintiff participated in the act of his brother in approaching for a large fee certain defendants whom plaintiff was prosecuting as district attorney, the proof that plaintiff did not impart to the proper authorities the intelligence of his brother's misconduct as soon as it reached his ears, so that the brother continued to remain in an employment of trust for which he had shown himself to be unfit, is the justification of a different charge from that made, and is no justification at all.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 333.]

3. SAME—LICENSE TO PUBLISH.

The demand of plaintiff that defendants should name the "reasons too numerous to mention" why he was unfit to be district attorney, or even to practice law, was not a license to defendants to publish defamatory falsehoods about him.

4. SAME—PRIVILEGE OF NEWSPAPER.

A newspaper has no greater privilege than an ordinary person to publish false and defamatory statements.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by Chandler C. Luzenberg against Dominick C. O'Malley and the Item Company, Limited. Judgment for defendants, and plaintiff appeals. Judgment set aside, and judgment against defendants entered.

Carroll & Carroll, William Stirling Parker-son, and Clegg & Quintero, for appellant. E. A. O'Sullivan, for appellees.

PROVOSTY, J. Plaintiff alleges that in the autumn of 1904 he was the district attorney for the city of New Orleans, and was a candidate for that office at the approaching election; that the defendant D. C. O'Malley and the City Item, an evening paper having a large circulation in the city of New Orleans, opposed his election, and began in September a series of insinuations against his private and official character; that these were challenged, and that there then appeared in the newspaper certain articles defaming and libeling him; that these publications were false and malicious. The petition reproduces the articles, and sets out the innuendo in these words:

"Meaning thereby to charge, and alleging and charging in effect and purpose, that your peti-

tioner was guilty of corruption and favoritism and oppression and gross misconduct in the exercise of his office of district attorney, and that he was incompetent to discharge the duties thereof, and that your petitioner was wanting in integrity as a man, and was and would be dishonest and corrupt as an officer, all of which is wholly untrue."

The defendants, after disclaiming malice, and after pleading no cause of action, proceed in their answer and plead that the publications were true, and therefore justified; second, that they were made at the solicitation of plaintiff; and, third, that they were privileged.

The defendant D. C. O'Malley filed a separate answer, but his defense is the same as that of the newspaper. The two defenses were tried below and argued here as one and the same, and may be similarly dealt with in this opinion.

On September 11, 1904, 10 days before the nominating convention was to meet, there appeared in the defendant newspaper the article that is incorporated in the following open letter addressed by plaintiff to the Times-Democrat and Picayune:

"New Orleans, Sept. 14, 1904.

"To the Editor of the Times-Democrat:

"On Monday afternoon, Sept. 12, at 3:55 o'clock, the following letter from me was delivered at the office of the New Orleans Item:

"New Orleans, La., Sept. 12th, 1904.

"To the Editor and Publisher of the New Orleans Item:

"The issue of your paper of Sunday, September 11th, 1904 (yesterday), contains the following article:

"District Attorney.

"The next most important office to that of Mayor is that of District Attorney. Chandler C. Luzenberg's name will never be presented to the Democratic nominating committee. Mr. Luzenberg will never appear even as a tentative candidate. The office of District Attorney will go uptown, no doubt, and may go close, but not to the municipal bailiwick bossed by City Attorney Gilmore, to wit: the Fourteenth Ward. There are reasons too numerous to mention at this present time why Chandler Luzenberg should not succeed himself, and no one better than the present District Attorney knows what these reasons are. And, further, Mr. Luzenberg knows accurately what a review of these reasons would mean to the future of any practicing attorney. Chandler C. Luzenberg lives in a glass house.

"I demand to be furnished in the same public manner with the particulars of the charge in the foregoing innuendo, and I demand that such publication be made before Wednesday morning next, 14th inst.

"[Signed] Chandler C. Luzenberg."

"None of the issues of the New Orleans Item of yesterday, Sept. 13, contains any response to the foregoing letter, nor have I received any response from Mr. Denholme, Mr. O'Malley, or any other person connected with the New Orleans Item.

"Very truly, Chandler C. Luzenberg."

On the same day, the 14th, there appeared in the defendant newspaper the following, purporting to come from the defendant D. C. O'Malley:

"I am anxious to know if Mr. Chandler C. Luzenberg will deny that his brother, W. H. Luzenberg, a short time after Chandler C.'s

appointment as District Attorney, did not solicit a person supposed to have influence with counsel and two accused persons who were charged before the Criminal Court for serious offenses to have him, W. H. Luzenberg, owing to his relationship with the recently appointed District Attorney, associated with the defense of the accused, and did not this W. H. Luzenberg, brother of the recently appointed District Attorney, set his fee at \$5,000? Is it not a fact that the proposition was declined by the party approached, and yet, after the refusal, did not W. H. Luzenberg, brother to the District Attorney, write a letter, through one of the defense attorneys, demanding employment in the direction mentioned, and the defense, not acting, did not W. H. Luzenberg in person solicit from the accused themselves the sought-for services?

"Did not District Attorney Chandler C. Luzenberg inspire the publication in a morning paper of a certain article wherein it was stated that in the Arthur Behan case District Attorney Luzenberg, if it became necessary to substantiate the charges, would place on the witness stand a certain ward leader who, by personal knowledge, having played against Behan's game in 18 Royal street, could prove that Behan owned and operated this place as a gambling house?

"Why, may I ask, did not Mr. District Attorney put this ward leader on the witness stand to secure conviction, when as a matter of record Arthur Behan was acquitted?

"Is it a fact that for this immunity from witness service the ward leader I allude to has secured for Mr. Luzenberg the support of this leader and his paper in the efforts being made by District Attorney Chandler C. Luzenberg to secure a nomination to the office he now fills?

"Has not District Attorney Luzenberg summoned to his office certain witnesses without authority or warrant in law, using his office for illegal methods, well knowing that he did not possess such authority, nor was it done in the interest of justice?"

The day after this publication plaintiff filed the present suit.

The nominating convention met. Plaintiff was a candidate before it, and was not nominated; and thereupon, on the 20th of the same month, the defendant newspaper published the following editorial:

"The District Attorneyship.

"For the past several weeks an almost united press of New Orleans has been sounding the praises of Mr. Chandler C. Luzenberg and urging his nomination for the office of District Attorney for the Parish of Orleans. In their efforts to advance the candidacy of Mr. Luzenberg, these papers lost sight of the claims of any other candidate for the office, and the praise of their favorite degenerated from argument to fulsome flattery. In their efforts to foist Mr. Luzenberg upon the people of this Parish, regardless of his fitness for the office, in view of its conduct during his incumbency, these papers heralded him as a savior of the city and compared him with Folk of St. Louis and Jerome of New York. Assuming that they voiced the sentiment of the people of New Orleans, these papers predicted direct disaster to any man or set of men who should dare oppose their wishes. It was iterated and reiterated that Luzenberg was necessary to save the ticket, and the ward bosses were complimented upon their sagacity and wisdom in selecting Mr. Luzenberg for the place. It was strongly intimated that the ward bosses have at last thrown off the domination of Governor Blanchard exercised in the selection of Martin Behrman for Mayor, and it was openly boasted that even the Governor himself would not dare

interfere and oppose his wishes to the desire of an almost united press. In all of these controversies the Item was the only New Orleans paper that had the courage to doubt the divinity of the present district attorney and to publish to the world potent and irrefutable reasons why he should not be continued in office. But, buoyed by an almost united press, Mr. Luzenberg's boom continued to soar. He received more free advertising, and, with the bosses united for him and the Governor afraid to interfere, it appeared on the surface that his nomination was assured. But the Item's exposé had been bearing fruit. Mr. Luzenberg was no longer like Caesar's wife, above suspicion. People began to see that the alleged popular idol had feet of clay. And suddenly his boom collapsed. Governor Blanchard, upon his return from St. Louis, exercised the right accorded him by even the Luzenberg organs to interfere to prevent the nomination of any man of known unfitness for office, and announced his preference for Mr. Porter Parker. And who can say that the Governor was not justified in his course? Who can say that Mr. Blanchard has not investigated the office of the District Attorney; that Mr. Luzenberg has not been weighed in the balance and found wanting? One thing is certain: Against Mr. Porter Parker there has been raised no whisper of suspicion. He is clean, he is honest, he is capable. He has been in the office of the District Attorney and resigned. Therefore, he is not wholly without experience. Personally, the Item is not acquainted with Mr. Parker. This paper has never advocated his candidacy. All the interest the Item had or has in the contest is the desire to see the office filled by a capable, honest, fearless man. Mr. Luzenberg has appealed to the courts to redress wrongs alleged to have been done him by the Item. It may be that in the trial of that case the public will be given an insight into the reasons for Governor Blanchard's interference. The Governor has been accused of trucking to the ward bosses. Now the ward bosses are scourged for trucking to the Governor. It is difficult to follow the reasoning of a disgruntled press. But one thing at least has been settled: An almost united press does not always voice public sentiment nor sway the honest judgment of all men."

The subject-matter complained of as libelous subdivides itself into four heads. The first is the statement contained in the publication of September 11th that plaintiff lives in a glass house and that the defendant newspaper knows "reasons too numerous to mention" why he is unfit to be district attorney or even to practice law. This first head, however, merges into the three others, which are contained in the publication of September 14th, and which purport to be the "reasons too numerous to mention" referred to in the publication of the 11th. These three are given in the form of self-answering questions.

The first is whether plaintiff will deny that his brother did thus and so. A man is not rendered unfit to practice law by the guilty conduct of his brother, unless he has participated in it; hence the imputation contained in this question was that plaintiff had participated in the misconduct of his brother—either colluded with it, or, at the very least, connived at it.

Counsel for defendant says that the imputation was that plaintiff had not, as soon as the intelligence of this misconduct came to his ears, imparted it to the judge of the division

of the criminal district court in which his brother was official stenographer, and that as a result of this culpable silence the brother, an unfit person, continued to hold the important and responsible position of court stenographer. But how could that be the imputation when not a word is said about the brother's having been stenographer, or about plaintiff's having failed to impart the information, or, for the matter of that, of the intelligence not having reached the judge's ears as soon as it did plaintiff's. It stands to reason that the reader was expected to draw inferences from the facts that were stated, and not from facts that were not stated and of which he knew nothing.

Moreover, whatever blame may attach to a public officer for shrinking from becoming the denouncer of his young brother, for not finding it in his heart, Spartanlike, to resist the brother's entreaty, "Do not take the bread out of the mouth of my wife and children for an act which I deplore and which I did while drunk," such a—we may say—milk and water charge could not have done service for the announced fatal "reason," the revelation of which was to blast plaintiff's candidacy; nay, his future professional life. Had that been the charge, plaintiff might have thrown himself upon the indulgence of the public with the plea made here: "The boy begged so hard and promised to join the temperance society." On the other hand, the imputation that plaintiff had participated in this shady transaction does measure to the full size of the announced fatal reason. Its revelation might well, as announced, have put an end to plaintiff's candidacy, and blighted his prospects as a lawyer, if true. The one imputation fits the announcement; the other does not. The court has adopted the one that fits.

The second reason assigned is that plaintiff made a corrupt bargain with a ward leader, by which this ward leader was dispensed from appearing as a witness in a criminal case, and, in consideration thereof, his support was secured for plaintiff's candidacy.

The third is that plaintiff summoned his office certain witnesses without warrant in law, using his office for illegal methods, and not in the interest of justice.

Taking the first charge to have been what we have found it to have been, namely, that plaintiff had participated in some way in this misconduct of his brother, then the situation is that defendants do not pretend to offer any justification for it; nor, as a matter of fact, could any be found.

As to the charge that plaintiff summoned witnesses to his office without warrant in law, using his office for illegal methods and not in the interest of justice, the only justification offered is that witnesses were summoned to plaintiff's office, and that there is no statute authorizing the district attorney to use the compulsory process of the court for causing witnesses to come to his office. Here, again, the justification offered is for a

by St. Charles avenue, Upperline, Carondelet, and Robert streets, measuring 69 feet, 4 inches, more or less, in front on St. Charles avenue 182 feet more or less, in front and depth on Upperline street, 165 feet, 5 inches more or less on the side line nearest Robert street by a width in the rear of 65 feet.

That prior to the date aforesaid the said Mrs. Genella divided the tract above described into two parcels or lots, and assigned limits to each and caused a dwelling house and appurtenances to be erected on each of said lots; the actual boundary mark between the same being, for the greater part, the side wall of the dwelling house on the lot nearest Robert street, and a fence extending in continuation and projection thereof towards the rear, and from the front of the said house to the line of St. Charles avenue the said Mrs. Genella divided the said lots by means of a fence which beginning with an offset of about two feet towards Upperline street from the front corner of the said house continued in a line parallel with said Upperline street to the line of St. Charles avenue, which said houses and fences still stand in the same positions in which they were built.

That on the 14th day of January, 1893, by act of that day passed before Hunter C. Leake, a notary public of the parish of Orleans, the said Mrs. Genella, with the assistance of her said husband sold to this defendant one of the lots of ground aforesaid, to wit: That which forms the corner of Upperline street and St. Charles avenue, and which in the said act is described as follows:

"A portion of ground, with the improvements thereon and the appurtenances thereof, situated in the Sixth district of this city in the islet bounded by St. Charles avenue and Upperline, Carondelet, and Robert streets, designated by the letter C on the hereto annexed sketch and measuring according thereto, in American measure, 33 feet front on St. Charles avenue, 32 feet in width in the rear of an alley, 179 feet in depth and front on Upperline street, and 160 feet in depth on the line dividing it from lot D on said sketch.

"Which said act was registered in the conveyance office of the parish of Orleans in book 149, fo. 45, and a duly certified copy thereof is hereto annexed as a part hereof."

And defendant avers that immediately upon the passage of an act of sale aforesaid, to wit, on January 14, 1893, and in accordance with and under the said act, his said vendor placed him in the physical possession of the said lot, and of the whole area thereof comprised within the limits theretofore assigned and fixed to the same by the said Mrs. Genella, as aforesaid; and since the said date and up to the present time this defendant has remained in the uninterrupted and undisturbed, notorious, and physical possession of the said lot up to the side line of the house of the plaintiff and the fences aforesaid.

And defendant shows that the deed aforesaid by which he acquired the land aforesaid is valid and sufficient to transfer the property of the same, and that, having been in actual possession of the same under the said deed since the date thereof he is entitled to the benefit of the prescription of ten years, which he now especially pleads in bar of the defendants' demands.

Defendant shows that subsequently, to wit, on the 18th day of May, 1893, by an act before Theodore Cotonio, a notary public of the parish of Orleans, the said Mrs. Genella sold the other of the said lots to the plaintiff herein, who went into the possession thereof, according to the limits which had been fixed thereto by the said Mrs. Genella, as aforesaid. And respondent avers that the said plaintiff has never, up to a short time before the filing of this suit, contested or questioned his right of ownership of any part of the lot of ground included within the boundaries hereinabove indicated; but on the contrary she has always acquiesced in and consented to his ownership and possession of all his lot aforesaid, and especially of that part thereof which she claims in these proceedings.

And for further answer respondent avers that though by reason of the fact that part of the land first hereinabove described which lies between Upperline street and the side of plaintiff's houses and fences aforesaid, and yet, considering that the deed under which the said plaintiff acquired described her acquisition as fronting on St. Charles avenue, and being at a distance of 35 feet from Upperline street and having a width of 32 feet in the rear, and considering that the deed by which this respondent acquired described his acquisition as forming the corner of Upperline street and St. Charles avenue and fronting 33 feet on St. Charles avenue by a width in the rear of 32 feet, so that of the whole portion of ground formerly owned by the said Mrs. Genella first hereinabove described a strip having a frontage of about 3 feet on St. Charles avenue, and running back between the lots owned respectively by respondent and plaintiff, to the rear line thereof, to a width of one foot, might be considered not to have been conveyed to this defendant by his deed aforesaid, though delivered to him, and remaining in his possession thereunder, as aforesaid; this defendant therefore, in order to strengthen his title and place the same beyond doubt, purchased from the heirs of the said Mrs. Genella, who is now dead, with full warranty of title, all their right, title, and interest in and to the said parcel or strip of land, the whole as will more fully appear by a deed under private signature executed on the 23d day of March, 1904, and acknowledged the same day before M. M. Boatner, notary public, by Miss Asenath L. Genella, then a feme sole, now the wife of George S. Dodds, and Mrs. Cornelia D.

Genella, wife of Samuel Sansum; and by said Sansum to authorize his wife, the said parties with Alphonse J. K. Genella and Louis J. Genella, being the children and only heirs of the said Mrs. Mary Louise Kennedy Genella, and being the transferees of the hereditary rights of the said Alphonse J. K. Genella and Louis J. Genella, in the succession of their said mother; which said deed was registered in the conveyance office of the parish of Orleans in book 196, f. 322; and therein the said strip of ground is described as follows:

A certain piece or portion of ground together with all the improvements thereon and all the rights, privileges, and servitudes thereto appertaining, situate in the Sixth district of the city of New Orleans in the square bounded by St. Charles avenue, Upperline, Carondelet, and Robert streets, lying between the lot sold by Mrs. Mary L. K. Genella to James J. Conway by act before Hunter C. Leake, notary public, dated January 14, 1893, and the lot sold by the same vendor to Miss Frances E. Gasquet by act before Theodore Cotonio, notary public, dated May 18, 1893, and measuring two feet more or less front on St. Charles avenue, and running back between the side line of the lots aforesaid about 169 feet to an alley with a width of about 1 foot in the rear, the said description being intended to comprise all the land in the said square owned by these vendors lying between the lot so sold as aforesaid to Miss Gasquet and Upperline street.

Defendant shows that the purpose of the plaintiff is to evict him from the land purchased by him from the said Mrs. Asenath L. Genella, wife of George S. Dodds, and the said Mrs. Cornelia D. Genella, wife of Samuel Sansum, according to their deed aforesaid, whereby they warranted their title thereto, and that they the said Mrs. Dodds and the said Mrs. Sansum and their said husbands to authorize them ought to defend this suit and ought to defend and warrant the title which they conveyed to this defendant.

In view of the premises defendant prays that the demands of the plaintiff may be rejected and her suit dismissed at her costs; that the said Mrs. Asenath L. Genella, wife of Geo. S. Dodds and the said Dodds, to authorize his said wife, and the said Mrs. Cornelia D. Genella, wife of Samuel Sansum, and the said Sansum to authorize his said wife, may be called in warranty and cited to answer hereto; and that in the event this defendant should be cast in this suit he have judgment against the said Mrs. Dodds and the said Mrs. Sansum jointly, in the sum of \$150, being the price paid by defendant to them on the conveyance to him by them of the strip of land described in their deed hereinabove referred to. And defendant prays for cost, for all necessary orders, and for full and general relief.

George S. Dodds and his wife and Samuel Sansum and his wife answered, pleading a general denial. Sansum and wife being called in warranty by the defendant company, answered, pleading the general issue. There was judgment in the district court in favor of defendant, and warrantors and plaintiff appealed.

Opinion.

Plaintiff and defendant both purchased property on the same block on St. Charles avenue from Mrs. Genella. The defendant purchased on the 14th of January, 1893, for \$7,300, and the plaintiff purchased on the 18th of May, 1893 for \$7,100.

Defendant's property is described as forming the corner of Upperline street and St. Charles avenue, measuring 33 feet on St. Charles avenue.

Plaintiff's property is described as measuring 34 feet on St. Charles avenue with right to all extra frontage by the new alignment of the line of the said square of ground fronting on St. Charles avenue, the property beginning at a distance of 35 feet from Upperline street.

The present action is a boundary suit in which plaintiff seeks to have established the boundary between her property and that of defendant, in which in order to establish the line as claimed by her she has to vary the starting point of the property from a point 35 feet from Upperline street to a point at a distance of 33 feet from Upperline street, so as to join defendant's property at that point.

Defendant, in order to maintain his claim, has to extend his frontage on St. Charles avenue beyond 33 feet on St. Charles avenue to 35 feet.

This he claims the right to do under a sale made to him by the heirs of Genella on the 23d of March, 1904, of a strip of land embraced between 33 and 35 feet fronting on St. Charles avenue; he asserting that he was already owner of that property by the previous sale made to him by Mrs. Genella, and his later purchase from the heirs of Genella having been made simply with a view to strengthening his title to the property.

The plaintiff claims to have acquired ownership of the property up to a point commencing at 33 feet from Upperline street, instead of from 35 feet from that street, under the allegation that 34 feet front on St. Charles avenue was conveyed to her by her vendor, there being that amount of property belonging to her (vendor) at that time with that frontage on St. Charles avenue. That her vendor was bound to convey to her, and did so convey the full extent of the premises so owned by her.

In view of the fact that defendant set up title to the intervening small strip under a sale from the heirs of Genella, the plaintiff

attacks incidentally the sale of that property as being null and void, and as being of property belonging to her, under her act of purchase from Mrs. Genella. Both parties claim to have been and to be in possession of the property respectively claimed by each.

"The plaintiff claims in her suit in the way of damages an amount exceeding \$500 for serious annoyances, inconvenience, and loss and depreciation of the disposable value of her property, and expenses and attorney's fees, etc., for which defendants are liable in solido in addition to the said threatened loss and dismemberment of her property for which she would be entitled should same occur, to additional damages in a sum exceeding \$2,000."

In her petition she alleged that the said strip of ground attempted to be encroached upon and taken away from her is valuable to her in a sum exceeding \$2,000 in connection with her investment of \$7,100 for the said property, and to lose the same would damage her in a sum exceeding \$2,000.

Though no motion has been made to dismiss the appeal, the question which meets us on the threshold is whether this court can entertain the appeal as it now comes before us. Under the rulings of the court in the cases of *Hite et al. v. Hinsel & Tallieu et al.* 39 La. Ann. 113, 1 South. 415; *Lombard v. Belanger*, 35 La. Ann. 311; *State ex rel. Levet v. Lapeyrolerie*, 38 La. Ann. 264; *State ex rel. Police Jury v. Miscar*, 34 La. Ann. 834; *Buddig v. Baldwin*, 38 La. Ann. 394; *State v. Cox*, 52 La. Ann. 2049, 28 South. 356; *State ex rel. Lewis v. Foster*, 111 La. 241, 35 South. 536—where in a boundary suit the matter in dispute between the parties involves the ownership of an intervening strip of property, the value of that property determines the jurisdiction of this court.

On the one hand we have before us the sale from the Genella heirs to Conway, for the price of \$150, and on the other hand we have the allegation of plaintiff that the strip in controversy under the circumstances in which its ownership is made an issue has a special value to her of over \$2,000.

The district court dismissed the action presumably on the ground that there was presently existing as an established and fixed boundary line certain existing fences and buildings. Before proceeding further we have to dispose of the question of jurisdiction.

The decisions quoted control the case before us.

We are of the opinion that the present appeal for want of jurisdiction *ratione materiae* cannot be entertained by us.

For the reasons assigned it is hereby ordered, adjudged, and decreed, that in the event the appellant or her attorney shall, within six judicial days from the date of the rendition of this decree, make oath as provided by Act No. 56, p. 135, of 1904, this cause shall be transferred to the Court of Appeal, parish of Orleans, otherwise that the appeal herein be dismissed at cost of appellant.

(116 La.)

No. 15,668.

BREWERY v. HOLZNER et al.

(Supreme Court of Louisiana. Feb. 26, 1906.
On Rehearing, March 26, 1906.)

FRAUDULENT CONVEYANCES — SUIT TO SET ASIDE—EVIDENCE.

Where it appears that a debtor in insolvent circumstances, immediately on being sued for a large amount, makes (what purport to be) sales of nearly all his salable property to a brother-in-law living in his house, who had been employed by him for years, and who is not shown to have had the means wherewith to make the purchases, and, both being charged with fraud, neither of them as a witness denies it, or affirms that the sales were made in good faith, such sales will be annulled, at the instance of a creditor, as fraudulent simulations.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by the Dallas Brewery against Henry Holzner and A. Thoman. Judgment for plaintiff, and defendants appeal. Affirmed.

Elstner & Land and Solomon Wolff, for appellants. Sutherlin & Barret, for appellant George B. Oliver, administrator of the succession of Henry Holzner. Alexander & Wilkinson, for appellee.

Statement.

MONROE, J. Plaintiff, alleging itself to be a creditor of Henry Holzner in an amount exceeding \$8,000, brings this suit to set aside certain transactions, purporting to be sales of real estate made by him to his codefendant, who is also his brother-in-law, and was employed by him for many years in the capacity of barkeeper; the cause of action alleged being that said transactions were either fraudulent simulations or fraudulent sales, and, whether the one or the other, were concocted to defraud the creditors of Holzner, and particularly the plaintiff. Both defendants plead the general issue.

It appears from the evidence that the defendant Holzner had been for a number of years the proprietor of a barroom known as the "Two Brothers," having acquired the real estate in which the business was conducted, together with other real estate, during the life of his wife and as community property, so that, since the death of his wife, which occurred in 1897, he has owned it in indivision with his two minor children. It further appears that for many years prior to 1902 the defendant Thoman had been employed by Holzner as barkeeper, that his wife and Mrs. Holzner were sisters, and that upon the death of Mrs. Holzner in 1897 they (Thoman and his wife) went to live at Holzner's house, where they have since resided; Mrs. Thoman having charge of the Holzner children. It further appears that in 1902, Holzner sold the business of the "Two Brothers" to Thoman, and that the latter has since then conducted that business

for his own account. We infer that Holzner has in the meanwhile, for part of the time at least, been the agent in Shreveport of the Dallas Brewery, plaintiff. Certain it is that in May, 1904, he owed the plaintiff in the neighborhood of \$8,000 on open account for beer, and also a debt secured by mortgage which, with interest, etc. (when settled on May 16, 1904), amounted to \$6,623.

In May, 1904, Griffing, the travelling agent of the Dallas Brewery, having gone to Shreveport for that purpose, called on Holzner and told him that he understood that he (Holzner) had agreed to handle the beer of the Shreveport Brewery, and that he (Griffing) was specifically instructed by the Dallas Brewery to demand a settlement of its account. Holzner replied that he could do nothing about it just then, and Griffing telephoned for the president of his company to come to Shreveport, which that officer did, and on May 5th they called together on Holzner and he promised to meet them at 2 o'clock in the afternoon. He failed to keep his appointment, and the Dallas company instituted suit against him on its account. There was also a proceeding on the mortgage debt, but whether that was instituted at the same time is not altogether clear. There is no doubt, however, that Holzner, on the same day, and after the filing of the suit on the account, executed three acts, purporting to be sales to Thoman of his undivided interest in three parcels of real estate which he owned in common with his children, and that the officer before whom the acts were executed was requested to keep them out of the newspapers, a request which he says is frequently made, but not complied with. The consideration expressed in the acts so executed aggregates \$12,500, of which \$2,110 is said to have been cash; the balance being represented by notes, or the assumption of mortgages. Thoman testifies that he had at that time \$2,000 or \$3,000, which he kept in a safe; but he does not say, nor does any one else, that any money belonging to him was actually used and finally parted with in buying the property in question, nor does he (as a witness), nor does Holzner, deny the imputation of fraud, or testify that the sales in question were made in good faith. There can be little doubt, considering the relations between the two men, that Thoman knew that Holzner was being pressed, and, probably, that he was being sued, on the claim of the Dallas Brewery, and the evidence makes it sufficiently clear that Holzner was insolvent, or at all events that, with the property in question alienated, it would be impossible for the plaintiff to recover from him the amount due it. In fact, whilst the present suit was pending, judgment was obtained and execution issued in the suit on the account, and, this case having been reopened for that purpose, it was shown by the sheriff's return that the *fi. fa.* was unsatisfied; one piece of property owned by de-

fendant having realized \$1,050, and another (and the only remaining piece) not having been sold for lack of bidders, no doubt because of the mortgages resting on it.

Opinion.

The case presented by the record is one in which a debtor in insolvent circumstances, immediately after being sued for a large amount, makes what purport to be sales of nearly all of his salable property to a brother-in-law, living in his house, who had for years been employed by him, and who is not shown to have had the means wherewith to make the purchases, and, both being charged with fraud, neither of them denies it, or affirms the good faith of the transactions, though both take the stand as witnesses. We agree with the judge *a quo* that these facts justify the conclusion that the sales were fraudulent simulations.

The judgment appealed from is accordingly affirmed, at the costs of the appellants.

On Rehearing.

PER CURIAM. This application for a rehearing is based on the sole ground that on the day this suit was filed the Dallas Brewery intervened in an act of mortgage from Thoman to Miss Beulah Dillingham, and in consideration of receiving the proceeds of the mortgage note waived all of its rights against the property in dispute over and above said mortgage on account of this suit. The act of mortgage as copied in the transcript reads "reserve," instead of "waive," and the record, if erroneous in this respect, should have been corrected by the appellant previous to the submission of the case. We may add that the application is accompanied by no certificate or affidavit showing error in the record.

The application for a rehearing is therefore refused.

(116 La.)

No. 16,043.

FELLMAN v. MERCANTILE FIRE & MARINE INS. CO.

In re COOKE.

(Supreme Court of Louisiana. March 26, 1906.)

1. STATUTES — ENACTMENT — VETO OF GOVERNOR.

What is known as act No. 190, p. 242, of 1894, never became a law, by reason of the fact that it was vetoed by the Governor and was never, thereafter, passed by the General Assembly.

2. CONTEMPT — WHAT CONSTITUTES.

Where a case had been finally decided, not only in the trial, but in the appellate, court, and a person representing the defendant, in satisfying the judgment, writes to the counsel for the plaintiff a letter inclosing a check, and at the same time intemperately criticising the judgment, such criticism, having no tendency to impede or embarrass the court in the disposition of any pending case, cannot be made the basis of a proceeding for contempt.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 6, 16.]

3. TIME—STATUTES—ENACTMENT—RETURN BY GOVERNOR—COMPUTATION.

In computing the five days allowed the Governor within which to return a bill to the General Assembly, Sundays are to be excluded.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Time, § 36.]

(Syllabus by the Court.)

Action by Anna Fellman against the Mercantile Fire & Marine Insurance Company. Application of William A. Cooke ruled into court for contempt for writ of prohibition. Writ made peremptory.

Clegg & Quintero, for relator. Saunders & Gurley, for respondent judge. Dinkelspiel, Hart & Davey, for respondent. H. B. McMurray, Civil Sheriff, for Parish of Orleans.

Statement of the Case.

MONROE, J. Relator complains that he was ruled into court for contempt, alleged to consist in the writing and delivery to the counsel for the plaintiff in the above entitled suit of a communication reading as follows:

"March 7th, 1906.

"Messrs Saunders & Gurley, Attorneys—Gentlemen: In the matter of Mrs. Anna Fellman, widow, v. Mercantile Fire & Marine Insurance Company, we hand you check, in payment of the judgment, for \$595.45, plus \$3.49 additional, interest. We do this by instruction, under protest, for no amount is due or has ever been due. By some mischance, or mistake, or worse, the court has been prevailed on to give a decree [assuming the correctness of your contention as to the demolition of certain walls] for about three times the amount of the loss. Shortly after the fire damage we made repairs in strict accordance with the city engineer's instructions, and turned the building over in better condition than before the fire. By the remarkable decision you [your client] make a net profit of every cent the companies pay, which is on a basis of \$3,272.72. The specifications have disappeared from the record; moreover, they were made without regard to the fire damage, and the builder, who made the estimate [for his principal], on which the judgment is based, and whom you interviewed [he does not appear as a witness] told you that about \$1,000 of his estimate belonged and should be charged to the Uthoff building adjoining. This is to put you on notice that we shall endeavor, by proper procedure, to reopen this matter, and to have repaid to the company above named the sum that is now extorted under the judgment.

"Yours respectfully,

"Wm. A. Cook, President.

"P. S. One check is made to cover both judgment and interest for \$3,593.64."

Relator alleges that he appeared in answer to the rule (which also embraced a demand for the payment of certain costs) and, disclaiming any contempt of the court or any contemptuous act, excepted to the proceeding, on the ground that the court was divested of jurisdiction, by Act No. 190, p. 242, of 1894, to punish the act complained of as contempt, but that the exception was overruled, and that he was declared guilty and sentenced to pay a fine of \$50, and be imprisoned for 10 days. He alleges that the court thereby exceeded its jurisdiction, that,

as appears upon the face of the papers, the matter complained of did not in any way affect the court or its process, and (after some further allegations to the same effect) he prays for a writ of prohibition to restrain the execution of the judgment.

To the rule nisi and restraining order issued in the case, the judge a quo makes return in substance, as follows: that it is true that relator was ruled into court for contempt, and excepted to the jurisdiction of the court, as alleged by him, and that respondent, after hearing, overruled the exception and rendered the judgment complained of; that the sole ground upon which the exception was based was that respondent's jurisdiction has been divested by Act No. 190, p. 242, of 1894, but that though said act appears among the published Statutes of the year 1894, the official journals of the House of Representatives for that year show that it never became a law, for the reason that it was vetoed by the Governor, and was never thereafter passed, over the veto; the fact being, that the bill was delivered to the Governor for his signature on July 2d, and was returned, with his veto, on July 9th, and the Judiciary Committee of the House of Representatives having reported that, because it had not been returned within five days, it had become a law, without the signature of the Governor, no further action was taken by the General Assembly concerning it, but that, in fact and in law, the veto was effective, because the House of Representatives adjourned over from Saturday July 7th to Monday, July 9th, and the intervening Sunday did not count in computing the delay.

Respondent further returns that the bill in question would have been unconstitutional, if adopted, in that Article 166 of the Constitution, under the authority of which it was adopted, was intended to authorize the General Assembly to limit the penalty which might be imposed for contempt, but not to authorize the regulation of contempt, in general, or the defining of what acts should constitute contempt, and that it is essential to the proper exercise of their functions that courts should be free to determine such question, and that apart from the statute in question respondent was vested with jurisdiction in the matter at issue, and, having jurisdiction, his action is not reviewable in these proceedings.

It is conceded and the official journal of the House of Representatives for 1894 shows that the bill in question, having passed both houses of the General Assembly, was delivered to the Governor for his signature on July 3, 1894; that it was returned by him with his reasons for refusing to sign it or veto message, on July 9th; that July 8th was Sunday; and that the House of Representatives had adjourned from the day before (Saturday) until the day following

(Monday); that the veto message was referred to the judiciary committee of the House of Representatives, which committee reported that the bill had become a law before the veto message was received, by reason of the fact that the message had not been received within five days from the day upon which the bill had been presented (and delivered) to the Governor, and, hence, came too late; and that, thereafter no further action was taken by the General Assembly in regard to said bill.

Opinion.

Article 76 of the Constitution provides, *inter alia*, that:

"If any bill shall not be returned by the Governor within five days after it shall have been presented to him, it shall be a law in like manner as if he signed it, unless the General Assembly, by adjournment, shall prevent its return, in which case it shall not be a law."

We concur in the view expressed by the Judiciary Committee in its report to the House of Representatives that it is the adjournment of the "General Assembly," and not of one branch of the General Assembly, which relieves the Governor of the necessity of sending in his veto within five days, in order to make it effective. But we have heretofore in a carefully considered case, taken a different view than that expressed by the committee of the question whether, in computing the delay allowed the Governor, Sundays are or are not to be considered. In the case referred to it was said by Blanchard, J., as the organ of the court:

"There is a rule of general, though, perhaps not of universal acceptance, that where a limitation of time is fixed within which a particular act or thing is required to be done, if done at all, after which performance or the doing of the thing would be of no effect, that if the time exceed a week an intervening Sunday is to be included in the computation, if less than a week, Sunday is to be excluded. 26 A. & E. Ency. of Law, p. 10; *Haley v. Young*, 134 Mass. 306; *Anonymous*, 2 Hill (N. Y.) 375; *Thayer v. Felt*, 4 Pick. (Mass.) 354; *Hannum v. Tourtellott* 10 Allen (Mass.) 494; *Cunningham v. Mahan*, 112 Mass. 59. * * * The federal Constitution allows the President of the United States 10 days, Sundays excepted, to return a bill. * * * Many of the states of the Union allow 10 days, Sundays excepted. Some allow a less number of days, Sundays excepted, and others a less number of days without mentioning Sundays. Where there has been an omission to mention Sunday in the constitutional provision, and cases have gotten into the courts, no authoritative announcement of the rule has been laid down, so far as our research has extended. Indeed, no decision covering the exact case has been discovered anywhere. * * * It would seem that since the earlier Constitutions of this state expressly excepted Sunday and the later Constitutions did not, the intention was that Sunday should be counted in the five days allowed the Governor. But this first impression is obliterated when we consider the general rule above referred to. Under the operation of that rule, had not the framers of the [earlier] Constitutions expressly excluded Sundays from the computation, in the 10 days given the Governor, the Sundays would have been counted; whereas, since, in

the later Constitutions, five days only are allowed, a time which does not necessarily include a Sunday, that day [Sunday], happening to be one of the five days, is excluded from the count. Where the time stipulated is such that it does not necessarily include Sunday, Sunday is excluded from the computation without express mention of the fact. Where the time stipulated must necessarily include Sunday, to exclude that day from the computation there must be an express declaration to that effect. Such is the effect of the general rule laid down, and the framers of the several Constitutions under which the state has been governed are presumed to have intended the language and phrases used in accordance therewith."

And agreeably to the views thus expressed, it was held that the act under consideration had been returned within five days—a Sunday being excluded from the computation—and that it failed to become a law because it was not passed over the veto which accompanied it. *State ex rel Pharmaceutical Ass'n v. Michel*, 52 La. Ann. 936, 27 South. 505, 49 L. R. A. 218, 78 Am. St. Rep. 364.

Adhering to the ruling thus stated, we conclude that Act No. 190, p. 242, of 1894, did not become a law, because vetoed by the Governor and not passed over the veto.

Counsel for relator argue that even though the act of 1894 be unconstitutional the penalty imposed was unauthorized because the writing of a private letter concerning a judgment which has been rendered and executed, be the terms of the letter what they may, is not an act which can be dealt with by the court rendering the judgment as a contempt, and in this position we believe the counsel to be sustained by authority.

Contempts are defined to be:

"(1) Direct, such as are offered in the presence of the court while sitting judicially; or (2) constructive, such as, though not in its presence, tend to embarrass the due administration of justice."

The authorities are, in the main, agreed that anything done or said in or out of the presence of the court, which impedes or obstructs it in the decision of a "pending case," or in the execution, by authorized means, of its judgments, may be punished as contempt, but, quoad a case, which has been decided and the execution of the judgment in which is not hindered, a different rule obtains, which is stated as follows:

"A slanderous and libelous publication concerning the judge in relation to an act already done, or a decision already rendered, cannot be punished by the court as a contempt. However criminal the publication may be, it lacks that necessary ingredient to constitute a contempt, of tending to prejudice the cause or to impede its progress." A. & E. Ency. of Law (2d Ed.) vol. 7, p. 61, citing *Ex parte Barry*, 85 Cal. 603, 25 Pac. 256, 20 Am. St. Rep. 248; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199; *Dunham v. State*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *Rosewater v. State*, 47 Neb. 630, 66 N. W. 640; *State v. Kaiser*, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584; *Bayard v. Passmore*, 3 Yeates (Pa.) 438.

In *State ex rel. Ashbaugh v. Circuit Court* (Wis.) 72 N. W. 193, 38 L. R. A. 559, 65 Am. St. Rep. 90, it appeared that the judge of the circuit court was a candidate for re-election, and that the alleged contemnor had issued a publication charging him with partiality and corruption in the trial of certain causes which had been decided by him and had been sentenced for contempt. In passing upon the question of the legality of the sentence, the Supreme Court of Wisconsin said:

"A criminal contempt at common law may be generally defined as any act which tends either to obstruct the cause of justice or to prejudice the trial of any action or proceeding then pending in court. The power of courts of superior jurisdiction created by the Constitution to punish such acts is necessarily inherent in such courts, and arises by implication from the very act creating the court. A court without the power would be at best a mere debating society. * * * Doubtless, this power may be regulated, and the manner of its exercise prescribed by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which are essential to preserve its character as a judicial tribunal. The decisions on this point are well nigh unanimous. * * * In the present case it is of the utmost importance to bear in mind that Judge Bailey was a candidate before the people for re-election. Had he been a candidate for any other office, it would not be contended by any one that the publication would afford ground for any other legal action than an action for libel in the regular course of law; but the claim is that because he was a judge, and was holding court at that time, such unfavorable criticism of his past action may be summarily punished by the judge himself for contempt. * * * The result of such a doctrine is that all unfavorable criticism of a sitting judge's past official action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. * * * Under such a rule the merits of a sitting judge may be rehearsed, but, as to his demerits there must be profound silence."

And the relator was discharged.

We are of opinion that the views thus expressed are sound and that they apply with greater force to a private communication than to a publication which is distributed broadcast. If this be not so, it would be difficult to fix any limit to the judicial power in the matter of contempt, and remarks made in the most casual conversation, or expressions used in letters from one person to another concerning litigation long terminated might be made the subject of proceedings for contempt; a condition which, it seems to us, is wholly unnecessary for the protection of the judiciary, and wholly inconsistent with the exercise of the constitutional right of free speech. There is an obvious reason which appeals to the common sense of mankind, why outside influences should not be allowed to interfere with the conduct and decision of a cause or with the execution of a judgment, and that is that every individual, whether he be prosecuted criminally or be a litigant in a civil action, is guaranteed, by the fundamental law, a trial according to law, and protection by and

under the law, for life, liberty, and property, and he is denied those rights just as certainly as one who is hanged by a mob is denied them, if every interested, meddlesome, or malicious person who may choose to do so is allowed to intimidate his witnesses, corruptly influence the jurors to whom his case is submitted, denounce the judge for his rulings as the trial progresses, and obstruct the execution of the judgment when obtained. But when the case of the criminal or litigant has been fairly and finally tried, and the judgment rendered and executed, and the court has no longer any function to discharge in the matter, or when the act or speech charged to be in contempt in no manner hinders or obstructs the court in the discharge of its functions, it would be, we think, going further than either law or reason require to hold that the wisdom and propriety of the court's action and methods are beyond either public or private criticism. Aside from these considerations it is, perhaps, safe to say that in a large proportion of cases decided by the courts, the losers entertain and express unfavorable opinions of the judge; for as "no thief e'er felt the halter draw, with good opinion of the law," so, the average individual who is convinced of the justice of a cause which he loses is apt to entertain a poor opinion of the other who differs from him, and such poverty becomes destitution if the opinion of the other produces a loss as its practical result. This is human nature, and as the loser is not always in the wrong in his opinion, so his criticism is not always unjust, and may produce a wholesome and tonic effect rather than a prejudicial one, so far as the judiciary is concerned. In the instant case, the criticism was intemperate and ill-judged, though we do not deduce from it that the relator intended to charge the respondent with anything more serious than having been misled, and neither our learned brother, who has occupied his present position for many years, and who enjoys the confidence and respect of the community which he has so ably and conscientiously served, nor the body of the judiciary of the state, are likely to sustain any injury from the charge as made. The material point, however, is that the criticism was not made with reference to any pending case, but with reference to a case that had been decided (not only by the respondent, but finally, by the Court of Appeal), and that it was made in a private communication from one individual to another, for which reasons, we think, it was beyond the reach of any proceeding for contempt. There are a number of cases in our jurisprudence in which it has been held that in order to authorize such proceedings, the court in which they are instituted must be interfered with in the exercise of its lawful jurisdiction. Thus, in *State ex rel. Liversey v. Judge*, 34 La. Ann. 741, it was held that a proceeding for contempt would not lie for

the violation of an injunction prohibiting the publication in a newspaper of an alleged libelous article. In *State ex rel. Kane v. Lazarus*, 37 La. Ann. 401, it was held that such proceeding would not lie to, punish a witness for answering untruthfully. In *State ex rel. Anglade v. Judge*, 48 La. Ann. 1414, 20 South. 912, it was held that a writ of *habeas corpus* could not be enforced by process for contempt. In *Re State ex rel. Hero*, 36 La. Ann. 352, the same ruling was made as to a writ of sequestration. In the first-mentioned case it was found that the court was without jurisdiction to issue the injunction, and in the other cases that the writs were authorized, but that proceedings for contempt were not the proper means for enforcing their execution. In the instant case no writ or order had been issued, and the alleged contempt was committed whilst the relator was in the act of satisfying a final judgment. Our conclusion, then, is that the proceeding against him was unauthorized.

It is therefore ordered, adjudged, and decreed, that the alternative writ herein issued be now made peremptory, and that the respondent judge be accordingly prohibited and restrained from further proceeding to execute the sentence for contempt pronounced by him against relator.

(116 La.)

No. 16,044.

FELLMAN v. MERCANTILE FIRE & MARINE INS. CO.

In re COOKE.

(Supreme Court of Louisiana. March 26, 1906.)
CONTEMPT—HEARING.

Where the judge has no personal knowledge of the matter imputed as contempt he can punish only after full hearing on rule to show cause.

(Syllabus by the Court.)

Action between Anna Fellman and the Mercantile Fire & Marine Insurance Company. From an order sentencing William A. Cooke for contempt, he applies for writs of prohibition and certiorari. Sentence set aside.

Clegg & Quintero, for relator. Respondent Judge (Saunders & Gurley, of counsel), pro se. Dinkelspiel, Hart & Davey, for respondent. H. B. McMurray, Civil Sheriff, for Parish of Orleans.

PROVOSTY, J. The relator made some remark in the court room while court was still in session, but while the judge was off the bench, and out of the hearing of the judge. Upon hearing of it, the judge ascended the bench, directed the relator to be brought before him, and heard the statement of the clerk of the court regarding what relator had said, and refusing to hear relator, but, he says, after hearing the counsel of the relator, sentenced relator to fine and imprisonment for contempt. Relator com-

plains that inasmuch as the judge had no personal knowledge of what had taken place, he should have heard him before proceeding to pass sentence on him. In this court there is difference between the parties as to what exactly did take place in the lower court. This illustrates the wisdom of the rule that where the judge has no personal knowledge of the matter imputed as contempt, he should not pass sentence without having afforded the party a full opportunity to present his defense. *State ex rel. De Buys v. Judge*, 32 La. Ann. 1262. The relator in this case has not had such an opportunity.

The sentence against the relator is set aside, without prejudice to the right to proceed according to law.

(116 La.)

No. 15,866.

Succession of SCHIRM.

(Supreme Court of Louisiana. April 9, 1906.)

APPEAL — WHO MAY APPEAL — INTEREST IN SUBJECT-MATTER.

An ex parte judgment sending heirs into possession cannot affect the right of the state to claim the inheritance tax, if one is due; hence the state is without interest, and without stand to appeal from such an order.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

In the matter of the succession of Louis August Schirm. From an order placing the heir in possession, the state appeals. Dismissed.

James Porter Parker, Dist. Atty., and Mark Mayo Boatner, Asst. Dist. Atty., for the State. Dart & Kernan, for appellee.

PROVOSTY, J. By Act No. 45, p. 102, 1904, an inheritance tax is imposed upon succession property that has not borne its just share of taxation, and the duty is imposed on judges to require "satisfactory" proof that the estate is not liable to the inheritance tax before granting an order placing the heir in possession.

In this case the heir was sent into possession on an ex parte petition, supported by affidavit, to the effect that the property of the succession was of less value than \$2,500 and had borne its just share of taxation, and that there were no debts, and that an administration was unnecessary. What the property consisted of was not stated.

The state has appealed, and complains that the proof on which the order of possession was rendered was not "satisfactory," within the meaning of the above-mentioned statute, because, unless the judge is informed of what the property consists, he cannot, in the nature of things, know what its value is.

We cannot see why not. If the witnesses know and testify, and the judge believes them, we can see no reason why the proof should not be "satisfactory." But the objec-

tion to the state's appeal lies deeper than that. The state cannot be affected one way or the other by the ex parte order, and therefore is without interest to appeal.

Appeal dismissed.

(116 La.)

No. 15,872.

HUNLEY v. A. L. PATTERSON & CO.

(Supreme Court of Louisiana. April 9, 1906.)

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

The servant has the right to rely upon the superior knowledge of the master, and when acting under his orders will not be held to have assumed a risk, unless it was so evident that no prudent person in his place would have obeyed the order.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 675, 676.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas O. W. Ellis, Judge.

Action by Marshal Hunley against A. L. Patterson & Company. Judgment for plaintiff, and defendants appeal. Affirmed.

John Janvier and Miller, Dufour & Dufour, for appellants. Nicholas Eugène Humphrey, for appellee.

PROVOSTY, J. The plaintiff and other laborers, under a foreman, were laying a sewer pipe in a street. The rules were to brace the sides of the trench, so as to prevent them from falling in when the pipe was being laid; but the bracing material had given out, and the plaintiff, whose part it was to get into the trench and steady the joint of pipe as it was moved into position, hesitated to go in, and said to the foreman: "It looks kind of dangerous." The foreman answered: "That's nothing, I think that's solid enough; go ahead." The sides fell in on plaintiff, and injured his leg.

The plaintiff had been doing the same kind of work for eight months, and the contention is that he knew of the danger and assumed the risk.

The plaintiff is a colored laborer, and was working under the directions of a white foreman. The trench was six feet deep. We think the case is a plain one for the application of the rule that the servant has the right to assume superior knowledge on the part of those under whose orders he is working. A. & E. Ency. of Law, vol. 20, p. 148. The danger was not so evident that plaintiff might not have relied on the supposedly better judgment of the foreman, or that no prudent man would have obeyed the foreman. One of plaintiff's fellow workmen went into the ditch with him, showing that he, too, did not consider the situation sufficiently perilous to justify opposition to the orders of the foreman.

Judgment affirmed.

(116 La.)

No. 15,865.

BUCKINGHAM et ux. v. NEGROTTTO.

(Supreme Court of Louisiana. April 9, 1906.)

TAXATION—TAX SALE—PUBLICATION.

The advertisement of a tax sale in the last week of the 30 days must be published before the day and hour fixed for the sale.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1340.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by M. S. Buckingham and wife against D. Negrotto, Jr. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. Zach. Spearing, for appellant. Frank McGloin, for appellee.

Statement of Case.

MONROE, J. Plaintiff Mrs. Annie Griford Nash, wife of and aided by M. L. Buckingham, alleges that for many years she had possessed as owner certain real estate in this city, and she complains that her possession has been disturbed by defendant, who, as she alleges, has surreptitiously taken possession of the property and collected certain rents therefrom, and she prays for judgment quieting her possession and condemning defendant for the amounts so collected.

Defendant sets up a tax title, which he prays may be held good, and, in the alternative, prays that he be reimbursed certain amounts expended by him in acquiring and preserving the property. There was judgment in the district court in favor of plaintiff, decreeing the nullity of the title set up by defendant, and condemning him, for rents collected, at the rate of \$50 per month from October 1, 1904, with interest until he shall have surrendered the property, and in favor of defendant for the amounts claimed by him; and defendant has appealed.

Since the appeal, the death of defendant has been suggested, and his administratrix has been made party in his stead.

Opinion.

The title of plaintiff and her possession, to October, 1904, are established by the evidence. It is also shown that the property was adjudicated to defendant in June, 1904, at a sale made for city taxes of 1900; that defendant has collected rent therefrom at the rate of \$50 a month since October 1, 1904, and that he has expended the amounts claimed by him. Several grounds of nullity were, and are, urged against the title set up by defendant. We find it necessary to consider but one of them. The notarial act upon which defendant relies recites that the sale of the property was advertised in the Daily States, but it was shown on the trial that such was not the case. The defendant was then allowed to prove (over objection) that

the advertisement was published in the City Item. Pretermittting the question, whether the evidence was admissible, it appears that the sale was advertised to be made on June 13, 1904, that the advertisements were published in the papers of May 13, 20, and 27, and June 3, and 13, 1904, but that the last advertisement was published after the hour at which the sale was to take place, which was fatal to its validity, though, in point of fact, the sale was not made until June 15th. In re Lindner, 113 La. 772, 37 South. 720.

The judgment appealed from is therefore affirmed, at the cost of appellant.

(116 La.)

No. 16,120.

STATE v. KIERNAN et al.

In re KIERNAN et al.

(Supreme Court of Louisiana. April 23, 1906.)

1. **LIBEL—CRIMINAL PROSECUTION.**

Sections 804 and 982, Rev. St., are in no manner superseded by Act No. 107, p. 161, § 4, of 1902.

2. **CRIMINAL LAW—CONFRONTING WITNESSES—RIGHTS OF ACCUSED.**

An affidavit, attached to an application for certiorari and prohibition, to the effect that a witness, "in answer to an attachment," appeared before the trial judge "and gave evidence in connection with" the case, and that the accused were not present, suggests no sufficient ground for the issuance of the writs prayed for.

(Syllabus by the Court.)

Application by Peter Kiernan and others for writs of certiorari and prohibition. Writs denied.

Joseph D. Kiernan, for petitioner.

MONROE, J. Relators were convicted of libel, under Rev. St. § 804, and sentenced, on each of two counts, to imprisonment for three and two months, and to pay a fine of \$200, and, in default of payment, to further imprisonment for one month, on each count, and they complain that the sentences were unauthorized, for the reason that the law under which they were imposed has been superseded, as they allege, by Act No. 107, p. 161, § 4, of 1902.

Rev. St. § 804, provides that:

"Whoever shall, maliciously, defame any person by making, writing, publishing, or causing to be published, any manner of libel, shall, on conviction thereof, suffer fine and imprisonment, or both, at the discretion of the court."

Rev. St. § 982, limits the penalty of fine and imprisonment which may be imposed at the discretion of the court to \$1,000, in the one case, and two years in the other. "Libel," in the criminal law, is "a malicious defamation, expressed either in printing or writing, or by signs or pictures, tending to blacken the memory of one who is dead, with intent to provoke the living; or the reputation of one who is alive, and to expose

him to public hatred, contempt or ridicule." Bouvier; Black; verbo "Libel." Act No. 107, p. 161, § 4, of 1902, relied on by relators, provides that "whoever shall, by spoken words, maliciously defame," etc., "shall be fined," etc. It therefore relates to an offense different from that dealt with by the law under which relators were convicted and sentenced, and does not supersede that law.

Relators allege that a certain witness, H. Laroussin, testified in the case out of their presence, and they attach to their petition his affidavit, reading in part, as follows:

"That, in answer to an attachment issued by the criminal district court, section B, of the parish of Orleans, in the case of the state of Louisiana v. Peter Kiernan, Louis A. Hoffman, and Jesse H. Webb, he was taken to the said court and, in the private office of the Hon. Frank D. Chretien, judge of said court, he was duly sworn and gave evidence in connection with said case; and that, at the time, neither the said Peter Kiernan, nor Jesse H. Webb were present in the said office, and they were not confronted by him."

We infer from this affidavit that the witness was allowed to explain, under oath, why it had been necessary to bring him into court by attachment, a matter which concerned the court and in which the relators were not concerned.

These grounds being insufficient to entitle relators to the writ of certiorari and prohibition, or either of them, and no other grounds being set forth in their petition, the relief prayed for is denied.

(116 La.)

No. 16,080.

STATE v. KIERNAN et al.

In re KIERNAN et al.

(Supreme Court of Louisiana. April 9, 1906.)

1. **HABEAS CORPUS—WHEN ISSUES.**

The writ of habeas corpus issues in any case where the court may have appellate jurisdiction. Article 93 of the Constitution.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 35.]

2. **SAME—JURISDICTION.**

The court is without appellate jurisdiction. The application for habeas corpus is dismissed.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 35.]

3. **CRIMINAL LAW—REVIEW.**

After sentence and final judgment, only issues of a grave character are subject to review, such as want of jurisdiction or similar allegations.

4. **SAME—CERTIORARI—PRIMA FACIE SHOWING.**

A prima facie showing should be made by annexing required papers showing by allegations and copies, or documents annexed, that the party applying is entitled to a hearing. (Syllabus by the Court.)

Application of Peter Kiernan and others for writs of mandamus, certiorari, and habeas corpus. Petition dismissed.

Joseph D. Kiernan, for relators.

BREAUX, C. J. We will, in the first place, take up the application for a writ of habeas corpus.

The case is not an appealable one. This court has jurisdiction to entertain such an application where it may have appellate jurisdiction. Article 93 of the Constitution.

This article has been interpreted to mean just what it says, and it follows that, in that view, this court is without jurisdiction touching habeas corpus.

Touching the other writs, the first ground in support of the application is that the mittimus or commitment is not signed by the judge of the district court. It seems that it was signed by the minute clerk.

No copy of the mittimus was annexed, although it was alleged in the petition of the relator that a copy is annexed.

Moreover, this objection has no merit, for the clerk is authorized to sign the mittimus in the name of the district judge.

This mittimus or commitment not having been annexed, we are not sufficiently informed to determine to what extent it was informal. In the absence of all copy, we infer that it was in the usual form, and that it conveyed to the sheriff all that it was needful for him to know in order to take charge of the relator.

The relator next in order urges in his petition that the five indictments or counts are a joinder of five separate and distinct offenses of the same sort, committed on five different days, although these asserted separate offenses, relator contends, constitute one offense.

The petition does not show that the publication was one single act.

Libel is not a continuing offense.

Here it was charged to have been committed on certain specified days. Each day that the asserted libel was committed marked a separate offense, and for two of these separate offenses the defendant was found guilty.

If it was otherwise, we do not so infer from the petition.

Relator complains, as we understand, of successive convictions for one offense.

With reference to successive conviction we will state in passing that the second conviction commences at the expiration of the first sentence.

The second conviction did not have the effect of rendering the first illegal.

It is legal, and the relator will have to remain until the end of it.

If he has any right at all it will be at the end of the first sentence. We must say that we are not inclined to the view that he has any right to release, if no further showing be made of grounds than contained in the petition now before us.

The relator has not made it appear that he has been punished twice for the same offense.

In *State ex rel. Hart v. Hicks*, 118 La. 845, 37 South. 776, this court held, as shown by

the syllabus, that, under a writ of certiorari, after a final judgment has been rendered, issues of a grave character may be reviewed. A relator should make a prima facie showing sufficient to enable the court to determine that error has been committed of a character to require a review.

His petition is dismissed, and his demand is not granted.

(116 La.)

No. 16,018.

MARSHALL et al. v. TOWN OF MANSURA et al.

(Supreme Court of Louisiana. April 23, 1906.)

1. **APPEAL—MOTION TO DISMISS.**

A motion to dismiss an appeal for want of jurisdiction will not be granted, unless it is evident that there is good ground.

[Ed. Note.—For cases in point, see vol. 3 Cent. Dig. Appeal and Error, §§ 8123, 8124.]

2. **INJUNCTION—LOCAL OPTION—ELECTION—PARTIES.**

Residents of a parish, but not within the limits of a municipality within the parish, and having no property interest therein, have no right to an injunction restraining the citizens and inhabitants of the town from enacting ordinances touching local option and holding elections in the town.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 154.]

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Gregory Horatio Couvillon, Judge.

Action by J. H. Marshall and others against the town of Mansura and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Peterman & Couvillon and Coco & Couvillon, for appellants. Joseph W. Joffrion, Joseph Olifton Cappel, and Adolph Jaimeus Lafargue, for appellees.

On Motion to Dismiss the Appeal.

BREAUX, C. J. Plaintiffs move to dismiss the appeal on the ground that the court is without jurisdiction *ratione materię*.

We have considered the issues presented in this case touching jurisdiction, and have arrived at the conclusion that this court has jurisdiction, and that appellees were without ground to move for a dismissal of the appeal.

We must therefore decline to dismiss the plea.

The motion is denied.

On Defendants' Exception of Plaintiffs' Want of Authority to Sue.

This was an action to enjoin the town of Mansura from issuing a license to sell liquors and from setting aside an election held under the local option law.

In defendants' answer it is alleged that plaintiffs are not residents of the town of Mansura.

The truth of the allegation is not questioned.

Before pleading to the merits, defendants filed an exception in which they averred that plaintiffs had no right to prosecute this suit because they are not residents of the town of Mansura.

The plaintiffs sought to meet this ground of objection of defendants by arguing substantially that every citizen of the parish was interested in enforcing the parish ordinances against issuing liquor licenses, that the citizens of the town are equally with themselves a part of the parish, and that it is not left to them alone to determine whether a parish ordinance should be enforced within the limits of the town.

We do not agree with that view, presented by plaintiffs. We are decidedly of the opinion that the town has some authority which is beyond the power of private individuals, not residents within its limits.

The ordinance attacked under proceedings of election and the licenses referred to are primarily concerns of the taxpayer who resides within the limits of the town. Persons residing out of the limits of the town must leave the enforcement of parochial regulations and ordinances to its local agencies.

The municipality is a body corporate, subject to superior authority, it is true; but it is not subject to suits by citizens to enforce duties of a moral nature. Citizens have no interest in the alleged acts of the town of Mansura, if they are illegal.

An action is an assertion in a court of justice of a right given by law. In conferring the right upon the citizen to sue in certain contingency the authorities representing the corporation within whose limits he resides, it does not confer upon him the right to sue the authorities of a corporation in whose jurisdiction he does not reside, in order to have declared null a public ordinance.

We are of opinion that the exception should be maintained. The judgment appealed from is avoided, annulled, and reversed.

The suit is dismissed, at the cost of appellees in both courts.

(116 La.)

No. 16,019.

MARSHALL et al. v. TOWN OF MARKSVILLE et al.

(Supreme Court of Louisiana. April 23, 1906.)

1. APPEAL—ON MOTION TO DISMISS.

The grounds of the motion to dismiss are not sustained by the facts alleged and the issues of the case.

2. INJUNCTION—ACTION BY TAXPAYERS—PRIVATE RIGHTS—IRREPARABLE INJURY.

Persons have not in their private capacity a right to an injunction to enforce moral obligations and the performance of moral duties.

Plaintiffs have no personal interest in the suit.

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Gregory Horatio Couvillon, Judge.

Action by J. H. Marshall and others against the town of Marksville and others. Judgment for plaintiffs. Defendants appeal. Reversed, and action dismissed.

Peterman & Couvillon and Coco & Couvillon, for appellants. Joseph W. Joffrion, Joseph Clifton Cappel, and Adolph Jalmeus Lafargue, for appellees.

On Motion to Dismiss the Appeal.

BREAUX, O. J. Plaintiffs move to dismiss the appeal on the ground that the court is without jurisdiction *ratione materiæ*.

We have considered the issues presented in this case touching jurisdiction, and have arrived at the conclusion that this court has jurisdiction and that appellees were without ground to move for a dismissal of the appeal.

The motion is denied.

On the Exception.

The plaintiffs are citizens and taxpayers of the parish. They instituted this suit against the defendant town to set aside and annul an election held in the town and carried in favor of issuing licenses for the sale of liquor for the year 1906.

And the further purpose of the suit is to have declared a nullity an ordinance of the town council fixing licenses for the sale of liquors.

The plaintiffs in these proceedings aver that the parish of Avoyelles, in November, 1904, held an election under the local option law. This election was carried in favor of granting a license for the sale of liquors.

Before pleading to the merits the defendants filed an exception in which they controverted plaintiffs' right to prosecute this suit and stand in judgment.

The exception was overruled.

The facts made the basis of this exception are that plaintiffs have no interest to stand in judgment.

The plaintiffs sought to meet this ground of objection, urged in the petition, by the plea, substantially, that every citizen of the parish is interested in enforcing parish ordinances against issuing liquor licenses.

The suit of plaintiffs is accompanied by a writ of injunction against the officers of the town of Marksville to the end of preventing them from issuing licenses under the election of the town recently held.

The exception before mentioned was overruled.

Defendants then filed their answer, in which they took issue with plaintiffs, and in support of their contention against plaintiffs' demand they averred that the result of the election held throughout the parish in November, 1904, in favor of prohibition, is not binding upon the defendant town, and does

not have the effect of striking down, as null, the result of the election held in the town on the 1st of December, 1905.

The defendants urge the fact that the town election was held over a year after the date of the parish election.

The further contention of the defendant town is that section 1211 of the Revised Statutes, amended by Act No. 221, p. 451, of the General Assembly of 1902, did not invest the parish with continuing authority as relates to liquor licenses over the town.

Defendants' exception on the ground that plaintiffs do not show actionable interest: Plaintiffs sue in their own behalf and that of others similarly situated, taxpayers and citizens. In what respect plaintiffs and other taxpayers are to be effected in any right they have is not shown, for the very good reason, no doubt, that it cannot be shown.

In the recent decision, to wit, *W. S. Benedict v. City of New Orleans*, 115 La. 645, 39 South. 792, the court intimated broadly enough that there is a limit to the right of action by citizens and taxpayers in matters that are public and in which they are not concerned.

While citizens and taxpayers have a right to inquire into things relating to the public fisc in which they are concerned, they have no right of action in matters purely moral, political, or social, in which the public is concerned, and not private persons. This is the trend of all decisions, although it may be that here and there it is possible to wrench a different meaning from the texts.

The right of injunction is to protect property and civil rights, and not to enforce moral obligations and the performance of moral duties. "And in the absence of any injury to property rights it will not lend its aid by injunction to restrain the violation of a public or penal statute." *High on Injunction*, § 20.

Moreover, irreparable injury must be shown. It would be difficult for the plaintiffs to prove wherein they are irreparably injured to a degree which renders an injunction necessary in so far as they are concerned.

The jurisdiction of courts of equity to restrain the proceedings of municipal corporations at the suit of citizens and taxpayers, where such proceedings encroach upon private rights and are productive of irreparable injury, may be regarded as well established. *Dillon on Municipal Corporations* (4th Ed.) § 914.

Here there is no encroachment upon private rights and no irreparable injury shown.

We will therefore maintain the exception and dismiss the action. This relieves us from the necessity of passing upon the other point raised on the merits; that is, whether the town is emancipated from parish action, 12 months having elapsed. The judgment

appealed from is avoided, annulled, and reversed.

It is ordered that plaintiffs' action be dismissed, in both courts at their costs.

(116 La.)

No. 15,099.

STATE v. CURTIS.

(Supreme Court of Louisiana. April 9, 1906.)

1. BURGLARY—ENTRY OF HOUSE IN DAYTIME—REPEAL OF STATUTE.

Whoever enters a dwelling house in the daytime with intent to steal is guilty of the crime denounced in the section 854 of the Revised Statutes.

The offense is distinct and substantive, and the section 854 is not repealed by section 6 of the statute, Act No. 107, p. 162, of 1902.

2. SAME—INDICTMENT.

The indictment properly charged that the defendant entered the house with the "intent" to steal.

3. SAME—VERDICT.

From the verdict it must be implied that the facts proven showed the "intent" alleged. (Syllabus by the Court.)

Appeal from Criminal District Court, Parish of Orleans; Frank D. Chrétien, Judge.

Sam Curtis was convicted of entering a house with intent to steal, and appeals. Affirmed.

Henry Oscar Hollander, for appellant. Walter Guion, Atty. Gen., James Porter Parker, Dist. Atty., and Henry Mooney, Asst. Dist. Atty., for the State.

BREAUX, C. J. The information charged the defendant with having committed a crime prohibited by section 854 of the Revised Statutes.

He was put upon his trial before a jury and found guilty.

A motion in arrest was made, and a motion for a new trial. They were overruled.

The trial judge sentenced the accused for a term of one year in the penitentiary, and to pay costs.

He appeals.

The defendant attacked the proceedings on the ground that section 854 of the Revised Statutes has been repealed by Act No. 107, p. 161, of 1902; that the court was without jurisdiction; and that the intent to commit a felony was not proven.

The statute which defendant says had repealing effect relates to vagabondage and is germane to and forms part of section 3880 of the Revised Statutes, and does not relate to section 854 of the Revised Statutes, which prohibits entering a dwelling house in the daytime with intent to steal. This was the crime charged against defendant, and of which he was found guilty.

There is nothing inconsistent between the statute (section 854) and Act 107, p. 161, of 1902.

The purpose of each is distinct and separate. One seeks to protect the dwelling house

and the other seeks to put an end to vagabondage.

Evidently it never entered the mind of the legislator, in inserting a section in the statute (Act No. 107, p. 161, of 1902) against vagabondage (germane to the crime denounced by section 3880 of the Revised Statutes), to repeal section 854 of the Revised Statutes directed against those who enter a dwelling house with intent to steal. The latter is a substantive offense.

The title of the statute in question, as well as the text, and the text of the Revised Statutes, show the decided difference between the two offenses. Act No. 107, p. 161, of 1902, grades misdemeanor and other minor offenses; section 854 denounces entering any dwelling house in the daytime with intent to steal—two distinct purposes relating to distinct, substantive crimes, differing in character and gravity.

The further contention is made on behalf of defendant that it was not shown that there was an intent on his part to commit felony within the house.

The testimony showing that the accused entered a dwelling house with intent to steal less than \$20 may not be a felony. Granted that in itself the "intent to steal less than \$20" makes the crime a misdemeanor, falling exclusively within the jurisdiction of the inferior city criminal court for trial; the crime denounced by section 854, including the two, intent to steal, and entering a dwelling house, falls within the jurisdiction of the district court.

The purpose of Act No. 107, p. 161, of 1902, was to bring within the jurisdiction of the First and Second criminal courts certain minor offenses therein named, among others, vagabondage.

But this statute, Act. No. 107, had no such effect upon the cited section of the Revised Statutes as is contended for by defendant.

If it was the intention to steal less than \$20, it does not lessen the gravity of the crime here charged, viz., of entering a dwelling house with intent to steal.

The evil of each of the offenses combined, that is, first, entering a dwelling house, second, with intent to steal, is greater when combined than it was before they were combined.

Entering and stealing is the offense, of which the district court has jurisdiction.

The argument, in addition, brings up the question of intent, and urges that it was to commit a misdemeanor and not a felony.

The jury decided the question of fact; that is, of entering a dwelling house with intent to steal. As denounced it is a felony.

After having heard the testimony touching the entering, also touching the taking of old clothes from the house entered, they found the facts showing intent. It does not show that in thus finding they committed any error which falls within our jurisdiction to review.

The intent is charged in the indictment. The jury, as it was its duty to do, if proven, held that it was proven.

It only remains for us to affirm the judgment.

It is affirmed.

(116 La.)

No. 15,937.

ZEIGLER et al. v. INTERIOR DECORATING CO., Limited.

(Supreme Court of Louisiana. April 9, 1906.)

1. RECEIVERS—CLAIMS—ESTABLISHMENT BY EVIDENCE.

All claims on a receiver's account, when opposed, must be proved up with legal certainty.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 263, 269.]

2. EVIDENCE—IN ANOTHER PROCEEDING—ADMISSIBILITY.

Documents found in the record of another suit against the corporation, offered in evidence on the trial of oppositions to a receiver's account, cannot be received or considered as evidence against the creditors of the insolvent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2410-2413.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walker Byers Sommerville, Judge.

Action by Ferdinand Zeigler and others against the Interior Decorating Company, Limited. From an order dismissing the account of the Germania National Bank as in case of nonsuit, it appeals. Affirmed.

Buck, Walshe & Buck, for appellant. Lionel L. Labatt, Robert O'Connor, John Watt Duffy, George Joseph Unterciner, Stafford & Lambert, Charles Rosen, Edgar Mayer Cahn, John G. Robin, Bernard McCloskey, J. Zach. Spearing, Henry W. Robinson, Gabriel Fernandez, Sr., R. M. Montgomery, James J. McLaughlin, Herman Michel, Robert John Maloney, E. J. Dreyfous, John Thomas Nix, Lamar C. Quintero, W. H. Byrnes, Jr., R. A. Tichenor, Benjamin W. Kernan, Henry Garland Dupré, Asst. City Atty., James Barkley Rosser, Jr., and Ernest Touro Florance, for appellees.

LAND, J. The receiver filed a provisional account, on which the Germania National Bank appeared as a creditor for \$4,000, without specification as to character of indebtedness.

Numerous oppositions were filed to the account, some of the opponents opposing generally all the items thereon.

Several opponents specifically opposed as not due the item, "Germania National Bank, \$4,000.00."

On the trial of the oppositions no appearance was made in behalf of the said bank, and its claim was dismissed as in case of nonsuit, with the reservation of the rights of the bank as against any other funds that might thereafter be accounted for by the receiver.

The Germania National Bank has appealed, and the sole question for review is whether the evidence adduced is sufficiently certain to prove that the bank is a creditor of the insolvent corporation in the sum of \$4,000.

As no direct evidence was offered by the bank to show that it was a creditor in any amount, the question seems to answer itself.

But counsel for the bank argue that its claim was proven by evidence offered in behalf of one of the opponents and received without objection. It appears that this opponent, Ferdinand Zeigler, claimed to be a creditor in a large amount, and that his counsel, in adducing evidence to establish the claim of the opponent, offered a certain suit as follows, to wit:

"By Mr. Cahn: I offer, introduce, and file in evidence the suit of Germania National Bank, in Liquidation, v. Interior Decorating Company, Limited, Ferdinand Zeigler, and Jean H. Duffy, Indorsers. The object of that offer is to show that Mr. Zeigler is still being pursued by the Germania National Bank in liquidation upon the indorsement which he made for the benefit of the Interior Decorating Company, Limited."

The record of the suit shows that the Germania National Bank, in liquidation, sued the Interior Decorating Company, Limited, as maker, and Jean H. Duffy and Ferdinand Zeigler, as indorsers, on four several promissory notes, for \$1,000 each, bearing interest at the rate of 8 per cent. per annum from different dates.

The four notes, with certificates and notices of protest, were annexed and filed as a part of the petition.

The receiver appeared in the suit for the sole purpose of excepting to the petition and service thereof, on the ground that neither the corporation nor the receiver had been properly cited. The indorsers filed exceptions, which were overruled. Thereupon Ferdinand Zeigler answered, admitting his signature on the notes, but averring that he signed as surety and was entitled to the benefit of discussion, and therefore could not be proceeded against until the plaintiff had exhausted its recourse against the maker and the assets in the hands of the receiver.

The contention that the offer of this suit for the purpose named was equivalent to offering the notes as evidence to establish the claim of the bank against the receivership is without merit.

The notes went in as a part of the petition, and not as evidence. The suit was res inter alios acta as to the creditors of the insolvent corporation.

The record of the suit is no evidence, even against the corporation, that the notes were signed by its duly authorized officers. The most that can be said is that the record shows that Ferdinand Zeigler judicially admitted the execution of the notes.

In *Erwin v. Bank of Kentucky*, 5 La. Ann. 6, this court said:

"The documents and testimony found in the record offered in evidence cannot, because they form part of the record, be received as proof in another suit."

In *Mestier v. New Orleans & Opelousas R. R.*, 16 La. Ann. 368, this court said:

"The introduction of another suit in evidence does not make the testimony on which the judgment was rendered evidence in the new suit."

The account of the receiver was provisional, and he will have other funds to distribute. When the receiver files his final account, the bank will have another opportunity to prove the validity of its claims against the corporation.

For the foregoing reasons the judgment appealed from is affirmed, at the cost of the appellant bank.

(116 La.)

No. 15,979.

GALLAGHER v. LURGES et al.

(Supreme Court of Louisiana. April 9, 1906.)

1. INSANE PERSONS—PROPERTY OF INTERDICT—PRIVATE SALE.

It is only in case where the purpose is to effect a partition by the sale of the whole property that the interest of an interdict can be alienated at private sale, otherwise such interest must be sold at public auction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, §§ 111, 118.]

2. SAME—VALIDITY.

A proceeding which has for its purpose only the private sale, to one of the plaintiffs, of the interest of an interdict in the property held in common is unauthorized and illegal, and is ineffectual to divest the title of the interdict, though there be included in such proceeding a family meeting recommending such sale and a judgment homologating the same; and a party agreeing to purchase the property from such plaintiff (subject to examination of title) is not bound to comply with his agreement.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Somerville, Judge.

Action by Peter Gallagher against Hubert Lurges and others. Judgment for plaintiff, defendants appeal. Affirmed.

Louis Paul Bryant, for appellants. John Patrick Sullivan and Arthur Landry, for appellee.

Statement.

MONROE, J. Plaintiff alleges that he agreed to purchase from defendants, for \$17,000, on condition that the title should prove satisfactory certain real estate in the city of New Orleans, and that, to bind the bargain, he deposited with defendants \$1,700, in cash, but that for reasons stated by him the title has not proven satisfactory, and that he desires that the agreement shall be avoided and his money returned; and he prays for judgment accordingly. Defendants, for answer, allege that the title is good, and pray that the agreement be enforced.

It appears from the evidence that Hubert, Anna, Emma, and Julia, Lurges (the latter being, now, the widow Lindenschmidt), together with their brother, Charles F. Lurges, inherited the property in question from their mother, and that Charles F. Lurges, having been found to be non compos mentis, was placed by the probate court of St. Louis under the guardianship of the Lincoln Trust Company. It further appears that in 1904 defendants filed in the civil district court a petition alleging that they did not desire any longer to hold the property in question in indivision with their brother, Charles, and that Mrs. Lindenschmidt wished to purchase his interest at private sale, and praying that a family meeting be convened to advise upon the subject. In the suit thus filed, August C. Wuerpel, whom, as guardian of the Interdict, the Lincoln Trust Company, had appointed its agent for the purposes of a "partition," was made defendant, as representing said guardian, and through it, the Interdict; and the family meeting having been convened, and having advised that the interest of the Interdict be sold at private sale to Mrs. Lindenschmidt for \$1,600, and those facts having been brought to the knowledge of the court, together with certain testimony given by plaintiffs (defendants herein), to the effect that the property is indivisible in kind, there was judgment recognizing the litigants as the owners of the property and further proceeding as follows, to wit:

"It is further ordered, adjudged * * * that the deliberations of the family meeting * * * be approved and homologated, and accordingly let August C. Wuerpel, duly * * * authorized agent of the Lincoln Trust Company of Missouri, duly appointed guardian of the person and estate of Charles F. Lurges, Interdict, and defendant herein, be authorized to sell the undivided fifth which belongs to said Interdict in the property described in said process verbal to Mrs. Julia Lindenschmidt * * * for the price and sum of \$1,600, cash. * * * It is further ordered that all parties to this cause be referred to John G. Eustis, notary, * * * for the purpose of completing said partition and that all costs of this suit be borne by the mass. It is further ordered that the purchase price to be paid by Mrs. Julia Lindenschmidt be deposited by the said notary, less the pro rata expense and after expenses payable out of the share of said Charles F. Lurges, Interdict, in the registry of this court."

It may be here remarked that no undercurator appears to have been appointed to the Interdict. This judgment was followed by a proceeding before the notary concerning which he gives this certificate, to wit:

"I John G. Eustis, a notary public * * * do certify: That in pursuance of a judgment rendered in the above-entitled cause * * * I, said notary, on this 21st day of July, 1904, did proceed to pass a notarial act of sale by Charles F. Lurges, Interdict, of his one-fifth interest in and to a certain portion of ground in square No. 64 in the Seventh district of New Orleans to the said Mrs. Julia Lindenschmidt, for the

price of \$1,600 cash, which sum, * * * I have this day deposited with the register of said court, less the following expenses paid by me, notary:

- (1) One-fifth share of Charles F. Lurges, Interdict, for city and state taxes of 1903. . . \$ 48 97
- (2) J. G. Eustis, notary, for holding family meeting and money paid for certificates of said sale. 37 65
- (3) Bernard Tiche, attorney's fee. 50 00
- (4) L. P. Bryant, attorney's fee and one-fifth costs of court. 50 00

\$186 62

"Leaving a balance of \$1,364.41, which I, said notary, have this day deposited with the register of this court, whose receipt is annexed to said act of sale."

A motion to homologate the proceedings as recited by this certificate was filed, but continued indefinitely, and, thereafter, upon the application of the Lincoln Trust Company, and publication of the same, the \$1,364.41, which had been deposited in the registry of the court, was ordered to be paid over to that company "less the costs of court, publication, and \$50 attorney fee." Upon the foregoing facts the judge a quo reached the conclusion that the defendants in the suit now before the court have not a clear and unincumbered title to that portion of the property which is owned by the Interdict, and he accordingly gave judgment for the plaintiff as prayed for, and the defendants have appealed.

Opinion.

It is only in cases where the purpose is to effect a partition by the sale of the whole property that the interest of an Interdict can be alienated by private sale (Act No. 25, p. 47, of 1878), otherwise it must be sold at public auction (Civ. Code, arts. 341, 415; Parker v. Ricks, 114 La. 949, 38 South. 687). The private sale to Mrs. Lindenschmidt of the interest of her brother and co-owner, Charles F. Lurges, in the property in question was therefore null, and conveyed no title. Moreover, the agent by whom the Interdict appears to have been represented was without authority in the premises, since he was authorized to represent the guardian in and for the purposes of a "partition" proceeding, whereas the proceeding in which the sale is said to have been made was not a partition proceeding, but was a proceeding to dévest the Interdict alone, of his interest in the property held in indivision, and to transfer it by illegal methods for an inadequate price, and mainly at his expense, to one of the other litigants and co-owners.

The defendants, having no title to the interest in question, can convey none to the plaintiff; his agreement with reference to the purchase of the property is at an end, and he is entitled to the return of the deposit.

The judgment appealed from is accordingly affirmed.

(116 La.)

No. 15,825.

SEVEY v. CHAPPUIS CO., Limited.(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied May 7, 1906.)**EXECUTION—RELEASE OF SEIZURE—EFFECT ON
THIRD OPPOSITIONS.**

The seizing creditor has the right to cause the seizure to be released and the writ returned at any time; and where he does so, all third oppositions claiming the proceeds of the expected sale fall with the writ.

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Phillip Sidney Pugh, Judge.

Action by William S. E. Sevey against the Chappuis Company, Limited. The Dodge Manufacturing Company filed intervention. From a judgment sustaining the intervention, plaintiff appeals. Reversed in part.

Dinkelspiel, Hart & Davey, for appellant. Chappuis & Holt, for appellee. Hampden Story and Andrew Jackson Cammack, for intervenor and third opponents appellee.

PROVOSTY, J. The main suit is an executory process, and the appeal is from a judgment sustaining the intervention and third opposition of the Dodge Manufacturing Company. The latter company, on the day of the sale, filed its petition of intervention and third opposition asking for a personal judgment against the defendant, and asking that the machinery seized be appraised and sold separately from the land, and that for the amount of its judgment against the plaintiff it be decreed to have a vendor's privilege on the machinery, and entitled to be paid in preference out of the proceeds of the sale; and that the sheriff be ordered to hold said proceeds accordingly.

There not being time to make the separate appraisement, the plaintiff directed the machinery to be omitted from the sale, and this was done.

The date of the sale was December 19, 1903. On the same day the sheriff returned his writ. On the 26th of the same month the plaintiff wrote to the sheriff, as follows:

"Dear Sir: In the matter of Sevey v. The Chappuis Co. Ltd. No. 1819, so far as the articles upon which the Dodge Mfg. Co. claims a vendor's lien and privilege, we beg to inform you that all further expenses connected with that matter must be borne by that company. So far as our client is concerned, we desire no keeper kept on the premises and nothing further done unless we specially instruct you so to do."

On the 2d of January the plaintiff filed the following answer to the petition of intervention and third opposition:

"And now into this honorable court, through undersigned counsel, comes the plaintiff, and to the intervention and third opposition of the Dodge Manufacturing Company, denies all and singular the allegations therein contained.

"Further, answering, this respondent denies that the said Dodge Manufacturing Company

ever had any vendor's lien and privilege on the property described in said intervention and third opposition.

"Further, answering, this respondent says that if any vendor's privilege ever did exist, which is denied, that same is subordinated to the claim of this plaintiff, because the property described became immovable by destination, and therefore covered by mortgages securing the notes herein sued on by him.

"Further, answering, this respondent says that if the said company ever had any vendor's lien and privilege as alleged, and that same was given to secure the note described in the document dated November 19, 1902, that then, as all of said notes have been paid by the defendant herein, the maker thereof, and the debtor to said Company said vendor's lien and privilege ceased to exist and the claim of the said company against the defendant, if any, is but an ordinary claim, secured by no privilege whatever. Wherefore," etc.

On the 19th of January the plaintiff wrote to the sheriff the following letter:

"Dear Sir: Answering yours of January 16th, we beg to state that if you have returned the writ in the matter of Sevey v. the Chappuis Co. Ltd. of course, that necessarily releases the seizure. As before stated, we have no desire for any further proceedings to be had under the writ."

When the case was called for trial, the counsel for plaintiff suggested verbally to the court that the property had been released from seizure, and that there was nothing upon which the third opposition could operate, and that therefore the proceeding should be dismissed; and the court made an order accordingly. On appeal, this court set aside the order, on the ground that the proceedings had been irregular,—the cause not having been tried on any plea of record. When the case returned to the lower court the plaintiff filed a formal plea to the same above effect. The sheriff and the defendant each filed a general denial.

On the trial, plaintiff and the sheriff offered to prove that there had been no property under seizure since the 19th of December, 1903, but the evidence was, on objection, ruled out. The sheriff's bill of costs, however, shows that the keeper was discharged on that date.

The above letters of the plaintiff to the sheriff are not open to any other construction than that the action of the sheriff in releasing the seizure and returning the writ was approved by the plaintiff.

This release of the property carried with it the third opposition. A plaintiff controls his writ and has the right to recall same at any time (*Stackhouse v. Zuntz*, 41 La. Ann. 419, 6 South. 666); and necessarily all third oppositions claiming the proceeds of the expected sale follow the writ into its untimely grave.

Moreover, seizure, *vel non*, is a matter of fact, and not a matter of law; and unless the res is under seizure the court cannot proceed to rank the privilege on it. Non constat that by the time the judgment came to be executed the res might not be out of the jurisdiction of the court, so that the court

would have been wasting its time ranking privileges upon empty air.

In so far, however, as the personal judgment against the defendant is concerned, it was rendered upon issue joined and after trial, and is therefore valid. Besides, the defendant does not appeal.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside in so far as it affects the sheriff or the plaintiff, or fixes the rank of privileges, and that it be in other respects affirmed. Intervenor and third opponent to pay costs of appeal.

(116 La.)

No. 15,982.

STATE v. LEWIS et al.

(Supreme Court of Louisiana. March 12, 1906.
On Rehearing, April 9, 1906.)

1. INTOXICATING LIQUORS—SALE WITHOUT LICENSE—EVIDENCE.

A prosecution under section 910 of the Revised Statutes of 1870, for retailing intoxicating liquors without previously obtaining a license from the police jury, town, or city authorities, fails, where the accused produces a license in due form either from the parish or municipality.

2. SAME—IMPEACHMENT OF LICENSE.

A license in proper form to sell intoxicating liquors issued by a municipality, with general powers to regulate and license such business, cannot be collaterally impeached in a criminal prosecution by evidence tending to show that the powers of the corporation had been divested by a parochial election in favor of prohibition.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 84.]

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Morehouse; Luther Egbert Hall, Judge.

J. E. Lewis and H. J. Brodnax were convicted of violation of the liquor law, and Lewis appeals. Reversed and remanded.

Hudson, Potts & Bernstein and Levy & Todd, for appellant. Walter Guion, Atty. Gen., and James Pemberton Madison, Dist. Atty. (Lewis Guion, of counsel), for the State.

LAND, J. Defendants were indicted on a charge of retailing spirituous and intoxicating liquors in the parish of Morehouse, "without previously obtaining a license therefrom from the police jury of said parish or from the authorities of any town or city."

The accused, J. E. Lewis, was tried by the court, found guilty, and sentenced to pay a fine of \$301, and in default of payment to be confined in the parish jail for 60 days.

The accused has appealed, and relies for reversal on a number of bills of exception.

On his arraignment, the accused pleaded not guilty, and trial was had on an agreed statement of facts subject to legal objections as to admissibility.

It is admitted that on the 3d day of January, 1906, the municipal authorities of

the town of Bastrop, in the parish of Morehouse, issued to the defendant a license for the retailing of spirituous and intoxicating liquors within the corporate limits of said town, for which the defendant paid said municipality the sum of \$1,000.

It is further admitted that, acting under said license, the defendant opened a saloon and sold liquors as charged in the indictment; that he had no license from the parish of Morehouse; and that the police jury thereof had not fixed the amount of such a license for the parish or any municipality therein, for the year 1906.

It appears from the statement of facts that on November 8, 1904, a majority of the electors of the parish of Morehouse voted against the issuance of licenses for the sale of intoxicating liquors by retail within the limits of said parish. It further appears that on December 30, 1905, a special election was held in the town of Bastrop, the parish seat of Morehouse parish, by order of the municipal authorities thereof, to take the sense of the legal voters of said town on the question of licensing the sale of intoxicating liquors by retail; that a majority of the legal voters participating in said election voted in favor of the issuance of licenses for such purpose; that the result of said election was duly promulgated by the municipal authorities, and the officers of the town authorized and instructed to issue licenses accordingly.

Section 910 of the Revised Statutes of 1870 reads in part as follows:

"Whoever shall keep a grog or tippling shop or retail spirituous or intoxicating liquors, without previously obtaining a license from the police jury, town or city authorities, on conviction, shall be fined not less than one hundred nor more than five hundred dollars and in default of payment shall be imprisoned not less than thirty days or more than four months."

The indictment follows the words of the statute, which are in the disjunctive, and therefore do not require the payment in advance of all the license taxes that may be exigible on the business of retailing spirituous liquors.

It suffices that the seller has previously obtained a license either from the police jury or the municipal authorities.

It is not a criminal offense to sell intoxicating liquors without first obtaining a state license.

The state relies on civil remedies to enforce the payment of license taxes, and parishes and municipalities have the same remedies, and besides may pass ordinances, within the limit of their delegated powers, requiring the payment of license taxes in advance under penalty of fine or imprisonment.

We have no jurisdiction to erase from the text the word "or" and substitute the word "and" because we have no powers of legislation.

It may be added that, in the instant case, it was impossible for the accused to pay a parish license tax that had not been levied either in the parish or within the limits of the town of Bastrop.

The next contention of the state is that the action of the municipal authorities of the town of Bastrop in licensing the sale of intoxicating liquors was null and void, as being in contravention of the will of the voters of the parish as expressed at the election held in November, 1904.

Defendant, however, objected to any collateral attack on the license issued to him and to the admissibility of evidence tending to show that the action of the municipal authorities was ultra vires. His objection was overruled, and he duly excepted to the ruling of the court.

The town of Bastrop has authority under its charter to license the sale of intoxicating liquors. The state offered to prove that this authority had been divested as the result of a parochial election held in November, 1904.

Neither the town nor the parish are parties to this proceeding, and neither would be bound by any judgment herein rendered.

The town had at least apparent authority to issue the license, and we do not think that the license held by the defendant can be collaterally impeached in a criminal proceeding.

This seems to be the general rule of law in other jurisdictions.

"The production of a license in proper form is a complete defense and precludes all further inquiry. As it is not collaterally impeachable, the finding of the licensing authorities is conclusive on the state." Black on Intoxicating Liquors, §§ 508, 178, 187.

The issues attempted to be raised collaterally in this criminal prosecution are of the gravest character. They affect the powers of every parish and municipality in this state relative to the licensing of the sale of intoxicating liquors.

We have before us neither proper parties nor pleadings to enable us to determine this question.

The defendant is prosecuted for selling intoxicating liquors without a license, and he produces a license in due form issued apparently by competent municipal authority.

If the power of the town of Bastrop to issue such licenses has been divested by a parochial election, the issue should be raised by direct action as in the case of *Police Jury v. Mansura*, 107 La. 201, 31 South. 650.

If the authorities of the town of Bastrop, acting in good faith, have transcended their powers, we see no good reason in law or equity why the defendant should be punished as a criminal for the mistake of the municipal corporation.

It is therefore ordered that the judgment appealed from be reversed, and that this cause be remanded for a new trial, in accordance with the views hereinbefore expressed.

On Rehearing to Amend the Decree.

The decree heretofore handed down is amended so as to read as follows, viz.:

It is therefore ordered that the judgment appealed from be annulled, avoided, and reversed, and that this cause be remanded to the district court, with instructions that the defendant, J. E. Lewis, be discharged from further prosecution.

PARRY MFG. CO. v. I. LOWENBURG & CO.
(Supreme Court of Mississippi. June 18, 1906.)

PRINCIPAL AND AGENT—UNAUTHORIZED SALE BY AGENT—RIGHTS OF PURCHASER.

Plaintiff turned over to H., a merchant, some vehicles under an unrecorded contract reserving title, but giving H. power to dispose of them; he to have a commission therefor, and to report from time to time. H., being indebted to defendant and others, turned them over to defendant, who had no notice of plaintiff's reservation of title, to sell them and distribute the proceeds pro rata to his debts to defendant and his other creditors. *Held*, that defendant acquired title as against plaintiff.

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Replevin by the Parry Manufacturing Company against I. Lowenburg & Co. Judgment for defendants. Plaintiff appeals. Affirmed.

A. H. Geisenberger, for appellant. Ratcliff & Clinton, for appellees.

CALHOON, J. The appellant company turned over to W. H. Harvey, of St. Joseph, La., a lot of vehicles under a contract reserving title, but giving him the power to dispose of them as their agent, allowing him commissions as such and requiring reports from him; he being a general merchant. He became indebted to appellees and others, and shipped to appellees, I. Lowenburg & Co., which firm was one of these creditors, to Natchez, Miss., a lot of these vehicles to sell and to distribute the proceeds pro rata to his debts to that firm and his other creditors. The contract between appellant and Harvey reserving title was never recorded, and none of the appellees had any notice of it, or that any one except Harvey had any claim on the vehicles. The case arises out of an action of replevin by the company.

We are unwilling to extend the rights of the owner who turns over property, with reservation of title, but giving the *ius disponendi*, beyond the present limits allowed by the authorities. This court has held in *Columbus Buggy Co. v. Turley*, 73 Miss., on page 537, 19 South., on page 233, 32 L. R. A. 260, 55 Am. St. Rep. 550, under like circumstances, that a creditor, taking from the holder one of the articles in payment of a debt to him, got a good title. In the case before us, I. Lowenburg & Co. were not mere naked trustees, but interested, in that they were creditors and were to get their share of the proceeds in payment pro tanto of the debt due them. So we think the title passed from Harvey to them in the case now in hand.

Affirmed.

KITTERINGHAM v. McCLUTCHIE.

(Supreme Court of Mississippi. June 18, 1906.)

ASSAULT AND BATTERY—PUNITIVE DAMAGES.

Evidence, in an action by a boy 14 years old against a man 45 years of age for assault and battery, that as plaintiff was passing defendant's premises a dog, which defendant had

bought of plaintiff's father, jumped on the fence, and plaintiff patted him on the head, when defendant accused him of trying to steal the dog, whereupon plaintiff called him a liar, and defendant broke a stick from a tree, seized plaintiff by the throat, threw him to the ground, and struck him five or six times with the switch, using abusive language, and that plaintiff's throat, back, and head were bruised and painful for several days, is sufficient to go to the jury on the question of punitive damages.

Appeal from Circuit Court, Adams County; M. H. Wilkinson, Judge.

Action by George Kitteringham, by next friend, against J. D. McClutchie. From the judgment, plaintiff appeals. Reversed and remanded.

Engle & Reily, for appellant. A. H. Geisenberger, for appellee.

CALHOON, J. Appellant, a boy 14 years old at the date of the trial, sues by his next friend, charging assault and battery with malicious cursing and abuse, and claiming actual and punitive damages. The jury were peremptorily charged that they should not find punitive damages. The verdict was for \$45.

It appears by many witnesses on behalf of plaintiff that the appellee had bought a dog from the boy's father, and that the boy was passing appellee's premises, when the dog jumped on the fence, and the boy touched or patted him on the head, when appellee, who was a man 45 years old, accused him of trying to steal the animal, to which charge the answer was, "You are a liar," whereupon the appellee broke a stick, or switch, from a china tree, came out of the yard into the street, seized the boy by the throat, threw him on the ground, struck him five or six licks, until the switch or stick broke, grabbed the boy's cap, went back into his yard, got a cowhide whip, and came out with it, but did not use it. Abusive language is shown, and there is evidence that the appellant's throat was so hurt that it was bruised and painful for several days, as was the back and head. This evidence being adduced for plaintiff below, the matter of punitive damages should have been left to the jury.

Reversed and remanded.

WEATHERSBY v. PEARL RIVER LUMBER CO.

(Supreme Court of Mississippi. June 18, 1906.)

JUDGMENT—RES JUDICATA.

The decree, on demurrer to a bill to remove a cloud from title, that it "is ordered by consent that the demurrer be sustained and the bill dismissed," complainant to have 60 days to file an amended bill if he desires, the demurrer being on the grounds that the bill had no equity on its face, failure to deraign title, no title shown in complainant, bill shows title in defendant, and bill fails to show any redemption by complainant from tax sale, is a final ad-

judication of what was pleaded, or might properly have been pleaded, and so is a bar to a second suit.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1047, 1048.]

Appeal from Chancery Court, Lincoln County; Robt. B. Mayes, Chancellor.

Suit by A. E. Weathersby against the Pearl River Lumber Company. A plea of res adjudicata was sustained, and complainant appeals. Affirmed.

P. Z. Jones, for appellant. Brennan & Hannah, for appellee.

CALHOON, J. This suit was first brought in the year 1900, when the bill was demurred to because (1) there was no equity on its face; (2) failure to deraign title; (3) no title shown in complainant; (4) bill shows title in defendant; (5) bill fails to show any redemption by complainant of the land sold for taxes. This demurrer was sustained on September 20, 1900, in the following words: "This cause having been set down for hearing on bill and demurrer, it is ordered by consent that the demurrer be sustained and the bill dismissed, and that complainant have 60 days in which to file amended bill, if he so desires." There the litigation ended; no amended bill ever having been filed, or sought to be filed. That decree was a final adjudication of what was pleaded, or might properly have been pleaded, in the bill in that cause. 24 Ency. Law & Procedure, 714; Phillips v. Wormley, 58 Miss. 398; Straw v. I. C. R. Co., 73 Miss. 446, 18 South. 847. The present brand new bill, filed nearly five years afterwards, cannot be supported on the ground that the demurrer to the former one might possibly have been sustained only because it did not deraign title or show complainant's privity with the title. The decree does not say so, and no amendment was offered.

Affirmed.

STEVENS v. WILBOURN.

(Supreme Court of Mississippi. June 11, 1906.)

1. HOMESTEAD—RIGHT OF WIDOW.

So long as exempt property of which a husband dies seised is occupied or used by his widow, his children cannot have a partition thereof or an accounting by her for the use.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 270.]

2. SAME—MEASUREMENT.

In towns and villages the homestead is measured by its value, not exceeding \$2,000, and is unaffected by territorial extent.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, § 94.]

Appeal from Chancery Court, Yalobusha County; J. C. Wilson, Chancellor.

Suit by Mrs. Claude Stevens against Mrs. E. J. Wilbourn. Decree for defendant. Complainant appeals. Affirmed and remanded.

J. M. Wilbourn died, leaving surviving him, as his heirs at law, his widow, Mrs. E. J.

Wilbourn, and two children, Mrs. Claude Stevens and W. E. Wilbourn, both of whom were children of a former marriage, and who were adults at the time of the death of their father. At the time of his death he owned a homestead within the corporate limits of the village of Tillatoba, consisting of 182 acres of land, but worth less than \$2,000. The other property which he left was without the corporate limits of said village, and was not adjacent to the homestead. His estate, both real and personal, was duly administered and divided among his said heirs; his widow taking a life estate in the homestead. The appellant, Mrs. Stevens, afterwards filed a bill in chancery, claiming that she was tenant in common in the homestead with the widow and her brother, and alleging that the widow had leased the homestead to tenants, and praying that a receiver be appointed to take charge of the premises, and that an accounting of all receipts and disbursements be made, and that she be awarded her share of the rents and profits of the homestead. Mrs. Wilbourn's answer admitted that she had leased some parts of the homestead, but had reserved a room in the house for herself. She made her answer a cross-bill, and prayed an injunction against Mrs. Stevens and W. E. Wilbourn, enjoying them from the use and occupation of any part of the homestead, and from any interference with the tenants working thereon. The injunction was granted. A motion to dissolve the injunction was made, which the chancellor overruled, and this appeal is prosecuted. On appeal it was contended that under the law a homestead embraced not exceeding 160 acres of land.

See sections 1551, 1970, 1971, of the Annotated Code of Mississippi of 1892.

I. T. Blount, for appellant. Stone & Stone, for appellee.

CALHOON, J. We adhere to the decision in Martin v. Martin, 84 Miss. 533, 36 South. 523, and it carries this case. The chancellor was right in overruling the motion of appellant to dissolve the injunction granted on the cross-bill of appellee on the pleadings and agreed evidence. So much we say on the point of the right of the widow to the undisturbed possession of the homestead.

On the other point made we say that in towns and villages the homestead is measured by its value, not exceeding, as in this case, \$2,000, and is unaffected by territorial extent.

Affirmed and remanded.

MISSISSIPPI FIRE ASS'N v. STEIN.

(Supreme Court of Mississippi. June 11, 1906.)

1. INSURANCE—ACTION ON POLICY—DEFENSES.

The fact that one was a stockholder in a fire insurance company had no bearing on his right to recover on a policy.

2. APPEAL—REVERSAL—FORM OF REMEDY.

Under the express provisions of Const. 1890, § 147, no decree in chancery can be re-

versed for want of jurisdiction for error as to whether the cause was of equity or common-law jurisdiction.

3. REFORMATION OF INSTRUMENTS—INSURANCE POLICY—VACANCY PERMIT.

An insurance agent had authority to grant vacancy permits, and it was customary for him, in response to verbal requests of a certain policy holder, to issue such permits and attach them to his policies, to which the agent had access. When about to leave the state the policy holder requested a permit, which was agreed to by the agent, but through inattention it was not issued. *Held*, that after a loss a reformation of the policy by inserting a permit was proper.

Appeal from Chancery Court, Leflore County; Percy Bell, Chancellor.

Bill in chancery by Samuel J. Stein against the Mississippi Fire Association, seeking to reform an insurance policy. The chancellor allowed the relief sought, and the insurance company appeals. Affirmed.

Appellee was a stockholder in the Mississippi Fire Association. He insured a dwelling house, which he rented, in said company. At various times he obtained vacancy permits from the local agent of appellant insurance company. He had obtained a vacancy permit from April 20 to May 20, 1904, and before leaving on a vacation had given verbal instructions to the agent of the appellant insurance company for an extension of 30 days on said vacancy permit, which would extend the time to June 20th. After arriving at his destination he wrote his agent, and also the agent of the insurance company, to see that his verbal instructions were carried out and the vacancy permit granted. It was the custom of the agent of the appellant to obey verbal instructions as to granting vacancy permits, and to make no charge for same, as he had instructions from the appellant to grant such permits upon application. On the night of May 20th the dwelling house was burned. The appellant refused to pay the loss, and this suit was filed.

McClurg, Gardner & Whittington, for appellant. Gwin & Mouser, for appellee.

CALHOON, J. It can make no difference in his right to recover for a fire loss that Mr. Stein was a stockholder in the company which insured his house. Even if it were correct that the questions here were not in the jurisdiction of chancery, as previously understood, it is clear that this cannot be availed of since the adoption of section 147 of the Constitution of 1890; the chancellor having taken jurisdiction and decided the case.

The bill in this case is to reform an insurance policy by inserting a vacancy permit from May 20 to June 20, 1904—30 days; the loss having occurred on the night of May 20, 1904. There was a proper permit from April 20 to May 20, 1904, and there is a controversy as to whether the fire did not in fact occur during the life of that permit, which we do

not decide. The policy had a clause providing that "it shall be void if it [the building] be or become vacant or unoccupied and so remain for 10 days." It was issued on May 18, 1903, for three years. There had been four valid vacancy permits on it for 30 days each. The first was from the date of the policy, it having been insured while vacant; the second from June 18, 1903; the third from November 5, 1903; and the fourth from April 20, 1904. The insurance was taken with S. S. Steele & Co., agents of appellant. It was the custom with this firm of insurance agents, in reference to this and divers other policies of insurance appellee had on divers other structures, to obey his verbal request and issue vacancy permits, and take them, without submitting them to appellee, to the place where appellee kept his policies, and to which these insurance agents had access, and to attach them to the policies without submitting them to appellee. This firm of insurance agents had authority from the company to give vacancy permits and to waive any charges for such permits. No charge was ever made against the appellee for such permits. On the contrary, it was customary for this firm of insurance agents, and other agents of the appellant, to make no charge for vacancy permits, unless the insurance company specially directed them to do so on receipt of daily reports showing the issuance of them. The particular building in question was sometimes vacant and sometimes occupied, and the custom being as we have stated, and while the written permit for 30 days from April 20 to May 20, 1904, was in force, this agency was requested by appellee, who was about to leave the state for a while for his health, to issue another vacancy permit at the expiration of that one, which was agreed to by one of the members of that agency. This, through inattention or oversight, was not done. Under this state of facts we hold that the court below properly granted the prayer of the bill.

Divers other contentions are argued with great force on both sides; but, inasmuch as our ruling on this question is decisive of the whole case, we do not enter on their discussion.

Affirmed.

O'NEAL v. REFUGE COTTON OIL CO.*
(Supreme Court of Mississippi. May 21, 1906.)
MASTER AND SERVANT—INJURIES TO SERVANT
—QUESTION FOR JURY—ASSUMPTION OF RISK.

In an action for injuries to a servant, *held* a question for the jury whether he had assumed the risk of a defective appliance.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1068-1072.]

Appeal from Circuit Court, Warren County; O. W. Catchings, Judge.

"To be officially reported."

Action by Mary E. O'Neal against the Ref-

*Rehearing denied June 4, 1906.

uge Cotton Oil Company. From a judgment for defendant, plaintiff appeals. Reversed.

The deceased was in the employ of the appellee as stationary engineer. A part of his duty consisted in pulling cars into the mill by the use of a capstan and a rope, to which was attached a large hook. This hook was attached to the trucks of the car, and the rope wound around the capstan, and thus pulled the car into the mill. While thus engaged in the performance of this portion of his duty, the hook, which weighed from 15 to 20 pounds, pulled loose from the car to which it was attached, and struck the deceased, who was standing at his post of duty near the capstan around which the rope was being wound, and so injured him that he died as a result of the injury. The declaration alleges that the hook and other appliances used to draw the cars into the mill were of a defective and dangerous character, and that the unsuitable and unsafe condition was known to the appellee, and that deceased had no knowledge of the unsafe, defective, and dangerous character of said appliances, nor had he ever been advised or warned of their unsafe condition. The court gave a peremptory instruction to find for the appellee, and from this action of the court this appeal is prosecuted.

Theo McKnight, for appellant. Smith, Hlrsh & Landau, for appellee.

WHITFIELD, C. J. The testimony shows beyond all controversy that the proximate cause of the death of Mr. O'Neal was the utterly defective and unfit hook used by this corporation in pulling cars in by the use of the capstan, as explained very fully in the record. The witness, Joe Callahan, the chief engineer, shows that he improvised this hook; that it had been in use about 1½ years before O'Neal was killed, and that the corporation had continued to use the same hook after his killing; that he (the chief engineer) had never cautioned anybody about handling that hook after O'Neal was killed; that he himself never knew that the hook was dangerous, never had any thought that it was dangerous, and never told Mr. O'Neal that it was dangerous. The witness Donovan shows, clearly and without any contradiction, that this improvised hook was utterly defective, and was very dangerous, and specifies the particulars wherein it was defective; the chief one being that the point of the hook was not long enough. He also states that it was not the "standard hook" in use by railroads for this business, that there was a standard hook for this particular purpose in use by railroads, that such standard hook had so been in use a number of years, and that the railroad should have known it, since the law and rules of the Master Car Builders' Association required the use of a standard hook. He goes into a detailed comparison of the hook used, which

killed O'Neal, and the standard hook, which should have been used, and his testimony condemns the hook used as utterly unfit and extremely dangerous, and further establishes the fact that, if the railroad company did not know of the standard hook, it was guilty of gross negligence in not knowing. So much for the fact that the hook was an utterly defective one, wholly unfit for the purpose for which it was used, and must have been so known to the defendant corporation, which nevertheless continued to use it after it had killed O'Neal, just as it had been used before, and that, too, without giving any warning of its dangerous character to employes.

O'Neal is shown to have been a sober, industrious, hard-working man, and, as shown by Callahan, when recalled, not "to have served his time as an engineer, but to have had only such experience as he picked up as he went along with his work." It is perfectly obvious that the only defense that could be made was to show, if it could be shown, and to show clearly, that O'Neal had such knowledge of the defective character of the hook and the danger from its use as would bar a recovery. On this point, Callahan, the defendant's chief engineer, testifies explicitly that he himself did not know the hook was dangerous, never thought of it as dangerous in his life, and that he had never told O'Neal or any one that it was dangerous. It is true that on his cross-examination, when first introduced, an effort was made to show that, since O'Neal was "a stationary engineer" and was "familiar with machinery," consequently he had "capacity to see how the hook worked," and "in the course of his duty he had occasion to observe how the hook worked," and that he must have observed how the hook worked, etc. All these questions are merely general questions, and received merely general and inconclusive answers. Bolled down, all that was extracted from him on cross-examination amounted to nothing more, in any fair view of it, than that since O'Neal was a stationary engineer, and was familiar with machinery, and in the course of his discharge of his duty would see the cars moved by, and would sometimes have himself moved them, necessarily he must have been familiar with the defect in the hook and the danger from its use. But on redirect examination he was asked this question: "Q. What did you mean when you say that Mr. O'Neal had capacity to see how that hook worked? A. I meant that he was familiar with machinery and all about it. What I mean is, the same difference between you and I, for instance, in regard to that machinery and plant and engine, etc." A purely perfunctory answer. He was again asked: "Q. What do you mean by knowing how that thing worked? Do you mean that he knew how to hook the hook on and turn on the capstan? A. Yes, sir. Q. Do you

mean anything else than that? A. No, sir; just a good, bright man. Q. You did not mean to say, by that expression, that he knew whether it was dangerous or not by looking at it, did you? A. No, I did not mean that he knew it was dangerous. I never knew it." It is perfectly obvious that the result of this witness' testimony is the statement that he himself did not know it was dangerous, never told O'Neal that it was dangerous, and that O'Neal did not know it was dangerous so far as the witness knew.

But, again, Callahan says, when recalled, that he never showed O'Neal the hook at all, and did not think of there being any danger from it. He says that he "took him around and showed him where to look out, but never showed him that hook." Indeed, Callahan shows that he worked in the daytime, and O'Neal at night, and he gives that as a reason why he did not see whether O'Neal himself put the hook on the car and moved cars with the hook. But, again—a most vital thing to notice—what precisely was O'Neal's duty? What precisely did he have to do? It is very clearly shown by Callahan that it was O'Neal's duty to stand by the capstan near the throttle valve and operate the capstan. He says: "A man took the line out and hooked it in the car." Again he says that "the labor gang, the men who weigh in and out, etc.," moved the cars. And when he was recalled he was asked: "Did Mr. O'Neal have anything to do with roping cars there—using hooks to rope cars?" And he answered expressly, "No, sir," and repeated the same answer to the question when repeated again. It is obvious enough that O'Neal could not operate the capstan, controlling the steam and the throttle valve, and do the other work of fastening the hook into the truck of the car to be moved, without loss of time. We think it is very clear from the testimony that his business was by the capstan, and that his duty was operating the capstan, and that putting the hook into the cars to be moved was a thing obviously to be done by the labor gang, as stated by Callahan. Surely, on this state of the testimony, it should have been left to the jury to say whether O'Neal had such knowledge of the defective character of this hook, and of the danger from its use, as would bar his recovery.

Reversed and remanded.

SMITH et al. v. HOPE et ux.

(Supreme Court of Florida, Division A. May 1, 1906.)

1. SPECIFIC PERFORMANCE—PLEADING—PLEA.

To a bill for specific performance of a contract, framed upon the theory that a written instrument is a bill of sale, a plea to the effect that said instrument is a mortgage is properly sustained.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 874, 880.]

2. EVIDENCE—PAROL EVIDENCE.

The rule excluding parol testimony does not apply to the introduction of evidence that an instrument on its face a bill of sale is in fact a mortgage.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 44.]

3. APPEAL—REVIEW—LEADING QUESTIONS.

Permitting leading questions is not reviewable.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 8855; vol. 50, Cent. Dig. Witnesses, § 795.]

(Syllabus by the Court.)

Appeal from Circuit Court, Hernando County; William S. Bullock, Judge.

Action by Jordan W. Hope and Grace M. Hope against William J. Smith and Larkin J. Edwards. Judgment for plaintiffs. Defendants appeal. Affirmed.

J. C. Davant, for appellants. G. C. Martin, for appellees.

COCKRELL, J. A statement of the bill and the instrument sued on will be found in the opinion rendered at the former hearing of this case. 47 Fla. 295, 35 South. 865.

The writer concurred with the majority of the court qualified to sit, in holding that the instrument sued on, upon its face and read in the light of the allegations of the bill, was not a mortgage, but that further facts were necessary to constitute it such, which facts must be set up by plea or answer, and we held the circuit court in error for ruling otherwise. Other grounds of the demurrer were reserved as not being argued and as not having been properly considered below. After the cause was remanded the demurrer was not again presented for consideration, nor was there an amendment of the bill either in allegation or prayer, but a plea was interposed by Grace M. Hope setting forth that the late J. W. Hope, her husband, was indebted during his lifetime to W. J. Smith & Co., in the sum of \$200, and that to secure this indebtedness she signed the instrument sued upon, which was intended to be and is in fact a mortgage. This plea was set down for argument, was sustained, and, issue being joined and testimony taken, the instrument was held to be a mortgage and the bill dismissed.

The final decree in the case being found correct, there is no occasion to pass upon the demurrer, nor to consider whether it is properly before us for consideration. The complainants persist in planting their relief, in direct opposition to the mortgage theory, and the court was not called upon to make out a case for them.

The plea may not be a model for those seeking precedents for a form, but it sufficiently sets forth the main defense that is fatal to the bill as framed, that is, the indebtedness and the intent of the parties in giving an instrument as security therefor, and the evidence, while contradictory in part, on the whole sustains the plea.

The rule excluding parol evidence to con-

tradict a written instrument does not apply, nor can we review the discretion of the court in permitting leading questions, nor were any of the questions and answers so irrelevant as to call for reversal. It would serve no purpose to enter into detailed discussion of the numerous assignments upon the admission of testimony. The above general rules cover them all.

The decree is affirmed.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR and PARKHILL, JJ., concur in the opinion.

HOCKER, J., disqualified.

SEABOARD AIR LINE RY. CO. v. BARWICK.

(Supreme Court of Florida, Division B. March 27, 1906. Rehearing Denied June 1, 1906.)

RAILROAD—ACCIDENT ON TRACK—CONTRIBUTORY NEGLIGENCE.

Where a party on a dark night, at a point where there is no public crossing of a railroad track, steps upon the track within three feet of an approaching engine and train of cars that she knew to be present and approaching, and is struck and injured by such engine, and it is shown by such railroad company by uncontradicted proof that its servants and agents in charge of such engine and cars did use all ordinary and reasonable care and diligence under the circumstances and conditions by which they were then and there surrounded, and were guilty of no negligence that contributed in any way to the bringing about of the injury, and further showed that the injury resulted solely from the party's own negligence, such party cannot in law recover for such injury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1305.]

(Syllabus by the Court.)

Error to Circuit Court, Duval County; R. M. Call, Judge.

Action by Julia A. Barwick against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. P. Raney and J. C. Cooper, for plaintiff in error. A. W. Cockrell & Son, for defendant in error.

TAYLOR, J. The defendant in error, Julia A. Barwick, sued the plaintiff in error, the Seaboard Air Line Railway Company, a corporation, in the circuit court for Duval county for damages for personal injuries caused by the alleged negligence of the defendant in the operation of one of its trains, whereby the plaintiff was thrown from the track of said railway by one of its engines, and received personal injury. The trial of the case resulted in a verdict and judgment for the plaintiff in the sum of \$1,000, for relief from which the defendant below comes here by writ of error.

There are 20 assignments of error predicated upon rulings of the court on the pleadings, on admissions of evidence, on charges given, and on refusals to give charges requested, and upon the denial of the defendant's motion for a new trial, and upon the denial of a motion by defendant to compel plaintiff to amend her declaration so as to make it more definite and explicit; but, from the conclusion we have reached after careful study and consideration of the case, it becomes unnecessary to consider any of such assignments except the eighteenth, which is: "That the court erred in overruling the motion of defendant for a new trial in said cause."

This motion for new trial contained 24 grounds, but we shall consider but two of them, the first and second, as follows: (1) The verdict is contrary to the evidence. (2) The verdict is contrary to the law.

The overwhelming preponderance of the evidence in the cause establishes the following state of facts, which are practically uncontroverted. The plaintiff with her sister and niece between half-past 7 and 8 o'clock on a dark night in December, 1902, were proceeding on foot from the plaintiff's millinery store located on the east side of defendant's railway tracks in the town of Wildwood in Sumter county, to her dwelling house located on the west side of said railway tracks in said town of Wildwood. They were proceeding along a private footpath that crossed the railway tracks at the point where the accident occurred, which footpath, though habitually used for some time by the plaintiff and her family in going back and forth from her residence to her store, was not a public crossing of the railway, but was distant from the public crossing several hundred feet. The plaintiff's niece carried a lantern and walked in the lead, the plaintiff's sister walking next to her while the plaintiff came last. As they got to the defendant's railway tracks a train composed of an engine and caboose was coming in from the north moving towards the south immediately across their path. The plaintiff's niece and sister succeeded in safely crossing the track immediately in front of the approaching engine, but the plaintiff, who came last, stepped upon the track about three feet (in the language of the only witness who attempts to give the distance) ahead of the engine, was struck by the engine, thrown from the track, bruised and injured with some of her ribs fractured. The engineer driving the engine sat on the right hand side of his cab looking out ahead, but did not see the plaintiff until after she was struck, the boiler of the engine being between him and the plaintiff who approached the track from the opposite side to that on which he was sitting. She was seen by the fireman of the engine, who sat on the same side of the cab as the one from which she was approaching, at the instant that she

stepped upon the track in front of the engine. The fireman exclaimed "look out," whereupon the engineer instantly reversed his lever, put on the air brakes, and brought the train to a stand within a few feet, the rear end of the caboose stopping within 10 feet of the spot where the plaintiff was struck. The whistle of the engine was sounded at the end of the yard limits some distance from, but within hearing of, the place where the accident happened, the engine was provided with a headlight in good condition, and the engine bell was being sounded continuously.

The plaintiff's declaration does not allege any specific act or acts of negligence, but in the most general terms alleges that "the defendant, disregarding its duty, negligently and carelessly ran and operated a locomotive and cars on its line of railway, and in so negligently running and operating said locomotive and cars did then and there strike the plaintiff," etc. Neither was any act of negligence by the defendant proven or attempted to be proven by the plaintiff, but she simply showed at the trial that she had been injured by one of the defendant's locomotives, and there stopped, apparently relying upon the provisions of section 1 of chapter 4071, p. 113, Laws of 1891, imposing liability on railroad companies for any damage done to persons or property by the running of their locomotives or cars unless such companies shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, and making the presumption in all such cases against such companies. The defendant company in this case has met and, as we think, effectually overcome this presumption, and has shown by affirmative proof, that is not contradicted, that its agents and servants on this unfortunate occasion did use all ordinary and reasonable care and diligence under the circumstances and conditions by which they were there surrounded, and that the injury to the plaintiff resulted from no negligence or carelessness of theirs in the discharge of their duty towards the plaintiff and the public generally. Section 2 of said chapter 4071 provides further: "No person shall recover damages from a railway company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence." The proofs show, conclusively and without any material conflict, as we think, that the injury to the plaintiff on this occasion resulted solely and entirely from her own reckless, careless, and negligent act of attempting to cross the track immediately in front of a moving locomotive, that she knew to be present and approaching, and that too, on a dark night when her presence, position, and movements were difficult of discovery by the persons in charge of such locomotive. Under these circumstances she is by law not entitled to recover from the railroad company for the

injuries so received. Corollary to what has been said, the circuit court erred in the denial of the defendant's motion for a new trial, upon the grounds, if upon no other, that the verdict was contrary to law and to the evidence. The judgment of the circuit court in the case is, therefore, hereby reversed, at the cost of the defendant in error.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and WHITFIELD, J., concur in the opinion.

COCKRELL, J., disqualified.

On Rehearing.

TAYLOR, J. This cause comes again before the court upon an application for rehearing. Each member of the court, not disqualified, has carefully gone over and considered all the evidence presented in the record, and are unanimously of the opinion that the case made thereby does not in law justify a recovery. The only point upon which there was any conflict at all in the evidence was shown by the evidence to be wholly immaterial. Such conflict was as to whether the bell upon the engine was being sounded at the time of, and before, the accident. The plaintiff alone testified that it was not rung, but by the plaintiff's own testimony it was shown that even if the defendant railway was in fact guilty of negligence in not sounding its engine bell, such negligence on its part did not contribute in any way to the bringing about of the accident, since the plaintiff herself testified that she knew of the presence of the moving train, heard the rumbling thereof, and after she got upon the track saw the approaching headlight. The duty of a railroad company to ring its engine bell, and to sound its whistle is for the sole purpose of giving warning of the approach of trains; if a person about to cross the track has full knowledge of an approaching train otherwise than from hearing its bell or whistle, by actually seeing the moving train or from hearing the rumbling noise of its approach, then as to him the negligent failure to ring the bell or sound the whistle becomes immaterial, as it contributes in no way to any injury resulting to him from being struck by such train while he was attempting to cross the track immediately in front of it. The overwhelming preponderance of the evidence, however, went to show that the bell upon this train was being sounded for some time immediately before, and at the time of, the accident. There was no evidence of any negligence on the part of the defendant company that was the proximate cause of, or that contributed to the bringing about of, the injury to the plaintiff. On the other hand the uncontradicted evidence on behalf of the defendant showed affirmatively that it was not guilty of any negligence that contributed

to the production of the injury to the plaintiff, but the plaintiff's own testimony, and that of all the witnesses showed that the accident and injury to her resulted solely from her own recklessness and imprudence in attempting to cross a railroad track on a dark night immediately in front of an approaching train.

The application for rehearing is, therefore, hereby denied.

SHACKLEFORD, C. J., and HOCKER, WHITFIELD, and PARKHILL, JJ., concur.

COCKRELL, J., disqualified.

WADE v. ATLANTIC LUMBER CO.

(Supreme Court of Florida. April 6, 1906.
On Rehearing, June 1, 1906.)

1. STATUTES—ENACTMENT—ENROLLED BILL—VARIANCE.

When the journals of the Legislature speak as to the title of an act, and the enrolled bill contains a variance therefrom, the journals will control.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 386.]

2. SAME—TITLE OF ACT—SUFFICIENCY.

The title, "An act to incorporate the Atlantic, Suwannee River & Gulf Railroad Company" (Laws 1893, p. 223, c. 4267), is not sufficiently broad to apprise the Legislature and the people that a land grant to be selected by the company from the state at large will be included thereunder; and such grant, not being within the subject expressed in the title, is void.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 124, 142.]

3. SAME.

The mere fact that legislative grants have been at various times included in acts with titles too restrictive is not sufficient to force the courts to disregard a plain mandate of the Constitution directed against surreptitious legislation.

On Rehearing.

4. STIPULATIONS—SUBJECT-MATTER — DETERMINATION OF CONSTITUTIONALITY OF STATUTE.

Concession of counsel as to irregularity in the passage of a law will not influence the court in determining the constitutionality of an act of the Legislature.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Stipulations, § 2.]

5. EVIDENCE—PAROL EVIDENCE—CONTRADICTING JOURNALS OF LEGISLATURE.

Parol evidence is not admissible against the affirmative showing of the journals of the Legislature.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1699.]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Taylor County; Bascom H. Palmer, Judge.

Bill by the Atlantic Lumber Company against Neill G. Wade. Decree for plaintiff, and defendant appeals. Reversed, and bill dismissed.

Wm. Wade Hampton, R. W. Williams, W. S. Jennings, and Bryan & Bryan, for appellant. Maxwell & Reeves and Jno. T. Walker, for appellee.

COCKRELL, J. The Atlantic Lumber Company, claiming as assignee of the Atlantic, Suwannee River & Gulf Railway Company, filed its bill of complaint in the circuit court for Taylor county against Neill G. Wade, praying that the said Wade be decreed to hold certain "swamp and overflowed" lands, deeded to him by the trustees of the internal improvement fund, in trust for the complainant, and that it be adjudged that the complainant is the rightful owner of the lands. There were prayers for injunctions and general relief. To this bill a demurrer was interposed, and this appeal is taken from the order of the court overruling the demurrer.

Many interesting questions of grave import have been ably and exhaustively argued before us, respecting the power of the Legislature to interfere with the trustees of the internal improvement fund to the extent sought to be done in the instant case and also with reference to the powers, duties, and discretions conferred upon the said trustees by the act of 1855, as also the whole policy and scheme underlying the donation by the United States of the swamp and overflowed lands to the state of Florida.

On view, however, of the conclusions reached by the court, it is not only not necessary to determine these questions; but it would be improper for us to do so. The court should not lightly pass upon the power of a co-ordinate branch, but only when necessity impels such step.

Before we are called upon to pass upon the power of the Legislature to make the grant claimed here, we are confronted with the preliminary question whether the Legislature has sought to exercise such power in the manner and form prescribed by the Constitution; and, having reached the conclusion that it has not done so, we shall proceed no further.

The complainant below, appellee here, bases its claim solely upon sections 9, 10, 18, c. 4267, pp. 225, 228, of the Laws of 1893. These sections read as follows:

"Section 9. That the state of Florida, for the purpose of aiding the construction of said railroad, its branches and extensions, hereby grants unto said company ten thousand acres of land for each mile of road it may construct, of the lands granted to the state of Florida, under the act of Congress of September 28, 1850, and which are commonly known as the swamp and overflowed lands, said lands to be deeded to the company by the trustees of the internal improvement fund, as fast as each five miles of said road or any of its branches are graded, cross-tied and rails laid thereon.

"Sec. 10. That upon the filing of a certificate of the completion of any five miles of said road or any of its branches, signed by the engineer and president of the said company,

It shall be the duty of the trustees of the internal improvement fund to require the state engineer or some other competent person to examine and inspect each five miles of road so completed; and on such person's or the state engineer's report that the five miles are completed as certified, it shall be the duty of the trustees of the internal improvement fund to issue deeds to the said corporation, as required in the foregoing section: Provided, that the said corporation, its successors and assigns, shall have the privilege of requiring and having from the trustees of the internal improvement fund a certificate authorizing and entitling it to locate the lands which it may at any time have earned and become entitled to as aforesaid; and whenever and as often as the said corporation shall file with the trustees of the internal improvement fund a plat and survey of the lands located by it in pursuance of a certificate given it by the trustees as herein provided, the said trustees shall set apart and upon demand excuse unto said corporation, its successors or assigns, a deed conveying unto it the lands described in said plat and survey, from the swamp and overflowed lands granted to the state of Florida by the act of Congress of September 28, 1850: Provided, that nothing in this act contained shall make the state of Florida liable by reason of any deficiency there may exist in the public lands belonging to the state under and by virtue of the act of Congress of September 28, 1850."

"Sec. 18. That whereas the individuals herein incorporated have already incorporated themselves under the name of the Atlantic, Suwannee River & Gulf Railroad Company, by virtue of letters patent from the Governor of the state, and have begun the construction of the line of railroad contemplated by this act, therefore, be it enacted, that the corporate franchise of the last above named corporation shall be merged into the franchise of the Atlantic, Suwannee River & Gulf Railway Company, hereby incorporated, and the corporation so formed by such merger shall exist under and by virtue of the corporate franchise hereby granted with all the privileges granted by this act; and all the property, rights and privileges of the said Atlantic, Suwannee River & Gulf Railroad Company are hereby vested in the Atlantic, Suwannee River & Gulf Railway Company; and, whereas, a portion of the said line of railroad herein provided for has already been built which will hereafter be conveyed and transferred into the said Atlantic, Suwannee River & Gulf Railway Company, therefore, be it further enacted, that for each mile and part of a mile of railroad heretofore built and hereafter conveyed to the said Atlantic, Suwannee River & Gulf Railway Company, the corporation hereby enacted, it shall receive its full quota of ten thousand acres of land from the swamp and

overflowed lands granted to the state of Florida by the act of Congress passed September 28, 1850; which lands shall be conveyed to the company in the manner and under the conditions specified in sections 9 and 10 of this act."

The complainant exercised its option under section 10, and took "floats," which it asserts might be located upon any unappropriated swamp and overflowed lands within the domain of the state.

Is the title to the act sufficiently broad to embrace such a grant?

As printed, chapter 4267 bears the title, "An act to incorporate the Atlantic, Suwannee River & Gulf Railway Company, to grant said corporation certain privileges, and to aid the construction thereof."

The journals of the two houses of the Legislature disclose, however, that the bill which was voted on by them bore at its passage the title merely, "A bill to be entitled 'An act to incorporate the Atlantic, Suwannee River & Gulf Railroad Company,'" and was designated further as "House Bill 99." The bill, after its passage by the House, appears by the Senate Journal to have been amended in that body, and the House Journal shows affirmatively and specifically what that amendment was, and the concurrence by the House in the designated amendment. The bill by its short original title was referred to the joint committee on enrolled bills, and subsequently there appears a report from this committee to the House that it finds correctly enrolled, not House Bill 99, nor a "bill to be entitled 'An act to incorporate the Atlantic, Suwannee River & Gulf Railway Company,'" but "An act to incorporate the Atlantic, Suwannee River & Gulf Railway Company, to grant said corporation certain privileges and to aid the construction thereof," which "act" was signed by the Speaker. The Senate Journal, subsequent to the passage of the House Bill 99 with the short title, is silent therein, unless, except, and until the joint committee report the presentation to the Governor for his signature to the "act" with the changed and enlarged title, and on the day thereafter the announcement by the President that he was signing the "act."

This court is firmly committed to the holding that when the journal speak they control, and, as against such proof, the enrolled bill is not conclusive. We are further committed to the proposition that a material change in the title to a bill as signed by the presiding officers of the Legislature and as signed by the Governor is fatal. *State ex rel. Attorney General v. Green*, 36 Fla. 154, 18 South. 334, and cases cited.

Under such precedents, the counsel for the appellee were justified in conceding that they were bound by the original title, and contended only that the change was not material, and that the short title was sufficient to

comply with the constitutional command, "Each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."

We need not consider whether the act embraces more than one subject and matter properly connected therewith, but only whether the title is not too restrictive to express this subject. In other words, does the title, "An act to incorporate" a railroad company sufficiently apprise the Legislature and the people that under such a title a large land grant, hundreds of miles, perhaps, from the proposed line of road, will be included thereunder?

Two attempts are made to justify the title—one upon authority of adjudged cases, the other upon an appeal to contemporaneous history of legislative grants under similar titles, wherein it is asserted every one was put on notice.

First, as to the adjudged cases cited by appellee: In *State ex rel. McQuaid v. Commissioners of Duval County*, 23 Fla. 483, 3 South. 193, we held that the title, "An act to establish the municipality of Jacksonville, provide for its government, and prescribe its jurisdiction," was sufficiently broad to enlarge its territorial limits, so as to take in other municipalities adjacent thereto. Necessarily an act to establish a municipality may include therein the territorial limits of the town, and this court held that the territory covered by the new charter was matter properly connected therewith. Cases are cited us from Georgia, Illinois, Kentucky, South Carolina, Virginia, and West Virginia, all of which hold that the title to "incorporate a railroad" is sufficiently broad to permit thereunder counties and towns to subscribe for the stock or to issue bonds therefore. The Supreme Court of the United States in *San Antonio v. Mehafty*, 96 U. S. 312, 24 L. Ed. 816, declared such a title sufficient under the Texas Constitution to bind the city of San Antonio for bonds voted and issued in pursuance of a provision of the act. This ruling, however, was subsequently repudiated by the Supreme Court of Texas in *Peck v. City of San Antonio*, 51 Tex. 490. These citations are not controlling upon the point at issue before us, and the reasoning employed by the earlier ones shows clearly the distinction.

Apart from the generalities indulged in as to the necessity for caution to be exercised by the courts before setting aside or declining to make effective the action of a co-ordinate branch of the government, the decisions are based upon the postulate that under the general subject or object of "incorporation" may be included as matter germane or connected therewith the persons who may become "incorporators," and in the absence of other constitutional restrictions the Legislature may enlarge that class, so as to permit certain persons or entities to enter upon the speculation, who have no such

capacity under the general incorporation law.

The cases most in point that are brought to our attention are two from New York, both of which hold that the title to "incorporate" is too restrictive to permit a loan or grant from the state. *People ex rel. v. Allen*, 42 N. Y. 404, and *People ex rel. Failing v. Commissioners of Highways*, 53 Barb. (N. Y.) 70. These cases were cited approvingly by us in support of a declaration that a title to an act was too narrow in *Webster v. Powell*, 36 Fla. 703, text 718, 18 South. 441. See, also, *Case v. Loftus* (C. C.) 43 Fed. 839.

Counsel for appellee disclaim any sinister purpose in those asking the charter, and we freely accord them whatever benefit may come from good motives. The fact remains, however, that the short title, to which alone we look, is so narrow and so innocent looking that neither the Legislature nor the people of Florida were thereby put upon notice that hundreds of thousands of acres of the public domain were being granted away.

Under our Constitution as amended, bills may be read by their title only upon the first and second readings, and must be read by sections only upon the final passage, and the journals almost never contain any part of the bill except its title and certain proffered amendments, nor do the newspapers as a rule publish more than the titles. It is of importance, therefore, that these titles be not misleading and lull into indifference the members of the Legislature and the people of the state. With such a restriction in the Constitution, a legislator may excuse himself from a critical analysis of a bill upon which he is to vote, and it perhaps may be said that the legislative mind is not fully directed towards specific provisions of a bill, but only to the general outline thereof as disclosed by the title.

The general rule to guide the courts in the consideration of questions of restrictive titles has been frequently announced by us. *Carr v. Thomas*, 18 Fla. 736; *State ex rel. Gonzalez v. Palmes*, 23 Fla. 620, 3 South. 171; *Holton v. State*, 28 Fla. 303, 9 South. 716; *State ex rel. Attorney General v. Green*, 36 Fla. 154, 18 South. 334; *County Commissioners of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416; *Webster v. Powell*, supra; *State ex rel. Attorney General v. Burns*, 38 Fla. 367, 21 South. 290; *State ex rel. Attorney General v. Bryan* (Fla.) 39 South. 929. In the majority of the cases cited legislation has been stricken down as being without the purview of the title to the act. Even if the question were open under our decisions, upon principle and authority we would hold the title too narrow.

Appellee's appeal to contemporaneous history is of no avail. It is true that many charters were granted between 1883 and 1893 with similar titles, which upon examination

disclose land grants of the internal improvement fund, limited, however, to alternate sections within six miles of the line of the railroads. Should we admit the overpowering influence of such acts of the Legislature, could it go further than to give warning that a similar grant was being now conferred? It is boldly asserted that, under chapter 4267, the grant is to any overflowed lands undisposed of at the time of its passage, within the domain of the state, and that no grant to any other railroad by the state has been so broad. Contemporaneous history, then, gave no notice that an entirely new field was opened up for donations. While it is true many charters were passed with these brief titles, it was by no means the universal practice, and probably more, numerically, contained fuller titles, containing, in addition to the title before us, the words "to grant aid thereto," "to facilitate the construction of," and similar expressions. It is further true, as matter of contemporaneous history, of which we may take judicial knowledge, that many of these charters were obtained by "promoters" and were long since forfeited, and while it is doubtless true that, under similar titles, the trustees have conveyed lands, yet there is no adjudication by this court that tends in any wise to recognize the sufficiency of the title to such acts.

In doubtful cases we have yielded our judgment to administrative or legislative construction, and in other states the courts have apparently yielded their own judgments in matters less doubtful, when to hold otherwise would amount to serious embarrassment to the administration of law and order. The latter is a dangerous precedent, when followed, even in extreme cases, and has not obtained here; nor do we feel tempted by the seriousness of the situation to follow it now. If harm is done, the Legislature is the forum for relief.

We are unwilling to assert that, whenever a railroad asks for articles of incorporation, the people throughout the state are thereby put upon notice that hidden beneath so simple a request there lurks a grant of lands amounting to a principality, but affirm that, when the railroad's only basis for equity is founded upon such esoteric grant, the courts of this state will not aid them.

Applying, then, the rule recognized by this and all other courts whose opinions we have examined upon the point of restrictive titles, we hold that the quoted sections 9, 10, and 18 of chapter 4267 are not included within the title "An act to incorporate the Atlantic, Suwannee River & Gulf Railroad Company," and are therefore ineffective and void.

It is but fair to the circuit judge who decided the cause below to state that it is probable that the point discussed by us was not properly and fully presented at the hearing before him.

It follows that the order overruling the demurrer to the bill must be reversed, with

directions that the demurrer be sustained and the bill dismissed. It is so ordered, at the cost of the appellee.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and PARKHILL, JJ., and MALONE, Circuit Judge, concur.

WHITFIELD, J., disqualified.

On Rehearing.

COCKRELL, J. In its petition for rehearing the appellee suggests that we erred "in holding and assuming that the counsel for appellee conceded irregularity in the passage of the act of the Legislature known as chapter 4267, p. 223, of the Acts of 1893, such as would limit the consideration by the court of the sufficiency of the title of said act to the title 'An act to incorporate the Atlantic, Suwannee River & Gulf Railroad Company.'" The quoted suggestion is not exactly the statement of the opinion, which followed, as the court understood and recalled the oral argument of at least one of the attorneys for the appellee, the exact concessions made. We are unwilling, however, to be placed in the attitude of taking issue with counsel on a matter of memory, and therefore withdraw from the opinion any inference that might attach to such concession.

It was, however, not the "concession" of counsel that rendered the grant unconstitutional and void, nor did such concession operate upon the minds of the court in so holding; but the fact, disclosed affirmatively by the journals of the Legislature, that the title of the act, as it passed the two houses and was voted on by the legislators, was too restrictive to apprise them that such a land grant was being made.

The appellee also asks that the decree be modified to enable the petitioner to show that the title to the bill as actually introduced into the House and at all subsequent stages was in the form as now published, and that the fact of the shorter form appearing in the journals was due to the mistake or carelessness of the clerks. To grant this request would be to permit uncertain parol evidence to countervail the legislative journals, and would produce overwhelming uncertainty as to the validity, force, or effect of every law upon the statute books. If admitted for the purpose of sustaining an act, it would be equally admissible to overthrow an act, and cannot be permitted. *Happel v. Brethauer*, 70 Ill. 160, 22 Am. Rep. 70; *Attorney General v. Rice*, 64 Mich. 385, 31 N. W. 203; *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66; *Common Council of City of Detroit v. Board of Assessors of City of Detroit*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59.

The only other point presented is, we think, sufficiently answered in the original opinion, and the petition is denied.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and PARKHILL, JJ., and MALONE, Circuit Judge, concur.

WHITEFIELD, J., disqualified.

LOVEJOY v. BESSEMER WATERWORKS CO.

(Supreme Court of Alabama. May 11, 1906.)

WATERS — MUNICIPAL SUPPLY — LOSSES BY FIRE—LIABILITY OF WATER COMPANY.

A resident of a city cannot recover damages for loss by fire occasioned by the failure of a waterworks company to furnish a supply of water in accordance with its contract with the city.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 301.]

Appeal from City Court of Bessemer; B. Clay Jones, Judge.

"To be officially reported."

Action by G. M. Lovejoy against the Bessemer Waterworks Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

The complaint in this case contained two counts, as follows:

"Plaintiff claims of the defendant \$10,000 as damages, for that heretofore, to wit, on the 19th day of March, 1902, the defendant operated the waterworks system for supplying water to the fire plugs of the city of Bessemer for extinguishing fires, under a contract with the city of Bessemer by the terms of which the defendant bound itself to keep its system of waterworks in effective working order, and to supply the said city, its citizens, and manufacturing establishments of said city with water for sanitary, fire, domestic, and manufacturing purposes, and to keep a full and sufficient quantity of water at all times available for all of the purposes aforesaid, and by the terms of this contract defendant had the exclusive right to furnish water within the limits of said city; that on said date plaintiff owned and resided in a certain house situated in said city of Bessemer, to wit, on Dartmouth avenue, between Twentieth and Twenty-First street, in said city, and had a large amount of personal property in said house; that on said day said house caught fire, and said fire department attended the scene of said fire, ready, able, and willing to extinguish said fire, provided there had been a proper supply of water to be promptly had from said fire plug, and it was the duty of defendant, growing out of the aforesaid contract with the city of Bessemer, to exercise due care to furnish a full and available supply of water for said purpose; but, notwithstanding said duty, defendant so negligently conducted itself in that regard that there was not a full and available supply of water to be had from said fire plug, and as a proximate consequence thereof plaintiff's house was destroyed by fire, and most or all of said personal property was destroyed

by said fire, and plaintiff lost a large amount of furniture, fixtures, books, bric-a-brac, and other valuable personal property, and said house was lost to plaintiff.

"Count 2. Plaintiff claims of the defendant the further sum of \$10,000 as damages, for that, heretofore, to wit, on the 19th day of March, 1902, defendant operated the waterworks system for supplying water to the fire plugs of the city of Bessemer for the use of the fire department of the city of Bessemer for extinguishing fires; that on said date plaintiff owned and resided in a certain house situated in said city of Bessemer, to wit, on Dartmouth avenue, between Twentieth and Twenty-First street, in said city, and had a large amount of personal property in said house; that on said day said house caught fire, and said fire department attended the scene of said fire, ready, willing, and able to extinguish said fire, provided there had been a proper supply of water to be promptly had from said fire plug, and it was the duty of defendant, growing out of a contract with said city of Bessemer, to exercise due care to furnish a proper supply of water for said purpose; but, notwithstanding said duty, defendant wrongfully and willfully failed to furnish a proper supply of water at said fire plug for said purpose, and as a proximate consequence thereof said house was destroyed by fire, and most or all of said personal property was destroyed by said fire, and plaintiff lost a large amount of furniture, pictures, books, bric-a-brac, and other valuable personal property, and said house was lost to plaintiff, all to plaintiff's damage \$10,000. Wherefore he sues."

The defendant interposed the following grounds of demurrer to the complaint, to each count separately: "(1) It does not appear that the defendant owed the plaintiff any duty to supply water to the fire plug of the city of Bessemer. (2) It does not appear that the defendant was under any contract to supply water for the extinguishment of said fire, for the breach of which contract plaintiff had any right of action. (3) It does not appear that the plaintiff was a party to the alleged contract between the defendant and the city of Bessemer, or that said contract inured to the plaintiff's benefit, so that he can maintain an action against defendant for the breach thereof. (4) No facts are alleged from which it appears that defendant was under any contract or duty to supply water for the fire plug of the city of Bessemer for extinguishing fires. (5) It does not appear that the defendant owed the plaintiff any duty to supply water for the use of the fire department for the extinguishment of the fire which it is alleged destroyed plaintiff's house and the personal property therein." These demurrers were sustained by the court, and, the plaintiff declining to plead over, judgment was rendered in favor of the defendant.

Bowman, Harsh & Beddow and Pinkney Scott, for appellant. Benners & Benners, for appellee.

WEAKLEY, C. J. The overwhelming weight of authority is against the right of the plaintiff to maintain this action. The reason why he may not do so is that there is a want of privity between him and the defendant which disables him either from suing for a breach of the contract or for the breach of duty growing out of the contract. It is impossible at this late day to say anything new upon the subject, and it would be affectation to attempt any elaborate discussion of the question involved. The reasoning which leads to the conclusion may be found in many, if not all, of the following cases, which have been examined and which hold against the right of a plaintiff, under similar conditions, to recover damages for losses by fire occasioned by the failure of a waterworks company to furnish a supply of water as it had stipulated to do in its contract with the municipality: *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1; *Foster v. Lookout Water Co.*, 3 Lee (Tenn.) 42; *Davis v. Waterworks Co.*, 54 Iowa. 59, 6 N. W. 126, 37 Am. Rep. 185; *Fowler v. Waterworks Co.*, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; *Ferris v. Water Co.*, 16 Nev. 44, 40 Am. Rep. 488; *Becker v. Waterworks*, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146; *Fitch v. Seymour Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Britton v. Green Bay Water Co.*, 51 N. W. 84, 81 Wis. 48, 29 Am. St. Rep. 856; *House v. Houston Water Co.* (Tex. Civ. App.) 22 S. W. 277, affirmed by Supreme Court of Texas in 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532; *Beck v. K. Water Co.* (Pa.) 11 Atl. 300; *Wilkinson v. Light, Heat & Water Co.* (Miss.) 28 South. 877; *Mott v. Cherry Vale Water Co.*, 48 Kan. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267; *Bush v. Artesian Water Co.* (Idaho) 43 Pac. 69, 95 Am. St. Rep. 161; *Eaton v. Fairbury Waterworks Co.*, 37 Neb. 546, 56 N. W. 201, 21 L. R. A. 653, 40 Am. St. Rep. 510; *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.* (La.) 37 South. 980, 68 L. R. A. 650; *Boston Safe Deposit & Trust Co. v. Salem Water Co.* (C. C.) 94 Fed. 238; *Metropolitan Trust Co. v. Topeka Water Co.* (C. C.) 132 Fed. 702. Only two courts in the United States, as far as we can ascertain, have sustained an action of this kind. The first case so holding is *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536, which cited no authorities, and in which the holding was unnecessary, since there was in that case a private contract between the water company and the consumer which required the fire pressure to be furnished. The later Kentucky cases but followed the first decision. In *Gorrell v. Water Supply*

Co., 124 N. C. 328, 82 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, it was held by a divided court that a similar action would lie. The decision was rested upon the principle, stated by the court in general terms, that one not a party or privy to a contract, but who is the beneficiary thereof, is entitled to maintain an action for its breach, and many cases are cited which are assumed to sustain the general proposition, which was stated without qualification.

It is not true, however, that the principle can be maintained to the full extent and in the unqualified terms stated by the Supreme Court of North Carolina in the *Gorrell Case*, *supra*. The same cases there cited were examined by the Supreme Court of Missouri in *Howsmon v. Trenton Water Co.*, 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146, and were shown to establish the qualification that "the rule is not so far extended as to give to a third person, who is only indirectly and incidentally benefited by the contract, the right to sue upon it." It was furthermore shown that in the cases where an action had been sustained, when instituted by a third party upon a contract for his benefit, there had been a debt or duty owing by the promisee to the party claiming the right to sue upon the promise. It is not claimed that the city of Bessemer owed any duty to the plaintiff to furnish water for the extinguishment of fire, or that an action could have been maintained against the city for a failure in that regard. While there has not heretofore been a direct adjudication in this state of the question presented by this record as arising out of a water supply contract, yet there has been an incidental recognition of the want of a right of recovery by a property owner against a water company failing to observe its contract with a municipality to furnish water for the extinguishment of fires. In *Blenville Water Supply Co. v. City of Mobile*, 112 Ala. 260, 20 South. 742, 33 L. R. A. 59, 57 Am. St. Rep. 23, in vindicating the right of the city to enjoin the water company from cutting off the water supply, where a contract existed for the supplying of water for fire purposes, *Brickell, C. J.*, said: "If the city may not adopt this remedy, it is without any remedy. If, pursuant to the notice given, the company should shut off its water supply, and damage should result, no matter how extended, it is settled that neither the city nor the owners of private property injured by the breach of public duty could maintain an action against the company." The principle of law which controls this case is also stated and applied in the somewhat similar cases of *Williams v. Stillwell*, 88 Ala. 332, 6 South. 914, and *City Council of Montgomery v. Halse* (at the present term) 40 South. 665. The latter case involved a contract by a lighting company to light the streets of a city.

In his work on *Waters and Water Rights*, Mr. Farnham considers the question in-

volved in this case, and reviews some of the authorities upon the subject. He says that, so far as the decisions favorable to the maintenance of the action are based on the theory that one for whose benefit a contract is made may sue to enforce it, they are unsound, and asserts that the only ground upon which such suits can be sustained is that the contract is made by the taxpayer as principal, through the instrumentality of the municipality as his agent. The author also asserts that, "even if the company undertakes to pay the damages which will result to taxpayers because of its breach of duty, there can be no recovery unless plaintiff shows himself to be a taxpayer," citing for the proposition the case of *Mott v. Cherryvale Water Company*, 48 Kan. 15, 15 L. R. A. 375, 30 Am. St. Rep. 267, 28 Pac. 989. After considerable discussion the learned author concludes that the decisions adverse to the right to maintain the action are correct in their result, although he thinks that they have been placed on the wrong principle; that is, the principle of want of privity. His opinion is that "the nonliability of the water company depends, not on the inability of the taxpayer to maintain the action, but on the failure of the water company's contract to cover the liability sued for," which lack of liability he bases upon the proposition that the contracting water company is not an insurer against fire losses, and that its agreement to furnish water is not an agreement to extinguish fires. *Farnham on Waters and Water Rights*, pp. 842-848, § 160b.

Much might be urged pro and con as to the proper ground upon which to place nonliability, but we have no desire to enter upon that field of disputation. It suffices for all practical purposes of this case to say that our own decisions, in which the opinions were written by as able judges as ever occupied this bench, and in which there was no dissent, have rested the conclusion in similar cases involving public contracts upon the declaration that there was a want of privity; and this declaration has likewise been made by many other American courts, enjoying the very highest reputation, if, indeed, it has not been made by all the courts of last resort which have reached the same conclusion as that we here announce. If there be those who think the decision should be rested upon the theory that the contracting company has not assumed liability for damage or loss from fire, because liability for such loss was not within the contemplation of the parties to the contract, they must admit the correctness of our holding, although not agreeing to the reason which this court and other courts have chosen to give as the basis of their decisions. When there is agreement as to the result in any case, differences as to the reasons inducing or that should induce that result are not vital nor always important.

We recognize that the absence of a remedy by suit for damages for a failure by a water

company to furnish water for fire purposes, according to its contract with a city, leaves the subject "in an extremely unsatisfactory position," as stated in the note to *Britton v. Waterworks Co.*, 29 Am. St. Rep. 856, 863, yet, as the learned annotator suggests, "the only security would seem to be in legislation or in the incorporation of some suitable provision in future contracts of this description, whenever the taxpayer desires to reserve a personal remedy against the water company." It is not the function of a court to make law to fit hard cases.

The demurrer to the complaint was properly sustained.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

HAND LUMBER CO. v. HALL.

(Supreme Court of Alabama. May 10, 1906.)

1. ACCORD AND SATISFACTION—PART PAYMENT—ACCEPTANCE.

Where a claim is unliquidated or the amount thereof is in dispute, a payment and acceptance of a less sum than claimed in satisfaction is an accord and satisfaction.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Accord and Satisfaction, § 67.]

2. RELEASE—CONTRACT DEBT.

A release of a simple contract debt need not be in writing, but may be by parol.

3. ACCORD AND SATISFACTION—UNLIQUIDATED DEMANDS—EVIDENCE—SUFFICIENCY.

Evidence examined, and held to support a finding that a claim of an attorney for services was unliquidated and the amount thereof in dispute, so that a payment and acceptance of a less sum than claimed in satisfaction of the claim operated as an accord and satisfaction.

4. SAME.

A client sent to his attorney a check containing the words "in full of all accounts." The attorney refused to accept the check and proposed that the client should erase therefrom the words quoted. The client prepared another check and voucher. The voucher attached to the check recited that it was given in full of all services rendered. The attorney detached the voucher and collected the check. Held to constitute an accord and satisfaction.

Appeal from Circuit Court, Baldwin County; William S. Anderson, Judge.

"To be officially reported."

Action by Leslie Hall against the Hand Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action begun by appellee to recover an attorney's fee. Nearly all the facts necessary to an understanding of the case are set out in the opinion. The check and voucher referred to in the opinion are in words and figures as follows: "To cover voucher 478. Bay Minette, Ala., 5/30, 1902. Baldwin County Bank, pay to the order of Leslie Hall \$30.00, thirty & 00/100 dollars. J. D. Hand." Indorsed on back of the

check: "Leslie Hall." And a voucher in words and figures as follows: Voucher No. 478. Doline, Ala., May 30, 1903. Hand Lumber Co., Doline, Ala., to Leslie Hall, Dr. Requisition No. —. Bay Minette, Ala. In full of all services rendered to any or all of the following companies, viz.: Hand Lumber Company, Tug Lady Jane, Hand Export Company. Paid by check number 76. Authorized: J. D. Hand. Approved: —. Attested correct: G. J. S., Auditor. Received —, 190—, of Hand Lumber Co., 30 & ⁰⁰/₁₀₀ dollars in full of the above amount. Please date, sign, and return at once." The plaintiff testified that he received this check actually attached to the voucher. "I collected the check, and kept the voucher, and did not sign and return it. The indorsement on the check is in my handwriting." It was shown, further, that the check had been previously forwarded to the plaintiff with the voucher attached, which the plaintiff returned, declining to accept it as payment. Afterwards the check and voucher above set out were sent in place of the check and voucher returned.

Stevens & Lyons, for appellant. Mitchell & Tonsmeire and Gregory L. & H. T. Smith, for appellee.

WEAKLEY, C. J. "The rule that the payment of a less sum than the real debt will be no satisfaction of a larger sum without a release by deed applies only to conceded or undisputed demands. Where the claims are in dispute the compromise and part payment thereof are sufficient consideration to support the discharge." 24 Am. & Eng. Ency. Law (2d Ed.) p. 288. The cases of Barron v. Vandvert, 13 Ala. 232, Pearson v. Thomason, 15 Ala. 700, 50 Am. Dec. 159, and Hodges v. Tenn. Implement Co., 123 Ala. 573, 26 South. 490, each involved an indebtedness by note, and in those cases there was no dispute as to the existence of the indebtedness as evidenced by the written obligations. In each of them the holding was that on part payment of the debt, without surrender of the note, the agreement by the creditor to accept in discharge of the debt a less sum in money than the debtor owed was a nude pact, constituting no bar to a recovery of the balance. Those cases, therefore, do not at all conflict with the settled rule above announced, and which has also been thus stated: "When a claim is unliquidated or in dispute, payment and acceptance of a less sum than claimed in satisfaction operates as an accord and satisfaction, as the rule that the receiving of a part of the debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply when the plaintiff's claim is disputed or unliquidated. In such case the concession made by one is a good consideration for the concession made by the other. The fact that the creditor was not legally bound to make any abate-

ment of his claim, or that the amount accepted was much less than the creditor was entitled to receive and would have recovered, had he brought action, does not in any way affect the rule." 1 Cyc. 229.

It is quite true that section 1805 of the Code of 1896, declaring the effect of written releases, receipts, and discharges, has no application to this case, because the plaintiff gave no writing of the kind mentioned in that section. A release, however, at least of a simple contract debt, need not be in writing, and no set form of words is necessary. It may be by parol, may be express or implied, or may result by operation of law. 24 Am. & Eng. Ency. Law (2d Ed.) 284. The dictum in Hart v. Freeman, 42 Ala. 567, that the Code section corresponding with section 1805 of the Code of 1896 requires settlements for the composition of debts to be in writing, was declared in Singleton v. Thomas, 73 Ala. 205, to be erroneous as a general proposition, although correct in the particular case wherein it was uttered. The questions for consideration in this case, therefore, are, first, whether the claims of the plaintiff beyond the sum paid him were conceded, or whether they were disputed or unliquidated; and, second, whether, if the latter, they were discharged by what was written and done between the parties, taken in connection with the collection by the plaintiff of the check, under the circumstances shown by the undisputed evidence.

The appellee contends that "the evidence does not show, nor tend to show, the claim of the plaintiff against defendant for services sued for in this case was ever disputed, nor that the plaintiff's claims against J. D. Hand, or Hand Export Company, or the Baldwin County Bank were ever denied," while the appellant contends just the contrary. The evidence must therefore be examined to settle this question of fact, controverted between counsel. The plaintiff's suit was first brought for \$100, and then amended so as to claim \$250, and was upon the common counts. He testified to having been employed by defendant to render legal services in three cases, but had no contract as to the amount to be paid in any of the cases, and he offered evidence of attorneys as to what was a reasonable fee in each case. He claimed, prior to collecting the check, to which we refer more fully later on, that he should be paid \$30 in the "Lady Jane Tug Case," for which item he had presented a bill at one time for \$22.50, and when the check was received there was a suit pending by the plaintiff to recover the sum of \$30 for said fee. The plaintiff testified that he had a yearly retainer from Mr. Hand of \$50 for what we may designate generally as certain small legal services, not including the services for which this suit is brought. Mr. Hand, however, testified that he had an arrangement or contract with the plaintiff whereby

he was to pay him \$50 per year for whatever services he might call upon him to render for himself or his companies; and that he employed plaintiff to do whatever he was called on to do for any of the companies the witness was interested in, which were the Hand Export Company, the Hand Lumber Company, the Hand Land Company, and the Baldwin County Bank. It was conceded that the retainer of \$50 for the year, whatever it included, had been paid. Hand further testified that on one occasion the plaintiff told him that the cases in Baldwin county were covered by the fee, meaning the retainer, while the witness said he told plaintiff he understood the retainer to also cover the "Lady Jane tug fee." Plaintiff, according to the testimony of the witness, replied that he thought otherwise, whereupon Hand said, according to his testimony, that he would see if the captain of the tug would pay that bill. This review of the evidence has disclosed, we think, a controversy as to the amount of one item, and, further, there was serious controversy as to whether the services were not all included in the retainer, which had been paid. Nor was any item of the account liquidated.

The question of law then arises whether the receipt and collection of the check, under the circumstances shown, settled plaintiff's claim in full. A plea of release is in the record, and appellee concedes it was sufficient as a pleading to present the defense on which appellant relies. The check and voucher as first sent the plaintiff were declined, and plaintiff would not receive the check in full of the services, as stated in the face of the check and voucher. Plaintiff proposed, however, that if defendant would erase from the check the words "in full of all accounts," and return the check, he would accept it as payment in the tug case. Hand did not do as plaintiff proposed, but prepared another check and voucher, under the same number, the voucher being attached to the check, and the latter on its face stating it was to cover voucher 478; that being the number of the voucher attached. From this voucher it appeared the check was given "in full of all services rendered to any or all of the following companies, namely: Hand Lumber Company, Tug Lady Jane, Hand Export Company." The plaintiff detached the voucher, collected the check, and thereupon sued the Hand Lumber Company in this action.

We cannot construe the correspondence and action of the parties otherwise than as constituting a proposal to the plaintiff to pay the amount of the check in full settlement of all claims mentioned in the voucher, and as the acceptance of the proposal by the plaintiff, thereby releasing the defendant from further liability; and the plaintiff will not be heard to say he accepted it only in payment of his fee in the tug case. The plaintiff must have known the tender was made on condition,

and, having accepted and collected the check, was bound by the condition. 1 Cyc. 333. "While a mere tender, though of the whole amount due, when unaccepted, does not operate to extinguish or satisfy the claim, yet when made in full of the amount due and accepted, without protest as to its sufficiency, the debt becomes extinguished. The creditor may reject a tender on condition that he receive it in full of his claim; but, if he accept it, he is bound by the condition, and will not be allowed to keep the money and repudiate the condition." *Hanson v. Todd*, 95 Ala. 328, 10 South. 354. The plaintiff, no doubt, in the course he pursued, supposed he was safe in doing so, because a somewhat similar action was held in *Hodges v. Tenn. Implement Co.*, 123 Ala. 573, 26 South. 490, not to constitute full satisfaction of the debt; but that case involved an undisputed indebtedness and is distinguishable from this.

The defendant was entitled to the general affirmative charge, and for the refusal to give it, as requested in writing, the judgment must be reversed, and the cause remanded. Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

BUTTERICK PUB. CO. v. CRANFORD MERCANTILE CO.

(Supreme Court of Alabama. May 8, 1906.)
SALES—ACTIONS FOR PRICE—ADMISSIBILITY OF EVIDENCE.

In an action for the price of patterns, where the defendant pleaded a set-off for patterns returned to plaintiff, a written contract between the parties whereby the defendant agreed to retain the patterns sent him till a date later than that at which he actually returned them was admissible in evidence.

Appeal from Law and Equity Court, Walker County; Peyton Norvell, Judge.

"Not officially reported."

Action by the Butterick Publishing Company against the Cranford Mercantile Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

This was an action begun by appellant against appellee for the purchase price of certain patterns shipped to him under a written contract. The plea was the general issue, and set-off. The defendant admitted the correctness of the account, but alleged that he had returned patterns enough to more than pay the account, leaving a balance over in his favor. Two written contracts were introduced, of date September 26, 1898, and January 12, 1900, respectively. In each of these contracts, it was provided that patterns purchased under the agreement might be returned in exchange for new patterns to be ordered at the time of the return or subsequently thereto, but not in exchange for goods other than patterns. Patterns may be re-

turned twice during each year, in January or February, or July or August, at nine-tenths of the sum paid to them. Plaintiff attempted to introduce the contract made June 7, 1900, which also provided that patterns might be returned on the same terms and at the same time as provided in the other agreement, with the additional agreement that "patterns returned, either for exchange or redemption, at the termination of the agreement, must have been procured direct from the party of the first part, and not through any other party, and patterns stamped or marked (otherwise than by mark affixed by party of the first part at the time of the sale), wet, opened, or in any way damaged or defaced, shall not be returned. Failure or neglect to perform the provisions of this contract by either party shall, at the option of the other, release" said other party from all obligations hereunder. It was shown by the testimony that on or about the month of May, 1901, the defendant returned to the plaintiff what is alleged to be the entire stock of patterns on hand. This stock the defendant agreed to keep on hand until September 7, 1902, and defendant violated this agreement by returning the patterns in May, 1901. The patterns are still held by the plaintiff subject to the order of the defendant, of which defendant was notified by letter, as they were not returned in accordance with the terms of the contract. It was further shown that the defendant refused to accept the monthly shipment for June, which was forwarded early in the month of May, and which was ordered by the defendant. It was further shown that defendant settled for all goods purchased up to February, 1901, except the \$100 standing credit.

Acuff & Acuff, for appellant. Coleman & Bankhead, for appellee.

WEAKLEY, C. J. The undisputed evidence and the concession by the defendant established the plaintiff's right to recover the sum of \$125.10, unless this right was defeated by a counter right upon the part of defendant under its plea of set-off. The plea alleges an indebtedness to the defendant on the part of the plaintiff "for patterns returned to the plaintiff." It became necessary, therefore, to the establishment of this plea that the defendant prove a return of the patterns, and that the return was made under such circumstances and conditions as would create an indebtedness from the plaintiff to the defendant. The defendant offered no evidence, but relied upon the plaintiff's evidence to support the plea. The trial court held the plea had been proven to such an extent as to require judgment over against the plaintiff for a small sum.

The patterns were returned in May, 1901, and it was important to inquire what contract then existed between the parties upon the subject of a right to return patterns and have payment therefor. The plaintiff's evi-

dence on which defendant relied, showed that when the patterns were returned the defendant was notified they had been returned in violation of the agreement between the parties, and that they were held subject to defendant's order. The plaintiff's evidence showed that all goods purchased up to February, 1901, had been paid for, except the sum of \$100, which, under the second contract, remained on the books as a standing credit, and, as we understand the evidence, this sum and the price of the patterns purchased from February, 1901, to May, 1901, had been added together, and from the total undisputed credits had been deducted, leaving the sum of \$125.10 confessedly due on the account. The set-off was based upon a claim for returned patterns. The contract of June 7, 1900, was offered by plaintiff to be proven, and an effort was made to secure its admission in evidence. If this had been admitted it would have appeared to be in force from the date mentioned, and the right to return patterns purchased under it would have been subject to its terms. The contract, the third in point of time between the parties, would have shown, or at least tended to show, that the defendant, by reason of some of the terms thereof, considered in the light of other evidence in the case, had no right to claim payment for the returned patterns, or to return them at the time they were returned. The court erred in not allowing this proof to be made. The result was that the rights of the parties were not adjudicated upon the real facts of the case. We see no reason why the contract would not have been admissible as tending to support the cause of action alleged in the complaint. It would have fixed the price of the patterns ordered under it, and when coupled with proof of the furnishing of the items of the account, or some of them, would have established, or tended to establish, the common counts of the complaint for at least a part of the sum claimed. The item of "standing credit" seems to have accrued under the second contract, which was in evidence without objection.

While we have said the excluded contract was admissible to support the cause of action, it was not important for that purpose. The account was conceded, and it was only in reference to the defense of set-off the said excluded contract was material to be proven. But it was highly important to the plaintiff, as bearing upon the question of the right of the defendant vel non to return patterns and have credit therefor, and as supporting the plaintiff's contention that the plea of set-off could not be sustained under the existing contract. There was reversible error in excluding the contract, and for this reason the judgment must be reversed, and the cause remanded.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ. concur.

RICHARDSON v. STATE.

(Supreme Court of Alabama. April 28, 1906.)

1. CRIMINAL LAW—FACTS RELEVANT TO ISSUE—EXPLANATORY MATTER.

On a prosecution for murder, questions to a witness as to his knowledge of the time and place where deceased was said to have been killed were proper, where they were merely introductory to his testimony as to his dogs trailing tracks from the reputed place of the crime to defendant's house.

2. SAME—CONFESSIONS—PRELIMINARY EVIDENCE.

An officer testified that a confession was voluntary, and that no reward or inducement was offered or threat made. No objection was made to the statement, and no cross-examination had, and though it appeared that another was present at the time of the confession, there was no evidence as to any act done by him to wrongfully induce a statement by defendant. *Held*, that the confession was properly admitted.

3. HOMICIDE—PROXIMITY TO SCENE OF CRIME.

On a prosecution for murder, it was competent to prove that on the day of the killing defendant was seen with a shotgun about a mile or more from the scene of the crime.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 341.]

4. CRIMINAL LAW—EXPLANATORY EVIDENCE.

Where it is proposed to introduce evidence to show that dogs trained to track human beings were put on the trail at the scene of the crime, and that they went thence to a point where defendant was shown to have been after the crime, it is proper to permit a witness familiar with the dogs and accustomed to handling them to testify that they are skilled in trailing men and within what time after the making of tracks the dogs would take up and follow the trail.

5. HOMICIDE—INCRIMINATING CIRCUMSTANCES.

Where, on a prosecution for murder, there was evidence that defendant was in the vicinity of the crime about the time it was committed, and a confession tended to show that he was present and participated, and that he left the scene in company with H. and went to the house of H., it was competent to prove that trained dogs took up a trail at the scene of the crime and followed it to or near the house of H.

6. WITNESSES—CROSS-EXAMINATION—SCOPE.

Where evidence was admitted that dogs trained to track human beings were put on the trail at the scene of the crime, and that in taking the trail they went thence to a point where defendant was shown to have been after the crime, defendant should have the fullest opportunity by cross-examination to inquire into the breeding and testing of the dogs, and into all circumstances which might lead the jury to believe that the dogs were unreliable or unskilled.

7. CRIMINAL LAW—OPINION EVIDENCE.

Where there was evidence of the trailing of defendant from the scene of the crime by dogs trained in trailing human beings, but it appeared that the dogs left the trail at a certain place and went out into a field, and that the owner of the dogs called them back and put them again on the track, and that the trail was several times lost, it was error to permit the owner of the dogs to testify that, from what he knew of the dogs, he thought that the reason the dogs quit the trail was because there was a body of men, and that the dogs expected to find the person they had been trailing.

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

"To be officially reported."

Robert Richardson was convicted of murder, and he appeals. Reversed and remanded.

This defendant, together with Albert Richardson and John Hoskins, was indicted for the murder of Frank L. Fosque. The defendant demanded a severance, and was tried alone, and convicted, and sentenced to be hanged. The witness Townsend testified that he was sent from Selma with a lot of dogs, which he obtained from the Union Star kennel; that he had tried the dogs before, and knew they were trained dogs; that he remembered the time when Dr. Fosque was said to have been killed; that he was shown the place where it was said the murder was committed. All the questions bringing out the above testimony, together with the answers thereto, were objected to by the defendant, and motion was made to exclude each separately, which objections and motions were overruled by the court. He further testified, over the objection of the defendant: "I took the dog Rock. He picked up the trail, and the dog Rye joined therein. They struck the trail 20 or 30 feet from where I was told the body had lain. We first picked up the trail down the hill in a natural depression, trailed down the branch and into the woods." The witness further testified that he had handled dogs all of his life, and knew that these dogs would trail the tracks of men; that "these dogs have trailed a track nine hours old. I know these dogs are man trailers, and I saw two human tracks in the creek that night, a small one and a large one, where the dogs were trailing. The tracks went in the direction of the defendant's house, and the dogs trailed in the same direction."

Wilson & Wilson, for appellant. Massey Wilson, Atty. Gen., for the State.

WEAKLEY, C. J. The several questions propounded to the witness Townsend as to his knowledge of the time and place where and when the deceased was said to have been killed were within the rule declared in *Stoball v. State*, 116 Ala. 454, 459, 23 South. 162, and were properly allowed. They were merely introductory to other questions necessary to elicit facts that were legal evidence. *Frazier v. State*, 116 Ala. 442, 23 South. 134; *Green v. State*, 96 Ala. 29, 11 South. 478.

There was testimony addressed to the court that the confession of the defendant was voluntarily made, and that the officer to whom it was made offered no reward or inducement and made no threat to procure the defendant to make the inculpatory statement. Under these circumstances we cannot declare that the trial court erred in holding the confession to be competent and in allowing it to go to the jury, although another person was present at the time of the confession and there was an absence of evidence as to any act done by such person to wrongfully induce a statement by the defendant or that such

person did nothing improper to procure the confession to be made. No objection was made to the statement of the witness that the confession was voluntary, and no cross-examination was indulged to disprove the statement. The court, therefore, was authorized to conclude that a sufficient predicate had been laid to warrant the admission of the confession for the consideration of the jury.

It was competent to prove that on the day of the killing the defendant was seen with a shotgun by witnesses who were cutting cordwood about a mile or more from the scene of the crime.

The previous decisions of this court have settled that under proper conditions it is permissible, for the purpose of connecting a defendant with a crime, to admit evidence, along with the other circumstances, that dogs trained to track human beings were put on the trail at the scene of the crime, where circumstances or evidence tend to show the defendant had been, and that after taking the trail they went thence to a point where defendant is shown to have been after the commission of the act. *Hodge v. State*, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17; *Simpson v. State*, 111 Ala. 6; *Little v. State* (Ala.) 39 South. 674. The case of *Pedigo v. Commonwealth*, 103 Ky. 41, 44 S. W. 143, 82 Am. St. Rep. 566, 42 L. R. A. 432, is to the same effect. Where such evidence is proposed to be introduced, it would, of course, be proper to allow a witness, familiar with the dogs and accustomed to handling them, to testify that they are skilled in the trailing or tracking of men, and within what time, after the making of tracks, the dogs would take up and follow the trail. The court committed no error in allowing the witness Townsend to testify along these lines. There was evidence tending to show that the defendant was in the vicinity of the crime about the time it was committed, and his confession, if the jury believed he made a confession, tended to show he was present and participated in the murder, and that he left the scene in company with one Hoskins, and went by the house of said Hoskins on his way to his own home, not very far away. It was competent, therefore, to prove that trained dogs took up a trail at the scene of the crime and followed it to or near the house of Hoskins. The court, therefore, committed no error in declining to exclude all the evidence upon the subject of the trailing by the dogs.

When evidence of this character is admitted, a defendant should have the fullest opportunity by cross-examination to inquire into the breeding and the testing of the dogs, and into all the circumstances and details of the hunt, that he may lead the jury to believe, if he can, either that the dogs are unreliable or unskilled, or that the dogs so acted on the trail as to deprive the evidence of incriminating value. For this purpose, no doubt, the defendant's counsel proved, on cross-examination by the state's witness, that the dogs left

the trail in the woods and went out into a field, and that the witness called them back and put them again on the track, and that the trail was several times lost. Thereupon the solicitor asked the witness on redirect examination, "Why did the dogs quit and leave the trail and go out into the field?" The defendant interposed an objection to the question upon the ground, among others, that it called for the conclusion of the witness. The trial judge sustained the objection, but only conditionally; for he remarked "that the witness could not testify as to why they did so, unless the witness was thoroughly acquainted with their habits and training." Thereupon the witness answered: "From what I know of these dogs, I would say that the reason the dogs quit the trail and went out into the field was because there was a body of men out in the front, and the dogs expected to find the person they had been trailing." The motion of the defendant to exclude this answer on the ground that it was an opinion and the conclusion of the witness should have been granted. The witness could not know why the dogs went into the field. It was a matter of inference only. The cause moving the dogs to abandon the trail and go into the field was a matter of deduction from all the facts and circumstances in evidence, carefully weighed and considered, and was not a fact to which a witness could testify. Witnesses are not allowed to reason to a jury. They must speak to and of facts. Like intention or motive or belief, to be inferred from facts, the jury must deduce the conclusion, unaided by the opinions, reasoning, or inferences of witnesses. *Peake v. Stout*, 8 Ala. 647; *Wheatstone v. Bank*, 9 Ala. 875; *Clement v. Cureton*, 36 Ala. 120; *Brewer v. Watson*, 71 Ala. 299, 46 Am. Rep. 318; *Burks v. Bragg*, 89 Ala. 204, 7 South. 156. Witnesses must testify, not argue. *Mobile Furniture Com. Co. v. Little*, 108 Ala. 399, 19 South. 443.

There is no basis for a distinction between expert witnesses and others which would take even experts out of the general rule against drawing out reasons which conduce to an act or omission to which they depose. *A. G. S. R. R. Co. v. Hill*, 93 Ala. 514, 519, 9 South. 722, 30 Am. St. Rep. 65. It may be the opinion given as to the reason why the dogs left the woods and went into the field where the men were was derived from facts within the knowledge of the witness, but the facts were not disclosed. He would no doubt have been allowed to state any facts within his knowledge from which the jury might have inferred the abandonment of the trail was induced by an expectation that the person sought would be found among the crowd of men in the field, but the inference must be drawn by the jury. The witness could not properly be allowed to substitute himself for the jury, and to draw and state the conclusion in their place and stead.

For the error pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

BARCLIFT v. FIELDS.

(Supreme Court of Alabama. April 28, 1906.)

1. MORTGAGES—REDEMPTION—USURIOUS INTEREST.

Gen. Acts 1900-01, p. 164, amending Code 1896, § 2630, declaring that contracts for payment of usury cannot be enforced, except for the principal, by adding thereto a proviso that no borrower of money at a usurious rate shall be required to pay more than the principal sum borrowed, adopted after the decision of the Supreme Court that section 2630 did not destroy the equitable rule requiring a borrower seeking relief against a usurious mortgage to offer to pay legal interest in addition to the principal debt, must be construed as authorizing a borrower to redeem such mortgage without paying any interest.

2. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—IMPAIRMENT.

Gen. Acts 1900-01, p. 164, amending Code 1896, § 2630, by adding the proviso that no borrower at a usurious rate of interest shall be required to pay more than the principal, enacted subsequent to the execution of a usurious mortgage, does not impair the obligation of the contract thereof, in violation of Const. 1901, § 95, though it abolishes the then existing rule of equity that a borrower, seeking relief against a usurious mortgage by a bill in chancery, must offer to pay legal interest in addition to the principal debt; the mortgagee having no vested right in the rule.

Appeal from Chancery Court, Blount County; John C. Carmichael, Chancellor.

"To be officially reported."

Suit by A. E. Fields against Allie Barclift. From a decree for plaintiff, defendant appeals. Affirmed.

Shugart & Bell, for appellant. M. L. Ward, for appellee.

WEAKLEY, C. J. The bill was filed for redemption from a mortgage executed on March 21, 1896, and also sought relief from usurious interest upon the debt secured. There was no offer in the bill to pay interest at the regular rate, and the decree relieved complainant from paying any interest. The law in force when the mortgage was executed declared that usurious contracts could not be enforced "except as to the principal." Code 1886, § 1754. Under the law then and theretofore existing it was settled that, in a suit by a lender of money for the enforcement of the contract to repay, either in a court of equity or law, where the defence of usury was set up and sustained, there could be recovery only of the principal, exclusive of all interest. *Lindsay v. United States Savings & Loan Co.*, 127 Ala. 366, 28 South. 171, 51 L. R. A. 393. In was further held that the payee of a usurious contract, becoming the actor in a court of equity, must always remove the taint by an offer to abate the whole of the interest, since

the principal was all he was entitled to recover; and, without an offer in his bill to abate the whole interest, the lender could obtain no relief. *Hawkins v. Pearson*, 96 Ala. 369, 11 South. 304, and authorities there cited. On the other hand, the law was well understood to be that, when the borrower upon such usurious contract sought relief in a court of equity, he must, according to the principles governing that court in granting relief, offer to pay the amount equitably due; that is, the sum borrowed with legal interest. *Turner v. Merchants' Bank*, 126 Ala. 397, 28 South. 469.

Section 2630 of the Code of 1896 so amended the corresponding section of the Code of 1886 (1754) as to declare that contracts for the payment of interest at a higher rate than that prescribed could not be enforced "either at law or in equity," except for the principal. The purpose and effect of this amendment or revision, whereby for the first time it was expressly declared that usurious contracts were not enforceable inequity as to any interest, were considered by this court in *Lindsay v. United States Savings & Loan Co.*, supra, and it was there held by a majority of the court that the new provision had not accomplished the destruction of the equitable rule requiring the borrower, seeking relief in equity, to pay the principal of his debt and legal interest, but that the amendment was merely declaratory of the existing law, which prevented a lender at a usurious rate from recovering any interest in a court of equity, when he was the actor in that tribunal. By an act approved February 23, 1899 (Gen. Acts 1898-99, p. 39), the Legislature amended section 2630 of the Code in a particular not involved in this case; and thereafter, on March 4, 1901 (Gen. Acts 1900-01, p. 164), enacted a statute amendatory of the act of February 23, 1899, whereby it was further declared, by way of addition to the provisions of section 2630 of the Code, as follows: "Nor shall the borrower of money at a usurious rate of interest ever in any case be required to pay more than the principal sum borrowed." It cannot be doubted that this declaration was inserted in the statute for the purpose of meeting the decision of the majority of this court in *Lindsay v. United States Savings & Loan Co.*, supra, and to conform the law to the views of Justice Haralson in his dissenting opinion in that case. Stated precisely, the intention of the Legislature was to abrogate the rule, the creation of the equity court, that a borrower, seeking relief against a usurious mortgage by a bill filed in the chancery court, must offer to pay legal interest, in addition to the principal debt, and to authorize him to redeem without paying any interest; and it may be that wider scope than this may be found for the amendment in other cases as they may arise. The chancellor gave this operation and effect to the act of 1901, and applied the act to a mortgage taken be-

fore its passage upon a bill thereafter filed. It is not denied that the intention of the Legislature was to alter the pre-existing law, as above declared; but the contention of counsel for appellant against the decree of the chancellor is that the act of 1901 cannot be constitutionally applied to a pre-existing mortgage, for the reason that such application would be violative of the provision that "there can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement." Const. 1875, art. 4, § 56; Const. 1901, § 95. The argument is that, inasmuch as the mortgagee had a remedy, by a sale under the power, to collect the debt secured, which could only be restrained by injunction out of the chancery court, and since the injunction could not be obtained without offering to pay legal interest, therefore the act of 1901 impairs or destroys a remedy for the enforcement of the mortgage contract, within the meaning of the section of the Constitution just quoted.

We are of opinion the contention cannot be successfully maintained, and that it rests upon a misapprehension of the true principles involved. Under the law as it existed when the mortgage was taken the agreement to pay usurious interest was illegal, and the mortgagee could not collect any interest, when employing the remedy by suit, either at law or in equity, if the mortgagor interposed the defense of usury. The contract stipulating for a greater rate of interest than eight per cent. was tainted with an evil and wrongful intent. *Hawkins v. Pearson*, 96 Ala. 369, 11 South. 304. There was no contractual right to recover any interest, and that was so because the contract, to the extent of all interest, was offensive to the policy and positive mandate of the law. Nor was the authority of the court of equity to impose terms upon a borrower seeking its aid conferred by statute, nor "exercised for the purpose of enforcing any contractual right." *Lindsay's Case*, supra. The rule that one asking equity must do equity was but the invention of the court of chancery for regulating its own procedure. "The power of the Legislature to prohibit courts of equity from applying the maxim in cases involving usury is undoubted," as Justice Sharpe declared in the prevailing opinion in *Lindsay's Case*; and we do not see that the Legislature owed the mortgagee, claiming under a contract pro tanto illegal, any constitutional duty to preserve the rule of equity procedure for her benefit, to the end that she might realize the usurious interest, or even legal interest, by a sale of the mortgaged property under the power of sale. Redemption from a mortgage before foreclosure, upon paying the debt secured, has always been allowed by courts of equity. The valid legal debt in this case was the principal sum borrowed and no more. At no time could the mortgagee have collected more than that sum by suit in any

court against the mortgagor's will; and the remedy for the collection of the legal debt by suit is in no way altered or affected by the act of 1901. The insertion of a power of sale in the mortgage did not impart validity to the agreement to pay usurious interest; and, notwithstanding the power of sale, the contract remained legal only to the extent of the principal borrowed.

The mortgagee had no vested right in the rule of equity pleading and practice, and cannot complain that its abrogation by the law-making power has enabled the mortgagor to have relief without paying any interest. The law existing when the loan was made and the mortgage taken declared the contract could not be enforced except as to the principal, and to that extent it has been enforced. This preserves all the mortgagee's constitutional rights. The rule of equity practice was in no just sense a part of her remedy. That the mortgagee was a widow, who loaned money to her brother-in-law, cannot alter the rules of law; and, if he chose to seek redemption without paying any interest, the court is bound to declare that the statute authorized him to pursue this course.

No other contention is pressed for a reversal of the decree than that already disposed of, and, of consequence, the decree must be affirmed.

Affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

(116 La.)

No. 16,082.

STATE ex rel. LISSO v. POLICE JURY OF RED RIVER PARISH et al.

(Supreme Court of Louisiana. May 21, 1906. Rehearing Denied June, 1906.)

INTOXICATING LIQUORS—PROHIBITING SALE—POWERS OF POLICE JURY—MANDAMUS.

Under no law of this state is the power conferred on police juries to prohibit the sale of intoxicating liquors, and whilst it is true that the taxing power is essentially legislative, and that the unlimited power to tax may include the power to prohibit, it is also true that, where the state grants to one of its agencies the power to license and regulate, whilst, not only withholding, but lodging elsewhere, the power to prohibit, the power so granted is exceeded when used to prohibit and destroy, and a case is thereby presented in which the authority of the judiciary may be invoked.

(Syllabus by the Court.)

Appeal from Eleventh Judicial District Court, Parish of Red River; Charles Vernon Porter, Judge.

Application by the state, at the relation of Sam Lisso, for writ of mandamus to the police jury of Red River Parish and others. Judgment for relator, and defendants appeal. Affirmed.

Nettles & Teer, and William Augustus Wilkinson, Dist. Atty., for appellant Police

Jury. Scheen & Stephens, for appellant Town of Coushatta. Pugh, Thigpen & Foster, for appellee.

Statement.

MONROE, J. Relator alleges that he desires to engage in the business of selling intoxicating liquors in the town of Coushatta, but is prevented from so doing by reason of the fact that the police jury of the parish and the town council have imposed a license tax thereon of \$5,000; that said tax was imposed with the sole and declared purpose, and with the effect, of prohibiting the business, which cannot be conducted without loss under a higher license than \$2,500; and that the action of the parish and town authorities amounts to a wanton abuse of discretion and is ultra vires, in that the power to prohibit in such case is vested in the people, and is to be exercised by means of elections to be held for that purpose. He prays that the police jury and the town council be cited, that the ordinances imposing the tax mentioned be annulled, and that said bodies be directed, by mandamus, to repeal the same and to adopt ordinances fixing the amount of the license in question at not more than \$2,500.

The police jury for exception and answer says:

That the court is without jurisdiction, *ratione materiae*.

That the petition discloses no interest in relator and no cause of action; and that respondent fixed the amount of the license at \$5,000 as both a police regulation and a revenue measure, and, in so doing, acted within the authority and discretion conferred on it by law.

The town council answers that it imposed the license in the amount stated in order to secure for the town of Coushatta, under article 229 of the Constitution and Act No. 142 of 1904, exemption from parish licenses, and, but for that consideration, would fix an amount which would not be prohibitive.

It is admitted that the license for 1899 was \$250; for 1900, \$2,000; for 1901, \$4,000; and for each of the years 1902, 1903, 1904, 1905, 1906, \$5,000. It is shown that no license of either \$4,000 or \$5,000 has ever been paid, and that but two persons paid the license of \$2,000. Relator offered to prove by members of the police jury, and others, that, when the ordinance imposing the license of \$5,000 was adopted, the purpose, as expressed by all the members of the police jury, was to prohibit the sale of whisky in the parish, but the testimony was objected to and excluded. Several witnesses testified that they had had some experience in selling liquor in the parish, and that any license exceeding \$2,500 would, in their opinions, operate to prohibit the business, and there is nothing to the contrary, unless it be the testimony of the relator to the effect that, in 1904, a New Orleans firm proposed to pay the license of \$5,000, provided

the members of the police jury would, personally, agree not to increase it during their term of office, but that the proposition was rejected.

There was judgment for relator, annulling the ordinance complained of, and ordering the police jury and town council to adopt ordinances fixing the license at an amount not exceeding \$2,500, and the police jury has appealed.

Opinion.

What the decision shall be depends mainly on the result of the inquiry whether the question at issue is one which the judiciary department of the government is authorized to determine. The Constitution confines the legislative powers of the government to one department, those which are executive to another, and those which are judicial to another, and provides that no one of these departments shall exercise power properly belonging to either of the others, except in cases expressly directed or permitted. Articles 16, 17. It is undisputed that the power to make laws is vested in the legislative department, the co-operation of the executive in such matters constituting an exception "expressly directed" (articles 76, 77, 78); and it is equally undisputed that there are no other limits to that power than such as are to be found in the Constitution, laws, and treaties of the United States and in the Constitution of this state. Upon the other hand, it is not, and cannot, reasonably, be asserted, that the judiciary department is vested with the slightest shadow of authority in the matter of making laws; its sole function being to interpret the laws, as made, and to determine whether, in enacting and enforcing them, the legislative and executive departments have confined themselves within the limits prescribed, and the attaching of any other function to the officers of the department first mentioned being expressly prohibited (article 96). The power to make laws, in general, includes the power to make laws imposing taxes, but this latter authority is conferred, in terms, upon the legislative department, proper, and upon the agencies which that department is authorized to create and establish, as follows:

"Article 224. The taxing power may be exercised by the General Assembly, for state purposes, and by parishes and municipal corporations and state boards, under authority granted to them by the General Assembly, for parish, municipal and local purposes, strictly public in their nature."

Dealing with the particular subject under consideration, the Constitution provides:

"Article 229. The General Assembly may levy a license tax * * * : all persons pursuing any trade, profession, business, or calling may be rendered liable to such tax, except clerks. * * * No political corporation shall impose a greater license tax than is imposed by the General Assembly for state purposes. This provision shall not apply to dealers in distilled, alcoholic, or malt liquors."

"Article 181. The regulation of the sale of alcoholic or spirituous liquors is declared a police regulation and the General Assembly may enact laws regulating their sale and use."

Pursuant to the authority conferred by article 229, the General Assembly passed Act No. 171, p. 387, of 1898, being "An act to levy and enforce payment of an annual license tax upon all persons * * * pursuing any trade, profession, vocation, calling, or business," etc., section 16 of which reads:

"That any municipal or parochial corporation in this state shall have the right to impose a license tax on any business, occupation, or profession herein provided for; provided, that all such license tax shall conform to the provisions of article 229 of the Constitution."

And section 13 of which imposes a state license tax on the business of liquor selling. Pursuant to the authority conferred by article 181, the General Assembly passed Act No. 115, p. 168, of 1898, which provides that:

"The police juries shall have power to make all such regulations as they may deem expedient. * * * Sixth. To regulate the police of taverns and houses of public entertainment and shops for retailing liquors in their respective parishes, and to impose whatever parish tax they may see fit on all keepers of billiard tables and grog shops and on all hawkers, peddlers and trading boats."

—Which provision was re-enacted in Act No. 202, p. 391, of 1902. These provisions plainly contemplate the licensing, rather than the prohibiting, of the business in question, and no more authorize its suppression, by the exercise of either the taxing or the police power, than they authorize the suppression, by that method, of taverns or houses of public entertainment. Nor, do we find the situation changed by other, or subsequent, legislation. Act No. 221, p. 451, of 1902, which amends the pre-existing local option law (so as to include "villages") provides:

"That the police juries, * * * the municipal authorities of the several villages, towns and cities, and the city council of the city of New Orleans shall have the exclusive power to make such rules and regulations for the sale, or the prohibition of the sale, of intoxicating liquors as they may deem advisable and to grant, or withhold, licenses from drinking houses and shops within the limits of the city, parish, ward of a parish, town or village, as a majority of the legal voters of any city, parish, ward of a parish, town or village may determine, by ballot, and the said ballot shall be taken whenever deemed necessary by the police juries of the several parishes, the municipal authorities of the several towns, and the city council of the city of New Orleans; provided, said election shall not be held oftener than once a year, and, when so held, the effect of said election shall continue in force until another election in the parish, ward of a parish, city, town, or village is held on the same question, and, provided further, that, whenever, at an election held under this section, the majority of votes cast in said ward, if only a ward election has been held, or a majority of

the votes cast in a parish, if an election has been held in a whole parish, shall be against granting the license for the sale of intoxicating liquors, said vote, or decision, shall control the action of any ward, city, town or village, within the limits of the ward, or parish, as the case may be, as fully and completely as if said election had been held by authority of said city, town, or village."

We find it impossible to interpret this statute otherwise than as meaning that the police juries shall have exclusive power to regulate the sale of liquor when the sale is authorized by the legal voters of the parish, and the exclusive power to regulate or enforce the prohibition when such is the expressed will of the voters. When, therefore, either by the action or nonaction of the legal voters, the sale of liquor is authorized, the police jury has the power, and it becomes its duty, to determine the amount of, and to impose, the license tax upon, and to "regulate," the business as conducted by those who pay the tax and take out the license.

In no case, however, is the power conferred on the police jury to prohibit the business, and, whilst it is true that the taxing power is, essentially, legislative, and that the unlimited power to tax may include the power to prohibit, it is also true that, where the state grants to one of its agencies the power to license and regulate, whilst not only withholding, but lodging elsewhere, the power to prohibit, the power so granted is exceeded when used to prohibit and destroy, and a case is thereby presented in which the authority of the judiciary may be invoked. *Dillon on Mun. Corps.* vol. 1, pp. 151, 152, § 94; *Cooley on Taxation* (2d Ed.) 597, 598; *Cooley on Taxation* (3d Ed.) pp. 14, 15, 1101; *City of Lyons v. Cooper*, 39 Kan. 324, 18 Pac. 296; *Morton v. Mayor*, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 483; *Black on Intoxicating Liquors*, § 227; *A. & E. Enc. of Law*, vol. 17, pp. 285, 286.

We find no objection, in the pleadings, to the form of the proceeding, and our conclusions, from the admissions and evidence in the record, are that the license tax for the year 1906, here complained of, is prohibitive; that any license tax on the business in question, for the present year, in excess of \$2,500, would be prohibitive; that the levying of a prohibitive tax, in the case presented, involves the exercise of a power which the police jury does not possess; and that it is the plain, ministerial duty of that body to levy a license tax on the business in question, which, for the whole year 1906, will not exceed \$2,500. This we understand to have been the conclusion reached by the judge a quo.

The judgment appealed from is, accordingly, affirmed.

NICHOLLS, J., absent.

(116 La.)

No. 15,811.

S. H. KEOUGHAN & CO. v. EQUITABLE OIL CO., Limited, et al.

(Supreme Court of Louisiana. March 26, 1906. Rehearing Denied April 23, 1906.)

1. APPEAL—WAIVER OF RIGHT.

Conceding for argument that the right to appeal cannot be waived before judgment, it can most assuredly be waived after judgment.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1008, 1009.]

2. SAME—CONSIDERATION.

The matter of waiver of appeal is governed in this state by article 567, Code Prac., according to which a valuable consideration is not necessary to support the waiver.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1008.]

3. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—WAIVER OF APPEAL.

After judgment, an attorney at law, under the general authority from his client to act in the case, is without authority to make a gratuitous waiver of appeal.

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by S. H. Keoughan & Company against the Equitable Oil Company, Limited, and others. Judgment for plaintiff, and defendants appeal. Remanded for further evidence.

Cline & Cline, for appellants. McCoy & Moss, for appellee.

On Motion to Dismiss.

PROVOSTY, J. The motion to dismiss is founded on the following express waiver:

"S. H. Keoughan & Co. v. Equitable Oil Co. "Fifteenth Judicial District Court, State of Louisiana, Parish of Calcasieu. No. 4,966.

"The defendant in the above numbered and entitled suit does hereby waive the rights of an appeal from the judgment herein rendered, and, by reason of such waiver, it is hereby agreed by both plaintiff and defendant that the stenographic notes taken upon the trial of the above numbered and entitled suit need not be transcribed.

"Witness our signature hereto at Lake Charles, Louisiana, on this the 19th day of July, A. D. 1904.

"[Signed]

McCoy & Moss,

"Counsel for Plaintiff.

"[Signed]

Cline & Cline,

"Counsel for Defendant."

Appellant contends that the waiver is void because a litigant cannot waive in advance his right to appeal; but, conceding for argument that he cannot waive it before judgment, he can most assuredly waive it after judgment, and in this case the waiver was after judgment.

A more serious question has appeared to us to be whether an agreement of this kind, whereby a valuable right is parted with, should not be either supported by a valuable consideration or clothed in the form prescribed by law for donations.

At common law a waiver must be support-

ed by a valuable consideration. 29 Am. & E. E. of Law, 1097; 2 E. of P. & P. 173. And this applies to the waiver of the right of appeal after the right has accrued. 2 Cyc. 643.

We have come to the conclusion, however, that the waiver of appeal after the right has accrued is governed in this state by article 567, Code Prac., which reads as follows:

"The party against whom judgment has been rendered cannot appeal:

"(1) If such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily.

"(2) If he has suffered the time prescribed by law for appealing to elapse."

It appeared to us as questionable at first whether that article was not merely the expression of the doctrine of estoppel, and meant anything more than that a litigant was estopped from contradicting a condition of things upon which, by his confession, he had induced a court of justice to act, or of which he had sought to take advantage; but we have come to the conclusion that the scope of the article is greater, its real sense being that a litigant shall not be permitted to vex uselessly the ear of the courts with a complaint the unfounded character of which he was at one time willing to admit.

The learned counsel for appellant urges, however, that the mandate of an attorney at law does not extend to the waiving of the right of appeal, and we think the contention is well founded. The mandate of the attorney is to prosecute and defend, and not to waive or abandon. While the battle is raging the proper measures of attack or defense are necessarily left largely to his judgment, and, if it appears to him good strategy to waive certain rights, he may do so, and the client be bound, as a general proposition; but, after the battle has been brought to a close by judgment, he cannot take upon himself to make a gratuitous abandonment of the right of his client to renew the contest. Whether his mandate still continues for the purpose of compromise is another question.

On the question of fact whether the attorney in this case had or not special authority to make the waiver, we think the case had better be remanded to take testimony. We do not think the fact that the attorney who made the waiver happened to be also the president of the appellant corporation is at all conclusive on the question of authority vel non. Even the president of a corporation has not authority to give away the rights of his principal, unless, indeed, the charter confers it upon him.

The complaint of the appellant that the waiver was the result of an agreement, which the appellee has not kept, cannot, in the absence of all evidence, be considered by this court, and could not have been considered, even if presented to the trial court on rule to set aside the waiver, since it would have been contradictory of the terms of the written document executed by the parties to evidence their agreement.

The case is remanded for the purpose of taking evidence on the question of whether the attorney had or not authority to make the waiver in question; subject, however, to the right of appellee, on application for rehearing, to have this decree set aside and the case proceeded with.

(116 La.)

No. 16,063.

In re JONES.

In re MITCHELL.

(Supreme Court of Louisiana. April 9, 1906.)

INSANE PERSONS — INTERDICTION — APPOINTMENT OF CURATOR—APPEAL.

Article 404 of the Civil Code is not necessarily in conflict with article 395 of that Code, and is not with article 580 of the Code of Practice.

(Syllabus by the Court.)

In the matter of the interdiction of R. H. Jones. Application of James R. Mitchell for writs of certiorari and mandamus to the judge of division B of the district court. Writ denied.

Carroll & Carroll and Richardson & Soulé, for relator.

BREAUX, C. J. Plaintiff asks for writs of certiorari and mandamus to go to the judge of division B of the district court in the matter of the interdiction of Mrs. H. R. Jones, compelling him to render an order upon relator's petition for a family meeting for the purpose of appointing suitable persons as curators and undercurators for Mrs. Jones.

The respondent judge answered the application and gave grounds for refusing to grant the order in question. Originally, when the application of relator came up, accompanied by the answer of the respondent judge, both application and the answer were considered.

The court considered that there was ground sufficient to decline to issue the writs.

After that relator filed a second application requesting the court to reconsider its action, and relator filed a brief therewith.

Although this court held in *Hinnricks v. Monteleone*, 51 La. Ann. 899, 25 South. 546, that rehearings in this class of cases are not admissible under its rules, yet, as the interest of an interdict was involved, the court chose to consider the questions anew.

We will state at this time that an administrator pro tempore had been appointed and is still discharging the functions of that trust.

We will also state that a judgment of interdiction was rendered in the district court interdicting Mrs. Jones.

From this judgment she has taken an appeal. The cause is before this court. We do not think we should issue orders to ap-

point a curator and undercurator while the question of interdiction is sub judice.

The Code directs that if there is no appeal from the judgment of first instance, or that if there is an appeal, then within a month from the judgment, it shall be the duty of the judge to appoint a curator.

See article 404 of the Civil Code.

The duties of the administrator pro tempore after the curator will have been appointed will be at an end, and he shall then render an account.

Relator's contention is that the interdiction as pronounced should be provisionally executed, notwithstanding the appeal.

Relator says that, if the judgment is not to be executed, article 395 upon the subject becomes a dead letter.

On the other hand, we shall say, for it is very evident, if the provisional execution must take place and a curator appointed pending the appeal, that in that case article 404 of the Civil Code will be a dead letter.

As construed by relator the articles are inconsistent. Article 395, Civ. Code, orders that provisional execution should take place. On the other hand, article 404 delays the appointment pending the appeal. The inconsistency is more apparent than real.

The positive terms of article 404 are controlling touching the appointment of a curator and an undercurator, and it then follows that there is no inconsistency.

The judgment is to be executed provisionally, as required by article 395; that is, the interdict is subject to the disabilities laid down in the judgment. The only exception to its execution is that laid down in article 404, which is positive, and not to be misunderstood, regarding the appointment of a curator and undercurator. Neither of the articles is then a dead letter. Both are to be enforced.

The relator cites article 580 of the Code of Practice.

In our view the article cited is not pertinent to the issue and does not have the effect of repealing article 404. This article of the Code of Practice provides that the appointment of a curator should be executed provisionally; that he should exercise the functions of his trust despite an appeal.

In the case here, as there has been no appointment, the necessity for his acting does not arise, and no appeal can be taken from an order appointing him, inasmuch as he has not been appointed.

Furthermore, the judge of the district court informs us that proper care is taken of the person of the interdict and that there is no necessity for the appointment of a curator and undercurator until after the rendition of a final judgment.

In the *Leech Interdiction Case*, 45 La. Ann. 194, 12 South. 128, we said that which has here application in part at least, viz.:

"The law having specially intrusted the district court with the duty regarding persons interdicted, we will not disturb the judgment."

For reasons stated, the court declines to issue the order asked, and declines to recall the judgment heretofore rendered, dismissing relator's petition and his demand.

(116 La.)

No. 18,066.

STATE v. GRAHAM.

(Supreme Court of Louisiana. April 23, 1906.)

1. CRIMINAL LAW—OPINION EVIDENCE.

An old man, familiar with firearms from his boyhood, is a competent witness to express the opinion or conclusion that, judging from the report heard by him, the weapon used was a pistol.

2. SAME—WEIGHT OF EVIDENCE.

The statement of Wills on Circumstantial Evidence, p. 126, that "it must be shown that the shoes were compared with the footmarks before they were put on them," is a rule of sufficiency, rather than of admissibility, of evidence, and cannot be followed in this state, where the jury is made by law the sole judge of the weight and sufficiency of the testimony.

3. SAME—FOOT PRINTS—EVIDENCE OF EXPERIMENTS.

Testimony is admissible to show that the sheriff carried the prisoner to the place of the shooting and placed his feet in certain footprints there found, and that the fit was perfect; it being shown that the prisoner made no objections to the experiment and that no force was used by the officer.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 874.]

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Walter Graham was convicted of shooting with intent to kill, and appeals. Affirmed.

John Sheldon Toomer, for appellant. Walter Gulon, Atty. Gen., and Leland Hugh Moss, Dist. Atty. (Lewis Gulon, of counsel), for the State.

LAND, J. Defendant was charged by information with shooting one William E. Perkins with a certain dangerous weapon, to wit, a pistol, with felonious intent to kill and murder.

Defendant was tried, convicted, and sentenced to the State Penitentiary at hard labor for 21 years, and has appealed, relying on three bills of exception.

Bill No. 1.

W. E. Perkins, the prosecuting witness, having been asked whether the wound inflicted on him was made by a pistol, rifle, or shotgun, answered that he supposed that it was a pistol from the report it made. The witness further testified that he was 59 years of age, had been a hunter in his time, and had been familiar with the report of firearms ever since he could remember. In answer to questions on cross-examination the witness replied:

"I just suppose it was a pistol from the report. * * * I can be sure that it was a pistol in my own mind."

Counsel for defendant moved that the testimony be stricken out on the ground that it was the opinion or conclusion of the witness. This motion was overruled, and defendant excepted.

The witness was familiar with firearms, and was therefore qualified to express an opinion as to what kind of weapon produced the report heard by him when he was wounded. The sufficiency of the testimony is another question.

Bill No. 2.

W. W. Farque, a witness for the state, testified that he took a shoe off of the foot of the accused and placed it in certain shoe tracks found at the scene of the shooting, and that the shoe fitted the track "exactly." Counsel for the defendant thereupon moved the court to strike out the answer and to instruct the jury to disregard the same, on the ground that such a comparison could not be legally made until measurements of the track and the shoe had first been taken by the witness. This motion was overruled on the ground, first, that there was no such law; and, second, because the objection went to the effect of the evidence.

We think that the ruling was correct. The quotation from Wills on Circumstantial Evidence, p. 126, shows that the English judges did not, in similar cases, rule out evidence of identification, where no previous comparison had been made, on the ground of inadmissibility, but considered such evidence insufficient to prove identity, and so instructed the jury.

We are not advised that this rule of practice has been followed in the United States, and it cannot be adopted in the state of Louisiana as long as our laws leave the question of the sufficiency of evidence solely to the jury.

Whether the comparison between the shoe and the track was made in such a manner as to secure accuracy was a question of fact for the jury, and not the trial judge.

Bill No. 3.

The sheriff, as a witness for the state, testified that certain tracks were found under the window through which the shot was fired, and that he brought the accused to the spot and made a comparison by putting his feet, first the right and then the left, in the tracks, which had been cautiously preserved by coverings. The sheriff further testified that no force was used, and that the accused made absolutely no objection to the experiment, and at its conclusion agreed that his shoes fit the footprints perfectly. Defendant's counsel objected to the admissibility of the testimony on the grounds, first, that so measurements of the feet of the accused and of the footprints had been made as required by law; and, second, on the ground that defendant could not be compelled to testify against himself, and that the test in question was nothing.

ing more than a compulsory attempt to force defendant to furnish evidence against himself.

The argument for the defense assumes that the evidence furnished by the comparison of the feet of the accused with the footprints was in the nature of a confession. If so, the accused consented, without the exercise of any force or duress on him, to make the comparison. If he had the privilege of refusal he did not exercise it.

Wigmore, in his recent work on Evidence, states that testimonial compulsion is the kernel of the privilege against self-crimination, and that bodily exhibition and muscular exertion are not within its protecting scope. Sections 2263, 2265.

This author cites with approval *State v. Graham*, 74 N. C. 648, 21 Am. Rep. 493, where the court held that evidence was admissible to show that the officer took off the shoes of the prisoner and compared them with the tracks in the cornfield, and required him to put his foot in the track. In that case the court held that it was unnecessary to decide whether or not the officer might have compelled the prisoner to put his foot in the tracks, if he had persisted in refusing to do so. See *Walker v. State*, 7 Tex. App. 254, 32 Am. Rep. 595, to the same effect.

In *Day v. State*, 63 Ga. 669, it was held that testimony that a witness forcibly placed the prisoner's foot in certain tracks was inadmissible. There is no such case before us. It has been held in a number of cases that a prisoner's shoes or boots may be taken off for the purpose of comparison with certain tracks. See *Wigmore*, *supra*, notes. The tendency of the more modern cases is to restrict the constitutional privilege against compulsory self-crimination to confessions, and admissions proceeding from the accused, and to open the door to the reception of all kinds of "real evidence," or proof of physical facts, which speak for themselves.

In none of the American cases, as far as we are advised, has it ever been intimated that proof of prior measurements is required before a witness can be permitted to testify as to the result of a comparison between the foot of the defendant and tracks found at or near the scene of the crime. The quotation from *Wills on Circumstantial Evidence* is a rule of sufficiency, rather than of admissibility, of evidence.

Judgment affirmed.

(116 La.)

No. 15,969.

DUPUY et al. v. POLICE JURY OF IBERVILLE.

(Supreme Court of Louisiana. March 26, 1906.
On Rehearing, April 23, 1906.)

1. PARISHES—POLICE JURY—SALE OF COURTHOUSE.

The police jury of a parish has no authority to sell or exchange a courthouse and grounds

without legislative sanction, for the purpose of acquiring another site for a new courthouse.

2. SAME—PUBLIC IMPROVEMENTS.

The remaining issues involved in this controversy were considered in the mandamus suit under the same title reported in 115 La. —, 39 South. 627, and the rulings in that case are reaffirmed.

(Syllabus by the Court.)

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Calvin Kendrick Schwing, Judge.

Action by Dan T. Dupuy and others against the police jury of Iberville. Judgment for defendant, and plaintiffs appeal. Reversed in part, and, as amended, affirmed.

Edward Blount Talbot and Edward Nichols Pugh, for appellants. Alexander Hébert, Clarence Samuel Hébert, and Laycock & Beale, for appellees police jury and McWilliams. Sutherland & Barret, for appellee John Arthur.

LAND, J. This case has heretofore been before us on an application for a mandamus to compel the district judge to grant a suspensive appeal from an order dissolving on bond the injunction sued out by plaintiffs. This application was refused. See 115 La. —, 39 South. 627.

The allegations of the petition are so fully stated in the opinion of the court in that case that repetition is unnecessary. All of the issues, save one, now before the court, were presented and fully considered on the application for a mandamus.

On the final trial there was judgment in favor of the defendants, and plaintiffs have appealed.

The question before the court in the mandamus suit, it is true, was whether the dissolution of the injunction on bond would work irreparable injury to the plaintiff; but the solution of that question depended on the relief that plaintiffs were entitled to on the record presented to the court.

The court reached the following conclusions, as expressed in the syllabus prepared by the justice who handed down the opinion:

"(1) Whether a police jury, in undertaking to build a new courthouse upon a new site at the parish seat, is acting wisely or unwisely, in view of the alleged suitability of the old site and the alleged probability that such action will at some future time involve the building of a new jail, is a question which presents nothing upon which this court can act, since the discretion vested in the police jury in such matters is not subject to judicial control.

"(2) An ordinance declaring that a courthouse shall be built upon one lot at the parish seat, being inconsistent with a previous ordinance declaring the purpose to build on another lot, the previous ordinance is to that extent repealed by implication.

"(3) A police jury may meet in special session, when it is deemed necessary, upon the call of the president or otherwise; notice of such meeting being given to the members.

"(4) If a courthouse is established in a town, the corporate limits of which are enlarged, a change in the location of the building to the center of the town as enlarged is not a removal

of the courthouse, such as to require a special election to be held.

"(5) A dedication by ordinance of a police jury of two mills of the estimated surplus of the parish tax, without specification of the number of years for which the tax is dedicated, is controlled by Rev. St. § 2449, and Act No. 32, p. 39, of 1902, to the extent that it must continue for ten years, if necessary for the payment of the debt to which it is dedicated, and cannot continue beyond that time.

"(6) Where a police jury undertakes a work of public improvement, such as the building of a courthouse, for which it is necessary to incur a debt payable from the estimated surplus of the parish revenues, the contract therefor may be made on the basis of cash realized or to be realized from certificates of parish indebtedness, to the payment of which the surplus is dedicated."

The court found that the only serious question presented was whether sufficient provision had been made for the payment of the debt which the police jury proposed to contract, and on the record before it decided that question in the affirmative. We see no good reason to change our views.

The police jury had the power under Act No. 32, p. 39, of 1902, to make agreements or contracts dedicating the excess of annual revenues of subsequent years and to issue interest-bearing certificates for the purpose of defraying the costs of public improvements.

Two mills from the regular parish tax of ten mills was set aside for that purpose.

This tax was levied for the year 1905, and its proceeds estimated on the budget at \$6,000. This annual surplus was sufficient to pay the cost of constructing the new courthouse well within the limit prescribed by the act of 1902. It is objected that the contract price exceeded the amount of \$37,000, authorized by the resolution.

But the police jury formally approved the action of its building committee in accepting the bid for \$39,500. Therefore at the time the contract was entered into the police jury had dedicated the excess of annual revenues of subsequent years to pay the full contract price.

It is further argued that the contract provided for cash payments, while the statute contemplates that payments should be made futuro.

If, as indicated by the evidence, the police jury made arrangements with local banks to take the certificates at their face value, thus enabling the police jury to make a contract on a cash basis, we see no grounds for complaint on the part of taxpayers, as it is not shown that they suffered any injury from the transaction.

The only remaining contention is as to the sale or exchange by the police jury of the old courthouse site and the purchase of another site for the erection of a new courthouse. We agree with the district judge that the right of the police jury to make such a purchase is not a debatable question, since it necessarily follows from the mandate of the

law requiring them to provide a good and sufficient courthouse for the parish.

The wisdom or expediency of abandoning an old courthouse building is a matter of discretion, vested in the police jury, over which we have no control. But the right of the police jury to dispose of the old courthouse site and building is a different question. It appears from the evidence that the police jury purchased the new site for the price of \$8,000, of which \$5,000 was paid in cash and \$3,000 by a transfer of the old site to the vendor.

In *Parish v. Gaddis et al.*, 34 La. Ann. 929, this court held that property donated to a parish in fee simple for its use and benefit, and upon which a courthouse was built and used, cannot legally be sold under a police jury ordinance, although, the parish seat being changed, the building was abandoned and threatened to go to ruin. In that case the court in a well-considered opinion pointed out the difference between parochial and municipal corporations as to their powers and functions.

The court said that parishes possessed no other powers than those delegated, "ranking low in the scale of corporate existence," and "as a rule cannot acquire real estate, unless for public utility, and cannot dispose of same, after it has been acquired and devoted to public service, without legislative authority"; citing *Dillon* (3d Ed.) vol. 1, p. 25.

The difference between that case and the one at bar is very slight. In one the property was acquired by the parish by donation "in fee simple for its use and benefit," and in the other the property was acquired by purchase as the site for a courthouse.

In both cases, the property was acquired for the benefit of the public, and particularly for the benefit of the people of the local community.

In one case the property was sold, and in the other exchanged or given in payment. There is no difference in principle between a sale and an exchange, quoad the power to alienate. Our statutes confer on police juries no express authority to acquire or sell real estate.

The authority to purchase is implied when it is necessary to enable the police jury to discharge the duties imposed on it, as in cases of the construction of courthouses, jails, and the like.

It has been held that a police jury may purchase the property of a delinquent tax collector sold under execution to pay a debt due the parish; this power being implied from the power to sue, recover judgment, and issue execution in such cases. *Parish of Concordia v. Bertron*, 46 La. Ann. 356, 15 South. 60.

We have been referred to no case in which it has been held that the police jury has the right, without special legislative sanction, to sell real estate acquired for a public purpose.

The sale of a courthouse site and building thereon is a matter which concerns the people of the parish, and we are not prepared to hold that a police jury has the authority to sell such property without legislative authority, either general or special.

Our amendment of the judgment will leave the defendants at liberty to carry out their judicially admitted agreement for a retrocession of the old courthouse and site to the police jury without affecting the purchase of the new site, and will not interfere with the construction of the new courthouse under the contract in question.

It is therefore ordered, adjudged, and decreed that the transfer from the police jury to Jacob McWilliams of the lot of ground on Main street in the town of Plaquemine on which the old courthouse of the parish stands, as per deed of date June 23, 1905, before Joseph A. Grace, clerk of court and ex officio notary public, be annulled and canceled, and that said property be declared to belong to the parish of Iberville; and it is further ordered and decreed that the injunction sued out against said Jacob McWilliams, restraining him from selling or disposing of said courthouse and grounds, be perpetuated; and it is further ordered and decreed that the said judgment be annulled, avoided, and reversed in so far as it dissolved the said injunction in its entirety and condemned plaintiffs to pay damages and costs; and it is further ordered and decreed that defendants pay all costs of suit in the district court, and that, as thus reversed in part and amended, the judgment appealed from be affirmed—appellees to pay costs of appeal.

On Application for Rehearing.

MONROE, J. In this case the purpose and intent of the decree handed down was to affirm the judgment appealed from in so far as the same accords to the defendant Arthur the right to proceed with the execution of his contract with the police jury, and to reverse said judgment only in so far as relates to the contract between the police jury and Jacob McWilliams, whereby the former undertakes to transfer to the latter the old courthouse and site; and it was inadvertence to condemn Arthur for the costs, whether of the district court or of this court, and to reverse the judgment in so far as it awards him the amount of his attorney's fees for dissolving the injunction against him.

It is therefore adjudged and decreed that the judgment handed down be so amended as to release the defendant Arthur from the payment of costs, and as to allow him the \$150 for attorney's fees as allowed by the judgment appealed from, and as to condemn the police jury and the defendant McWilliams for all costs.

Rehearing refused.

(116 La.)

No. 15,781.

ROSS v. SIBLEY, L. B. & S. RY. CO.

(Supreme Court of Louisiana. March 12, 1906.
Rehearing Denied April 9, 1906.)

**RAILROADS—ACCIDENT AT CROSSING—LAST
CLEAR CHANCE.**

While plaintiff was negligent in attempting to cross the defendant's track at a sharp curve without stopping to look and listen at the proper time and place, the company will be held liable when the evidence shows that the engineer saw the danger in time to avoid the accident by sounding the whistle or applying the brakes.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1096–1099.]

(Syllabus by the Court.)

Appeal from Second Judicial District Court, Parish of Webster; Richard Cleveland Drew, Judge.

Action by J. H. Ross against the Sibley, Lake Bisteneau & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stewart & Stewart and William Rufus Cowley, for appellant. Lynn Kyle Watkins and Roberts & Roberts, for appellee.

LAND, J. This is an action to recover damages for personal injuries.

There was a judgment in favor of the plaintiff for \$2,500, and defendant has appealed.

Plaintiff, a man 52 years of age, was struck by the pilot of the locomotive when crossing the track of defendant company in the village of Sibley, sometimes called Lanesville.

Plaintiff was struck on the left leg, which was fractured above the ankle.

It appears that, when the collision took place, plaintiff had nearly crossed the track; his right foot being beyond the rail. In a second, or a fraction of a second, he would have been safe from danger.

The place of accident was directly in front of the store or shop of the Lanesville Mercantile Company. The distance from the front door of the building to the end of the ties was 12 feet, and to the rail 13½ feet. The track of the defendant railway company coming from the south and rear makes a sharp curve at this point.

The degree of this curvature may be illustrated by the fact that a person standing one step from the front door of the building can see only 41 feet down the track. Defendant at this particular place has no right of way beyond the ground covered by its roadbed.

Immediately beyond the track on the northwest were several buildings occupied for business purposes.

In front of the store of the mercantile company there was a passway across the track of defendant company.

This passway was constantly used by the public.

Plaintiff was employed as a clerk in the store of the mercantile company, and on the morning of the accident crossed the track for the purpose of seeing the driver of the mail wagon and getting him to carry a large side of meat to another store belonging to the same company.

On returning plaintiff looked down the track and saw nothing. He then crossed over to the store, and, getting the side of meat, which had been put in a sack, raised it with both hands above his left shoulder, and, one step from the door, turned and looked down the track. He saw nothing, and proceeded immediately along the usual passway across the track. He did not stop and look again before stepping on the track, and in endeavoring to cross was struck and injured as already stated.

Plaintiff was hard of hearing to the extent that he had to use an ear trumpet. The sack of meat, carried as it was, prevented him from turning his head and looking down the track as he walked along. Plaintiff did not look at the proper time and place, and candidly admits that, if he had stopped and looked short of the track, he would not have been injured.

Plaintiff was guilty of negligence, and the question is whether defendant's servants could by ordinary care have avoided the consequences of his negligence.

It appears that defendant's road is not the ordinary freight and passenger railways. Its principal traffic is in lumber, and it carries passengers in the caboose attached to its freight trains. Defendant's railway connects with the Vicksburg, Shreveport & Pacific and the Louisiana & Arkansas Railway at Sibley Junction.

On the morning in question defendant's train pot of the Vicksburg, Shreveport & Pacific Railway, and a part of the train, consisting of a locomotive and tender, a box car, and a caboose, was coming back towards the depot. On this train were an engineer, fireman, and two brakemen.

Abe Hess, the head brakeman, was standing on the pilot of the engine. Hess did not see plaintiff until he stepped on the track, some 15 or 20 feet in front of the pilot. Hess shouted, but plaintiff paid no attention, and was struck as he was in the act of stepping off on the far side.

The train was running 4 or 5 miles an hour. Hess was looking at the Vicksburg, Shreveport & Pacific train coming in, and did not see plaintiff coming from the store. As the pilot struck plaintiff, Hess in his excitement jumped off and ran 30 or 40 feet down the track. When Hess stopped and turned, he saw the plaintiff lying on the ground back of the pilot, and about the gangway or step or cab of the engine.

The foregoing is a synopsis of the material part of Hess' testimony. He and other witnesses stated that plaintiff on several

occasions had been warned off the track when trains were approaching.

The substance of the testimony of Charles Matterson, the engineer, as far as pertinent to the inquiry, may be epitomized as follows:

The train in his charge was running without steam downgrade, and the fireman was ringing the bell. The speed was 3 or 3½ miles an hour. Matterson saw plaintiff coming towards the track, but could not see his face, on account of the bundle on his left shoulder, and did not recognize him. There were two pathways in front of the mercantile store; one leading across and the other leading down the track towards the Vicksburg, Shreveport & Pacific depot. These paths converged near the end of the ties, and Matterson could not tell whether the man was going across or down the track. As soon as Matterson saw the man cross the parallel pathway and raise his foot to step on the track, he reversed his engine and did all in his power to avert the accident. Plaintiff stepped on the track about 6 feet in front of the pilot. The train was in plain view, and plaintiff could have seen it, had he looked. Hess, who was standing on the pilot, "hollered out as loud as he could." Matterson, coming around the curve, could not see plaintiff until he got within about 6 feet of the end of the ties. Matterson might have stopped the locomotive in time, had he known that plaintiff was going to cross the tracks. The locomotive could have been stopped within 10 or 12 feet. It actually moved 11 feet after it struck him.

The fireman testified that he was ringing the bell when the accident occurred, that the speed was not more than 5 miles an hour, and that the locomotive moved 11 feet after it struck plaintiff. The fireman was on the far side of the locomotive, and could not see the plaintiff approaching the track.

Waldron, the other brakeman, was on the front end of the caboose, and did not see the accident. He testified that the train was running at a speed of about 4 or 5 miles an hour, and stopped very suddenly, with a jar which threw him against the hand rails of the platform of the caboose. This witness did not recollect whether or not the bell was ringing at the time of the accident. He testified that there were no air brakes on the box car and caboose, but there were such brakes on the locomotive and tender.

Two of the witnesses for the defendant testified, in a general way, that they heard the ringing of the bell. Others, two of whom were standing very near the plaintiff, testified that they did not hear the bell ringing at the time of the accident.

Two expert witnesses for defendant testified that under proper conditions such a train, going 3 or 3½ miles an hour, could be stopped within 8 feet.

Plaintiff and two other witnesses testified that after plaintiff was struck he was

dragged 12 or 15 feet, and the evidence of Hess and others shows that he was picked up about 26 feet from the point of the pilot. This evidence tends to show that the locomotive ran from 38 to 41 feet after the collision, and from this fact it may be inferred that the speed was high, or the brakes were not timely applied, or were defective. A number of nonexpert witnesses for plaintiff testified that the speed was rapid.

But we think that the determinative issue in the case is whether the engineer could have avoided the accident after he saw, or should have seen, that the plaintiff was about to cross the track. The engineer saw a man, with a large bundle on his shoulder, coming from the store and going straight towards the track, a few feet distant. The burden he carried obscured the vision of the man and prevented his seeing the approaching train.

It was more probable that the man would attempt to cross the track than it was that he would go to the end of the ties and then turn at a right angle down the track. Yet, with a human life in the balance, the engineer waited until the man actually raised his foot to step upon the track before he took any action whatever.

The mere sounding of the whistle when the engineer first saw the man would have saved the situation. There was probable danger, and this precaution should have been taken. In another view of the case, if the testimony of Hess be true, and he is a witness for the defendant, the engineer, after seeing the man step on the track, had 15 or 20 feet within which to stop or slacken the speed of the locomotive. The slightest diminution of speed would have prevented the accident.

We are of the opinion that under the circumstances of this particular case the engineer should have sounded the whistle, or slowed down his train, or both, when he first saw the plaintiff making for the crossing, which was dangerous at all times, owing to the curvature of the track.

We think that the evidence shows that the accident might have been avoided by timely action of the engineer after he saw, or should have seen, the danger of the plaintiff.

The question of negligence was one of fact, and we are not prepared to say that the verdict of the jury was erroneous. Plaintiff was permanently injured and suffered great pain.

Judgment affirmed.

(116 La.)

No. 15,732.

THEUS v. ARMISTEAD et al.

(Supreme Court of Louisiana, March 12, 1906.
Rehearing Denied April 9, 1906.)

1. PARTNERSHIP—DISSOLUTION—ACTION BETWEEN MEMBERS.

A member of a dissolved commercial firm, who has paid one of its obligations, has no right

of action against his partner for reimbursement, save by suit for a settlement of the partnership.

2. SAME—FIRM TRANSACTION.

Where the firm, A. & B., was succeeded by the firm, A. & C., and A. & C. gave their individual notes to a creditor of the firm of A. & B., *held*, that this was not a partnership transaction, though the firm of A. & C. may have used a portion of the assets of the firm of A. & B.

3. SUBROGATION—PAYMENT OF JUDGMENT.

One of two debtors in solido on payment of a judgment against both is subrogated to the rights of the judgment creditor against his codefendant to the extent of his part and portion of the debt, including interest and costs.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, § 8.]

(Syllabus by the Court.)

Appeal from Third Judicial District Court, Parish of Bienville; James Edward Moore, Judge.

Action by William P. Theus against W. W. Armistead and others. Judgment for plaintiff, and defendants appeal. Amended and affirmed.

William Upsher Richardson, Joseph Rush Wimberly, and Lynn Kyle Watkins, for appellants. Dorman & Reynolds, for appellee.

LAND, J. In June, 1896, R. M. Walmsley & Co. obtained judgment in solido against W. P. Theus and W. W. Armistead on three notes—one for \$2,000, less a credit of \$642.72, signed by Theus & Armistead, and two for \$2,549.30 each, reading "I promise to pay," and signed by W. P. Theus and W. W. Armistead.

In the petition it was alleged that the defendants "formerly were commercial partners doing a commercial business in the town of Arcadia, Bienville parish, La.," and that the last two notes were secured by a special mortgage executed by W. P. Theus on certain real estate situated in said parish. The judgment ordered this mortgage to be recognized and enforced.

It appears that W. W. Armistead, having paid this judgment in the year 1902, caused execution to issue thereon, under which was seized certain real and personal property belonging to W. P. Theus, who thereupon instituted the injunction suit now before this court.

Plaintiff alleges that the notes merged in said judgment were debts of the commercial firm of Theus & Armistead, which was dissolved, but never had been liquidated, and that there has never been a settlement of accounts between the partners. Plaintiff further alleges that upon a full, fair, and complete settlement of the partnership of Theus & Armistead he would owe W. W. Armistead nothing, but, on the contrary, said Armistead would be indebted unto him.

According to the allegations of the petition the note for \$2,000 represented a debt contracted directly by Theus & Armistead, and the other two notes represented a debt originally due by Theus & Co., which was assumed by its successor, Theus & Armistead;

the consideration being a large amount of notes, accounts, and moneys received by the new firm from the old firm.

W. W. Armistead having died, his widow and heirs were made parties to the suit. Defendants for answer, after pleading the general issue, averred that W. W. Armistead and Theus & Armistead were securities only on the obligations sued on and merged in the judgment in the case of R. M. Walmsley & Co. v. Theus & Armistead; that said obligations represented a debt contracted by the old firm of Theus & Co., of which W. P. Theus was a member, and were executed as security in effect for account of W. P. Theus and W. P. Theus & Co., and the members thereof; and that W. W. Armistead, having paid said judgment, was thereby legally subrogated to all the rights of R. M. Walmsley & Co.

Answering further, the defendants aver in the alternative that the partnership of Theus & Armistead was dissolved in the year 1893, and that W. P. Theus gave his duebill to W. W. Armistead for a balance due W. W. Armistead for his interest in all the remaining assets of the firm, agreeing to pay the debts, but disposed of the property of the firm, and has left all the debts for W. W. Armistead to pay.

Defendants further aver that by such disposition of the assets and the insolvency of W. P. Theus W. W. Armistead was forced to pay off all the debts of the firm; that the judgment in favor of Walmsley & Co. was paid after the alleged dissolution of the firm, and after the giving of the alleged duebill to W. W. Armistead; and that he, by payment of the judgment and by transfer and legal subrogation, acquired the full ownership of the judgment.

Defendants prayed for the dismissal of the suit and the dissolution of the injunction, with reservation of their rights to sue for damages.

There was judgment in favor of the plaintiff, sustaining and perpetuating the writ of injunction and quashing the writ of fieri facias. Defendants have appealed.

The firm of W. P. Theus & Co., composed of W. P. Theus and James Brice, was dissolved in 1889, and the firm of Theus & Armistead was formed in January, 1890. W. P. Theus retained possession of the assets of the old firm for the purposes of liquidation. R. M. Walmsley & Co. were creditors of Theus & Co. for a considerable amount, and also became creditors of the new firm, which on November 2, 1891, executed its note in favor of Walmsley & Co. for \$2,000, payable 90 days after date. On its face, this note is an obligation of Theus & Armistead, and the evidence shows that it was given for a balance due for merchandise sold to said firm.

On November 2, 1891, W. P. Theus and W. W. Armistead executed their two notes in order of Walmsley & Co. for \$2,549.30

each, with 8 per cent. interest from date, due, respectively, November 2, 1892, and November 2, 1893, and on the same day W. P. Theus, in order to secure the payment of said notes, executed a special mortgage in favor of Walmsley & Co. on certain lots and lands situated in the parish of Bienville. This mortgage was by private act, and was on December 28, 1891, canceled by the substitution of another special mortgage by public act, and new notes were executed of the same date with the act of mortgage, but otherwise of the same tenor as the notes executed on November 2, 1891.

These two notes undoubtedly represented a debt due by Theus & Co. to Walmsley & Co., and for which Theus & Armistead and W. W. Armistead were in no wise bound.

Armistead individually signed the notes and thereby made himself liable.

The firm of Theus & Armistead was no party to the notes, and was not bound for the debt due Walmsley & Co.

The testimony of W. P. Theus is to the effect that Theus & Armistead had collected out of the notes and accounts belonging to Theus & Co. an amount more than sufficient to pay the debt due Walmsley & Co., and that he and Armistead signed the two notes in order to keep the money thus collected in the firm of Theus & Armistead. The commercial books of that firm have been destroyed by fire; but the testimony from recollection of two witnesses, who were bookkeepers for the firm at different times, tends to show that the two notes were charged to Theus & Co.

Mr. Butler, an attorney, who represented Walmsley & Co. in the settlement, had no very definite recollection of the reasons which induced Armistead to sign the notes, but testified that he prevailed with Armistead to sign the notes with Theus, and "to let old man Brice out on account of his age," and that "there seemed to be a disposition with all the parties to let Brice out of the business and substitute Armistead for Brice." Mr. Butler was a witness for the defendants, and his testimony shows that Walmsley & Co. accepted Armistead as a debtor in the place of Brice. Walmsley & Co. did not by this transaction become creditors of the firm of Theus & Armistead. In the two acts of mortgage there is no reference to that or any other firm. It is significant that three notes were executed on the same day in favor of Walmsley & Co., and only one of them was signed in the firm name of Theus & Armistead.

Hence it cannot be said that the two notes in favor of Walmsley & Co. represented a debt due by the firm of Theus & Armistead. These notes are on their face individual obligations of W. P. Theus and W. W. Armistead.

The execution of these two notes extinguished by novation a debt due by W. P. Theus & Co., and whatever rights resulted

from the transaction inured to the benefit of W. P. Theus and W. W. Armistead.

The resulting claim against Theus & Co. belonged to them, and not to Theus & Armistead. If the notes were subsequently made to compensate a claim of Theus & Co. against Theus & Armistead, the transaction cannot be considered in any other light than a contribution by W. P. Theus and W. W. Armistead to the assets of the new firm, just as if they individually had purchased property and then turned the same over to the partnership.

Hence we conclude that the two notes do not represent a partnership transaction, and that the solidary makers stand to each other in the relation of individuals and not of partners. There is no evidence in the record to show that W. W. Armistead signed the two notes as surety for W. P. Theus; but the evidence tends to show that Armistead was substituted for Brice.

Having paid the two notes merged in the judgment, W. W. Armistead is entitled to claim from W. P. Theus his portion or one-half, and is subrogated pro tanto to the rights of the judgment creditors. Civ. Code, arts. 2103, 2104, 2161.

The alleged settlement of partnership accounts is not sustained by the evidence. W. W. Armistead retired from the partnership in January, 1893, having drawn out all the capital which he had invested in the concern. On July 19, 1893, W. P. Theus executed in favor of W. W. Armistead a duebill for \$2,789.25, bearing 8 per cent. interest from date, for his interest in the notes and judgments of the firm of Theus & Armistead.

The most that can be said of this duebill is that it evidences a purchase of the interest conveyed. All the direct evidence shows that there was no settlement of accounts between the partners. The firm was hopelessly insolvent, and both Armistead and Theus were at the date of the duebill consulting counsel relative to transferring all their property to their respective wives, and both transfers were made on or about the date of the duebill. W. P. Theus transferred to his wife all the notes, accounts, and judgments mentioned in the duebill. The direct testimony of Theus and one of the attorneys consulted is to the effect that it was understood that the duebill was not to be collected, but was to be held by Armistead merely as evidence to show what was the amount of his interest in such assets. As the firm was hopelessly insolvent, his residuary interest in the uncollected notes, accounts, and judgments was worth nothing. Reading between the lines, it is evident that the purpose of the duebill was to put the title to such assets in the name of W. P. Theus, so that he could transfer the same to his wife in payment of her paraphernal claims against him.

Partnership assets could not be legally transferred for such a purpose, owing to the superior preference of partnership creditors.

41 SO.—7

Theus and Armistead were brothers-in-law, and the transaction seems to have been a family arrangement to defeat the pursuit of creditors.

There having been no settlement of partnership accounts, the payment by Armistead of the balance of the note of the firm for \$2,000 gives him no right of action for the specific amount so paid against W. P. Theus. As to such claims, the sole remedy of the partner is by suit for the settlement of the partnership. *Reddick v. White*, 46 La. Ann. 1207, 15 South. 487, and authorities there cited.

Our conclusion on the whole case is that the execution and seizure should be maintained as to one-half of the sum of \$5,098.60, representing the aggregate of the two individual notes, with interest and costs as per judgment in favor of R. M. Walmsley & Co. in liquidation.

It is therefore ordered, adjudged, and decreed that the injunction sued out herein be dissolved, and the execution and seizure be maintained as to one-half of the sum of \$5,098.60, with 8 per cent. per annum interest thereon from November 2, 1891, and one-half of the costs indorsed on writ of fieri facias issued in the suit of R. M. Walmsley & Co. v. W. P. Theus and W. W. Armistead; and it is further ordered and decreed that the judgment appealed from, as thus amended, be affirmed, and that plaintiff pay the costs of this appeal.

(116 La.)

No. 15,986.

McLELLAN v. ROSSER.

(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied May 7, 1906.)

RES JUDICATA—PARTIES—ESTOPPEL.

Where, in a petition by an adjudicatee to enjoin a sale a la folle enchere, the petitioner alleges that he was made a party defendant in a suit previously brought, by the owner of the property for the same purpose (on account of the alleged illegality of the adjudication) and where it appears that in such former suit, as adjudicatee and defendant, he had appeared in this court, through counsel, and had insisted that the injunction prohibiting the sale a la folle enchere, as then attempted, should be maintained, such petitioner cannot be heard, for the purpose of defeating the plea of *res judicata*, to say he was not a party to such former suit and judgment because of an omission by the clerk of the district court to file the answer prepared on his behalf and which, without objection on his part, had been brought up in the original and made part of the transcript of appeal therein. And the plea is maintained.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Alden McLellan against James B. Rosser, Jr. Judgment for defendant, and plaintiff appeals. Reversed, and intervention of A. H. Murray dismissed.

Harry Hinckley Hall, for appellant. John Donovan Flynn, for appellee. Edwin How-

ard McCaleb, for appellee A. H. Murray, intervener.

Statement.

MONROE, J. The titular plaintiff in this case, as the holder of past due notes representing the purchase price of certain real estate, undertook to foreclose the mortgage by which the notes were secured, and the property was seized under executory process and adjudicated to A. H. Murray, who deposited 10 per cent. of the amount bid by him in the hands of the sheriff but failed further to comply with the adjudication, whereupon the sheriff, under plaintiff's instructions, proceeded to offer the property for sale, a la folle enchere, and the proceedings having been enjoined by the maker of the notes (and holder of the property), the matter came before this court, where the judgment of the district court, dissolving the injunction, was affirmed. *McLellan v. Rosser*, 114 La. 140, 38 South. 85.

Plaintiff then proceeded again to advertise the property for sale, a la folle enchere, when (upon the day preceding that upon which the sale was to have taken place) it was enjoined by Murray, the adjudicatee. His petition for injunction (which purports to be a petition of intervention in the pending proceeding) alleges, in substance, the adjudication of the property (in May, 1902) and the deposit made by him; that he has always been ready to comply with his bid, but that differences arose between the seizing creditor and the defendant, Rosser, which culminated in an attack by the latter upon the validity of the sale and his obtaining an injunction prohibiting the readvertisement and sale of the property, a la folle enchere, "making your petitioner and said McLellan parties defendant to said proceeding and praying judgment against them"; that the case was decided adversely to Rosser, and the final result of said litigation between said McLellan and said Rosser is "to affirm the validity of the said adjudication made * * * to petitioner, * * * and that petitioner is anxious and willing to complete said adjudication; * * * that the civil sheriff * * * is now illegally proceeding to advertise, cry, and adjudicate said property, * * * a la folle enchere; * * * that the law relative to sales a la folle enchere, does not apply to sheriffs' sales, * * * and that said acts and deeds of said sheriff and the plaintiffs herein, in attempting to sell said property a la folle enchere are illegal and violative of your intervener's rights and interest"; and he prays for an injunction, and for judgment ordering the sheriff to make him a title upon his complying with his original bid or else to return the amount of his deposit.

The defendant in injunction (*McLellan*) pleaded, as exceptions, *res judicata* and "no

cause of action disclosed," and, upon the trial of the exception of *res judicata* it was shown, among other things, that Murray was made party defendant to the original injunction proceeding (in which Rosser was plaintiff), Rosser, who was called as a witness in his behalf, testifying: "I joined him as a party defendant. I enjoined the advertisement of the sale a la folle enchere, * * * but Mr. Murray had no interest in the suit; that is, he had nothing to do with it. I considered I had to make all parties, both Mr. McLellan, as seizing creditor, and Mr. Murray as adjudicatee, and the civil sheriff, defendants to the injunction proceeding."

A question then arose as to whether Murray had ever filed an answer or had been represented by counsel, and a document purporting to be his answer, and found in the record but not filed by the clerk, was offered in evidence and admitted, over objections, which were reserved to the effect. In this document, which appears to have been signed by an esteemed member of the bar, Murray, as defendant, admits the adjudication of the property as alleged in Rosser's petition. He avers "that defendant, Alt H. Murray, has naught to do with the injunction proceedings; he had no interest therein and should be dismissed at the cost of the plaintiff in injunction," and he prays "that he be hence dismissed, as being without interest herein," etc. It was, then, shown that the document in question, not having been copied in the transcript of appeal, was brought up to this court, in the original, for the purposes of the former trial, by virtue of an agreement between the counsel representing the plaintiff and the defendant, Rosser, respectively, and that thereafter Murray appeared in this court, by the same counsel by whom his answer appears to have been signed, and, by brief, argued in support of the legality of the injunction and the illegality of the proceeding to sell the property a la folle enchere, the concluding language of the brief being, "Murray is without fault and the sale a la folle enchere cannot proceed against him."

The exceptions (in the instant case) were, however, overruled; the defendant in injunction answered, and after hearing on the merits, there was judgment in favor of Murray, perpetuating his injunction against the present attempt to sell a la folle enchere and ordering the sheriff to return to him the amount of his deposit, and, from the judgment so rendered, the defendant in injunction (plaintiff in seizure) has appealed.

Opinion.

The proposition relied on, that Murray could participate in this court, as an interested party, in the litigation to which he had been cited, and, after taking his chance of a favorable judgment, escape the consequences of an unfavorable one, by setting up

that the clerk of the district court had omitted to file the answer which had been prepared and tendered in his behalf, and, hence, that he was not a party to the suit or the judgment cannot be entertained. Moreover, in the petition filed by him in the present suit, he distinctly alleges that he was made a party defendant in the former suit, and he cannot be heard to deny it. Our learned brother of the district court seems to have thought that the issues presented in the former suit did not concern Murray, but, as the question there presented was, whether the property of which he was the adjudicatee should be sold a la folle enchere, and as that is the question which is presented here, it seems to us that he was interested in the former suit, or if it could be said that he was not, then, that it must follow that he is not interested in the present suit.

In the former suit, this court said:

"This is an injunction suit to prevent a sale a la folle enchere and to annul the adjudication upon which the attempted sale a la folle enchere is predicated. Plaintiff's property was seized and adjudicated under executory process, and, the purchaser failing to comply with his bid, the property was readvertised to be sold a la folle enchere, and the plaintiff brought the present injunction suit. * * * The injunction is unfounded and was properly dissolved."

And the judgment appealed from, by which the injunction was dissolved, was affirmed. This judgment, we think, constitutes res judicata, quoad the issues here presented; a conclusion which renders it unnecessary that we should consider other points presented on behalf of the defendant in injunction.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; that the demands of A. H. Murray be rejected; and that his intervention be dismissed and his injunction dissolved, at his cost in both courts.

(116 La.)

No. 15,800.

BLANCHARD et al. v. NAQUIN (FOLSE & FROST et al., Interveners).

(Supreme Court of Louisiana. March 26, 1906.
Rehearing Denied April 23, 1906.)

1. MARSHALING ASSETS—SCOPE OF REMEDY—MORTGAGE COVERING SEPARATE TRACTS.

Where a single first mortgage rests upon two plantations, owned by A. and B., respectively, though, as between such owners, the entire debt so secured is due by A., the plantation of B. cannot be made to contribute to the payment thereof, unless the proceeds of the sale of A.'s plantation prove insufficient to satisfy the mortgage in full, and, whilst the mortgagee may seize both plantations, the mortgagor, on the other hand, may demand that the plantation of A., alone, be sold, if, by such sale, sufficient may be realized to satisfy the mortgage, and if A., the mortgagor, neglect or refuse to make such demand, B., as his creditor, having an interest, may exercise A.'s right.

2. SAME—APPLICATION OF FUND.

Where two plantations held by A. and B., respectively, are affected by a single first mortgage, and the titles show that, as between the owners, A. has assumed the debt, and has agreed that in the event of B.'s paying any part of it, he shall be subrogated to the rights of the creditor and mortgagee, neither A., nor any creditor of his who was party to the contracts by which the titles were acquired or who claims under a mortgage inscribed against his plantation after the registry of those titles can take anything from the fund realized by the sale, under the first mortgage, of the two plantations, until B. is reimbursed the amount contributed by his plantation to the satisfaction of said first mortgage, to which to the extent and by virtue of such contribution and quoad the parties mentioned, he becomes subrogated.

3. MORTGAGES — EXTENSION — RELEASE OF LIEN.

The holder of notes secured by a mortgage containing the pact de non alienando does not lose his mortgage by consenting with the maker of the notes and mortgagor, without consulting a third person to whom the mortgagors property may have been sold, to an extension of the time for the payment of the notes.

(Syllabus by the Court.)

Appeal from Twenty-Seventh Judicial District Court, Parish of Assumption; Paul Léche, Judge.

Action by Agnes R. Blanchard, tutrix, and others, against Clovis Naquin. Folse & Frost and others intervene. Judgment for plaintiffs, and Folse & Frost appeal. Reversed, and judgment rendered.

Beattie & Beattie for Folse & Frost, appellants. Pugh & Pugh, for appellees Agnes R. Blanchard and others. Edward Nicholls Pugh, for appellees W. B. Bloomfield and Mrs. C. Naquin.

Statement.

MONROE, J. Plaintiff having proceeded via executiva to enforce payment of certain mortgage notes, Folse & Frost and some other persons, asserting mortgages upon the property seized, intervened, and there was a litigation which resulted in a judgment from which this appeal is prosecuted. The facts as they appear from a very badly prepared transcript are as follows: On March 12, 1898, Clovis Naquin (defendant) purchased an undivided half interest in Sans Nom plantation (the other half interest in which he already owned), and the whole of Cleveland plantation. In payment of the price, he assumed an interest-bearing debt of \$3,500, secured by mortgage on Sans Nom plantation, in favor of H. N. Dupont, and gave his 12 notes for \$1,500 each, secured by a single mortgage, bearing on both plantations, and for the purposes of which, his wife intervened and renounced her rights. The notes so given were divided into groups of three and, as thus divided, matured in one, two, three, and four years, respectively. The notes constituting the group which matured in one year were paid, the others were acquired by Dr. Blanchard, who, by agree-

ment with their maker, extended the time for their payment three years beyond that originally fixed, and, thereafter, upon the death of Dr. Blanchard, they passed into the hands of the plaintiff, as widow and tutrix, and are the notes upon which this suit is brought. In the meanwhile (upon April 4, 1898) Naquin sold to Oscar A. Folse (Mrs. Naquin renouncing her rights) an undivided one-third interest in the two plantations mentioned, and, in part payment of the price, Folse assumed one-third of the debts represented by the Dupont mortgage and by the 12 notes of \$1,500 each which Naquin had issued in buying the property. On July 29, 1899, Naquin sold to Folse his remaining two-thirds interest in Cleveland, and by separate act Folse reconveyed to Naquin the one-third interest in Sans Nom which he had purchased from him the year before. In the sale first mentioned Naquin declares "that there are mortgages against the property herein sold, but that he binds and obligates himself to hold the purchaser harmless from the effects thereof," that "in case the said Oscar A. Folse has to pay any of the mortgages mentioned * * * he shall be subrogated to all the rights of action, privileges, and mortgages of the holders," and Mrs. Naquin intervenes in the act, and renounces all claim that she might have against the property sold. In the sale from Folse to Naquin, the latter, as part of the price of the property purchased, reassumes the obligation to pay the debt represented by the Dupont mortgage and also the debt bearing on both plantations, represented by the notes here sued on, in favor of which (as we have stated) Mrs. Naquin had already renounced whatever rights she might have had. On September 9, 1899, Folse sold to H. W. Frost an undivided one-half interest in Cleveland, so that when this suit was filed he and Frost were sole owners of that property. It appears that D. H. Roussel had in the meanwhile acquired an interest in Sans Nom which was cultivated by the firm of Naquin & Roussel (Clovis Naquin being the senior member), but whether at the date of the seizure the plantation was owned by Naquin alone or by Naquin & Roussel does not appear. Three of the notes held by plaintiff fell due, as extended, in March, 1903, and, in June of that year, plaintiff obtained executory process under which both of the plantations were seized and offered for sale. Thereupon Folse & Frost intervened, alleging that Sans Nom, alone, would satisfy the claim sued on, that the seizure of Cleveland was unnecessary, and that the seizure of both plantations was the result of fraudulent collusion between the plaintiff and the defendant, the purpose of which was to favor the wife of the latter by having the claim of the plaintiff paid in part from the proceeds of the sale of Cleveland, thereby enabling

Mrs. Naquin to realize upon her inferior mortgage, resting on Sans Nom, alone. Interveners further allege that if their property were otherwise bound for the debt sued on it was released by reason of the fact that interveners occupied the position of sureties, and the time for the payment of the debt due plaintiff was extended without their knowledge or consent; and they make certain other allegations, and pray that until the further order of court, plaintiff's seizure be restricted to Sans Nom, and, in the event of that plantation selling for enough to satisfy her claim, that no further writ issue against Cleveland, or, in the alternative, that the two plantations be appraised and sold separately in order that a just and equitable distribution of the proceeds be made. Upon this intervention, a rule nisi issued, to which, as we infer, the plaintiff in the seizure and some persons asserting mortgages of inferior rank were made parties, and after hearing there was judgment denying the application of interveners, save in so far as to order that the two plantations be appraised separately. Some time later plaintiff and interveners, through their counsel, entered into a written agreement, from which we make the following excerpts, to wit:

"In the above case it is agreed * * * for the purpose of saving costs and * * * litigation, and to subserve the interests of all parties, that the property seized is to be considered sold, and the proceeds in court for distribution. It is agreed that the proportion to be contributed is to be, respectively, \$29,000 for the Sans Nom plantation, and, if any at all by the Cleveland plantation, the sum of \$3,122.50, which sums are to be considered in court for distribution to the various mortgage creditors and the owners of Cleveland plantation in accordance with their respective rights under their sales and mortgages. It being distinctly understood that the amount of contribution due by the Cleveland plantation (if any contribution is due at all) is \$3,122.50, no more and no less, and the amount of contribution due by the Sans Nom plantation is \$29,000, and no more and no less. It being distinctly understood that the owners of Cleveland plantation shall be at liberty to prove, if prove they can, that no contribution at all is due by said lands, and that the use of the word contribution heretofore made is not to be taken as an admission that anything at all is due, but simply that if anything be due by it towards paying the mortgages due by Clovis Naquin, that is the full amount due by it, and with the right of the owners to show that this amount shall be returned to them, and to none other of the creditors.

* * * * *

"The contention as to the distribution of the fund in court is to be made by third oppositions of the various parties interested, with the right to each and every one to contest the right and privilege of the others, as in concursus, to the fund for distribution, with the understanding that the district court has ruled that Cleveland plantation must be sold for the payment of the mortgage debt, but under a separate appraisal, the said contribution, if any, to be the sum of \$3,122.50, but that the said question, as to the right of separate sale, is to be presented on appeal from the said interlocutory judgment, on the final trial of these issues as fixed by the trial on third oppositions, the said inter-

locutory judgment not to be held to estop the owners of Cleveland plantation, but the amount due on the Blanchard mortgage * * * is not contested in so far as the amount of \$18,500 is concerned; but the question whether or not any part thereof shall be finally taken from the Cleveland plantation, so as to leave a greater amount to the mortgages of Mrs. Clovis Naquin and Wm. B. Bloomfield, is to be settled by the court in accordance with the rank of those mortgages, the rights of the owners of Cleveland plantation and the law. The contest to be carried on as above stated, in concursus, with the full right to each creditor to contest the right of the other save only as to the amount due Mrs. Agnes Blanchard, Tutrix. * * * It is understood that the owners of Cleveland plantation can only claim out of the total amount in court the sum of \$3,122.50, that being the sum taken from their plantation to make up the sum in court, and they have no claim on the \$29,000 coming from the Sans Nom plantation save to see it distributed to the creditors in such a manner that no claim can be urged by any of them against the Cleveland plantation fund. In other words, the owners of the Cleveland plantation, on being returned the amount coming from the sale of their plantation, have no right or interest in the other sum save to have it distributed so as to pay the debt due to Mrs. Blanchard, tutrix, and any other creditor having rights superior to her, if any there be, so as to entirely relieve the Cleveland plantation from any contribution towards paying the debts of the seized debtor. The whole matter to be passed upon in one trial, so as to save cost, expense, and delay."

It may be as well to state (though somewhat in anticipation) that so far as we can gather from the record, the following are the mortgages that are to be considered in distributing the fund on hand, to wit:

"(1) A conventional mortgage to secure a debt for \$3,500, bearing 8 per cent. interest per annum from June 13, 1895, recorded against Sans Nom Plantation in favor of H. N. Dupont, June 14, 1895. (This is the most ancient mortgage which appears upon the certificate filed in evidence, but, as the name of Dupont is not mentioned in the judgment appealed from, nor in the brief of counsel, and as Mrs. Coullier [or possibly Soullier], though not connected therewith by any evidence that we find, is recognized by the judgment and by all the counsel, as holding a mortgage which entitled her to take \$4,500 from the fund to be distributed, we conclude that she must represent the Dupont mortgage. Counsel for interveners intimate that her mortgage takes precedence of that of plaintiff which would seem to be correct; but the judgment ranks it next after that of plaintiff, on Sans Nom plantation, and there is no one before the court complaining of that disposition.)

"(2) The mortgage securing the debt sued on, which, by admission, calls for \$18,500, recorded against both plantations, June 16, 1898.

"(3) A mortgage for \$5,600 in favor of Mrs. Naquin, wife of the defendant in the seizure, resulting from the registry of her paraphernal claim against her husband July 2nd, 1896. (This claim was recorded against both plantations for a larger amount, but was renounced by Mrs. Naquin as against the whole of Cleveland, and as against one-third of Sans Nom, in the acts by which her husband sold those interests to O. A. Folse. By this litigation the mortgage is conceded to bear exclusively on Sans Nom, to the extent of \$5,600, whether upon two-thirds interest or upon the whole, being a question, perhaps, between Mrs. Naquin and interveners.)

"(4) A mortgage for \$6,000 in favor of W. B. Bloomfield, imposed, by Naquin and Roussel, as

owners of that property, upon Sans Nom plantation, recorded July 22, 1902. (This mortgage was executed for a larger amount, to secure a debt contracted for planting purposes, but, as appears from the evidence in the record, should be reduced to the amount stated.)

"There are other mortgages inferior in rank resting on Sans Nom, but the fund on hand will not reach them, and they need not be considered. So far as appears there are no mortgages on Cleveland plantation save that of the seizing creditor. Resuming the chronological statement of the case, the proceeds of the sale of the two plantations being constructively in court, the interveners filed a third opposition, in which they set forth their title and the obligations of the defendant in the seizure with respect thereto, and reiterate their allegations to the effect that the claim of the plaintiff can be satisfied from the proceeds of the sale of the property belonging to said defendant, and that recourse to the proceeds of the sale of their property is unnecessary, and to the effect that with respect to said claim they occupy the position of sureties, and are discharged by the granting, without their consent, of time for its payment, and they further allege that Mrs. Naquin can collect nothing on account of her claim because she has no judgment against and is a partner in community with her husband, and because of her renunciations; and that Bloomfield can take nothing because his claim is, in any event, inferior in rank to that of Mrs. Naquin (who never renounced in his favor) and, so far as the proceeds of the sale of Cleveland are concerned, arose after the sale of the plantation to opponents, and purports to be secured by a mortgage which bears only on Sans Nom.

"Mrs. Blanchard, plaintiff in the seizure, denies the charge of collusion, and alleges that her mortgage is indivisible, and must be enforced against all the property affected by it and the proceeds thereof, and that opponents were without right or interest to raise any issue except as to the amount of the contribution of the tract (Cleveland) owned by them. Bloomfield, by intervention and third opposition, sets up his claim against Naquin and Roussel, and his mortgage on Sans Nom plantation, and alleges that his debtors are insolvent, and that Mrs. Blanchard, as holder of a mortgage bearing on both plantations, is bound to apply the \$3,122.50 arising from Cleveland, pro tanto, to her mortgage debt, and this being so, that opponents, Folse & Frost, have no interest in * * * the distribution of the proceeds arising from the Sans Nom plantation."

After hearing, the judge a quo held that the two plantations had been appraised separately in order that if the total amount realized from the sale should exceed that due to the plaintiff, the surplus might be equitably distributed among the second mortgage creditors and the owners; that, as the result of the sale, Sans Nom plantation, belonging to Clovis Naquin, had realized \$29,000 and Cleveland, belonging to Folse & Frost, \$3,122.50 making a total of \$32,122.50; that plaintiff's mortgage bearing on both plantations amounted to \$18,500; that there were no mortgages of inferior rank on Cleveland, and that Sans Nom was burdened with mortgages, inferior to that of the seizing creditor, in favor of Mrs. Coullier, for \$4,500, in favor of Mrs. Naquin, for \$5,000, and in favor of W. B. Bloomfield, for \$6,000; that the proceeds of the two plantations should contribute, pro rata, to the payment of the Blanchard claim; that the surplus thereafter remaining from the proceeds of

Sans Nom should be paid to the claimants holding mortgages on that plantation, in the order in which the mortgages were recorded, and that the surplus, so remaining from the proceeds of Cleveland, should be paid to the owners of that property; and a decree was entered accordingly, save that a slight error was committed in finding that the pro rata due, upon the theory of the opinion, by Sans Nom, was \$16,696.25, instead of \$16,701.69, and that due by Cleveland, \$1,803.75, instead of \$1,798.31. A new trial was however granted, and, in his reasons for the judgment finally rendered, the learned judge said that the question to be decided was, not the amount to be contributed by each plantation—that question having been determined by the agreement of the parties—but merely whether any contribution should be made, and, holding that the question so stated must be decided in the affirmative, he ordered that the fund on hand be distributed as follows, to wit:

First, to Mrs. Agnes R. Blanchard,	
Tutrix	\$18,500 00
Second, to Mrs. Soullier.....	4,500 00
Third, to Mrs. Naquin.....	5,600 00
Fourth, to W. B. Bloomfield, balance	3,522 50
Total	\$32,122 50

From the judgment so rendered, Folse & Frost have appealed.

Opinion.

Clovis Naquin, having sold the property to Folse with full warranty of title, and having been paid the price, could claim nothing from the proceeds of a subsequent sale of Cleveland, nor could he confer upon his creditors the right to have claims against him which did not exist when the property was sold, or which did not affect it, or (as is the case of Mrs. Naquin's claim) were renounced in so far as they affected it, satisfied from the proceeds of that plantation. By the operation of the judgment appealed from Cleveland is made to contribute \$3,122.50 to a fund from which three such creditors of Naquin (the fully paid vendor) take, in the aggregate, in payment and part payment, of their claims against him, the sum of \$13,622.50, whilst his vendees, the owners, take nothing. It is evident, however, that if there were no claims against Sans Nom plantation (belonging to Naquin) and Cleveland (belonging to Folse & Frost), except that of the seizing creditor, and, if the sale of the two plantations created (as it has done) a fund more than sufficient to pay the seizing creditor, Naquin could not call on Cleveland to contribute to such payment, since, in selling that property and in repurchasing the one-third interest in Sans Nom, he warranted his vendees against that claim and agreed to pay it, himself, and would, therefore, be bound to pay it from the proceeds of his own property; and it is equally evident that as he could take nothing from the proceeds of

Cleveland, his creditors, to whom we have referred, and who can take nothing from those proceeds on their own account, can take nothing by reason of their claims against him, either for the purpose of paying the claim in question, or for the payment of their own claims.

Conceding, then, arguendo, merely that a creditor holding a single mortgage bearing on a number of separate estates has the absolute right to sell all of them, even though the sale of one will produce enough money to satisfy his debt, nevertheless, when the sale has been made, and the fund resulting therefrom has been returned into court, it is a question for the court, and not for the seizing creditor, to determine, whether the debt due the latter shall be paid from the whole fund or from the proceeds of a particular estate, since it may happen (as in this case) that payment from the whole fund will operate unjustly to other persons interested therein, or (as in some other case) that the payment from the proceeds of one of the estates, instead of from the whole fund, will operate unjustly to such persons, and the matter is one in which the seizing creditor, who gets all that is due him, has no interest and concerning which he has no right to be heard. The creditor holding a single mortgage bearing upon several estates, or distinct pieces of property, has, however, no absolute right to force the sale of all when the sale of less than all would suffice to satisfy his debt. He may, agreeably to the authority expressly conferred by Code Prac. art. 648, seize all the property affected by his mortgage; but, on the other hand (quoting the language of Code Prac. art. 650):

"Nevertheless, the debtor whose land shall have been seized, shall always be entitled to demand that a portion only, which he shall designate, shall be sold, if that portion be sufficient to satisfy the judgment; but, if it be insufficient, a sale of the other portions shall be made."

It is true that a mortgage is in its nature indivisible, but the indivisibility is declared by the law in a single sentence, which reads:

"It is, in its nature, indivisible, and prevails over all the immovables subject to it, and over each and every portion." Civ. Code, art. 3282.

From which it follows that one must proceed upon the mortgage for the recovery of the whole amount due, and that where a mortgage rests upon property, to a portion of which the mortgagor has no title, the mortgagee can enforce it for the full amount, against that portion to which the mortgagor has title. But it does not follow that the mortgagee is obliged to cause all the property mortgaged to be sold when it is unnecessary for the satisfaction of his mortgage, or that the article of the Code of Practice, which confers some rights upon the mortgagor in the matter of the ultimate enforcement of the mortgage, is thereby abrogated or repealed. On the contrary, if there were any conflict between the two articles cited, as

to the manner of proceeding to enforce the mortgage, the article of the Code of Practice would control as that Code is particularly addressed to the regulation of proceedings for the enforcement of claims (*Richardson v. Richardson*, 38 La. Ann. 640), and, besides, took effect in September, 1825 (*Williams v. Holloway*, 11 La. 517) and is therefore a later expression of legislative will than the Civil Code which was declared operative in May of that year (*Xanpi v. Orso*, 11 La. 60).

These views find support in the cases of *Galennie v. Questi et al.*, 3 La. 433, *Powell v. Hayes*, 31 La. Ann. 789, and *Mitchell v. Logan*, 34 La. Ann. 998, where it was held that the mortgagee had the right to enforce his mortgage against part of the property affected, but (in the case first mentioned) that the mortgagor might object that such part was more than sufficient to satisfy the debt; and in the cases of *Bauduc v. Conrey*, 10 Rob. 466, *Lambert v. De Santos*, 10 La. Ann. 725, and *Taylor v. Graham*, 18 La. Ann. 656, 89 Am. Dec. 699, in which it was held that, where the mortgagor does not demand that a separate appraisal and sale be made, he cannot afterwards complain of the sale in block of the entire property affected by the mortgage.

It may be said that in the instant case the debtor did not demand that the two plantations be appraised and sold separately, and it is true that he did not, his interest lying the other way; but *Folse & Frost* made that demand, and we are of opinion that it was competent for them to exercise the right of the defendant, their debtor, in that respect. *Lynch v. Kitchen*, 2 La. Ann. 844; *Tompkins v. Prentice*, 12 La. Ann. 470; *Forstall v. Consolidated Ass'n*, 34 La. Ann. 775. The appellants, it may be remarked, have acquiesced in the sale, and are asking only that, from the total amount realized, there be returned to them the proceeds of their property, to which, if the foregoing reasoning and statement of the law be correct, they are clearly entitled.

Counsel for the appellees, in support of the supposed necessity (arising from the indivisibility of the mortgage) for selling the property, in block, refer the court to the cases of *Hughes Adm'r v. Patterson et al.*, 23 La. Ann. 679, and *Succession of Anger*, 36 La. Ann. 252. In the first case the question presented was whether the vendor, having sold a single tract of land to several vendees, who gave their obligation, in solido secured by a single mortgage, for the price, could sell the mortgaged property without making all the obligors parties to the suit—a question which was correctly decided in the negative, and which has no bearing on the issues now before the court. The other case (*Succession of Anger*), is equally without application, or, if applicable at all, does not sustain the learned counsel in his position. In that case there were two plantations, *Forlorn Hope* and *Hermitage*, belonging to the same

succession, both of which were subject to the same first mortgage, and upon each of which there were different second mortgages. The executrix obtained an order for the sale of both plantations, to pay debts, but, for certain reasons, the sale of *Forlorn Hope* was stayed, whilst *Hermitage* was sold, and, in filing her account, the executrix attributed, practically, the entire proceeds to the payment of the first mortgage, the result being that *Hermitage* contributed, say, \$12,000 to the payment of the first mortgage, of say, \$16,000, bearing upon both plantations, and that there was nothing left for the second mortgages, whilst *Forlorn Hope* contributed nothing to the first mortgage, and there being but \$4,000 needed, was likely to yield a dividend to its second mortgages. It does not appear that any one objected to the sale, as made, but, by way of opposition to the account of the executrix, the tutor of certain minors, holding a second mortgage on *Hermitage*, objected that the whole proceeds of *Hermitage* should not be appropriated to the first mortgage, for which *Forlorn Hope* was equally bound, and the court sustained the objection, holding that to do otherwise would be to perpetrate a gross injustice; and it was ordered in effect that the right of the tutor be reserved, and that, upon the sale of *Forlorn Hope*, he be allowed to participate in the distribution of the proceeds to such an extent as to place him in the same position that he would have occupied if the two plantations had been sold at the same time. It will thus be observed that in the case relied on the two plantations belonged to the same debtor, whose creditors occupied the same relation to him and to the plantations, respectively; whereas, in the instant case, the debtor owned but one of the plantations and was bound by the sale which he had made of the other to hold his vendees harmless with respect, not only to his own particular creditors, but with respect, also, to the debt which was secured by the mortgage on both plantations. It will also be observed that the tutor, being a creditor of the owner of both plantations, held a second mortgage on *Hermitage*, and that, whilst the holders of the second mortgages on *Forlorn Hope* were entitled to be paid from the proceeds of that plantation, he was equally entitled to be paid from the proceeds of *Hermitage*, and that it was held that his rights could not be defeated by the separate sale, though it was not attacked or set aside as invalid; whereas, in the instant case, the first mortgage alone bore on both plantations, and as between the owners of *Sans Nom* and the owners of *Cleveland*, the former owed the whole debt by reason of his having assumed it, and as between him and his creditors, on the one hand, and owners of *Cleveland*, on the other, neither the latter nor their property were ever bound, since the debts due to those creditors were not their debts,

and never bore upon their property. Other differences could, perhaps, be pointed out, but it is hardly worth while. It is enough to say that the opinion and decree of the court in the matter of the Succession of Anger is to be construed with reference to the facts of the case, and that, so construing it, we find in it nothing at all inconsistent with the views here expressed.

Considering the matter from another point of view, Naquin, in selling the two-thirds interest in Cleveland to Folse, bound himself to hold the latter harmless with respect to the mortgage here sued on, and agreed that, in the event of Folse being held therefor, he should be subrogated to the rights of the holder, and, in repurchasing from Folse the one-third interest in Sans Nom, he reassumed the entire debt secured by that mortgage. Mrs. Naquin had originally waived and renounced her claim as against both plantations in favor of this mortgage, and she intervened in the sale made by her husband (of the two-thirds interest in Cleveland), thereby becoming a party to the stipulations of that contract, as between Naquin and Folse, and also for herself, renouncing, in favor of the vendee, Folse, whatever right or claim she might have in or against Cleveland plantation. As for Bloomfield, he was not at that time a creditor of Naquin, and, when some three years later he became a creditor, he accepted as security for his claim a mortgage on Sans Nom plantation, inferior in rank to that here sued on, to that in favor of Dupont, and to that in favor of Mrs. Naquin, and his mortgage was also subject to the other conditions by which the property was affected, one of which was that Naquin, the owner and mortgagor, had assumed, as part of the purchase price (of the interest that he had acquired from Folse) the obligation of paying the entire debt represented by the first mortgage. Whilst, therefore, quoad the holders, the mortgage sued on rested on Cleveland as well as on Sans Nom, and the owners of both plantations were bound by it; quoad those owners, inter sese, and quoad Mrs. Naquin and Bloomfield, Sans Nom was bound for the whole mortgage, and the owner of Sans Nom, as also the creditors named, are bound, by virtue of the contracts to which they are parties, and of the law, for the consequence of the payment of that mortgage, or any part of it, from the proceeds of the sale of Cleveland, that consequence being that the owners of Cleveland become thereby subrogated to the rights of the mortgagee, and hence are entitled to be reimbursed the amount of such payment from the fund derived from the sale of the mortgaged property before anything can be claimed therefrom by the owner of Sans Nom or his said creditors. Civ. Code, art. 2161; Baldwin v. Thompson, 6 La. 479; King v. Dwight, 3 Rob. 2; Gay v. Blanchard, 32 La. Ann. 501; Hancock v. Holbrook et al., 40 La. Ann. 53, 3 South. 351; Burbank v.

Buhler, 108 La. 39, 32 South. 201; Ledoux v. Rucker, 5 La. Ann. 500; Laurent, Cours Elementaire, Code Nap. art. 1251; Larombiere (Code Nap. art. 1251) tome 3, § 43; Marcade, p. 543, Code Nap. art. 1251.

We do not concur in the view entertained by the counsel for the seizing creditor (as also Mrs. Naquin and Bloomfield) that the owner of Cleveland plantation would, in any event, have been precluded by the agreement mentioned in the statement which precedes this opinion from contesting the amount for which their property should be held liable. As we interpret that agreement, it brought constructively into court the proceeds of the two plantations which had not at that time been sold, and fixed the amounts (assumed to have been) realized by each; but it did not bind the parties in any other respect. In view, however, of the conclusion which has been reached that Cleveland is not bound to contribute at all to the payment of the debt due to the seizing creditor, for the reason that the amount realized from the sale of Sans Nom is sufficient to pay that debt, in full, the difference of opinion between this court and the court a qua as to the meaning of the agreement is of no consequence. The contention that Folse should be regarded as a surety, quoad the notes sued on, and that he and his property were released by the fact that the time for their payment was extended without his consent, cannot be maintained. Dr. Blanchard held the notes of Naquin; he knew that the mortgage by which they were secured contained the pact de non alienando and that Naquin could not alienate the property affected so as to prejudice it, and he was not, therefore, interested in knowing, nor does it appear that he did know, whether Naquin had sold the property or not. To hold under such circumstances that the (unknown) purchaser was his (unknown) surety, and that he lost his mortgage by dealing with the only debtor whom he knew or was bound to know would be to announce a doctrine for which we find no support in either law or reason.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and, proceeding to render such judgment as should have been rendered, it is further adjudged and decreed that after deducting therefrom the costs of this litigation the fund on hand be paid in full satisfaction, each, in the order in which they are stated, and so far as the fund will permit, of the claims, as represented by the following litigants, to wit:

Mrs. Agnes R. Blanchard, Tutrix, etc.	\$18,500 00
Oscar A. Folse and Henry W. Frost	3,122 50
Mrs. Coullier	4,500 00
Mrs. Myrtyle Folse, wife of Clovis Naquin	5,600 00
William B. Bloomfield	6,000 00

It is further adjudged and decreed that the costs of this appeal be included among those to be first deducted from the fund to be thus distributed.

(116 La.)

No. 15,948.

STATE v. LE BLANC.

(Supreme Court of Louisiana. March 26, 1906.
Rehearing Denied April 23, 1906.)

1. WITNESSES—CROSS-EXAMINATION.

A witness called for the defense in a criminal prosecution, and testifying on direct examination to the general good character of the accused, may be cross-examined as to particular facts, in order to test the soundness of his opinion and the data upon which it is founded.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 965.]

2. CRIMINAL LAW—BILL OF EXCEPTIONS.

Where a bill of exception shows that a question propounded on cross-examination to one of the defendant's witnesses was objected to, but does not show that it was answered, there is no reversible error disclosed, even though the objection were improperly overruled; non constat but that the answer may have been quite the reverse of prejudicial to the defendant.

3. SAME—INSTRUCTIONS.

The trial judge is not bound to give special charges, requested on behalf of the defendant in a criminal case, when the law has been fully and correctly stated in the general charge already given.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

4. HOMICIDE—INSTRUCTIONS.

The instructions to the jury, specially requested, that: "Where a husband is charged with the murder of his wife, there is a strong presumption, in his favor, of his innocence, on account of the natural love and affection which usually exist between husband and wife. This presumption is in addition to the legal presumption that exists in favor of any person charged with the commission of a crime"—is properly refused.

5. SAME—CIRCUMSTANTIAL EVIDENCE.

The court having charged "that circumstantial evidence is legal evidence, but it must be of such a character and nature as to exclude every reasonable hypothesis other than that the prisoner is guilty. The circumstances not only must all be in harmony with the guilt of the accused, but they must be of such a character that they cannot be true, in the nature of things, and the accused be innocent"—and more to the same effect, the charge, specially requested, that "in a murder case circumstantial evidence must be received with great caution," is properly refused.

6. SAME—NEW TRIAL—VERDICT.

The allegation, in a motion for new trial, that the jury, in a murder case, found a verdict in 15 minutes, suggests no illegality in such verdict.

7. CRIMINAL LAW—OBJECTIONS TO CHARGE.

Objections to the charge delivered by the judge, but made for the first time in a motion for new trial, come too late.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2210-2218, 2646.]

8. SAME—PRESENCE OF ACCUSED.

It is not necessary that the accused should be personally present when his case is ordered to be set down for trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1470.]

9. SAME—MOTION IN ARREST.

Objections to the charge delivered by the judge cannot be entertained in a motion in arrest of judgment.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2438.]

10. HOMICIDE—NEW TRIAL.

When a person accused of murder pleads to the indictment, goes to trial, and is convicted, he cannot, on a motion for new trial, raise the question of his right to a preliminary examination.

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of St. Martin; James Simon, Judge.

Elius Le Blanc was convicted of murder, and appeals. Affirmed.

Martin, Voorhies & Martin, for appellant. Walter Guion, Atty. Gen., and Edwin Sidney Broussard, Dist. Atty. (Lewis Guion, of counsel), for the State.

MONROE, J. The defendant, having been convicted of the murder of his wife, and sentenced to death, has appealed, and for reversal of the conviction and sentence relies upon certain bills of exception, which will now be considered in the order in which we find them in the record.

1. A witness for the defense, having testified in chief to the general good reputation of the accused, was asked, on cross-examination, the following question, to wit:

"You have testified to the general good reputation of the accused in the community where he lived. Was he not likewise generally reputed in the community where he lived to be familiar with a certain lady, near his house, whom he visited?"

Such question was objected to by counsel for the accused, "on the ground that the state could not particularize the conduct of the accused, but was restricted to cross-examine on the general reputation of the accused in the community where he lived"; and, the objection having been overruled, a bill was reserved.

The ruling was correct. "While particular acts of bad conduct are not admissible to assail character on the direct examination, a witness deposing to general character may be cross-examined as to particular facts in order to test the soundness of his opinion and elicit the data upon which it is founded.

* * * By this is meant, not the truth of such particular facts, but circulating rumors of them which form a part of the general repute and help to make up one's good or bad character. This principle is illustrated by the old case of Reg. v. Wood, 5 Jur. 225, where a witness for the defendant, who was charged with highway robbery, having testified to his good character, was asked, on cross-examination, whether he had not heard that the prisoner was suspected of having committed a robbery in the neighborhood a few years ago. It was objected that this was a particular fact, raising a collateral issue. The objection was

overruled by Baron Parke, who observed: "The question is, not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." Rice on Ev. vol. 3, p. 604, par. 378; State v. Pain, 48 La. Ann. 311, 19 South. 138.

2. A witness for defense was asked, on cross-examination, "Did not the accused tell you that he had a woman on the outside?" Whereupon the accused, through counsel, objected to the question. The bill does not show the ground of the objection, nor what answer, if any, was made when the objection was overruled. From the statement per curiam we infer that the witness had testified, upon his direct examination, to the general good character and reputation of the accused and to his kindly treatment of his wife. If so, the question objected to was admissible for the reasons which have been stated, and because having another woman on the outside would be inconsistent with such conduct. But, whether that be so or not, the bill shows no ground for reversing the judgment, since it does not appear therefrom that any answer was given which could have prejudiced the accused; non constat, but that it was quite the reverse.

3. No written charge was demanded, and no bill was reserved to the charge given, which appears in the record, having been, apparently, reduced to writing without demand to that effect. The defendant, however, requested the court to give the following special charges, to wit:

"(1) When, from the whole proof offered to the jury, there is a probability of the defendant's innocence, it amounts to a reasonable doubt of his guilt, and he should be acquitted.

"(2) When the jury, on account of the nature of the evidence offered, or account of the insufficiency of the evidence offered, are not convinced and certain that the accused has committed the crime charged, they should acquit him, although they may not believe him to be innocent.

"(3) Where a husband is charged with the murder of his wife, there is a strong presumption in his favor of his innocence, on account of the natural love and affection which usually exist between husband and wife. This presumption is in addition to the legal presumption that exists in favor of any person charged with the commission of a crime.

"(4) When the proof in the case raised only a strong probability of the guilt of the accused, it is not proof beyond a reasonable doubt, and the accused should be acquitted.

"(5) In a murder case, when circumstantial evidence is relied on by the state for conviction, it is not sufficient that the circumstances proven should create on the mind of the jury an impression that the accused might or could have committed the crime, but, to bring a verdict of guilty, the jury must be sure, certain, convinced that the accused did commit the crime.

"(6) In a murder case, circumstantial evidence must be received with great caution. Where circumstantial evidence is relied on by the state for conviction, it is necessary that all the circumstances shall concur to show that only the accused could have committed the crime and that no other person could have committed it."

The judge refused to give these special charges, save a portion of charge No. 6, as follows: "In a murder case, where circumstantial evidence is relied on by the state for conviction, it is necessary that all the circumstances shall concur to show that only the accused could have committed the crime and that no other person could have committed it"—which was given; the grounds of his refusal being that he had already fully charged the jury upon the law of circumstantial evidence and of reasonable doubt, and the defendant, through his counsel, reserved a bill.

The special charges 1, 2, 4, and 5, and so much of 6 as was given by the judge, were fully covered in the general charge. The proposition, as contained in requested charge 3, to the effect that there is a strong presumption (in addition to the legal presumption of innocence applicable to all persons accused of crime), that the husband, charged with the murder of his wife, is innocent, is not supported by any law to which we have been referred; the most, we take it, that can be said upon that subject being that proof of the existence of amicable and kindly relations in such case may serve to strengthen the presumption of innocence of which the law gives the husband, as it gives every one prosecuted for crime, the benefit. The proposition, as contained in requested charge 6, that "in a murder case circumstantial evidence must be received with great caution," was included, so far as it should have been given, in the general charge and in that portion of the requested charge which was given; the general charge upon the subject having been as follows:

"Circumstantial evidence is legal evidence; but it must be of such a character and nature as to exclude every reasonable hypothesis other than that the prisoner is guilty. The circumstances must not only all be in harmony with the guilt of the accused, but they must be of such a character that they must also be inconsistent with any other rational conclusion, and such as to leave no reasonable doubt in your mind of his guilt. To warrant a conviction on circumstantial evidence, it is necessary that the circumstances should be of such a nature, and so related, as to leave no reasonable doubt that the accused is guilty of the offense with which he is charged."

4. A motion for new trial, to the overruling of which a bill was reserved, sets forth, in substance, that the jury deliberated only 15 minutes; that the charge, as given by the judge, was erroneous in several particulars; that the special charges requested were improperly refused; that the rulings to which the bills already considered were reserved were erroneous; that, having had no preliminary examination, the defendant was not prepared to meet the series of circumstances brought out at the trial.

There is no proof in the record as to the length of time taken by the jury in finding a verdict, and there is no law requiring more time to be taken than is needed. It is stated, however, in the brief filed on behalf of

the state (on the authority of the district attorney), that the jury in this case consumed two hours in deliberating before finding the verdict. Objections to the charge given by the judge come too late when made for the first time on a motion for new trial. *State v. Wright*, 104 La. 45, 28 South. 909; *State v. Weston*, 107 La. 45, 31 South. 383; *State v. John*, 109 La. 1088, 34 South. 98.

There is nothing in the record on the subject of the preliminary examination. But, after having pleaded to the indictment and having been tried and convicted, it was too late for the defendant to assert his right to a preliminary examination. *State v. Caulfield*, 23 La. Ann. 148.

5. A motion in arrest of judgment, to the overruling of which a bill of exception was reserved, alleges that the defendant was not present when his case was fixed for trial, having been brought into court only on the day of the trial, and that the judge charged the jury erroneously as to the law. It appears from the statement of the judge that the counsel for the accused was present when the case was fixed for trial, and consented thereto, and "the personal presence of one charged with crime is not necessary or required at each and every step of his case, or when each and every proceeding is taken therein. It is only needful that his actual presence be shown during the arraignment, trial, charge, verdict, and sentence." *State v. Hardaway*, 50 La. Ann. 1349, 24 South. 321. The other ground of the motion has already been disposed of, and, besides, is without merit.

Judgment affirmed.

(116 La.)

No. 15,964.

STATE v. THOMPSON et al.

(Supreme Court of Louisiana. March 26, 1906.
Rehearing Denied April 23, 1906.)

1. JURY—REJECTION OF JUROR BY JUDGE—OBJECTION OF ACCUSED.

The law gives to the accused the right to object to an obnoxious juror, but does not give him the right of selection, hence, the rejection of a juror by the judge, even if erroneous, affords no legal ground of complaint, and this rule is equally applicable where the judge has refused to allow the juror whom he has excluded to be cross-examined on his *voir dire*. Act No. 135, p. 216, of 1898, § 1.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 598.]

2. SAME—TALESMEN—ORDER TO STAND ASIDE.

It is within the discretion of the trial judge to order talesmen to be summoned "from any portion of the parish, remote from the scene of the crime, that he may designate"; and if the sheriff, in disregard of his instructions, returns talesmen from the neighborhood in which the crime was committed, the judge may order them to stand aside. Act No. 135, p. 222, of 1898, § 11.

3. CRIMINAL LAW—TRIAL—SERVICE OF LIST OF JURORS ON ACCUSED.

The accused on trial is not entitled to service of the list of talesmen summoned to complete

the panel after the regular venire has been exhausted.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1443.]

4. WITNESSES—CROSS-EXAMINATION.

Where a state witness testifies that just before a homicide the person who was subsequently slain said to the accused, "You have several times tried to kill me, why don't you do it now"? or words to that effect, such question does not open the door to the question on cross-examination, "Have you ever heard of a previous attempt by the accused on the life of the deceased?"

5. CRIMINAL LAW—APPEAL—REVIEW—HARMLESS ERROR—REFRESHING MEMORY.

Where a witness for the state is allowed, for the purpose of refreshing his memory, over the objection of the defense, to read the transcribed testimony given by him on the preliminary examination, but it appears that his memory is not thereby refreshed, and he testifies that he has no recollection of any fact about which he was then being interrogated, the defendant has no injury to complain of.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 3136.]

6. SAME—EVIDENCE—STATEMENTS OF ACCUSED.

Rev. St. 1870, § 1010, provides the manner in which the statements and answers of a person accused of crime may be reduced to writing and verified, so as to constitute evidence before the grand and petit juries, and the transcribed notes of a stenographer, unsigned by the accused, and unverified by the signature of either magistrate or witness, do not meet the requirements of the statute, and do not constitute evidence of such statements and answers, which, in the absence of such evidence, may be proved by the testimony of any competent witnesses who were present and heard them.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1238-1246.]

7. SAME—ADMISSIONS—EXPLANATION BY ACCUSED.

Where the state proves an admission made by the defendant in a criminal prosecution, the defendant has the right to prove all that was said at the same time and in the same connection relating to the subject-matter of, or explaining or modifying the admission, but he has no right to introduce his own self-serving statements made on another and separate occasion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 862.]

8. SAME—FAILURE OF ACCUSED TO TESTIFY.

The reading and explaining to the jury by the judge of Act No. 41, p. 77, of 1904 sufficiently meets the requirements of the situation, where it appears that in answer to a question by the judge in effect, as to why the trial does not go on, counsel assisting the district attorney informs the court that that officer has gone out, temporarily, under the impression that one of the defendants would take the stand as a witness, the answer being made without intention of commenting on the fact that the case for the defense had been closed without the defendant referred to having taken the stand as a witness.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1693.]

(Syllabus by the Court.)

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; Edward Taylor Lewis, Judge.

D. H. Thompson and C. A. Thompson were convicted of manslaughter, and appeal Affirmed.

Lewis & Lewis, and Edward Benjamin Du Buisson, for appellants. Walter Guion, Atty. Gen., and R. Lee Garland, Dist. Atty. (Lewis Guion, Benjamin Henry Pavy, and Edward Philip Veazie, of counsel), for the State.

MONROE, J. The defendants, D. H. Thompson and C. A. Thompson, having been convicted of manslaughter and duly sentenced, prosecute this appeal, and present their case to this court by means of the bills of exception which will now be considered.

Bill No. 1 shows that A. E. Calcote, called as a juror, and examined on his voir dire, stated that his wife was a cousin of the accused, though, how near, he did not know; whereupon the court ordered him to stand aside without affording counsel for the accused an opportunity to examine him; that F. C. Allen, summoned as a tales juror, answered that he would not convict on circumstantial evidence, alone, whereupon he was ordered by the court to stand aside, without giving counsel for the accused an opportunity to examine him; that A. J. Murray, having represented himself as a tales juror, the court refused to permit him to be examined, and, in the presence of the jurors already impaneled, made use of the following language:

"I order A. J. Murray sent up by the sheriff as a tales juror, to stand aside, because the sheriff violated the instructions of the court in sending him up here. The instructions were that he (the sheriff) should go east of town to get tales jurors. The court intends to see that impartial jurors are secured who know nothing about the case. Mr. Murray is from the northwest portion of the parish—that portion where the homicide is alleged to have taken place; that ——— Gay, appearing as a tales juror, stated on his voir dire that he had neither formed nor expressed an opinion in the case; that he had no bias or prejudice for or against the accused; that he felt some sympathy in the case, which, however, he felt he could disregard, and which would not influence him in rendering his verdict, which he felt prepared to do according to law and the evidence as developed in the case."

Whereupon he was challenged by the state, for cause, and the challenge was sustained by the court. To all of which rulings counsel for accused excepted.

The bill contains a further recital on behalf of the accused to the following effect, to wit: That the case was called for trial on Monday, and that three jurors from the regular venire were accepted, when the court, after ordering the sheriff to summon tales jurors from the eastern and the southern portions of the parish, adjourned; that the tales jurors presented themselves, from time to time, in small numbers, and were examined on Tuesday and Wednesday, and that counsel for the accused at no time had a complete list of the jurors so summoned; and that though the accused exhausted but 21 of their peremptory challenges, they accepted, "under protest, as it were," jurors

whom they would not have accepted but that they did not know who might afterwards be tendered; that the court had no right to order jurors to stand aside save for some good cause; and that the remark made by the court with reference to the juror, Murray, was calculated to prejudice the jurors impaneled. The judge gives the following reasons (stating them in substance) for the rulings complained of:

That Calcote had married a cousin of the accused, and that sustaining the state's challenge for cause on that ground was a proper exercise of judicial discretion; that Allen not only made it clear that he would not convict on circumstantial evidence, but that the judge was aware that intimate family relations existed between him and the accused, and was convinced from his manner that he was not impartial, but was strongly prejudiced; that on account of the nature of the crime there was widespread discussion in the neighborhood where it occurred, and for that reason the court ordered the sheriff to draw tales jurors from other parts of the parish, and that it was a most suspicious circumstance that Murray who was sent into court, not by the sheriff, but by the jailer, acting as his deputy, should have left his home, 30 miles away, where the relatives of the accused live, and should have been opportunely, in the neighborhood, so as to be summoned as a tales juror; that Gay stated on his voir dire that he had sympathy in the case; that he had several times visited parties in jail, and had made the acquaintance of the accused, and had discussed with them the facts of the case, and that it was considered better to obtain jurors without such sympathy.

We find no just cause of complaint in these rulings. The accused had no right to demand that they should be tried by the husbands of their cousins, the friends of their families, their immediate neighbors, persons whose sympathies they may have enlisted, or jurors who would be unwilling to convict them on legal evidence, and it was the prerogative, and the duty of the judge, if it was within his knowledge, or came to his knowledge, that for the reasons stated by him, or for any other reason, persons tendered for that service were not likely to make good and impartial jurors, to exclude them. But the legal situation would not have been different if he had erred, since it is settled that:

"The law gives to the accused the right to object to an obnoxious juror, but does not give him the right of selection. Hence the rejection of a juror by the judge, even if erroneous, affords no legal ground for complaint." Act No. 135, p. 216, of 1898, § 1; *State v. Breaux et al.*, 104 La. 541, 29 South. 222; *State v. Kellogg*, 104 La. 586, 29 South. 235; *State v. Shields*, 33 La. Ann. 1410; *State v. Creech*, 38 La. Ann. 481; *State v. Carries*, 39 La. Ann. 931, 3 South. 56; *State v. Lewis*, 41 La. Ann. 590, 16 South. 536; *State v. Claire*, 41 La. Ann. 1067, 6 South. 806; *State v. Thomas*, 41 La. Ann. 1088, 6 South. 803.

In the case last mentioned it was said by this court:

"It is true that in excusing jurors a trial judge is bound to exercise a legal, and not an arbitrary, discretion, and that when he does excuse a juror for cause it is advisable for him to state his reasons for so doing; but it does not follow when he fails to do so that the accused who may have wished the juror to sit on his trial is entitled to complain so as to have, in case of his conviction, the verdict quashed * * *. It may occur that the trial judge * * * may have good reasons not to make his motives publicly known, and may take upon himself the responsibility of merely stating that he excused the juror in the exercise of a legal discretion for sufficient valid cause. Such reticence would not, in itself, be censurable here." *State v. Thomas*, 44 La. Ann. 1089, 6 South. 804.

In *State v. Claire*, supra, it was held that the possible error of the judge in refusing to allow the juror whom he had excluded to be cross-examined on his *voir dire* afforded no legal ground of complaint. Section 11, Act No. 135, p. 222, of 1898, in express terms, authorizes the trial judge to direct the summoning of talesmen "from any portion of the parish, remote from the scene of the crime, that he may designate." And it has more than once been held by this court that the defendant in a criminal case is not entitled to service of the list of talesmen summoned to complete the panel. *Knobloch's Cr. Dig.* p. 276.

Bill No. 2 shows that Leon De Mourelle, a witness called by the state, testified in his direct examination:

"That, about two hours before the homicide, the buggies of the accused and the deceased collided in the street, near witness' store; that witness heard part of the colloquy between the deceased and the accused, and heard the deceased say to the accused, 'You have several times tried or attempted to kill me; do it now,' or 'why don't you do it now,' or words to that effect. Whereupon, on cross-examination, counsel for defendants asked the witness whether he knew if the accused had previously made an attempt on the life of the deceased, to which he answered, 'No.' He was then asked whether he had ever heard of a previous attempt upon the life of the deceased by the accused, which was objected to by the counsel representing the state, on the ground that an answer to the question would be hearsay. Counsel for defendants then announced that they expected to prove, not only by this witness, but, by every witness that the state might place on the stand, not only that said witness did not know of any previous attempt having been made by the defendants on the life of the deceased, but, that they had never heard of such an attempt, and contended that such proof was not hearsay but original testimony" etc.

And, the objection having been sustained, the bill was reserved. The ruling complained of was clearly correct. As appears from the statement *per curiam*, which forms part of this bill, the testimony given by the witness, on the direct examination, was admitted as showing something that was considered part of the *res gestæ*, and immediately after the colloquy testified to, one of the accused went to his home and secured a pistol whilst the

other obtained one from the town marshal and then jumped into a buggy with his co-defendant, who was driving in the direction of the home of the deceased, near which, the homicide, in which both defendants participated, occurred. No objection appears to have been made to the testimony given, and its admission without objection afforded no basis for the introduction of the testimony offered on behalf of the defendants, since, if the witness on the stand and others had testified that they had never heard of the attempt or attempts referred to, and still other witnesses had been called to testify that they had heard of such attempt or attempts, there would have been no light, legally thrown upon the subject, inasmuch as the whole mass of testimony would have been equally obnoxious to the objection that it was hearsay—not part of the *res gestæ*—and therefore illegal.

Bill No. 3 shows that Jean Soileau, a witness for the state, testified to a conversation which he had had with the defendant D. H. Thompson shortly before the homicide; that counsel for the state, for the purpose of refreshing his memory, attempted to read to him the transcribed testimony which he had given at the preliminary hearing some two months before, but was stopped by the objections that the state could not contradict its own witness; that the transcription in question could not be used because the writing had not been made contemporaneously with the conversation, and that the memory of the witness was as likely to have been at fault at the date of the preliminary examination as at the date of the trial; and the objections were sustained, but the court permitted the witness to read the transcribed testimony for himself, to which ruling a bill was reserved. It is enough to say of this bill that it appears from the statement *per curiam*, that the reading of the transcribed testimony did not refresh the memory of the witness, and that, after reading it, he testified that "he had no recollection of any fact about which he was then being interrogated."

Bill No. 4 shows that the state offered what purported to be the transcribed testimony of C. A. Thompson, one of the defendants, given at the preliminary examination, and taken down by an unsworn stenographer, and which had not been read to or signed by the witness after being transcribed; to which it was objected that the transcription was inadmissible "because not taken in conformity with section 1010 of the Revised Statutes of 1870, and the correctness of the same had not been established by the oath of any witness"; which objections were sustained. The bill further shows that the state then produced L. S. Childs, who was present when the testimony was given, and proposed to prove by him the substance thereof; to which it was objected that the testimony of Childs was not the best evidence; that the stenographer by whom the testimony of said Thompson had

been taken down and transcribed, was living in Crowley, and was accessible, and that the notes of the stenographer, verified by her, constituted the best evidence of the testimony sought to be proved, which objections were overruled by the court upon the grounds that the transcribed testimony, having been excluded upon defendants' objections, was out of the case, and that Childs who was present when the testimony was given was called to prove voluntary statements and inculpatory admissions made by the defendant C. A. Thompson; that the stenographer by whom the testimony of Thompson had been taken down and transcribed had not been sworn and was not a resident of the parish; and that, whilst the instrument offered might have been the best evidence, it had been excluded for good reasons; and that as next best evidence the testimony of any reliable witness as to what the defendant had stated was as good as would have been the testimony of the stenographer.

Section 1010, Rev. St. 1870, provides that in the preliminary examination, it shall be the duty of the magistrate "to receive the voluntary declaration of the person accused and the answers which, without promise or threat, he shall make to the questions which the examining judge or magistrate shall put to him, and cause them to be reduced to writing and signed by the prisoner, in his presence and that of two witnesses, or, if he cannot sign, to mention that circumstance and to certify the declaration with his signature and that of two witnesses, which declaration, thus certified and signed, shall be evidence before the grand and petit jury."

The instrument which is thus made "evidence before the grand and petit jury" is therefore the transcribed statement and answers of the person accused, signed by him in the presence of the magistrate and two witnesses, or, if he be unable to sign, with that circumstance mentioned, and the instrument certified by the magistrate with his signature and that of two witnesses. In the instrument offered none of those requirements were observed. It was therefore not "evidence," and, for that reason, was inadmissible "before the * * * petit jury," and would have been equally inadmissible if the stenographer had been present to verify her work, since her verification would not have supplied its deficiencies. That being the case, and it being virtually conceded by the bill and by the argument that the instrument offered represented the only attempt that was made to comply with the statute, and hence, that what might have been the best evidence of the facts sought to be proved had never existed, it follows that the state was at liberty to prove those facts by what would otherwise have been secondary evidence; i. e., evidence "such as presupposes or carries on its face an indication that there are more original sources of information or

that better evidence exists." In regard to evidence of that character, the English rule has been, and perhaps is now, "that it has no degrees. A party entitled to resort to this mode of proof," says an eminent English writer, "may use any form of it; his not adducing or even willfully withholding some other likely to prove more satisfactory is only a matter of observation for the jury." Best's Principles of Evidence (Chamberlayne's Amer. Ed.) p. 452, par. 483. Prof. Elliott, in his recent work, says:

"The English rule is followed by a few American courts. The rule established and clearly deducible from the majority of American authorities, however, as to secondary evidence, is the same in effect as the rule between primary and secondary evidence; that is, that, when secondary evidence is properly admissible, it must itself be the best that in the nature of the case can be produced, or the best kind of that character of evidence which appears to be within the power of the party to produce." 2 Elliott on Evidence, p. 1265.

In the instant case the only possible evidence (in the absence of that contemplated by the statute) of what was stated and admitted by the defendant in his preliminary examination must consist of the testimony of the witnesses who heard him; and, as between any two such witnesses, the law makes no choice, though possibly a witness who was present merely as an interested listener would be more likely to carry in his memory that which he heard than one who, whilst listening, was engaged in some mental and mechanical occupation. We therefore conclude that the testimony of Childs was properly admitted.

Bill No. 5, we are informed by the brief of counsel, is abandoned.

Bill No. 6 shows that Ademar Fontenot, a witness for the state, testified that he with several others, was about 200 yards away at the time of the homicide; that immediately thereafter he and the others went to the scene, all of them on foot except E. A. Solleau who was on horseback; that they all arrived about the same time; "that when he arrived he heard D. H. Thompson saying in French, 'Je l'ai tué'; that that was all he heard him say, and did not know to whom the remark was addressed, if to anybody * * *; that the witness and Solleau stayed where the accused was but a short time, and almost immediately went to where the deceased's buggy was, some distance off from the scene of the shooting," etc. The defense, as the bill recites, contended that the accused, D. H. Thompson, did not use the expression, "Je l'ai tué," but, in answer to a question from E. A. Solleau as to what was the matter in French; that is, "Qu'est-ce qu'il y a?" answered, "Le Docteur a tiré Chester et moi, et moi, je l'ai tiré" and, at the proper time, Solleau was called as a witness for the defense, and was asked to state what Thompson had told him when he and Fontenot and the

others arrived, which was objected to, and the jury was thereupon retired, and the testimony of Solleau having been taken, the objection of the state that the statement of Thompson, as testified to by Solleau, was a self-serving one, not connected with that testified to by Fontenot, was sustained, whereupon defendants reserved their bill and made the testimony of Solleau part of the same. That testimony is here reproduced as follows:

"By the court: Q. Did you and Ademar Fontenot go to where the Thompsons were, together? A. I was on horseback and he was on foot, and I did not notice if we arrived together or not. Q. Were you ahead of him, or he ahead of you? A. I ought to have been ahead of him, because I was on horseback and he on foot. Q. Were you both there when Buddy Thompson first spoke in French? A. I do not know if Ademar was there when he first spoke to me in French. Q. Can you say if you got to where the Thompsons were ahead of Ademar or not? A. I cannot say. Q. Did you hear Thompson speak before you got there? A. No, sir. Q. When you arrived there, were you the first person he spoke to in French? A. I was the first person he spoke to in French. Q. Was all of his conversation in French spoken in your presence? A. I heard all that he said in French while I was there. Q. Did you hear him use the expression, while talking in French, 'Je l'ai tué'? A. No, sir. Q. What did you hear him say in French? A. Buddy said to me in French, in answer to my question, in French, 'Qu'est-ce qu'il y a?' 'Le Docteur a tiré Chester et moi, et moi, Je l'ai tiré'. Q. Can you say that at any time while Buddy Thompson was talking French to you, or to any others at that time, he did not use the expression, 'Je l'ai tué'? A. He did not use that expression in my presence. Q. You arrived there about the same time that Ademar Fontenot did, as I understand, did you remain there after your arrival and hear all that Buddy Thompson said in French and in English? A. No, sir; I cannot say that I staid long enough to hear all that he said. Q. Did you stay long enough to hear that he said in French? A. Yes; I stayed long enough to hear all that he said in French. Q. If Buddy Thompson, during the time that he was talking French on that occasion, had used the expression, 'Je l'ai tué,' loud enough for Ademar Fontenot to hear it, would you also have heard it? Yes, I should have heard it. (By the district attorney) Q. Do you know whether he used the expression 'Je l'ai tué,' before you started any conversation with him at all? A. I never heard that. Q. Do you say that he never said that, or, that you never heard that? A. He never said that in my presence. Q. Do you know what he said, if anything, while you were coming up before you said anything to him? A. No, sir. Q. What he said to you in French was in response to a question to him by you? A. Yes, sir. Q. Then, if he said anything before you asked him the question in French 'What's the matter,' you never heard it? A. No; I don't suppose I had arrived. (By Mr. Veazie) Q. Then, if the accused Buddy Thompson did say, 'Je l'ai tué,' as stated by Ademar Fontenot, and you did not hear it, then it could not have been said at the time and in the same connection as the statement you heard him make? A. No; if he said that, it could not have been at the same time or I would have heard it. (By the district attorney) Q. If he used the expression, it was not in any conversation with you? A. No, sir. (By Mr. Dubuissou) Q. Nor was it in your presence? A. No, not in my presence. (By Mr. Lewis) Q. Were you not the first man who reached the place? A. Yes,

sir; one of the first. Q. Did you stay there until the entire party left for town? A. No, sir. (By Mr. Dubuissou) Q. Who left Buddy Thompson first, you or Ademar? A. I cannot say. Q. When the pistol was found in the lane were not you and Ademar together? A. Yes, sir. Q. Was not that immediately after the conversation between you and Buddy Thompson, as above? A. Yes, sir."

The judge gives his reasons for his ruling, in part, as follows:

"That the witness Ademar Fontenot testified that when going to the scene of the shooting he heard the defendant Thompson, say in a loud voice, 'Je l'ai tué,' that he heard him say nothing else before or after that remark was made, and that he heard no one ask him any question. The court permitted the defendants to show by any and all evidence in their possession that the defendant D. H. Thompson did not make the remark attributed to him by Ademar Fontenot. But the defendants, claiming that this statement of D. H. Thompson, being part and not the whole of the statement made by him at the time, offered or tendered the witness E. A. Solleau to show that fact, thereupon the court ordered the jury to retire and took out of their presence the testimony of the said Solleau, which is attached hereto; and upon examination by the court of said testimony, it was ascertained that the statement testified to by Ademar Fontenot was not part of the conversation detailed by the witness E. A. Solleau, and therefore excluded the declaration made by the defendant D. H. Thompson to the witness E. A. Solleau, on the ground that it was a self-serving declaration. It was apparent to the court that this was a disguised attempt on the part of the defendants to introduce before the jury the following self-serving declaration to a bystander, after the homicide had occurred, to wit: 'Le Docteur a tiré Chester et moi, et moi, Je l'ai tiré.' But unfortunately for them, their witness failed to connect the statement testified to by Ademar Fontenot with the declaration made to E. A. Solleau."

It will be observed from the statement of the judge that the exclamation testified to by Fontenot was heard as that witness was approaching the scene, that it was made in a loud voice, and that it was disconnected from any other remark, and that, upon the other hand, Solleau testifies that what he heard was said after he arrived on the scene, and was in response to his question, "Qu'est-ce qu'il y a?" It will also be observed that Solleau does not know whether he and Fontenot arrived at the same time; that he testifies that if the defendant made the exclamation attributed to him by Fontenot, it must have been before he (the witness) arrived; and that such an exclamation could not have been made when the defendant was talking to the witness, or he (witness) would have heard it. It was not asserted that the conversation testified to as having taken place between Solleau and defendant was part of the *res gestæ*. It is, no doubt, the rule that:

"Where a witness testifies to a part of a statement of a party as an admission, the party is entitled, on cross-examination, or redirect, of the same witness, or by other witnesses, to show the entire statement made at the same time, provided the part which he thus proves

relates to the subject-matter of the admission in evidence, and tends to explain or qualify it. It is generally held that where part of a conversation * * * is introduced by one party, as an admission, the other party is not entitled to the remainder, on his own behalf, unless it relates to the subject-matter of the admission, and explains or modifies the same, *nor can he introduce his own self-serving statements, made on another and separate occasion.*" (Italics by present writer). 16 Cyc. 1039-40.

It is evident from the testimony of Solleau that the exclamation attributed to the defendant by Fontenot was not made upon the occasion of, or in connection with, the conversation to which Solleau testifies, and therefore furnished no basis for the introduction in evidence of that conversation. State v. Gunter, 30 La. Ann. 536; State v. Rutledge, 37 La. Ann. 378; State v. Jones, 47 La. Ann. 1524, 18 South. 515; Knoblock's Cr. Dig. pp. 163, 171. Whether the exclamation was made at all, and whether the conversation took place at all, and whether the witnesses, respectively, could have heard the one without hearing the other, were questions for the jury.

Bill No. 7 shows that defendants, without having called the defendant D. H. Thompson to the stand as a witness, announced "that they had closed their case in chief," whereupon the court inquired of counsel for the state, what was their pleasure, to which one of the counsel, who was assisting the district attorney, replied in a loud and distinct tone of voice, that he could not say, as that officer had left the courtroom to telephone to his home, under the impression that counsel for the defendants would place the other defendant, meaning D. H. Thompson, on the stand to testify; that this statement was made in the hearing of the jury, and was objected to by counsel for the defendants, and that the court took no action in the matter, "but simply charged generally in the general charge by reading Act No. 41, p. 77, of 1904, to the jury, and explaining to them the meaning of said act, without referring, in terms, to the remark of counsel for the state, * * * to which remark of counsel for the state and the action of the court thereon, counsel for defendants excepted," etc.

The judge's reasons for his action are in part as follows, to wit:

"This matter was nothing more than a conversation between the court and counsel, necessary to carry on the business of the court, and to explain a seemingly unnecessary delay in the trial. No attempt was made by either court or counsel to draw any inference, favorable or unfavorable, from the fact that defendant, up to that time, had not testified. The remark was not made in a loud voice, or made with any apparent attempt to draw the attention of the jury to a fact patent to them. * * * It is impossible for any judge to prevent such occurrences as this during the progress of a trial, and when happening to say that because it may or is calculated to prejudice the jury, and, therefore, a new trial should be granted, is practically to say that the jury have violated their oaths of office, and have

acted in flagrant disregard of the charge of the court; and all this merely upon the supposition that they have been influenced by prejudice."

Act No. 41, p. 77, of 1904, after declaring that the accused may testify, subject to the rules applicable to other witnesses, provides "that his failure to testify shall not be considered for or against him," and this, as we understand from the bill, was read and explained to the jury, which (the remark complained of having been made without intention, and not by way of comment, but as a natural answer to a natural question) was sufficient to meet the requirements of the situation.

We find no error in the rulings of the trial judge, and the verdict and sentence appealed from are affirmed.

(116 La.)

No. 15,845.

DIDLAKE v. CAPPEL.

(Supreme Court of Louisiana. April 23, 1906.)

HUSBAND AND WIFE—DONATIONS BETWEEN—SECOND MARRIAGE.

Donations made by one of the spouses to the other before marriage fall within article 1753, Civ. Code, according to which the spouse who marries a second time forfeits to the children of the first marriage all property acquired by donation from the deceased spouse.

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Gregory Horatio Couvillon, Judge.

Action by Annie G. Didlake, wife of Claude F. Drake, against S. W. Cappel. Judgment for defendant, and plaintiff appeals. Affirmed.

Joseph Clifton Cappel, for appellant. William Harris Peterman, for appellee.

PROVOSTY, J. This suit is to compel defendant to accept title from plaintiff to a piece of real estate.

The objection to the title is that plaintiff, who has married a second time, acquired the property by donation from her first husband, and that there are children of the first marriage, and that in such a case, under express provision of the article 1753, Civ. Code, the property belongs to the children of the first marriage.

To this the plaintiff answers that the donation was made before the marriage, and that article 1753 applies only to donations made during the marriage.

The article makes no such distinction. The language is "any property given by the deceased spouse."

We have considered whether the use of the word "spouse" did not imply that the donation should have to be made by a "spouse," or, in other words, after marriage; but we have concluded that such an implication would exclude from the operation of

the article donations by marriage contract, and, consequently, was inadmissible, since the article is mainly directed against donations of that kind.

Moreover, the donation in question, if not one by marriage contract, strictly speaking, was at all events a nuptial gift. It was made a few days before the marriage, and the act recites that the donee is the "intended wife" of the donor; and, such being the case, it comes within the intendment of the article which is shown by its history to include nuptial gifts. Succession of Hale, 26 La. Ann. 201.

The case of Dupre v. Jenkins, 52 La. Ann. 1819, 28 South. 321, did not involve the interpretation of this article, but solely the question of fact whether the property had been given by the husband or by a third person. Judgment affirmed.

(116 La.)

No. 15,847.

MOULIERRE v. COCO et al.

(Supreme Court of Louisiana. April 23, 1906.)

1. PUBLIC LANDS—STATE PATENT TO SWAMP LANDS—EFFECT AS EVIDENCE.

A state patent to a tract of land as "swamp" does not per se prove that title passed to the state under the acts of Congress of 1849 and 1850, commonly called the "swamp land grants." Wright v. Roseberry, 7 Sup. Ct. 985, 121 U. S. 488, 30 L. Ed. 1039; Chandler v. Calumet & Hecla Mining Co., 13 Sup. Ct. 798, 149 U. S. 79, 37 L. Ed. 657.

2. ADVERSE POSSESSION—ADDING POSSESSION OF AUTHOR OF TITLE.

Defendant's title cannot be affected by the nonregistry of an anterior deed forming a link in the chain, and they have the right to add the sum of their author's possession to their own for the purpose of prescription.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 218.]

3. EVIDENCE—BEST AND SECONDARY.

The existence and loss of a process verbal of a probate sale of land having been proven, parol evidence is admissible to prove that the lost instrument evidenced an adjudication to a particular person, and also to prove the facts of adjudication, payment and transfer of possession.

[Ed. Note.—For cases in point see vol. 20, Cent. Dig. Evidence, §§ 582, 583.]

4. LANDLORD AND TENANT — DEFEATING LANDLORD'S TITLE.

A tenant during the continuance of his lease cannot change the character of his possession and oust his lessor by purchasing or leasing from a third person. Town of Morgan City v. Dalton, 36 South. 208, 112 La. 9, Harvin v. Blackman, 36 South. 213, 112 La. 24.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 199-209.]

5. ADVERSE POSSESSION—TITLE BY PRESCRIPTION.

Defendants and their authors, having been in actual and continuous possession as owners since the year 1856, have acquired title by the prescription of 30 years, if not by that of 10 years under titles transalative of property.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 161.]

(Syllabus by the Court.)

41 SO.—8

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Gregory Horatio Couvillon, Judge.

Action by Francois Moulierre against Albert D. Coco and others. Judgment for defendants, and plaintiff appeals. Affirmed.

William Harris Peterman and Tucker Horatio Couvillon, for appellant. Coco & Couvillon, for appellees.

LAND, J. This is a petitory action to recover a tract of land containing 80 acres, with the buildings and improvements thereon situated in the parish of Avoyelles.

Defendants set up title, and also pleaded the prescriptions of 10 and 30 years. There was judgment in favor of defendants, and plaintiff has appealed.

On August 15, 1859, the state of Louisiana issued a patent to Jules Desfosse to several tracts of land, described as "swamp" land, containing 278.33 acres, among which was included the E. ½ of N. W. ¼ of section 28, township 1 S., of range 4 E., Southwestern district, state of Louisiana.

On October 23, 1875, Jules C. Desfosse made a dation en paiement unto his wife, Mrs. Celestine Bordelon, for the purpose of reimbursing the sum of \$6,761.70, representing paraphernal property received and used by the husband. A number of tracts were conveyed including the E. ½ of N. W. ¼ of section 26, township 1 S., range 4 E.

On November 14, 1885, Mrs. Celestine Bordelon widow of Jules C. Desfosse, sold the last-described tract to Joseph O. Saucier, on terms of credit. This sale was however rescinded and the land retroceded to the vendor on December 6, 1887, for the reason recited in the act as follows, to wit:

"And from an examination of the records it appears that the land herein mentioned did not belong to the said Jules C. Desfosse and the sale thus made was null and void.

On April 11, 1903, the plaintiff purchased at a probate sale made in the succession of Celestine Bordelon, widow of Jules C. Desfosse, the following described property to wit:

"A certain tract or parcel of land, situated in this Parish containing eighty (80) acres, bounded North by Callegari, South by Choupique with the improvements thereon."

On the part of the defendant it is shown that the property in controversy was inventoried as belonging to one Zenon Lemolne and was purchased at a probate sale made in his succession on November 3, 1856, by Paul H. Ducote. The purchaser took actual possession of the land, and was living on it at the time of his death in 1868. The evidence shows that Ducote in 1867 mortgaged this same tract of land to L. D. Coco, and that the latter, in May, 1869, petitioned the probate court for an order directing the administrator of the estate of Ducote to sell said property at public auction for the purpose of

paying the debt secured by the mortgage in due course of administration. The probate court ordered all the property belonging to the succession to be sold for cash according to law.

In 1870 the parish judge rendered the following order in the matter of the petition of L. D. Coco v. Avit Ducote, Adm'r, to wit:

"In this cause the defendant having complied with plaintiff's demand since the filing thereof, it is therefore ordered, adjudged, and decreed that his suit be dismissed at defendant's costs."

The administrator's final account and tabeau of distribution shows the amount realized from the probate sale, and that after paying the homestead claim of the widow and minors there remained the sum of \$33.40 to be applied to the special mortgage in favor of L. D. Coco. The evidence shows that the process verbal of sale once existed, and that it recited the adjudication to L. D. Coco, but since 1885 has been lost or destroyed.

The secondary evidence also shows that the land in dispute was adjudicated to L. D. Coco. One witness testified that L. D. Coco paid the widow Ducote a considerable sum in specie. The evidence leaves no reasonable doubt that the purchaser went into possession, and that he and his heirs have continued in possession ever since.

The recorded deeds show that L. D. Coco, on September 20, 1877, conveyed the property to his wife in payment of her paraphernal claims, and that Mrs. Coco, in the year 1880, donated the same property to the defendant herein. It is admitted that the property in question was assessed to L. D. Coco from the time he acquired the same until his death, and was thereafter assessed to his estate.

In 1885, when Saucier purchased from Mrs. Desfosse, he was the tenant of the Cocos, who brought suit at once against him for rent. Before this suit could be tried Saucier retroceded the property to Mrs. Desfosse and voluntarily paid the rent to the Cocos.

In 1900 one Artigo was on the land as lessee of the Cocos, and while their tenant made another contract of lease with one Seiss, administrator of the succession of Mrs. Desfosse. Seiss testified that in the year 1899, he discovered that the Cocos had possession of the property and collected rent, and that Artigo was on the premises.

The next spring Seiss entered into a contract of lease with Artigo. A. D. Coco, who had charge of the property, testified that Artigo was occupying the premises under a contract of lease, and that he had never heard of the contract of lease between Artigo and David Seiss.

It appears that soon after the sale to Saucier, in 1885, counsel for the parties in interest investigated their respective title and arrived at the conclusion that Mrs. Desfosse had no title to the land. At the time, according to the testimony of A. D. Coco, there was found among the papers left by Zenon Le-

moine a United States land receipt covering the property in controversy. This paper was examined by counsel for the respective parties, and was exhibited to the notary before whom was executed the act of retrocession from Saucier to Mrs. Desfosse.

It is certain that Mrs. Desfosse was convinced that she had no title to the property, since she so declared in the act of retrocession. She never afterwards claimed title to the land and it was excluded from the inventory of her succession made in 1896. In 1902 the property was placed on a supplemental inventory.

Plaintiff has shown no title in the state, either in the usual mode of proving that the land was listed to the state, and approved by the Secretary of the Interior, or by showing that the land was in 1849 and 1850 in the category of swamp and overflowed lands and that the United States Land Department had neglected or failed to make the identification as required by the statutes. *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; *Chandler v. Calumet & Hecla Mining Co.*, 149 U. S. 79, 13 Sup. Ct. 798, 37 L. Ed. 657.

It is established by the evidence that the defendants and their authors have been in actual possession of the land as owners since 1856. The possession of Ducote and his succession continued until the sale to L. D. Coco in 1869.

The possession of Ducote was transferred to L. D. Coco and the sum of both possessions passed from him to Mrs. Coco, and from her to the defendants, who have held possession in their own right since 1880.

Defendants are in possession in good faith under a recorded deed, and their title cannot be affected by the nonregistry of the anterior conveyance to L. D. Coco. See *Hollingworth v. Wilson*, 32 La. Ann. 1012. If their title cannot be affected neither can their right of possession derived from the same source.

We think that Ducote acquired title by the prescription of 10 years prior to the probate sale in 1869, and, if not, that his possession added to that of L. D. Coco, completed the term long before the sale to Mrs. Coco in 1877. If the sale to Coco did not affect third persons, the possession continued in the estate of Ducote. There was no pretense of the interruption of possession until 1885, when Mrs. Desfosse conveyed the property to Saucier, who was at the time a tenant of Coco's. Saucier having commenced his possession of the estate for the defendants could not change the character of his possession. Civ. Code, art. 3446. A tenant cannot dispute his lessor's title while in possession of the leased premises. *Town of Morgan City v. Dalton*, 112 La. 9, 36 South. 208; *Harvin v. Blackman*, 112 La. 24, 36 South. 213. For the same reasons the surreptitious lease of 1900 to Artigo was without legal effect as an ouster of defendant's possession.

Considering the sale from 1856 to 1880, inclusive, as having merely the effect of transferring the right of possession as owner; the result is an adverse possession of nearly 48 years opposed to a claim of title, which more than 20 years ago the author of plaintiff solemnly acknowledged in an authentic act to be a nullity.

Hence, if defendants have not acquired title by the prescription of 10 years, they can successfully invoke the prescription of 30 years.

Judgment affirmed.

(116 La.)

No. 15,974.

STATE ex rel. LORENZ v. CITY COUNCIL OF NEW ORLEANS.

(Supreme Court of Louisiana. April 9, 1906.)

1. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—JUDGMENT AGAINST CITY—PAYMENT.

Judgments against the city of New Orleans can be paid only after statutory, necessary, and usual charges have been provided for in the budget, and what are necessary and usual charges is left to the discretion of the city council. *Benedict v. City of New Orleans*, 35 South. 605, 111 La. 374.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 2211.]

2. MANDAMUS—JUDGMENT AGAINST CITY—APPROPRIATION FOR PAYMENT.

Where the taxing power of the city has been exhausted, and its estimated revenues for the year are not more than sufficient to meet the necessary and usual charges fixed in the budget, mandamus will not lie to compel the appropriation of money to pay a judgment out of the unascertained and uncollected surplus of the taxes of the year or of previous years.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 231, 232.]

3. MUNICIPAL CORPORATIONS—ANNUAL BUDGET—JUDGMENTS—PRIORITIES.

Under the provisions of Act No. 5, p. 10, of Extra Session of 1870, judgments are payable in the order in which they are filed and registered out of money appropriated for that purpose in the annual budgets, and, where there are no funds available for that purpose, the judgment creditor has no other legal remedy to compel payment.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Application by the state, on relation of William A. Lorenz, for writ of mandamus to the city council of New Orleans. Writ granted, and defendant appeals. Reversed and suit dismissed.

Henry Garland Dupré, Asst. City Atty., and Samuel Louis Gilmore, City Atty., for appellant. Benjamin Rice Forman and James Thomas Nix, for appellee.

LAND, J. Relator recovered judgment against the city of New Orleans in the year 1904 for damages ex delicto, and this judgment was affirmed on appeal in May, 1905. See *Lorenz v. City of New Orleans*, 114 La. 802, 38 South. 566.

In November, 1905, the relator instituted

the present mandamus suit to compel the city council to include, in the budget for the year 1906, a sufficient sum to pay said judgment with interest and costs.

When this suit was filed, the budget had been made out, but had not finally been adopted.

The respondents answered that the framing of municipal budget is not a ministerial act, but is a matter of discretion vested in them by statute, and that this discretion had been exercised by them fairly, with a view to obtaining the best results, and has been characterized by no arbitrary or partisan spirit or act, and that consequently their action is not reviewable by the courts.

For further answer respondents aver that the taxing power of the city had been exhausted, and that they could find no source to secure the funds needed to pay relator's judgment out of the anticipated revenues for the year 1906, and that all the items in the budget are proper and legal disbursements, either imposed by express constitutional or legislative enactment, or growing out of the imperative obligations incumbent on the municipality.

The evidence offered on the trial of the suit consisted of the proposed budget with the ordinance providing for its adoption, an ordinance imposing a tax on all the property in the city of New Orleans for the year 1906; and a certificate from the city comptroller showing that relator's was the only unsatisfied judgment against the city of New Orleans.

There was judgment in favor of relator ordering respondents to include in the budget of 1906 a sufficient sum to pay relator's judgment, or to provide for the payment of the same by special appropriation payable out of any surplus for the year 1906 or any previous year, now or hereafter remaining in the treasury of said city after payment of all moneys not actually otherwise appropriated.

From this judgment the defendants have appealed.

Relator's right to a mandamus to compel the respondents to include in the budget for the year 1906 a sufficient sum to pay his judgment cannot be maintained, for judgments can be paid only after statutory, necessary, and usual charges, and what are necessary and usual charges is left to the discretion of the city authorities, free from the interference of the courts, where that discretion has not been manifestly abused. *State ex rel. Benedict v. City of New Orleans*, 111 La. 374, 35 South. 605.

Act No. 5, p. 10, of the Extra Session of 1870 makes it the duty of the comptroller to warrant on the treasurer for the amount due on judgments, without any special appropriation of money therefor by the council; "provided, always, that there be sufficient money in the treasury to pay such judgments specially designated and set apart for that

purpose in the annual budget or detailed statement of items of liability and expenditure required to be made" by the city charter.

It is therefore very clear that a judgment must not only be listed on the budget, but the necessary funds must be designated and set apart thereon for its payment, and the money actually collected and deposited in the treasury, before it can be lawfully paid.

The alternative mandamus ordered by the district judge would force the city council to make a special appropriation of contingent funds, which may never be collected, for the payment of relator's judgment.

This mode of making appropriations is in our opinion opposed to both the letter and spirit of the city charter, which requires that an estimate of all items of liabilities and expenditures for the year shall be made and published, and such a rate of taxation be fixed, as, together with other revenues of the city, may be necessary to meet the estimated liabilities and expenditures. Section 93 of Act No. 45, p. 74, of 1896.

The council is required to keep well within its revenues 20 per cent. of which, together with all sums, rights, interest, and credits received from miscellaneous or contingent sources, are reserved for the purpose of public improvement. Sections 94, 95, Id.

The surplus of revenues for any particular year may be applied to the payments of amounts due and unpaid out of the revenues of former years. Section 2, Act No. 32, p. 39, of 1902.

But there is no warrant in the charter or under Act No. 5, p. 10, of the Extra Session of 1870, for the appropriation in advance of such surplus, if any there be, for the benefit of a particular creditor. Section 94 reads, in part, as follows:

"The council is hereby prohibited from estimating for expenditures to be derived from any uncertain or indefinite source, cause or circumstance."

As we read the law, the relator cannot be paid unless his judgment is placed in the budget, and it cannot be budgeted unless there are sufficient funds available for its payment.

"We are not vested with power to frame a budget for the city of New Orleans," as was said by our predecessors, and we may add that we have no power to supplement a budget by incorporating another item of expenditure and making a contingent appropriation for its payment.

Section 3 of the act of 1870 provides that:

"All judgments shall be paid in the order in which they shall be filed and registered in

the office of the comptroller, from the first money next annually set apart for that purpose."

It is further provided that, when the money thus appropriated has been exhausted, the council shall have power, if they deem it proper, to appropriate from the money set apart for contingent expenses a sufficient sum to pay judgments.

Hence the duty imposed by the statute on the council is to provide in the annual budget money to pay judgments. If the council has exhausted its power of taxation, and the budget of expenditures as adopted will consume all of the estimated income of the city for the year 1906, there is no warrant in law for ordering the council to appropriate a surplus not shown to exist or which may never exist, for the payment of relator's judgment.

The lawmaker has left the distribution of the excess of revenue, above statutory, necessary, and usual charges, to the discretion of the council, which may apply the same to payments of amounts due and unpaid out of the revenues of former years. Section 2, Act No. 32, p. 39, of 1902.

The act of 1870 recognizes the power of the council to appropriate money for contingent expenses, and leaves it discretionary with the council to appropriate such fund in whole or in part to the payments of judgments. The lawmaker has wisely left the disposition of surplus revenues to the discretion of the council to be appropriated as the exigencies of the situation may require.

To appropriate such surplus in advance to the payment of judgment would deprive the city of all possible means of meeting extraordinary emergencies, such as epidemics, floods, and the like.

In conclusion, it may be remarked that this suit was instituted on the theory that the budget contained unnecessary items, among others, an item for \$40,000 for charities to be distributed to private institutions. This contention has been abandoned in this court, and the argument has been confined to the right of the relator to be paid out of the surplus revenues of 1906 and of preceding years.

The right of relator to such relief may well be questioned, as *ultra petitem*. But we prefer to pass on the merits of the contention as presented.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered and decreed that this suit be dismissed at relator's cost in both courts.

(116 La.)
No. 15,915.

STATE v. JOHNSON et al.

(Supreme Court of Louisiana. March 12, 1906.
Rehearing Denied April 9, 1906.)

1. JURY—RETURN OF JURY COMMISSIONER—IMPEACHMENT.

A jury commissioner cannot be heard to contradict or impeach the return of *procès verbal* made by him under the sanctity of his official oath.

2. SAME—JURY LIST—REVISION—STRIKING NAMES FROM LIST.

The purpose of the law (Act 135, p. 216, of 1898, as amended by Act 58, p. 136, of 1904) is to provide, as nearly as practicable, 300 competent men from among whom grand and petit jurors are to be drawn, which number is to be made good, every six months (after striking from the list the names of those who have served, died, removed, from the parish, or become exempt or disqualified), by supplementing such list with new names, equal in number to those stricken therefrom. The *procès verbal* of each successive drawing should show the names of the jurors then drawn, as also the names of those who have died, removed from the parish, or become exempt or disqualified, since the last drawing, and whether those names (as also the names of the jurors previously drawn) are stricken from the existing list by having a line drawn through them with a pen or pencil, by being obliterated in some other way, by being cut out of the paper, or by being checked in such manner as to indicate to the commissioners that the bearers are no longer available for service as jurors, is immaterial, provided enough new names be added to keep the number of competent jurors available for service at 300 or (allowing for errors and accidents) at approximately that number.

3. SAME—VENIRE—QUASHING—FRAUD.

The fraud required by section 15 of Act 135, p. 223, of 1898, to be shown as cause for the quashing of the venire of jurors is actual fraud or such nonobservance of the statute as will justify the inference of actual injury to the accused.

4. GRAND JURY—PLACE OF MEETING.

There is nothing in our law which requires a grand jury engaged in the investigation of crime to obtain permission of the court to visit the scene of such crime, within its territorial jurisdiction, or which deprives it of the right to meet at other places within the limits of the parish seat, than the courthouse.

5. CRIMINAL LAW—SEVERANCE OF TRIAL—DISCRETION OF COURT.

The general rule is that persons are not entitled to a severance of trial, as a matter of right, though the trial judge may, in the exercise of his discretion, grant a severance. Neither the fact that the defenses are antagonistic and that one defendant seeks to escape by fixing the crime upon another, nor the fact that one defendant may challenge jurors whom the other would prefer to accept, nor both, are sufficient to justify the conclusion that, in denying the severance, the trial judge has abused the discretion vested in him.

(Syllabus by the Court.)

Appeal from Twenty-Seventh Judicial District Court, Parish of Ascension; Paul Lèche, Judge.

Tama Johnson and others were convicted of murder, and appeal. Affirmed.

Caleb Cushing Weber for appellant Tama Johnson. Edward Nicholls Pugh and Walter Lemann, for appellants Willie Bradford and Paul Suarez. Walter Gulon, Atty. Gen., and

Gustavus Adolphus Gondran, Dist. Atty. (Lewis Gulon, of counsel), for appellee.

MONROE, J. Defendants having been convicted of murder without capital punishment, have appealed, and present their case (or cases) to this court by means of certain bills of exception which will be considered seriatim as follows, to wit:

1. They moved to quash the venire and the indictment upon the grounds as alleged by them (1) that the jury commissioners never selected 300 competent men to serve as jurors, and never kept or caused to be kept a general venire list of the names of such jurors; or (2) if such list ever existed, that they never kept the same complete by striking off the names of those who had served, and of those who had died, removed from the jurisdiction, become exempt, or disqualified, and, by supplementing such list by additional names; (3) that no copy of the *procès verbal* of the drawing was placed in the hands of the sheriff, who was therefore without authority to summon the jurors; (4) that R. J. Duke, one of the grand jurors, had, before being chosen, publicly expressed an opinion adverse to the defendants, and was incompetent to serve; (5) that the grand jury illegally left the courthouse and visited the scene of the homicide, without being authorized by the court; (6) that Act 135, p. 216, of 1898, is unconstitutional, in that it authorizes the selection of a grand jury in violation of article 117 of the Constitution; and that "to force defendants to be tried by the alleged jury drawn in this case would cause them great wrong and irreparable injury, because great wrong has been practiced and great injury committed in the selection, securing, and drawing of the alleged grand and petit juries in this case."

Upon the trial of this motion the defendants offered to prove the allegations thereof by the members of the jury commission, to which offer the district attorney objected, that the witnesses so offered could not be heard to contradict and impeach the *procès verbal* made by them, and, the objection having been sustained, the defendants reserved a bill of exceptions to the ruling of the court. Defendants then placed on the stand, for the same purpose, Messrs. T. A. LeBlanc and Henry L. Weil, the witnesses who had been summoned to attend the meeting of the jury commissioners, agreeably to the provisions of section 4 of Act 135, p. 218, of 1898, as amended by Act 58, p. 136, of 1904, and who testified to what had taken place at said meeting, and there was also introduced in evidence (on behalf of the state) the minutes of the jury commission and the testimony of the clerk, in corroboration of the *procès verbal* therein contained. Beyond this it was admitted that after commencing the investigation of the case, the grand jury, without permission or direction of the court, accompanied by a deputy sheriff and the district attorney, visited the house where the

killing is said to have taken place and then returned to the courthouse, and the defendants offered in evidence the procès verbal of the coroner's inquest "for the purpose of proving that one of the grand jurors, R. J. Duke, was a member of the inquest. Upon the evidence thus offered the motion to quash was overruled, and the defendants reserved their bill.

We are of opinion that the testimony of the jury commissioners, to contradict and impeach their procès verbal, was properly excluded; the rule which precludes the sheriff from contradicting his return and the juror from impeaching his verdict being equally applicable to such officers. *State v. Revells*, 31 La. Ann. 388; *State v. Allen*, 1 Ala. 442; *State v. Clarkson*, 3 Ala. 378—the two cases last mentioned being cited in 17 Cyc. 574, in support of the doctrine there stated that "oral evidence is inadmissible to impugn the certificate of officers to whom the selection or drawing of juries is confided."

From the minutes of the commission it appears (without going further back) that in July, 1900, the jury commissioners selected 300 competent men to constitute the general venire, and that grand and petit jurors having been from time to time drawn therefrom, and the list having been supplemented by the addition of the names of jurors to supply the places of those who had served, died, removed, become exempt, or disqualified, the commissioners met upon October 13, 1905, and took action as follows, to wit:

"Twenty-Seventh Judicial District Court. Parish of Ascension, State of Louisiana: Be it remembered that, on this 13th day of October, 1905, we, the undersigned jury commissioners, * * * having been duly notified by the clerk of the above-mentioned court to appear at his office on this day for the purpose of drawing a grand and petit juries for the October session, * * * in the presence of T. A. LeBlanc and B. (H.) L. Weil, two competent and disinterested witnesses, * * * proceeded in accordance with law, and especially Act 135, p. 216, of 1898, amended by Act 58, p. 136, of 1904, after being by said clerk furnished with a list of the grand jurors and of those who have served as regular jurors since the previous drawing of the general venire, * * * to examine the original venire list and strike therefrom the names of such as have served as well as the names of others on the list who are known to have died, removed from the parish, become exempt, or disqualified to serve as jurors, since their names were entered thereon, and a duplicate name of O. A. Guillot, whose name appeared twice on said list, were taken by us from the general venire box, and who are as follows. [Here follow the names of 12 jurors, with mention of the wards from which they were summoned.] After which, we, the jury commissioners, supplemented the original list and the ballots in the box with the names of the same number of good and competent men from the qualified jurors of the parish as were taken from the box and erased from the list, making the number of names in the general venire box and on the jury list the original standard of 300 competent, good, and true men to serve as jurors, grand and petit, for the session of the court beginning Monday, October 23, 1905, * * * and said supplemental names being as follows, to wit: [Here follow the names of 66 jurors,

with specification of the wards from which they were summoned.] And, immediately after completing the general venire list, we * * * selected therefrom the names of 20 citizens, possessing the qualifications prescribed by section 1 of said Act 135, p. 216, of 1898, amended by Act 58, p. 136, of 1904, the same being taken from different portions of this parish, as far as practicable, who shall be subject to duty as grand jurors, during the term of six months after the grand jury is impaneled and until a succeeding grand jury shall have been impaneled, the names of the persons so selected to serve as grand jurors being as follows, to wit: [Here follow the names.] And, the names of the 20 persons selected to serve as grand jurors having been written on separate slips of papers, by the clerk, in the presence of the commissioners and the witnesses, the slips containing the same were by us placed in an envelope, sealed, and the wards, 'List of Grand Jurors,' indorsed thereon, and each of the other supplemental names of the above general venire list having been written by the said clerk on a separate slip of paper, together with the number of the ward or place of residence of such person, the slips of paper or ballots, containing the names so selected, except those containing the names of those to serve as grand jurors, were placed in a box labeled 'General Venire Box.'"

And the procès verbal then proceeds to recite the drawing of the petit jurors to serve during the weeks beginning October 30th and November 6th, respectively; the placing of the names in envelopes; the sealing and indorsing of the envelopes; the placing of all the envelopes in the jury box; and the locking, sealing, and delivery to the clerk of the box, all as provided by the statute.

It appears from the face of the minute book, and from the testimony of the witnesses who were examined, that the names of the jurors who had served, died, removed, etc., were not stricken from the list by having a line drawn through them with a pen, but by having blue, yellow, and black pencil checks placed opposite them, and the defendants complain of this, on the ground that it is not a compliance with the law requiring the names to be stricken from the list. There is no merit in this complaint. The purpose of the law is to provide as nearly as practicable 300 competent men from among whom grand and petit jurors are to be drawn, which number is to be made good every six months, after striking from the list the names of those who have served, died, removed, etc., by supplementing the list with an equal number of new names. The procès verbal of each successive drawing should show, and, in the instant case, does show, the names of the jurors then drawn for service, as also the names of those who may have died, removed, etc., since the last drawing, and whether those names, as also the names of the jurors previously drawn, are stricken from the existing list by having lines drawn through them with a pen or pencil, by being obliterated in some other way, or cut out of the paper, or by being checked in such a manner as to indicate to the commissioners that the bearers are no longer available for service as jurors is immaterial, provided enough new names are added to keep the number of

competent jurors available for service up to 300 or (allowing for errors and accidents) to within a reasonable approximation of that number. Section 15 of the Act of 1898 provides:

"That it shall not be sufficient cause to challenge the general venire * * * or set aside the venire because some of the jurors on the list are not qualified to act, nor because of any other defect or irregularity in the manner of selecting the jury as above provided; and to [no] such defect or irregularity in the selection thereof or the summoning of the jury shall be sufficient cause, if it shall not appear that some fraud has been practiced or some great wrong committed, in the selection and summoning of the jury that would work irreparable injury; provided, that it shall be good ground to challenge, for cause, any juror who is not qualified to act under the provisions of this act."

It is true that the defendants allege fraud and injury, but their counsel argue that such fraud and injury consist in the fact that the names of the jurors who had served, died, etc., were not stricken from the list in a particular way (which they assume to be the way, and the only way, contemplated by the statute); i. e., by drawing lines through them, presumably with a pen or, possibly, with a pencil. The statute, however, does not confine the commissioners to that method any more than it confines them to the more literal method of striking the names out of the paper altogether, instead of merely drawing lines through or over them. Moreover, the failure of the commissioners to strike the names off by either of the methods mentioned, or by any other method, suggests no actual fraud or such nonobservance of the statute as to justify the inference of fraud or of actual injury to the accused; since, if the list be supplemented, if the names be not stricken off, such accused has the benefit of a larger number from which may be selected the jurors by whom he is to be tried, and he is not deprived of the right to challenge, for cause, any particular juror who may be disqualified.

We find it stated in the brief "that the list of grand jurors was prepared by the clerk of court, and was never selected by the jury commissioners," but there is no evidence in support of this charge, and the contrary appears from the procès verbal of the commissioners. The allegations that no copy of the procès verbal was placed in the hands of the sheriff, and that R. J. Duke, one of the grand jurors, had, before being chosen, publicly expressed an opinion adverse to the defendants, were disproved by the evidence offered to sustain them. As to the charge that the grand jury visited the scene of the homicide without obtaining permission from the court, it appears that the place visited is within the corporate limits of Donaldsonville, the parish seat of Ascension Parish, and the judge in signing the bill in relation to the matter, says:

"Being of opinion that the defendants were not concerned with the nature of the evidence

taken and considered by the grand jury, this motion to quash on this ground is overruled," etc.

The law requires a grand jury to hold its sessions at the seat of justice of the parish (Act 135, p. 221, of 1898, § 8); but it also requires it to visit the prisons within its district (Rev. St. 1870, § 2139), from which it follows that the sessions of the body are not, necessarily, to be held at the courthouse. A grand jury is authorized to act on evidence submitted to it, but its members are also required, under a very severe penalty in case of failure so to do, to act upon facts within their own knowledge (Rev. St. 1870, § 2140), from which it also follows that they do not require the permission of the court to investigate crime, but are bound to take the initiative and determine for themselves the character of the evidence, or the sufficiency of the facts, necessary to their findings. Under these circumstances, we see no reason for holding that the action of the grand jury here complained of was unauthorized. The suggestion that the Act 135, p. 216, of 1898, is unconstitutional, has not been referred to in this court, and, we presume, is abandoned. We therefore conclude that the motion to quash was properly overruled.

2. Bradford and Suarez moved for a severance, on the ground that, as between them and Johnson, the position of each was that the other had committed the crime.* This was conceded, but it was also conceded that the state was prosecuting upon the ground that all three of them had participated in the killing. Beyond this counsel for the defendants first above mentioned say in their brief:

"It is further admitted that the trial of all three accused together meant the introduction of illegal evidence against the accused, Bradford and Suarez."

We, however, find nothing to warrant this statement. If such evidence had been offered, they should (and no doubt would) have objected to it, and have protected the rights of their clients by bills of exception; but there are no such bills in the record. Moreover, it appears that no confessions were used or were intended to be used, and as Act 185, p. 355, of 1902, provides that "the circumstances of the witness being a party accused, or being jointly tried, shall in no wise disqualify him from testifying" (subject to the condition that he shall not be compelled to testify against himself, etc.), there appears to be no greater danger of the introduction of illegal evidence in the trial of joint defendants, having antagonistic defenses, than in any other case. The mere fact that one defendant is seeking to escape by throwing the blame upon the other is not sufficient to require a severance. *Com. v. Place*, 153 Pa. 314, 26 Atl. 620. Nor is it sufficient that one defendant may challenge jurors whom the others would prefer to accept, since neither has the right to select the jurors

by whom he will be tried, and the exercise by one defendant or by the state of the right of challenge does not oblige the other defendants to accept jurors who are incompetent.

"The general rule," this court has said, "is that persons are not entitled to a severance of trial, as a matter of right, though the trial judge may in the exercise of his discretion grant a severance." *State v. Lee et al.*, 46 La. Ann. 628, 15 South. 159; *State ex rel. N. O. & C. R. L. & P. Co. v. St. Paul Judge*, 110 La. 726, 34 South. 750.

It has been held proper to grant a severance where a confession of one defendant implicating another was intended to be used (*State v. Desroche et al.*, 47 La. Ann. 655, 17 South. 209), but the reason of this exception to the rule, as stated, would seem to have been removed by the passage of Act 185, p. 355, of 1902. In any event the case at bar does not fall within the exception. We therefore find no error in the overruling of the motion for severance.

The questions thus presented were considered in a motion for new trial, which, for the reasons assigned, we think was properly overruled.

Since this opinion was prepared there has been presented to the court, in behalf of the defendants Bradford and Suarez, a petition, accompanied by a typewritten statement made and verified before the judge of the district court, in the presence of all the counsel, by the defendant Tama Johnson, to the effect that she, alone, killed the person for whose homicide this prosecution was instituted, and that her codefendants are blameless in the matter, and this court is asked upon that ground to set aside the verdict and judgment appealed from, and remand the case. In support of this request, counsel for defendants refer to a case in which it was brought to the knowledge of the court in a suit pending on appeal to recover on a policy of life insurance, that the person insured was alive, and in which action was taken by this court upon the basis of that information. We find but little resemblance between that case and this, and, after mature deliberation, have concluded that in the instant case the matter presented cannot be permitted to influence the judgment to be rendered. The defendants have the right to present their case to the board of pardons, which is in a position to investigate the facts.

The verdict and sentence appealed from are accordingly affirmed.

(116 La.)

No. 15,828.

FONTELIEU v. FONTELIEU et al.

(Supreme Court of Louisiana. March 12, 1906.
On Rehearing, April 9, 1906.)

1. EXECUTION—SALES—TITLE OF PURCHASER—PROOF—SECONDARY EVIDENCE.

To establish a title as derived from a sale by the sheriff, one must show a judgment ren-

dered by a court of competent jurisdiction, a writ issued in conformity thereto, and a sale by the sheriff pursuant to the writ; but, where the original records are shown to have been lost or destroyed, the existence of those elements, or either of them, may be proved by secondary evidence.

2. SAME—PETITORY ACTION—EVIDENCE—SUFFICIENCY.

Where, after a lapse of nearly 30 years, the plaintiff in a petitory action, in support of a title derived from a sale under execution, proves the loss of the record in which the execution issued, produces certified copies of a judgment against the former owner of the property, and a sheriff's deed, both from the books in which said copies are required to be made, and produces the clerk's "charge docket," showing the issuance of a writ of fieri facias, as of date corresponding with that recited in the sheriff's deed, and there is nothing to suggest any want of jurisdiction in the court or irregularity in the proceedings, the title will be considered established.

3. MORTGAGES—FORECLOSURE—JUDGMENT AUTHORIZING SALE—TITLE OF PURCHASER—PRESCRIPTION—COLOR OF TITLE—ESTOPPEL.

The commercial firm of A., B. & C., through A., one of its members (whose authority does not appear), purchases, by notarial act, certain real and personal property from D, who retains a mortgage to secure a portion of the price, and E. intervenes in the act and grants a mortgage containing no pact de non, etc., on property belonging to her, as further security to D. Nine years later, and after the time has elapsed within which the payments under the original contract were to have been completed, judgment is rendered, in a suit entitled "D. v. B. et als.," upon the confession of the "defendants" (in which, however, no other defendant than B is named), condemning the "defendants" to pay a sum of money, subject to certain credits, to be indorsed on the judgment (the amounts of which are not specified, and which are not so indorsed), and also ordering that the mortgaged property be seized and sold, though it appears that in the meanwhile another contract had been entered into, by which, apparently (the act not being produced), the payments under the original contract had been extended to a period subsequent to the date of the judgment so rendered. Nine years later still, and after the property mortgaged by E. had been sold under execution to F., a third person, and is under administration, in the parish court, as belonging to his succession (of which C. is administrator), it is sold under a writ of seizure and sale, issuing from the district court (of the new parish to which the case had been transferred), and is purchased by G., the wife, separate in property of B. The entire record in the suit of D. v. B. et als., save the judgment, having been lost, and there being no proof, aliunde, connecting E. therewith, held that no judgment is shown to have been rendered against E.; that the district court was without jurisdiction to order the sale of the property mortgaged by her, but then owned by the succession of F., and under administration in the parish court; that the sheriff's deed to G., with the judgment mentioned and the writ of seizure and sale (the existence of which latter is assumed to have been proved), do not constitute the just title required as the basis of the prescription of ten years; and that G. and her heirs have been, and are, possessors in bad faith, liable for rents and revenues from the beginning of their possession. Held, further, that the heir of F. is not estopped to assert the nullity of the title set up by the heirs of G. by reason of the fact that F. had made certain payments on the judgment, or contract, in favor of D., and had been, in a measure, subrogated to his rights thereunder.

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Action by Mrs. Annette Fontelleu against Albert Fontelleu and others. From a judgment for defendants, plaintiff appeals. Reversed.

Weeks & Weeks and Burke & Burke, for appellant. Louis Octave Hacker, Louis Tascar Dulany, Foster & Broussard, and Albert Voorhies, for appellees.

Statement.

MONROE, J. Plaintiff, as the sole surviving heir of her father, Paulin Fontelleu, and of her mother and brother, brings this petition, action to recover (with the rents and revenues) a tract of land situated in New Iberia, which, she alleges, was acquired by her father as community property at a sale made by the sheriff in January, 1873, under an execution in the suit of Wallace & Co. v. Mrs. Jean (Leontine) Fontelleu, and of which she alleges that the defendants and their ancestors and authors are, and have been, in illegal possession since 1875. The defendants, Albert Fontelleu and Mrs. (Widow) Charles Fontelleu, tutrix, answer separately, in effect that plaintiff has no title to the land claimed, that the same was acquired by Mrs. Ernestine Fontelleu, wife, separate in property, of Theodore Fontelleu, and mother and grandmother of the defendants Albert and Theodore Fontelleu, respectively (the latter being the minor child of Charles Fontelleu, deceased), at a sale made by the sheriff August 7, 1875, under a writ of seizure and sale issued by the district court for the parish of Iberia in execution of a judgment rendered September 29, 1866, by the district court of the parish of St. Martin in the matter of Baptiste Cavaillez v. Laodice Fontelleu et al., which judgment made executory a special mortgage on the property in question granted by Mrs. Leontine Fontelleu and duly recorded, first, in the parish of St. Martin, and, subsequently (upon the creation of the latter), in the parish of Iberia. They allege that plaintiff's father was party to an act whereby he recognized the validity of said mortgage, and that he and those claiming under him are thereby estopped with respect to the pretensions here set up. They further allege that Mrs. Ernestine Fontelleu and those claiming under her have been in possession of the property, as owners, in good faith, and under a just title, for more than 20 years, and they plead prescription and pray for judgment. Plaintiff and defendants alike aver that most of the records and documents constituting their muniments of title have disappeared, and that they must rely upon secondary evidence.

The facts, as we find them from the admissions and evidence in the record, are as follows:

The land in question is part of a larger tract which was owned by Mrs. Leontine (Miguez) Fontelleu, wife, separate in property, of Jean Fontelleu, and mother of Paulin, Theodore, Laodice, and Zulme Fontelleu (the last named being the wife of Alphe Cestia). In 1857 Baptiste Cavaillez sold to the commercial firm of Cestia & Fontelleu Freres, composed of Alphe Cestia and Laodice and Theodore Fontelleu, certain real estate, as also a stock of merchandise and other movable property, all situated in the town of Abbeville, parish of Vermillion, for the aggregate price of \$15,300, payable \$900 cash, \$1,100 on demand, and the balance in equal annual installments of \$1,500, save the last payment, which was to have been \$1,300, such deferred payments having been represented by notes executed by the purchasers jointly and severally with Mrs. Leontine Fontelleu, who, to secure the payment of the \$14,000 represented by them, intervened in the act and mortgaged three slaves and the following described land and improvements, viz.:

"(1) Les proprietes suivantes, dans le centre de la corporation de la Nouvelle Iberie, consistant en trois maisons de maitre, construites en bois, une grande maison construite en brique et partie en bois, circonstances et dependances, en semble les sols et terrains sur lesquels reposent les susdites maisons."

In this transaction Cestia & Fontelleu Freres were represented by Alphe Cestia, but there is no power of attorney annexed or referred to, nor does the act contain any pact de non alienando. In September, 1866, a judgment was rendered by the district court of the parish of St. Martin, as follows:

"Dist. Court No. 5974, Parish of St. Martin.

"Baptiste Cavaillez v. Theodore Fontelleu et al.

"In this case, by reason of the written confession of the defendants, and besides, the law and the evidence being in favor of the plaintiff, it is ordered, adjudged, and decreed that plaintiff recover of defendants, in solido, the sum of \$7,300, with 8 per cent. per annum interest thereon from the 1st of April, 1858, and the costs of this suit, the note due on the 1st of April, 1861, and marked 'C,' in the statement of facts, to be credited with several amounts thereon paid, which credits, on the production of the receipts by which they are evidenced, shall be indorsed on this judgment. It is further ordered, adjudged, and decreed that the property hereafter described shall be seized (1) A lot of ground situated in the limits of the town of Abbeville, on Jefferson street, fronting on the Place de la Magdalene, having a front of 180 feet, being lots Nos. 34 and 35 of the plat of Abbeville, with the buildings and sold to satisfy these judgments, to wit: and improvements thereon erected. (2) Another lot situated in the town of New Iberia, measuring one arpent front on Main street by one arpent and a half in depth, bounded north by a lot belonging to the heirs of Dr. Smith, south by Petit Anse street, east by Main street, and west by lot of Mrs. Francois Vincent, with the buildings and improvements thereon erected; these lots and improvements being those mortgaged to secure the claims of plaintiff, as appears by document marked 'A' in the state-

ment of facts. Done, read, and signed in open court this 29th day of September, 1866."

So far as we are informed, no immediate action was taken in the way of executing the judgment thus obtained, and in December, 1868, the record in the case appears to have been transferred to the district court of the parish of Iberia, agreeably to the provisions of Act No. 208, p. 272, of 1868, whereby that court and parish were created, and thereafter said record disappeared, and nothing more is known as to the antecedents of the judgment, as to the circumstances under which it was rendered, or as to the parties bound, or intended to be bound, by it, than is to be gathered from its face and from the action subsequently taken concerning it, to which reference will hereafter be made. In April, 1871, Baptiste Cavaille executed a notarial act, reading in part as follows, to wit:

"Personally * * * appeared Baptiste Cavaille, * * * who declared that, for and in consideration of the sum of \$1,260 to him paid by Mr. Paulin Fontelieu * * * on account of the judgment obtained by him (Cavaille) in the case entitled 'Baptiste Cavaille v. Theodore Fontelieu et al.,' in the 3rd Judicial District Court of the parish of St. Martin * * *, but in full of the amount due on the first day of March, 1871, as per act passed on the 6th day of September, 1866, by Edmund Monge, recorder and ex officio notary public in and for the parish of St. Martin, declared that he does, by these presents, sell, transfer, assign, and subrogate said Paulin Fontelieu to the rights privileges and mortgages by him (Baptiste Cavaille) held, with the express understanding, however, that no claim will be made against him by the said Paulin Fontelieu on account of said transfer, and with the further understanding that the rights of the said Baptiste Cavaille under the aforesaid judgment referred to shall not be affected by this transfer, and shall not be exercised until final settlement against the defendant in the above-entitled case, by preference to any rights acquired by said Paulin Fontelieu. * * *"

A similar act was executed on April 17, 1872, by Clark H. Remick, who appeared as the owner of the judgment which had been obtained by Cavaille, said act reading, in part, as follows:

"The amount [\$1,440] herein paid by said Paulin Fontelieu to said Remick is in full payment of an amount due on the 1st day of March, 1872, as per act passed before Edmund Monge, recorder and ex officio notary public in and for the parish of St. Martin and dated September 6, 1866."

Neither the act thus said to have been executed before Monge, recorder, nor the act (said to have been executed before Drouet, notary, August 23, 1871) by which Remick acquired the rights of Cavaille, are produced, and we know nothing more about them than is to be gathered from the foregoing recitals.

In November, 1871, Wallace & Co. obtained judgment for \$932.50 against Mrs. Leontine Fontelieu, and upon January 4, 1873, the property here in question, having been seized under a writ of execution which they had

caused to be issued, was adjudicated to Paulin Fontelieu. The record in the suit thus mentioned has disappeared, but the plaintiff produces (1) a certified copy of the judgment from the office of the clerk of the court; (2) a certified copy of the sheriff's procès verbal and act of sale from the sheriff's salesbook or record; and (3) a certified excerpt from the clerk's charge docket showing entries of charges for all proceedings in the case, from the filing of the petition to, and inclusive of, the issuance and return of the *fi. fa.* The sheriff's procès verbal and deed contain the following recitals, to wit:

"Whereas, L. A. Hayes, sheriff, * * * by virtue of a writ of *fi. fa.*, dated 23d November, 1872, to me directed by the above honorable court in the above-entitled matter, and directed against the property of the defendant, did seize the following described property, to wit: One town lot in the town of New Iberia, measuring 192 feet by 280 feet, bounded on the east by Main street, north, or above, by property belonging to A. L. Bergerie, south by Iberia street, and in the rear, or west, by property belonging to Theodore Fontelieu—with all the buildings and improvements thereon erected or attached, consisting of one large two-story store on the corner of Main and Iberia streets, three small stores on Main street, one large dwelling house on Iberia street, and two other small houses on Iberia street. * * * I adjudicated said property to Mr. Paulin Fontelieu for the sum of \$6,000, which price of adjudication the said purchaser paid and settled in the following manner, to wit: He paid, cash, costs of suit and of sale of publication [sic] amounting to \$50. The balance of the purchase money, to wit, \$5,950 was retained by the purchaser, of which amount he is indebted in a certain sum, balance due on a mortgage of C. H. Remick, which amount due said Remick purchaser assumed the payment and obligates himself to pay in accordance with the terms of said mortgage, is imputed to the payment of said mortgage claim of said purchaser, he, purchaser, having been subrogated to the right of said Remick on said mortgage, with the exception due as above mentioned, and being a mortgage creditor of said defendant. Now, know ye, that I, the said A. L. Hayes, * * * in consideration of the said sum, * * * do bargain, sell and deliver unto the said Paulin Fontelieu and to his heirs and assigns, forever, the property above described," etc.

It may be remarked in this connection that the original contract between Cavaille and Cestia & Fontelieu Freres and Madame Leontine Fontelieu was recorded in the parish of Iberia on December 7, 1872, after the seizure and before the sale above referred to. Paulin Fontelieu died in the parish of Vermillion, where he had resided, in June, 1874. His succession was opened in that parish, and his brother, Laodice, one of the parties to the contract with Cavaille, was appointed administrator. He was, at the time of his death, 28 years of age. His children, Annette (the present plaintiff) and Paulin, were, say, five years and six months old, respectively. When, if at any time, their mother qualified as their tutrix, does not appear.

On March 25, 1875, Mrs. Ernestine Fontelieu, wife of Theodore Fontelieu, obtained a judgment of separation of property against

her husband, condemning him in the sum of \$333.06, with interest, and decreeing that the legal mortgage in her favor, on the immovable property of her husband and the community, be held to date from September 1, 1857; and on March 30th following Theodore Fontelieu made a dation en paiement to his wife, in satisfaction of the judgment so obtained, which reads in part as follows:

"Personally came and appeared Theodore Fontelieu, * * * who declared that, his wife, Ernestine Gonsoulin, having obtained judgment against him, * * * desiring to pay said judgment, or part thereof, * * * it was his wish * * * to make to his wife a dation en paiement: * * * that he therefore * * * does hereby transfer unto his said wife * * * a certain lot situated within the corporate limits of the town of New Iberia, measuring 72 feet, more or less, on Iberia street, by one arpent in depth, bounded above by lot belonging to A. L. Bergerie, below by Iberia street, east by lot belonging to Joseph A. Breaux, Esq., west by lot belonging heretofore to Widow L. Fontelieu."

It is undisputed that the property referred to as "belonging heretofore to Mrs. Widow L. Fontelieu" is that which is here claimed by the plaintiff, and which, as we conclude from the record, would have been described as "belonging to Mrs. Widow L. Fontelieu," but for the fact that her title had been divested by the sale to Paulin Fontelleu under the execution issued in the suit of Wallace & Co. Following these transactions, we find that, upon August 7, 1875, the sheriff executed a deed from which we make the following excerpts, to wit:

"No. 5,974 District Court, Parish of St. Martin. Transferred to Parish of Iberia Dist. Court, No. 425.

"Baptiste Cavailliez, C. H. Remick Subrogee, v. Laodice Fontelieu et al.

"Whereas, A. L. Hayes, sheriff of the parish of Iberia, by virtue of a writ of seizure and sale dated June 29, 1875, to me directed by the above-named honorable court in the above-entitled matter, and issued against the property of the defendant, did seize the following described property, to wit: A lot of ground situated in the town of New Iberia, measuring one arpent front on Main street by one and a half arpents in depth, bounded north by a lot formerly belonging to heirs of Dr. Smith, at present August Bergerie, south by Petit Anse street, east by Main street, and west by lot formerly of Mrs. Francois Vincent, at present Theodore Fontelieu. * * * I adjudicated the said property to Mrs. Ernestine Gonsoulin for the sum of \$2,342, which price of adjudication the purchaser paid and settled in the manner following, to wit: Costs of court, etc., and amounting to \$37.95. The adjudication for aforesaid and amounting to \$3,342 was handed over to C. A. Remick, subrogee of Baptiste Cavailliez, who being, as per certificate of recorder, the first mortgagee: Now, know ye that I, the said A. L. Hayes, * * * by virtue of the said writ and in consideration of the said sum of \$2,342 as aforementioned, do bargain, sell, and deliver unto the said Ernestine Gonsoulin and her assigns and heirs, forever, the property above described and all the right, title, and interest which the said L. Fontelieu et al. had in the property on the day of the seizure thereof, or at any time since, or now has."

The record in the case referred to in this act, save the judgment, as has already been stated, has disappeared, and no writ or application for a writ has been produced in support of the sale thus made, nor have the defendants produced the charge docket of the clerk, upon which, as appears from the offer made on behalf of the plaintiff, all papers filed or issued were regularly charged. What the defendants have produced is an excerpt from what is called the "General Docket," upon which there appears to have been entered, under the title, "C. H. Rennecke v. L. Fontelleu et al.," and under the Nos. 422 and 423, a suit, No. 5,974, transferred from the parish of St. Martin. In a column headed "Petition, When Filed," appears the entry "No petition in the file." In a column headed "Execution, When Filed or Issued," appears the entry "June 29th, 1875." In a column headed "Process, When Served," appears the entry "Service accepted Dec. 27/75." And there are no other entries, save the name of an attorney. Mr. Segura, called as a witness for defendants, testified that he became clerk of the court in 1876, and that he found that the General Docket had not been posted, in many cases, since 1873; that he and his deputy posted it from the original papers; that the handwriting of the entries excerpted is that of his deputy; that he and his predecessors kept "charge dockets," in which charges were made for all papers filed or issued. Being asked, in substance, what was entered in the general docket, he replied:

"I understand, the date of filing petition, of filing answer, date of judgment, and also date of notice of judgment, and also date of issuing fi. fa. In fact, I posted in that index all the filings had in the case.

As it appears in the transcript, the type-written figure "5," in the entry "Service accepted Dec. 27/75," seems to have the figure "7" written over it with a pen, and there are no other dates in the excerpt than those above given. Upon the same day that the sheriff made the sale as thus set forth, Mrs. Ernestine Fontelleu appeared before a notary, and, acknowledging that she owed C. H. Remick \$2,140, executed three notes, payable to his order, for \$714 each, and secured same by mortgage on the property purchased by her. Upon March 10, 1886, aided by her husband, she executed an act of sale to Mrs. Margueritta Del Bonduo, Widow Smerall, describing the property sold and otherwise reading, in part, as follows, to wit:

"(1) A certain lot situated within the corporate limits of the town of New Iberia, La., having a front on Main street in said town of 54 feet and 8 inches, including the sidewalk, by a depth on Iberia street, between parallel lines, of 85 feet. Said lot bounded on the front, or north, by Main street, and on the south, or rear, by lot hereinbelow described, west by property of vendor, and east by Iberia street.

"(2) Another certain town lot, situated within the corporate limits of the town of New

Iberia, La., and adjoining the lot above described, having a front on Iberia street of 37 feet 5 inches by 107 feet and 5 inches in depth, between parallel lines, and extending, in the rear, to the property of vendor. * * * The said property above described being part of the property acquired by vendor at sheriff's sale August 7, 1875, and of record in Book 1, Sheriff's Sales, folio 126. * * * This sale is made for * * * \$3,400, whereof the said purchaser has presently paid, in ready current money, unto said vendor, the sum of \$2,400, and for the balance * * * has furnished her two notes. * * * Now, to further secure the said purchaser against the claims of any and all persons whatsoever, and to the extent that any loss may accrue to said purchaser, or to any future owners of the land hereby sold to said purchaser, and on account of such claims, said Mrs. Ernestine Gonsoulin, aided as above, does hereby acknowledge herself indebted unto said Mrs. Margaritta Del Bonduo, or to any future owners of said property, in the sum of \$2,000 or such part thereof as may be necessary to pay such loss as may hereafter accrue, payable when said loss shall be determined to be due her or to such owners, and to secure the payment of such sum of money she declares she does hereby specially mortgage * * * in favor of all such persons the following described property: [Here follows a description of the property which Madam Fontelleu had acquired, by dation en paiement, from her husband.]"

In 1888 the plaintiff presented a petition to the district court, praying to be emancipated, and alleging, among other things, that:

"She has rights of property exceeding \$500 in value which require her personal attention and administration, and particularly, her rights in certain property situated in the town of New Iberia, bounded northeast, by Main street, southeast by Iberia street, northwest by A. Bergerie, and west by lots formerly belonging to Mrs. Vincent, and which land, or lot of ground, is now held by Mrs. Ernestine Gonsoulin and has been in her possession for several years, for which her said tuitrix is precluded from suing by certain documents signed by her several years ago."

And she was accordingly emancipated.

In 1894 Paulin Fontelleu (plaintiff's brother) presented a petition to the court, alleging that he desired to be emancipated, that his parents were both dead, and that he was without a tutor, and praying that Charles Fontelleu, his cousin, be appointed tutor ad hoc; and, the appointment having been made, he thereupon presented another petition, alleging as follows;

"That he has interests in certain claims which are worth to him at least \$200, being his pretensions to certain lands in the town of New Iberia which are now in possession of third persons; that his interest makes it necessary that he be fully emancipated," etc.

To this petition, Charles Fontelleu, the tutor ad hoc, appended his affidavit to the effect that the petitioner was over 18 years of age, and that "his interests set forth in his petition for emancipation are real and make it advisable that he be emancipated," etc.; and he was accordingly emancipated. It may here be stated that the judge a quo excluded these petitions for emancipation, and also excluded testimony on behalf of plaintiffs to explain that poverty and other

causes operated to delay the institution of this suit. It is admitted that Theodore Fontelleu and his sons, Albert and Charles, were lawyers practicing in Iberia.

Opinion.

It is admitted that plaintiff's father, mother, and brother are dead, and that she is their sole heir. As bearing upon her averment that her father acquired the property here claimed at the sheriff's sale made pursuant to a writ of fieri facias issued under a judgment rendered in the suit of Wallace & Co. against Mrs. Leontine Fontelleu, it is admitted that the original papers constituting the record in that case are lost or destroyed, and plaintiff has produced copies of the judgment and sheriff's deed from the books in which those copies are required to be made, and, in view of the fact that the events in question occurred more than 30 years ago and that the immediate actors are dead or have disappeared, she has offered, as showing the existence and purport of the writ of fieri facias: (1) The clerk's "charge docket," upon which all papers filed or issued are shown to have been entered, and upon which the issuance and return of a fi. fa. in the case of Wallace & Co. against Mrs. Fontelleu are charged as of dates corresponding with the recitals of the sheriff's deed; (2) parol evidence to the effect that it was and is customary to return writs of execution, when satisfied, to the file in the clerk's office; (3) the recitals in the procès verbal and deed of the sheriff, to the effect that in making the sale he acted under the authority of the fi. fa., which, from the docket kept by the clerk, appeared to have been issued. Under the circumstances as stated, and in view of the fact that we find nothing whatever to suggest that the proceedings were not, as they appear to be, regular, formal, and legal, we conclude that the plaintiff has established the title set up by her, and that the same should be sustained, unless it has been shown that she, or her authors, voluntarily or involuntarily parted with it after its acquisition.

It is the general rule that, to establish title derived from a sale under execution, one must show a judgment rendered by a court of competent jurisdiction, a writ issued in conformity, thereto, and a sale by the sheriff pursuant to the writ; but it is also well understood that, where the best evidence of a fact cannot be obtained, secondary evidence may be offered, and it has never been held, in this state, that one who pays for and obtains a title to property, adjudicated to him at sheriff sale, ceases to be the owner because of the subsequent loss or destruction of the writ under which the sheriff acted, or of the record of the suit in which such writ issued. In Succession of Baum, 11 Rob. 322, it was said:

"The appellees have shown the adjudication made to them at the sheriff's sale by the produc-

tion of the judgment, writ of *fi. fa.*, and sheriff's return and deed. These were *prima facie* evidence that the formalities of the law had been complied with, and it was the duty of their adversaries to prove that they were not."

In *Childress v. Allin et al.*, 17 La. 37, it appeared that "all the papers of the suit, together with the execution and sheriff's return, were lost or destroyed"; that "the judgment offered was copied from the minutes, or record book, of the court," and "was all the evidence of the suit that could be had"; and that the sheriff's deed recited that the sale had been made pursuant to a writ of *ieri facias* which had issued under the judgment. The court thereupon held:

"If the records of a court of justice be lost or destroyed, we are not ready to say that, after their existence and loss have been established, the party should not be allowed to resort to the next best evidence which the nature of the case is susceptible of, and that it should not be received, and, if written copies of them do not exist, their contents may, if necessary, be shown by parol testimony."

See, also, *Robinet v. Compton*, 2 La. Ann. 855; *Davis v. Wilcoxon*, 5 La. Ann. 584; *Purl v. Miles*, 9 La. Ann. 270; *Coulson v. Wells*, 21 La. Ann. 383; 17 Cyc. 503.

It is not suggested that plaintiff, or her authors, at any time parted voluntarily with the title so acquired, and the question is whether she or they has or had been divested of it by legal process or prescription. It will be remembered that by the contract of January 8, 1857, a mortgage was retained by Cavaillez upon the property in Abbeville, which he by that act sold to Cestia & Fontelleu Freres, and that by the same act another mortgage was granted (as security for the fulfilment of the obligations assumed by said purchasers) by Mrs. Leontine Fontelleu, upon property owned by her in New Iberia. According to its terms, the time within which the payments called for by the contract were to have been made expired in 1865, and apparently they had not all been made. On September 6, 1866, therefore, another contract seems to have been entered into, by act before Monge, notary, whereby the time was extended; for we find that, in April, 1871, and April, 1872, Paulin Fontelleu paid \$1,360 and \$1,440 to Cavaillez and Remick, respectively, as in full of payments falling due on March 1, 1871, and March 1, 1872, and that he was in a measure subrogated with respect to such payments to the rights of Cavaillez and Remick as against their debtors. It is not suggested that the act thus passed before Monge has been lost or destroyed, and, as it seems to be necessary to explain the judgment obtained by Cavaillez, upon which defendants rely, and to explain the subsequent situation, we are at a loss to understand why it has not been produced. As the case is presented (the balance of the record having been lost or destroyed), the judgment referred to seems to us to be unintelligible, and, as to Mrs. Leontine Fontelleu and her

property, unenforceable, for this: that it was rendered about three weeks after the contract of September 6, 1866, which, as we infer, extended to a period subsequent to the date of the judgment the time for the payment of the debt for which the judgment was rendered; that it purports to have been rendered on the written confession of the "defendants," and may therefore be regarded as in the nature rather of a contract than of a judgment, but that no defendant is named except Theodore Fontelleu, and we have no means of knowing, and no right to assume, that Mrs. Leontine Fontelleu was connected with, or was bound by, it; and that it is by its terms subject to credits, which were to have been indorsed upon it, but the amounts of which are not stated, and which have never been so indorsed.

Concerning the essentials to a valid enforceable judgment:

"The rule is correctly stated," says Mr. Freeman, "in *Alexander v. Wheeler*, 69 Ala. 332 as follows: 'The rule of law is that every judgment of a court of justice must either be perfect in itself or capable of being made perfect by reference to the pleadings or to the papers on file in the cause, or else the other pertinent entries on the court docket.'" Freeman on judgments, § 50; Ency. Pl. & Pr. vol. 11, p. 930, note.

In the case of *Cavaillez v. Theodore Fontelleu et al.*, if it could be ascertained from an examination of the record that Mrs. Leontine Fontelleu was cited or that she joined in the confession, it might be held that she was concluded by the judgment, although her name is not mentioned therein; but the record is lost, and those facts are not otherwise proved, and it would be a bald assumption to hold that they exist. Moreover, as we have seen, the judgment condemns the "defendants," whomsoever they may be, for no fixed amount.

"But we may say, in general," says Mr. Black, "that if a judgment purports to be final and is given upon a money demand, the amount of the recovery must be stated in it with certainty and precision. If the amount remains to be determined by a future contingency, or ascertained by references, or diminished by the allowance of an unliquidated credit, or is otherwise indefinite and uncertain, it is no proper judgment." Black on Judgments, vol. 1, § 3.

See, also, same volume, sections 114, 118; 11 Ency. Pl. & Pr. pp. 935, 936; *Decker's Ex'rs v. Bradford's Heirs*, 4 Mart. (O. S.) 312; *Dupuy v. Dashiell*, 15 La. 124; *Peet, Simms & Co. v. G. S. Whitmore*, 14 La. Ann. 408.

The judgment, such as it is, rendered by the district court of the parish of St. Martin, and by operation of law (Act No. 208, p. 273 of 1868 § 8) and as a matter of fact transferred to and made in effect, a judgment of the district court of the (newly created) parish of Iberia, was to be dealt with by that court as though originally rendered by it. There was, therefore, no authority for the enforcement of its execution by means of a writ of seizure and sale. Moreover, the act

upon which it was predicated did not contain the pact de non alienando, and the property affected by it, when seized, no longer belonged to the mortgagor, but to a third person, to wit, to the succession of Paulin Fontelleu, which was then under administration in the parish court of the parish of Vermillion, with Laodice Fontelleu (who, if any one besides Theodore Fontelleu could be so regarded, was a defendant in the seizure), acting as administrator, from which it follows that the district court was without jurisdiction to issue against it a writ either of seizure and sale or of execution. *Const. 1868, art. 87; Hall & Lisle v. Belden, 29 La. Ann. 118; Morgan, Wife, v. Lalanne, 32 La. Ann. 1300; Hart v. Connolly, 49 La. Ann. 1587, 22 South. 809; Donaldson v. Maurin et als., 1 La. 39; Taylor v. Pipes, 24 La. Ann. 551; Reggio, Curator, v. Blanchin & Giraud, 26 La. Ann. 532; Leonard v. Sheriff et al., 37 La. Ann. 299; Bank v. Miller, 44 La. Ann. 199, 10 South. 779.* Again, the original contract of January 8, 1857, was signed "Cestia & Fontelleu Freres," presumably by Cestia; but there is nothing to show that his authority to represent his firm or its members was in authentic form, or, indeed, that he had any authority, and executory process could not legally have issued to enforce the mortgage granted by him in their names. *Dosson, Curator, v. Sanders, 12 Rob. 238; Crescent City Bank v. Blanque, 32 La. Ann. 284.* And the suretyship of Mrs. Leontine Fontelleu could not have exceeded the debt due by the principals, or have been contracted under more onerous conditions. *Civ. Code, art. 3037; Gerson v. Hamilton, 30 La. Ann. 740; Bloom v. Kern, Id. 1263; Stewart v. Levis Bros., 42 La. Ann. 39, 6 South. 898.* The defendants, as secondary evidence of the issuance of the writ of seizure and sale, offered, as we have seen, an excerpt from what is called the "general docket" of the district court of the parish of Iberia; a docket which, so far as we are informed, the clerk was under no legal obligation to keep and had no personal interest in keeping, and which, when kept at all, was kept in a careless and perfunctory fashion, so much so that, from 1873 to 1876, it seems hardly to have been kept at all. The clerk who succeeded to the office in 1876 so testifies, and he also testifies that he and his deputy, who had been employed by his predecessor, posted the docket from the original papers, and that the entries offered were in the handwriting of the deputy, but whether they were among the entries so posted he does not state. Upon the other hand, the clerk's "charge docket" is a record in which the clerk has a vital interest, and the correctness of the entries in which is more or less assured by the fact that the litigants against whom the charges are entered have an interest in the matter of their correctness in conflict with that of the clerk. We are therefore inclined to think that it would have furnished more satisfac-

tory information upon the question at issue than the excerpts which the defendants thought proper to offer. Conceding, however, for the purposes of argument, that the general docket shows that, in the suits numbered 422 and 423, entitled "C. H. Rennecke, Sub., v. L. Fontelleu et al.," a writ was issued on June 29, 1875, it affirmatively appears, from the same evidence, that there was no petition in the file, or, in other words, that no application for the writ was placed of record, and it also shows that "defendants" accepted service, on Dec. 27, 1875, some four months after the writ had been executed by the sale of the property seized. Who the "defendants" were who accepted service does not appear (though it is fair to suppose that Laodice Fontelleu, the only defendant named, was one of them), nor, is the fact accounted for that, whereas the judgment runs against "Theodore Fontelleu et al." in the title of the suit as it came from St. Martin, as it appears on the general docket, the defendants are "L. Fontelleu et als." It will, however, be remembered in this connection that Laodice Fontelleu, whilst one of the debtors, was also, at the time of the issuance of the writ, the administrator of the succession of Paulin Fontelleu; that Paulin Fontelleu had paid \$2,800 of the debt due by "Cestia & Fontelleu Freres," and was, in a measure, subrogated to the rights of their creditors with respect thereto; that it was the property of his succession, and not that of Cestia & Fontelleu Freres, which was to be seized; and that the purchaser of that property was the wife of Theodore Fontelleu, who was also a debtor under the contract and judgment mentioned. As the matter stands, therefore, Paulin Fontelleu paid, with subrogation, \$2,800 of the debt due by Cestia & Fontelleu Freres (a firm composed of Alphe Cestia Theodore Fontelleu, and Laodice Fontelleu), and subsequently bought at sheriff's sale the property which was mortgaged to secure that debt. Thereafter the creditors, for the balance of the debt, caused an unauthorized writ directing the seizure and sale of the property to be issued by a court having no jurisdiction to order such seizure and sale, and Laodice Fontelleu, who was at once the only named defendant in the writ as issued and the administrator of the succession of Paulin Fontelleu, having accepted service, the property belonging to the succession was seized, and was sold to the wife of Theodore Fontelleu, another of the members of the firm of Cestia & Fontelleu Freres with the result that the amount which had been paid by Paulin Fontelleu inured to the benefit of that firm, and the property of his succession was illegally sold in satisfaction of the balance of the debt due by that firm and its members.

It is said that, in purchasing the property, Paulin Fontelleu assumed to pay, as part of the price, the balance of the debt due to Remick, subrogee, and that the debt so as-

sumed, having become his, as well as that of Cestia & Fontelleu Freres, his heirs have no reason to complain that the sale was made for its satisfaction. The facts are, however, that of the \$8,000 bid by him Paulin Fontelleu retained \$5,950 concerning which the sheriff's deed contains the following recital, to wit:

"Of which amount he is indebted in a certain sum, balance due on a mortgage of C. H. Remick, which amount, due said Remick, purchaser assumed the payment and obligates himself to pay in accordance with the terms of the mortgage is imputed to the payment of said mortgage claim of said purchaser; the purchaser having been subrogated to the right of said Remick on said mortgage, with the exception due as above mentioned, and being a mortgage creditor of said defendant."

This is almost unintelligible, but, interpreted in the light of other facts which have been established, seems at least to mean that, apart from the indefinite credits referred to in the judgment obtained by Cavallez in 1866, the original debt, arising out of the contract of 1857, was undetermined in amount, and was held partly by Remick and partly by Paulin Fontelleu himself. It is not, however, pretended that Remick proceeded upon any assumpsit of Paulin Fontelleu. On the contrary, the defendants allege that the writ of seizure and sale was issued in execution of the judgment mentioned, and the facts above stated are merely cumulative, in showing how impossible it was that that judgment could, under any circumstances, have served as the basis of the writ, and how unjust it was to the widow and heirs of Paulin Fontelleu that Laodice Fontelleu, his debtor and the administrator of his succession, and Theodore Fontelleu, also his debtor, should have allowed it to be executed to their own great advantage.

It is said that plaintiff is estopped by reason of the fact that Paulin Fontelleu recognized the judgment under which the property was sold by acquiring an interest in it; but we find nothing in the contracts by which that interest was acquired which is inconsistent with the right here asserted to deny that the judgment was susceptible of enforcement in the manner and under the circumstances heretofore stated. It is finally urged on behalf of the defendants that Mrs. Ernestine Fontelleu purchased in good faith and held possession for many years, under a title translatif of property, and hence that this action is barred by the prescription of 10 years.

Unlike tax titles, however, and titles evidenced by notarial acts executed by the parties holding the same, the title obtained through a sheriff's sale requires something more than the sheriff's deed to make it the just title contemplated by the law as the basis of the prescription relied on. The effect of the tax title is regulated by specific provisions of the Constitution and statutes. The title by notarial act results, ordinarily, from

a contract in notarial form by the owner of the property, or by his agent, whose mandate, in authentic form, is annexed to the contract. The sheriff does not pretend to sell his own property, nor does he pretend to sell the property of others by his own authority. He sells as a mandatary, whose mandate is a writ issued by the clerk, and the clerk can issue the writ only pursuant to and in execution of a judgment of the court, and the court must confine itself to its jurisdiction in rendering the judgment; so that the title translatif of property resulting from a judicial sale consists of a judgment of a competent court, a writ issued pursuant thereto, and the procès verbal, or deed, of the sheriff, showing the execution of the writ in conformity to the mandate therein contained. The following excerpts from a few of the many decisions upon the subject are sufficient to show that the question has long since been settled:

"The settled jurisprudence of this court is that, to constitute a title translatif of property, the judicial sale must be accompanied by the judgment and execution." *Dede v. Boguille*, 8 La. Ann. 139.

"It is incumbent on a party claiming under a sale by virtue of a *fi. fa.* to produce the writ of execution, the sheriff's return, and the judgment. * * * The judgment shows the nature of the decree of the court, the writ is the authority given for making the judgment effective, and the sheriff's return shows what was done under the execution." *Hyman v. Bailey et al.*, 13 La. Ann. 450.

"It has been often held that, when a party relies on a title acquired by a sheriff's sale, he must show, not only the sheriff's deed, but the writ and judgment on which the sale is based." *Clarkston v. Vincent & Co.*, 32 La. Ann. 613.

"The execution, being unauthorized by the judgment, could confer no title on the creditor by whom the irregularity was committed." *De Gruy's Syndic v. Hennen*, 2 La. 547.

"The sale of Mrs. Belard's interest in the property under the execution of a judgment rendered without citation is an absolute nullity. The defendant pleads prescription of five and ten years as giving title. The adjudication was null and void, and does not support prescription." *Belard & Johnson v. Gebelin & Dugan*, 47 La. Ann. 162, 16 South. 739.

Applying the law to the facts disclosed by the record, it is evident that the defendants have not possessed the property claimed under a just title, and hence that their pleas of prescription are not well founded. Nor can they and their authors be regarded as possessors in good faith. It is admitted in the brief of their counsel that Mrs. Ernestine Fontelleu knew, at the time of her purchase of the property, that the title was vested in the succession of Paulin Fontelleu. The learned counsel say, however, that she also knew that Paulin Fontelleu had not paid for it, but that he had retained \$5,950 of the price to meet the Cavallez & Remick mortgage debt. In this we think that the counsel are somewhat in error, since it appears to us that a portion only of that amount was retained for the purpose mentioned, whilst the balance was retained to be

attributed to that portion of the mortgage debt which was held by the purchaser himself, and we are not informed as to the amount of that portion. But, if it had been otherwise, if the succession of Paulin Fontelleu had owed a larger proportion of the price than in fact it did owe, that circumstance would not have cured the radical and patent nullities in the title under which the defendants' author took possession of its property. That title, to have authorized the belief that the holder was the owner of the property, should have consisted, as we have seen, not only of the sheriff's deed, but of a valid judgment, and a valid writ authorized by the judgment, under which the sheriff could legally have made the sale and have executed the deed. But of these three necessary elements two were lacking. There was no judgment, so far as we are informed by the record, against any one who owned, or had ever owned, the property in question, and that fact the purchaser was bound to know, as she was, also, bound to know that, even under the original mortgage, in which there was no pact de non alienando, the plaintiff could not legally have proceeded, via executiva, against property the title to which was vested in a third person, not a party to the mortgage, and that third person a succession under administration in a court other than that by which the writ was issued.

There has been great delay in the bringing of this suit, and the plaintiff endeavored to show the reason for it; but the testimony upon the subject was in the main excluded upon the objection of defendants' counsel. Even as it is, however, we are informed by the record that for many years the plaintiff and her brother were minors, that they were emancipated for the express purpose of enabling them to look after their interests in the property here claimed, and that, in the emancipation of Paulin Fontelleu, Jr., Charles Fontelleu, as tutor ad hoc, made affidavit to the effect that the interest referred to in the petition was "real." This, together with the fact that Mrs. Ernestine Fontelleu, in making the sale to Mrs. Del Bonduo, was required to give bond to protect her vendee against the claim now asserted, is sufficient to show that the plaintiff and her authors were understood to be in the position of at least standing upon their rights, and it may be that, if they had been permitted, they would have shown that poverty, or other good reason, has delayed the assertion of those rights. At all events, defendants, having excluded the explanation, are not in a position to object to the demand as stale. As possessors without a just title, the defendants owe the fruits and revenues of the property from the commencement of their possession (*Donaldson et al. v. Hull*, 7 Mart. [N. S.]

112; *Lowry, Curator, v. Erwin*, 6 Rob. 210, 39 Am. Dec. 556, et seq.; *Walworth v. Stevenson*, 24 La. Ann. 251; *Heirs of Dohan v. Murdock*, 41 La. Ann. 494, 6 South, 131; *Beaulieu v. Monin*, 50 La. Ann. 732, 23 South, 937; *McDade v. Levee Board*, 109 La. Ann. 636, 33 South, 628); and it is admitted that they and their authors (from whom they inherit) have collected \$240 a year as rent from the property since August 1, 1875. We find no counterclaim set up by defendants, and it is presumed that the amount admitted to have been collected represents the net revenue.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the plaintiff, Mrs. Annette Fontelleu, wife of W. M. Roberts, and against the defendants Albert Fontelleu and Mrs. Azema Durand, tutrix of the minor, Theodore Fontelleu, decreeing said plaintiff to be the owner of the property described in the petition, to wit, "a certain tract of land in the town of New Iberia, parish of Iberia, La., situated on Main and Iberia streets of said town, said property being bounded above by the property of Augustin Bergerie or assigns, below in part by property of Charles Gougnehlem and in part by said Iberia street, in front or on the east by said Main street and property of Charles Gougnehlem, and on the west by property of Albert Fontelleu," and that she be put in possession thereof. It is further ordered and adjudged that said plaintiff recover of said defendants the sum of \$240 per annum as rent for the years beginning upon August 7, 1875, and continuing until the surrender of the property, together with interest at the rate of 5 per cent. per annum upon each annual installment of rent from the date of its maturity; the interest upon the first year's rent to run from August 7, 1876, and so on with the others. It is further adjudged and decreed that defendants pay all costs.

On Rehearing.

On the application for rehearing the attention of the court is called to the fact that the minor defendant, having necessarily accepted the succession of his deceased father with benefit of inventory, ought not to be condemned beyond the property inherited.

It is therefore ordered, adjudged, and decreed that the judgment heretofore handed down be amended in so far as to restrict the execution thereof, as against the minor defendant, Theodore Fontelleu, Jr., to the property inherited by him from his deceased father, Charles Fontelleu.

Rehearing refused.

**BIRMINGHAM RY., LIGHT & POWER CO.
v. ODEN et al.**

(Supreme Court of Alabama. April 28, 1906.)

1. PLEADING—CONCLUSIONS.

Const. § 227, makes a corporation constructing any public utility along a street under a franchise permitting such construction liable to abutting property owners for actual damages. *Held*, that a complaint in an action against a corporation which had constructed a railroad embankment along a street under a franchise from the city, and which merely alleged that plaintiff's lot was "damaged on account of such construction," was demurrable as containing a mere conclusion.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 12, 18.]

2. EMINENT DOMAIN—REMEDIES OF PROPERTY OWNERS—PLEADING.

Const. § 227, makes a corporation constructing any public utility along a street under a franchise permitting such construction liable to abutting property owners for actual damages to their property. In an action against a corporation which had constructed a railroad embankment in a street under a franchise, the complaint alleged the plaintiffs claimed damages for that, while they were the owners of certain lots abutting on the street, defendant under a franchise from the city constructed an embankment along the street and was operating thereon a line of railroad, and that by reason of the embankment the water backed upon and stood upon plaintiffs' lots. Defendant demurred on the ground that the averments of the complaint were vague, indefinite, and uncertain; that it did not appear therefrom how or in what manner plaintiffs' property was damaged; that the statements of the complaint were mere conclusions; that no facts were alleged which showed or tended to show that the property was damaged; and that the complaint did not state a cause of action, in that it did not allege any duty owing by defendant to plaintiffs, nor allege a violation of any duty so owing. *Held*, that the demurrers were properly overruled.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 797.]

3. APPEAL—FAILURE TO URGE OBJECTIONS—WAIVER.

Grounds of error not insisted upon in the brief of counsel on appeal are waived.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4256-4261.]

4. EMINENT DOMAIN—REMEDIES OF PROPERTY OWNERS—STREET RAILROADS—RIGHTS IN STREETS—DAMAGES.

Const. § 227, makes a corporation constructing any public utility along a street under a franchise permitting such construction liable to abutting property owners for actual damages. *Held*, that the measure of damages is the difference between the market value of an abutting lot before and after the construction of the utility.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 815-817.]

5. TENANCY IN COMMON—ACTION BY TENANTS—DAMAGES.

In an action by five of seven tenants in common for damages to the land from the construction of a railroad embankment in a street on which the land abutted, the measure of recovery by the five was five-sevenths of the total damage.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, § 154.]

6. EMINENT DOMAIN—REMEDIES OF PROPERTY OWNERS—ACTION—EVIDENCE.

Const. § 227, makes a corporation constructing any public utility along a street under

a franchise permitting such construction liable to abutting property owners for actual damages. *Held*, that, in an action by the owner of a lot abutting on a street in which a railroad embankment had been constructed under a franchise, it was error to admit evidence as to what amount of material would be required to fill in plaintiff's lot to bring it to a level with the car rail on the embankment.

7. TRIAL—FAILURE TO REQUEST INSTRUCTIONS.

In an action by the minor owners of a lot abutting on a street to recover damages for the construction of a railroad embankment in the street, it was not error for the court to instruct that limitations had no application to the plaintiffs during their minority, and that it was immaterial so far as they were concerned when the embankment was constructed, without stating to the jury that the right of recovery was confined to damage accruing during and after the time of construction alleged in the complaint, where defendant requested no explanatory charge.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, § 628.]

8. EMINENT DOMAIN—REMEDIES OF PROPERTY OWNERS.

Under Const. § 227, making a corporation constructing any public utility along a street under a franchise permitting such construction liable to abutting property owners for actual damages, in an action by the owner of property abutting on a street to recover damages for the construction of a railroad embankment in a street under a franchise, it was necessary for plaintiff to show that the embankment was constructed under a franchise.

9. SAME—COMPUTATION OF DAMAGES.

Code 1896, § 1718, in relation to eminent domain, provides that the amount of compensation to which an owner is entitled must not be reduced because of accidental benefits. Const. § 227, makes a corporation constructing any public utility along a street under a franchise permitting such construction liable to abutting property owners for actual damage. *Held*, that, in estimating the damages, the jury may not consider whether the construction of the utility has enhanced or decreased the value of plaintiff's property.

10. PARTIES—STRIKING OUT—EFFECT.

Code 1896, § 3331, authorizing the amendment of a complaint by striking out parties plaintiff, where all the plaintiffs who originally sued for damages to their lot owing to the construction of a railroad embankment in a street on which the lot abutted owned a joint interest in the property, and some of the plaintiffs were stricken from the complaint, it did not entitle defendant to a verdict as against the remaining plaintiffs.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"To be officially reported."

Action by Jule L. Oden and others against the Birmingham Railway, Light & Power Company. From a judgment in favor of plaintiffs, defendant appeals. *Reversed*.

The complaint contained two counts as follows: "Plaintiffs claim of the defendant the sum of \$1,500 as damages, for that, whereas, heretofore, to wit, during the months of May, June, July, August, and September, 1903, the said defendants were constructing and operating a system of street railroads in the city of Birmingham, Ala., along and across the public streets of said city of Birmingham, under a privilege or franchise granted by the mayor and aldermen of the city of

Birmingham, permitting said company to construct and operate its said system of railroads. Plaintiffs further aver that the defendant, in the construction of the line of its system of railroads along Tenth avenue, a public street in said city, and between Eleventh and Twelfth streets, in said city of Birmingham, said defendant erected an embankment along said Tenth avenue, to wit, 20 feet wide and 10 feet high, in front of lot five (5), block three (3), of the J. M. Ware survey, in said city. Plaintiffs aver that they are the owners and proprietors of said lot 5, block 3, of said survey, and that the said lot abuts on said Tenth avenue, and that said lot is damaged on account of such construction of said embankment, for which they claim damages as before stated." Count 2: "The plaintiffs claim of the defendant the sum of \$1,500 as damages, for that, whereas, heretofore, to wit, during the months of May, June, July, August, and September, 1903, they were the owners and proprietors of lot 5, block 3, of the J. M. Ware survey, in the city of Birmingham, Ala.; that the said lots abut on Tenth avenue, a public street in said city, between Eleventh and Twelfth streets, of said city; that the defendant, under and by virtue of a privilege or franchise granted to it by the board of mayor and aldermen of the city of Birmingham, during the time above named, constructed or erected an embankment 20 feet wide and 10 feet high along said public street and in front of said property, and is operating thereon a line of its system of railroads; that by reason of said embankment the water backs upon and stands upon said lot; and that said lot is damaged by reason of the construction and operation of said line of railroads as above stated, hence this suit."

Defendant filed the following demurrers to the first count: "(1) The averments of said count are vague, indefinite, and uncertain. (2) For that it does not appear therefrom how or in what manner plaintiffs' said property was damaged. (3) The statements are but the conclusion of the pleader. (4) No facts are therein averred which show or tend to show that plaintiffs' said property was damaged. (5) It does not state a cause of action, in this: It does not allege any duty owing by defendant to plaintiffs, nor does it allege a violation of any duty which the defendant owed plaintiffs in the premises." Same grounds of demurrer were filed to the second count. The defendant filed the following plea: "(4) And the defendant for a further answer to said complaint, and for further answer to each and every count thereof, separately and severally, says that plaintiffs ought not to have or maintain their action against the defendant, for that prior to the erection or construction of the embankment the city officials of the city of Birmingham established and fixed the grade at which defendant's track should be laid on said Tenth avenue and in front of plaintiff's said

property; and the defendant says that the city officials of the said city of Birmingham have the right to establish and fix said grade at which the defendant's track should be laid, and that defendant was required to construct its track according to the grade so fixed by the city officials of the city of Birmingham; and defendant says that in laying its track it did conform to such grade as established by the city officials of the city of Birmingham."

The plaintiff demurred to this plea as follows: "(1) It is no answer to the complaint. (2) Said plea in effect asserts a right to take or injure property without due process of law. (3) The city had no authority to grant a right or franchise to the defendant to take or injure plaintiff's property without due process of law." The court sustained these demurrers to the fourth plea and this constitutes the third assignment of error. The plaintiff amended its complaint by striking two parties plaintiff, whereupon the defendant moved to dismiss the cause on account of the amendment, which motion was overruled, and this constitutes the fourth assignment of error.

The court gave the following charges for plaintiff: "(1) The plaintiffs in this case being minors, they are not confined to the one year before the filing of the complaint. (2) The statute of limitations of one year does not bind these plaintiffs. (3) A minor has one year after becoming of age of 21 years to bring suit for damages to property. (4) It is immaterial, so far as these plaintiffs in this cause are concerned, when the embankment was placed in front of this property."

Charges 1, 2, and 3 requested by the defendant were in effect affirmative charges to find against the plaintiff on each count of the complaint, and were refused by the court. The following charges were also requested by the defendant and refused by the court: "(4) If the jury believe the evidence in this case, the plaintiff can recover no more than nominal damages. (5) If the jury believe the evidence in this case, the plaintiffs can recover only nominal damages. (6) In estimating the damages in this case, the jury may consider whether the construction of a street railroad track and the operation of street cars in front of plaintiffs' property has enhanced or decreased the value thereof. (7) In estimating the damages in this case, the jury may consider whether or not the construction or operation of a street railway in front of said property has enhanced the value thereof. (8) The court charges the jury that the plaintiffs are entitled to recover only the damage that has been done to said lot within 12 months before the bringing of this suit. (9) The court charges the jury that the plaintiffs are entitled to recover only the damage that has been done to said lots since the 8th day of November, 1902. (10) The court charges the jury that the plaintiffs are not entitled to recover any damage done to the lot before the

9th day of November, 1902. (11) The court charges the jury that they cannot award the plaintiff, if they find for the plaintiff, more than five-sevenths of the difference between the market value of the lot 12 months before this suit was brought and the market value of the lot at this time. * * * (13) If the jury believe the evidence that part of the embankment was constructed in March and April, 1902, and the lot was thereby damaged, and if the jury further believe from the evidence that in July and August, 1903, the railroad track was constructed on said embankment, and said embankment was thereby increased in height and width, and further damage by reason of said increase, the court charges the jury that the plaintiffs are entitled to recover only the damage done to said lot because of such increase of said embankment. (14) The measure of damages under the second count of plaintiffs' complaint is what injury has been done to the property of plaintiffs during the year preceding the filing of the suit, and it is not the difference in market value of the property before and after the construction and erection of the embankment. (15) There is no evidence before you as to the difference in value of the property after the first part of the embankment was constructed, and before the track of the street car company was laid. (16) If you believe from the evidence in this case that all the plaintiffs who originally filed the suit owned a joint interest in the property, and that since the filing of the suit some of the plaintiffs have been stricken from the complaint, you will find the verdict in favor of the defendant."

Tillman, Grub, Bradley & Morrow, for appellant. Keendy & Whittaker and C. W. Hickman, for appellees.

DENSON, J. The plaintiffs sued the defendant, Birmingham Railway, Light & Power Company, a corporation, to recover damages alleged to have resulted to them as owners of a lot which abutted on Tenth avenue, in the city of Birmingham, from the construction by defendant of a street railroad embankment along said avenue. The complaint is composed of two counts, and was filed on the 9th day of November, 1903, in the circuit court of Jefferson county. A demurrer to each count of the complaint was overruled by the court.

The first and second grounds in the assignment of errors challenge the correctness of the judgment of the court on the demurrers. Each of the counts shows that the embankment was constructed by the defendant in the course of construction and operation of a system of street railroads in the city of Birmingham under a privilege or franchise granted to it by the mayor and aldermen of said city, permitting it to construct and operate its system of railroads. The first count avers that the plaintiffs' lot was "dam-

aged on account of such construction of said embankment," but no facts are averred in this count upon which the claim for damages is based, other than the ownership of the property abutting the avenue and the construction of the embankment, nor is the character or nature of the injury to the lot averred. Conceding that the count is framed with respect of section 227 of the Constitution, under that section there must have been actual damages resulting to the plaintiffs on account of the construction of the embankment. The averment of the construction of the embankment under a privilege granted by the city authorities, without more, would not show a substantial cause of action. There must have been a special injury to the plaintiffs' property with actual damages as a consequence. Actual damages, then, are of the very essence of the plaintiffs' right of recovery, and must be shown by appropriate averments in the complaint. Confessedly the averment of the first count with respect of damages is a bare conclusion of the pleader, and unless this is sufficient it must be held that the judgment of the court overruling the demurrer to this count was erroneous.

This case cannot be classed with that line of cases in which it has been held that if a complaint is good to recover even nominal damages, or if it alleges damages which are too remote, it is safe from demurrer. An inspection of those cases will reveal that the nature of the injury was specifically averred, and the demurrer was either upon the ground that there was no claim of damages, or that the damages claimed were too remote. In other words, it was sought in those cases to present by demurrer the question of the proper measure of damages. *Pryor v. Beek*, 21 Ala. 393; *A. G. S. R. Co. v. Tapia*, 94 Ala. 226, 10 South. 236; *Norton v. Kumpke*, 121 Ala. 446, 25 South. 841; *Elliott v. Kitchens*, 111 Ala. 546, 20 South. 366, 33 L. R. A. 364, 56 Am. St. Rep. 69; *Treadwell v. Tillis*, 108 Ala. 262, 18 South. 886. The actual recoverable damages are such as are the natural and proximate result of the construction of the embankment, and what constitutes such damage is a question of law, determinable by the court upon the facts alleged. While it is not necessary, nor would it be good pleading, to set out the evidence in the complaint going to show the plaintiffs' damages, yet, in order to make out a substantial cause of action, good pleading requires that the complaint in a cause like this should show that the plaintiffs' property was injured by the construction of the embankment and the nature and character of the injury. Less than this would not give the defendant any notice as to the injury and damage relied upon. It was not sufficient in this respect merely to aver the conclusion that the lot was damaged on account of the construction of the embankment, but the defendant was entitled to be informed by the complaint of the nature and extent of the injury done the prop-

erty. The facts from which the conclusion of damages to the property was deducible should have been succinctly stated. The conclusion is that the demurrer to the first count should have been sustained, and the court erred in overruling it. *Mayor and Aldermen v. Ewing*, 116 Ala. 576, 22 South. 984; *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389; *Commissioners' Court of Perry County v. Md. Society*, 128 Ala. 257, 29 South. 586; *City Council of Montgomery v. Gilmer*, 33 Ala. 116, 70 Am. Dec. 562; *Town of Avondale v. McFarland*, 101 Ala. 381, 73 South. 504; *M. & M. Ry. Co. v. A. M. Ry.*, 116 Ala. 51, 23 South. 57. The second count of the complaint was not subject to the demurrer.

The third and fourth grounds of error are not insisted upon in brief of counsel, and are therefore waived. However, as the case must go back to be tried again, we remark that there was no error in the rulings of the court upon which these grounds of error are based.

The rule for the admeasurement of damages applicable to the case, if the plaintiffs are entitled to recover, is the difference between the market value of the lot before and after the construction of the embankment—the diminution in value produced thereby. *City Council of Montgomery v. Townsend*, 80 Ala. 491, 2 South. 155, 60 Am. Rep. 112; *City Council of Montgomery v. Maddox*, 89 Ala. 181, 7 South. 433; *Mayor and Aldermen of Huntsville v. Ewing*, 116 Ala. 576, 22 South. 984. The plaintiffs were tenants in common of the property. There were originally seven of them. After the evidence was closed the complaint was amended by striking out two of the plaintiffs. The measure of the recovery by the five would be five-sevenths of the total damage, ascertained according to the rule above stated. *Lowery v. Rowland*, 104 Ala. 420, 16 South. 88.

What amount of material would be required to fill in plaintiffs' lot to bring it to a level with the car rail on the embankment was immaterial, and was not proper evidence with respect to the measure of damages. Hence the evidence of the witness Brown should not have been allowed over the objection made by the defendant.

The evidence without conflict showed that the five persons who remained as the parties plaintiff in the cause, after the amendment was made striking out two of the parties plaintiff, were minors at the commencement of the suit and owners of an undivided five-seventh interest of the lot in question at the time the embankment was constructed. Then, of course, their right of action accrued while they were minors, and under the evidence the statute of limitation had no field of operation in the case; and charges 1, 2, 3, and 4, given at the request of the plaintiffs, in so far as they attempt to exempt plaintiffs from the statute of limitations, abstract-

ly speaking, were not objectionable. Code 1896, § 2807.

But it is insisted by the appellant that under the evidence and the pleadings (the averments of the complaint) the charges were inappropriate and were erroneously given. The complaint alleges the embankment was constructed during the months of May, June, July, August, and September; but the averment is under a *videlicet*. The evidence without conflict showed that the greater portion of the embankment was constructed during the spring of 1902, and from that time until July, 1903, nothing more was done, and the construction of the embankment was completed in the fall of 1903, and prior to the commencement of the suit. The argument of the appellant is that by the averments of the complaint, notwithstanding the minority of the plaintiffs, their right of recovery was confined to damage accruing during and after the time alleged in the complaint up to the commencement of the suit. In this view of the case, these charges 1, 2, 3, and 4 of the plaintiffs' series may be misleading in their tendencies; but this would not make the giving of them error, as the defendant could have had protection by requesting an explanatory charge.

The first five charges in the defendant's series were in effect affirmative charges to find for the defendant. There was evidence in the cause tending to support plaintiffs' right of recovery in all respects but one. There was an entire lack of evidence that the defendant in constructing the embankment was operating under a privilege or franchise as alleged in the complaint. The averment was a material one in the complaint. The court was not required to take judicial knowledge of the fact that the defendant was operating under a privilege granted by the city. Without evidence of it the plaintiffs failed to make out their case, and the defendant was entitled to have the court give to the jury charges 1, 2, and 3, as requested by it in writing.

It is not necessary, in the light of what we have said, to comment on charges 4, 5, 8, 9, 10, 11, 13, 14, and 15 further than to say they were inapt. It is sufficient to say of charges 6 and 7 that they were abstract. But we think the charges do not state correct propositions of law. Code 1896, § 1718; *Hooper v. S. & M. R. Co.*, 69 Ala. 529. Charge 16 was not a correct statement of law. Code 1896, § 3331; *Lowery v. Rowland*, 104 Ala. 420, 16 South. 88.

For the errors pointed out, the judgment of the circuit court must be reversed, and the cause remanded.

Reversed and remanded.

HARALSON, DOWDELL, and ANDERSON, JJ., concur.

PATTESON et al. v. CARTER et al.

(Supreme Court of Alabama. April 28, 1906.)

1. JUDGMENT—EQUITABLE RELIEF—PARTIES ENTITLED.

Where judgment is obtained against an administrator by collusion with him, or owing to his failure to use due diligence in defending the action, chancery will relieve the heirs, unless it was for a valid and subsisting claim.

2. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE.

Where plaintiff rendered domestic services for one in loco parentis to her, it is presumable that no payment was expected, though the presumption may be overcome.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 733; vol. 50, Cent. Dig. Work and Labor, §§ 11, 17.]

3. WITNESSES—COMPETENCY—TRANSACTION WITH DECEDENT.

In an action against an administrator for services rendered decedent, plaintiff is incompetent to give evidence as to transaction with decedent, under Code 1896, § 1794, rendering incompetent testimony as to transactions with a decedent.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 582, 664.]

4. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE—EVIDENCE—SUFFICIENCY.

In an action against an administrator for services rendered decedent by a member of her family, evidence that decedent stated that she wished plaintiff to have certain property after decedent's death did not tend to show liability.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 1871, 1873; vol. 50, Cent. Dig. Work and Labor, § 13.]

Appeal from Chancery Court, Marshall County; W. H. Simpson, Chancellor.

"To be officially reported."

Suit by Sampson Patteson and others against W. H. Carter, as administrator, and others. From a decree for defendants, complainants appeal. Reversed and remanded.

This was a bill filed by the heirs and grandchildren of one Sarah Patteson, seeking to set aside a judgment by default rendered at the suit of Celia Patteson against W. H. Carter, as administrator of said Sarah Patteson. The bill alleges collusion between the plaintiff in the suit and the administrator, or a failure on the part of the administrator to exercise diligence in defending the suit. It sets up that there was no necessity for an administration and no demands against the estate, except the simulated demand of Celia Patteson, and denies that the estate owes Celia Patteson anything. The bill seeks also a revocation of the grant of letters of administration. The other facts sufficiently appear in the opinion.

John A. Lusk, for appellants. Street & Isbell, for appellees.

ANDERSON, J. The bill avers facts from which it can be concluded, and which averments are supported by the proof, that the judgment was obtained against the administrator, either by collusion with him, or, at

least, from a failure on his part to use proper diligence to defend the suit; and, such being the case, a court of chancery will relieve the heirs, unless it was for a valid and subsisting claim. The evidence shows that the plaintiff to the judgment, Celia Patteson, was reared by the intestate and continued and lived with her until her death, and practically occupied the same relationship with the decedent, the latter years of her life, that she did for a number of years previous to her death. She performed certain services in and about the place and for the deceased, and in return received a maintenance and support at what was to all intents and purposes their common home. She was practically a part of the family of Mrs. Patteson, who stood in the relation of a parent, and the presumption is that no payment is expected for services rendered or support furnished by the one to the other. "This presumption is not, however, conclusive, and may be overcome by proof either of an express agreement to pay or of such facts and circumstances as show satisfactorily that both parties at the time expected payment to be made. Whenever, therefore, compensation is claimed in any case by either parent or child against the other for services rendered, or the like, the question whether the claim should be allowed must be determined from the particular circumstances of the case. There can be no fixed rule governing all cases alike. In the absence of any direct proof of an express contract, the question which must be determined is whether it can be reasonably inferred that pecuniary compensation was in the view of the parties at the time when the services were rendered or the support was furnished; and the solution of this question depends upon a consideration of all the circumstances of the case." 21 Am. & Eng. Ency. Law, 1061. The only evidence to show that it was within the contemplation of the parties that Celia Patteson was to receive compensation for her services was her own testimony, which was clearly prohibited by section 1794 of the Code of 1896, and which should have been excluded. With this evidence excluded there is none remaining to support her claim. There was some proof as to what Mrs. Patteson said she wished Celia to have after her death, but which, instead of evidencing a subsisting liability, tended to indicate that, as her attentions to her were gratuitous, she desired to make some provision for her after her death, and she did not recognize that Celia Patteson had a charge against her estate for services. Nor does it appear from the evidence that it was within the mind or contemplation of the parties that any relationship existed the last few years different from those under which they lived so many years previous.

The chancellor erred in refusing complainant relief, and the decree is here reversed, and one here entered annulling and vacating

the judgment and revoking the letters of administration.

Reversed and rendered.

HARALSON, DOWDELL, and DENSON, JJ., concur.

NASHVILLE, C. & ST. L. RY. et al. v. WALLEY et al.

(Supreme Court of Alabama. April 28, 1906.)

1. TRESPASS—ACTS CONSTITUTING—TAKING OF PERSONAL PROPERTY.

Where a shipper loaded wood on railroad cars, and the railroad company was not a party to the taking, it did not become a trespasser, though subsequently notified by the owners of the wood not to ship it.

2. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action of trespass, where the error in sustaining a replication was not insisted on and the replication was proved, plaintiff was entitled to the affirmative charge, and hence the court committed no error in refusing charges requested by the defendant.

3. TROVER AND CONVERSION—OWNERSHIP OF PROPERTY—BURDEN OF PROOF.

In an action for the conversion of wood, where plaintiffs proved ownership and that the wood was taken without their consent, the burden was on defendant to prove that the particular wood taken had been paid for by him.

4. TRIAL—ABSTRACT INSTRUCTION.

In an action of trover, a charge that if the parties had been putting wood along a railroad, and the defendants had been taking it up in parcels, then the defendant and the right to act on this plan, and taking up the wood paid for by the defendants would not make them liable in trover, was abstract, and was properly refused.

5. TROVER AND CONVERSION—INSTRUCTIONS.

In an action of trover, where there was evidence tending to show that money advanced by a defendant to plaintiffs was in payment for the wood taken, the court should have charged that if the defendant paid for the wood, and plaintiffs accepted the pay, and defendant accepted the measurements of the wood by plaintiffs, or paid for it on their statement as to the amount, the plaintiffs could not recover.

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

"Not officially reported."

Action by John W. Walley and others against the Nashville, Chattanooga & St. Louis Railway and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed and remanded.

This is an action begun by appellee against appellants, the railroad company and one Stewart. The first count of the complaint was in trespass for the taking of certain wood. The second count was in trover for the same property. The third count was in case, and sought to recover for the removal of the property and consequent destruction of a lien alleged to be in plaintiff on the wood. The defenses set up by the railroad company were the general issue; and that the wood, the taking of which is averred in the complaint, was delivered to the defendant, which is a railroad company engaged in the busi-

ness of a common carrier, to be transported to the Eagle Iron Company at Attalla, Ala., said wood being delivered to said railroad company by the person or persons in possession of said wood, claiming at the time title and ownership thereof, and the said defendant avers that said wood was so transported by it as such common carrier, and delivered to the Eagle Iron Company in accordance with the instructions of the shipper thereof; and that at the time of the taking of the wood it was a railroad company and common carrier engaged in the transportation of freight and passengers for hire, and at the time of the said alleged taking of the wood it was so taken by this defendant in good faith by direction of the Eagle Iron Company or its authorized agents, who at the time had apparent control of the wood, and the present capacity of investing itself with the possession thereof, and delivered the said wood to the Eagle Iron Company at Attalla, Ala. Demurrers were filed to these pleas and overruled. Whereupon plaintiff filed the following replication to each of the special pleas: "The plaintiffs say that, before the removal of the said property by the said defendant railway, the said defendant was notified by plaintiffs that said property was the property of plaintiffs." The defendant moved to strike said replication, and, after motion was overruled, demurred thereto, which demurrer was overruled.

The evidence tended to show that the plaintiffs had cut and piled a lot of cordwood along the railroad of the defendant railroad company under a contract with Stewart, and that about 20 cords had been loaded and hauled away by the railroad company under directions of Stewart. The evidence further tended to show that the wood had not been paid for by Stewart, had not been measured, and no directions had been given to the railroad company by the owners of the wood to load it. It was further shown without conflict that Stewart had hands to load the wood and that it was loaded by him. It was further shown by the testimony without dispute that defendant railroad company's agent was notified not to move the wood, as it was the property of plaintiffs. There was evidence tending to show that Stewart had paid the value of the 20 cords of wood to the plaintiffs, \$15 to one and \$10 to another.

The defendants requested the court in writing to give the following, among other, charges to the jury, which the court refused: Charge 5: "If the jury believe the evidence, there can be no recovery from the defendant railway under the first count in the complaint." Charge 10: "The burden of proof in this case is upon the plaintiffs to prove that the 20 cords of wood shipped had not been paid for before it was shipped." Charge 12: "The court charges the jury that if the parties had been putting wood on the road, and the defendants had been taking

it up in parcels, then the defendant had the right to act upon this plan of taking up the wood, and taking up the wood paid for by the defendants would not make them liable in trover." Charge 14: "The court charges the jury that if the defendant Stewart paid for the 20 cords of wood, and that the plaintiffs accepted the pay for the wood, and that Stewart accepted the measurements of the wood by plaintiffs, or paid for it on the statement of the plaintiffs, or one of them, that there were 20 cords of wood, the plaintiffs cannot recover."

There was verdict and judgment for plaintiffs, and defendants appeal.

Oscar R. Hundley, for appellant Nashville, C. & St. L. Ry. John A. Lusk, for appellant Stewart. Street & Isbell, for appellees.

ANDERSON, J. The first count of the complaint is trespass, and the undisputed evidence shows that the wood was loaded on the railroad cars by Stewart, the shipper, and that the company was no party to the taking. If the wood was taken by Stewart and delivered to the railroad company for shipment, the company did not become a trespasser, although subsequently notified by the plaintiffs not to ship the same. *Prince v. Puckett*, 12 Ala. 832.

The plaintiff could doubtless maintain trover against the defendant railroad, but not trespass; and, but for the condition of the pleading, charge 5, refused to the defendant railroad company, should have been given. But the replication of plaintiffs, upon which issue was joined, was proved, and plaintiff was entitled to the affirmative charge as against said defendant; and the court, therefore, committed no reversible error in refusing the charges requested by said defendant. It is true that a motion was made to strike the replication, and, when overruled, demurrers were interposed, and also overruled. The replication was no answer to the special pleas, so far as they related to the count in trespass; but the ruling of the court in this respect is not insisted on by counsel for appellant railroad company.

If the trial court erred upon the rulings on the evidence, it was error without injury, as the evidence objected to was clearly innocuous to either of the defendants.

Charge 10, requested by the defendants, was properly refused. In the first place, it was calculated to mislead the jury as to the burden of proof. The plaintiffs made out a prima facie case when they proved ownership and that Stewart took the 20 cords of wood without their consent. Stewart admitted that plaintiffs told him "not to take or ship this particular wood, unless he measured up and paid for all the wood they had on the road." If this identical wood had been paid for by Stewart, the burden was on him to prove that fact.

Charge 12, requested by defendants, was abstract, and properly refused.

Charge 14, requested by defendants, should have been given, as there was evidence from which the jury could have inferred that the money advanced by Stewart was in payment of the 20 cords of wood. While it is true the defendant railroad company has waived the right to insist on their proposition, its action cannot prejudice the other defendant, Stewart.

The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

SOUTHERN RY. CO. v. HALL.

(Supreme Court of Alabama. April 28, 1906.)

1. QUIETING TITLE—PLEADINGS—BILL.

A bill alleging that complainant is in the peaceable possession of land and is the legal and equitable owner thereof, that the defendant claims or is reputed to claim some right, title, or interest in or incumbrance on the land, and that no suit is pending to enforce or test the validity of defendant's claim, is not demurrable.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quietening Title, §§ 69-77.]

2. SAME—EVIDENCE—SUFFICIENCY.

In a suit to quiet title, testimony of the complainant that he is in peaceable possession and is the owner of the land, without more, is sufficient evidence of possession.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quietening Title, § 92.]

3. SAME—PAYMENT OF TAXES.

In a suit to quiet title, the payment of taxes on the land is not of itself evidence of possession, though admissible in connection with evidence of actual possession to show its extent.

4. TAXATION—TAX DEED—SUFFICIENCY.

A tax deed, failing to recite that the probate court ever rendered a decree for the sale of the land, as required by Code 1896, § 4056, was void.

5. QUIETING TITLE—ADMISSIBILITY OF EVIDENCE—POSSESSION BY COMPLAINANT.

In a suit to quiet title, in which there was no evidence of actual possession by the plaintiff, a void tax deed was not admissible in evidence.

Appeal from Chancery Court, Marion County; W. H. Simpson, Chancellor.

"To be officially reported."

Action by W. W. Hall against the Southern Railway Company. From a decree in favor of complainant, defendant appeals. Reversed and remanded.

J. H. Bankhead, Jr., for appellant. A. F. Fite, for appellee.

HARALSON, J. The bill was filed in this case, under section 809 of the Code of 1890. It alleged that complainant was in the peaceable possession of the land described, and was the legal and equitable owner thereof; that the defendant claims or is reputed to

claim some right, title or interest in or incumbrance on said lands, and that no suit is pending to enforce or test the validity of defendant's claim or interest in said lands, etc. The demurrer to it was without merit. *Adler v. Sullivan*, 115 Ala. 582, 22 South. 87.

The defendant in answering, denies that complainant is in the peaceable possession of the land, and that he is the legal and equitable owner thereof. It also sets up its ownership of the land and the source of its title.

The word "peaceable" in connection with the word "possession" is used "as contradistinguished from disputed or contested possession, and that it shall be under claim of ownership." *Adler v. Sullivan*, 115 Ala. 587, 22 South. 87.

"Actual possession, or possession in fact, exists when the thing is in the immediate occupancy of the party, or his agent or tenant," is synonymous with "pedis possessio." 28 Am. & Eng. Ency. Law (2d Ed.) 238.

"Constructive possession, a possession in law, it is sometimes called, is that possession which the law annexes to the legal title or ownership of property, when there is a right to the immediate actual possession of such property, but no actual possession." *Id.* 239.

"When one has a legal estate in fee in land, he has the constructive possession, unless there is an actual possession in some one else." It is founded on the existence of title, in some form. *Id.*

"It is a legal impossibility for a constructive possession under the statute of uses to vest in one under a deed from another who had no legal estate to convey; the theory of the law being, that constructive possession accompanies the legal title." *Smith v. Gordon*, 136 Ala. 498, 34 South. 838.

The complainant testified that he was in the peaceable possession, and was the owner of the land described in the bill. Without more, this was sufficient evidence of possession. *Steed v. Knowles*, 97 Ala. 573, 12 South. 75. But when a witness swears to a fact, it may be shown on his cross-examination, that he was mistaken, or was stating a mere conclusion, without facts sufficient to base it on. On his cross-examination, the witness testified, "I have never exercised any acts of ownership of the lands in controversy, except to assess and pay the taxes on same. I never went on said lands to mine coal or other mineral. (He only claimed a mineral right in the land.) I have never been on said lands to prospect for minerals." The payment of taxes on land is not of itself evidence of possession, but in connection with evidence of actual possession, it is admissible to show the extent of such possession. *Jay v. Stein*, 49 Ala. 514; *Green v. Jordon*, 83 Ala. 220, 8 South. 513, 3 Am. St. Rep. 711. Complainant also testified, that defendant has a claim

to the lands, and he thought it had been assessing and paying taxes on them.

The complainant also introduced a deed from the auditor of the state to himself of date the 28th of December, 1895, conveying to him the land in question, sold by the state for delinquent taxes due on same. The deed failed to recite that the probate court had ever rendered a decree for the sale of said lands as required by section 4054 of the Code of 1896; and the proof showed that no such decree had in fact ever been rendered. Without this, no validity attached to said deed. *McKinnon v. Mixon*, 128 Ala. 612, 29 South. 690; *Johnson v. Harper*, 107 Ala. 708, 18 South. 198.

The deed though void to convey the legal title, would have been competent evidence as color of title to mark the boundaries and extent of the purchaser's possession, if there had been any evidence that he entered and claimed under it, but there was no such evidence. Indeed, the evidence is, that he never did enter under it. *Bank v. Baker-Hill Co.*, 108 Ala. 639, 19 South. 47. The deed was properly excluded.

It is sufficient to add, that the complainant has failed to present such a case as entitles him to the benefits of the statute,—has shown no possession, actual or constructive.

Reversed and remanded.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

NOBLE v. ANNISTON NAT. BANK.

(Supreme Court of Alabama. April 28, 1906.)

1. FRAUDS, STATUTE OF—PROMISE TO ANSWER FOR DEBT OF ANOTHER—PLEADING—SUFFICIENCY.

A plea, in an action on a note, which alleges that the note is void under the statute of frauds, because the same was given for the debt of another, a person named, is sufficient as against a demurrer based on the ground that the plea does not state for whose debt the note was given.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 367.]

2. PRINCIPAL AND SURETY — COLLATERALS GIVEN BY PRINCIPAL—RIGHT OF SURETY AS AGAINST CREDITOR.

A surety is not entitled to set off the amount collected on collaterals given by the principal against the creditor's demand.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Surety, §§ 393-396.]

3. BILLS AND NOTES — ACTIONS — DEFENSES—FAILURE OF CONSIDERATION—PLEA—SUFFICIENCY.

A plea, in an action on a note, which alleges that the maker purchased certain property, relying on the representation of the payee that the same belonged to him, that the payee did not own the property which constituted a large part of the value of the note, and that the consideration for which the note was given failed, is demurrable.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1520, 1523.]

4. SAME—FRAUDULENT REPRESENTATIONS—PLEA—SUFFICIENCY.

A plea, in an action on a note, which alleges that the maker purchased property from the payee in reliance on his representation that he was the owner thereof, that the representation was untrue, and by reason of the untrue statements as to the ownership of the property for which the note was given the same is void, is demurrable.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 1524, 1525.]

5. SAME—SET-OFF—PLEA—SUFFICIENCY.

A plea, in an action on a note, which alleges that the payee is indebted to the maker in a specified sum as damages for breach of a contract wherein the payee guaranteed that it would collect and realize on and for a certain interest in the stock of a company a right to property and other stock which the payee transferred to the maker at the time of the execution of the note, that the maker was unable to realize such sum, that the payee for a sufficient consideration guaranteed to the maker the receipt by him of such sum, wherefore the maker claims that the payee is indebted to him in a specified sum, with interest thereon from "the _____ day of _____, 189—," which the maker offers to set off, etc., is demurrable, because it contains blanks, and fails to sufficiently set out the contract, and fails to show that there was any consideration for the guaranty.

6. SAME.

A plea, in an action on a note, which alleges that the payee let to the maker a safety deposit box in which he deposited valuable papers, that the box was broken open and the papers lost, by reason of which he suffered damages in a specified sum, and that he incurred traveling expenses in an effort to avoid the effect of the loss, which damages and traveling expenses he offers to set off against the demand, is demurrable.

7. SAME.

A plea in an action on a note, which alleges that the maker hired a safety deposit box from the payee and deposited valuable papers consisting of deeds and mortgages therein, that the box was broken open and the papers lost, that among the papers deposited was a title deed to real estate which was sold by the maker, but by reason of his inability to furnish to the purchaser his title deed there was a delay in closing up the sale, during which time the maker was in default in making the conveyance, and by reason of the delay and the loss of the title deed he was damaged in the designated sum, which he offers to set off against the demand, is demurrable.

8. SAME.

A plea in an action on a note, which alleges that the payee is indebted to the maker in a specified sum for money paid by the maker to the payee by mistake, which amount he offers to set off against the demand, is demurrable.

9. SAME—FAILURE OF CONSIDERATION—PLEA—SUFFICIENCY.

A plea in an action on a note, which alleges that the note was given to the payee for a part of the purchase price of property which he sold to the maker, that the payee guaranteed that the property was of a specified value, and that the maker would receive that amount therefor, and that he could not realize from the property such sum, is demurrable as setting up a plea of failure of consideration.

10. SAME—SET-OFF—PLEA—SUFFICIENCY.

A plea in an action on a note, which alleges that at the time of its maturity the maker was indebted to the payee in a specified sum for money had and received, in that the maker was a surety on a promissory note made by a third person for \$3,000, to which note a large number of accounts were attached as collateral, that the

payee collected on said accounts \$3,000, which was understood at the time of the maker becoming surety for the third person would on collection be applied to the payment of the note, and that the payee failed to credit on the note the amount collected, and represented to the maker his inability to make collections, is demurrable on the ground that the maker is not entitled to set off the amounts collected from the collaterals.

11. SAME.

A plea in an action on a note, which alleges that the payee is indebted to the maker in a specified sum for the conversion of certain property, which was of a value designated, which property the maker has demanded of the payee, but which it has failed to surrender, is good as against a demurrer based on the ground that the plea seeks to set off a claim sounding in damages, and that there is no averment of a demand for the property, and that it is not shown that the payee had any money to which the maker was entitled.

12. SAME.

A plea in an action on a note, which alleges that the payee is indebted in a specified sum to the maker by reason of the fact that the payee held a mortgage on the property of the maker, and that in order to raise money to pay the same he made a sale thereof with the payee's consent, that before he could consummate the sale it was necessary for the payee to cancel the mortgage, which he failed for an unreasonable time to do, whereby the maker made several trips at a cost of a specified sum per day, and lost a specified number of days at a specified sum per day in procuring the cancellation of the mortgage, is demurrable on the ground that the plea is insufficient as a plea of set-off, and that the damages claimed therein are too remote, and that the claim set forth sounds in damages merely.

Appeal from City Court of Anniston; Thomas W. Coleman, Judge.

"Not officially reported."

Action by the Anniston National Bank against Stephen N. Noble. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint in this case contains six counts; the first five claiming various sums due by demand promissory note made on the 29th day of May, 1896, for \$4,448.89. The sixth count claims especially the sum of \$196.68 as attorney's fees as provided in the note. The defendant interposed, among others, the following pleas:

"(4) That the said alleged note or obligation is void under the statute of frauds. Defendant avers that the same was given for the debt, default, or miscarriage of another, to wit, John Noble."

"(7) That said plaintiff is indebted to said defendant in the sum of \$500, viz.: That this defendant was surety to said plaintiff on a note or notes made by the Coal City Company, to which note or notes upon which defendant a large number of accounts of various persons (whose names and the amount of each and all are unknown to defendant) were attached as collateral security. That plaintiff brought a suit to recover judgment in this honorable court against the defendant upon said Coal City notes, upon which defendant was surety. Said judgment was

recovered on the ——— day of ———, 189—, and was for \$——, which amount, with the cost of said suit, defendant has paid. Defendant avers that said plaintiff collected from such accounts so assigned to it as collateral to the note or notes, which defendant was surety on, and which said sums so collected should have been credited on such notes; but defendant avers that said sums were not so credited, and instead this defendant had to pay and did pay said Coal City Company note and debt due to plaintiff, and defendant avers that he did not know of such collection by plaintiff at the time of such payment of said Coal City Company debt by defendant. Defendant avers that the said plaintiff collected from said collateral account a large sum, to wit, \$3,000, and which sum, with interest thereon, he offers to set off against the demand of plaintiff, and asks judgment for the excess."

"(9) The defendant avers that said plaintiff is indebted to him in the said sum of \$3,000 for money paid to plaintiff by mistake, in this: That when said note was given plaintiff represented and stated to defendant that it owned the interest which John Noble had formerly owned in the Rome Foundry Company, which was estimated at such sale to be worth \$3,000. That upon such statement and representation by plaintiff, which defendant relied on, believing that plaintiff owned such interest in such Rome property, defendant agreed to purchase the same, and did purchase what said plaintiff claimed to own, to wit, the interest known as the 'John Noble interest,' in said Rome property. That the said plaintiff did not own such John Noble interest in the said property. That said property was a large part of the value of said note. Wherefore the defendant says that the consideration for which said note was given has failed.

"(10) The defendant, for further answer to the plaintiff's complaint, says that the said note is void by reason of the representation made by the plaintiff as to the ownership of the said John W. Noble interest in such Rome property as set out in the ninth plea; that such representation that said plaintiff owned such interest in said Rome property was untrue, and by reason of said untrue statements as to such ownership of said property, for which the said note was given, the said note is void."

"(13) Further answering said complaint, this defendant says that the plaintiff is justly indebted to him in the sum of \$1,500 as damages for the breach of a certain contract made by the said plaintiff with this defendant, wherein the said plaintiff did guaranty to this defendant that it could and would collect and realize on and for a certain interest in the stock of the Woodstock Iron Company No. 1 a certain right or claim to property in or near the city of Rome, Ga., and certain other stock which the plaintiff transferred to this defendant at the time of mak-

ing the note sued on in this case for the sum of \$7,833; but, notwithstanding the most careful and energetic management and disposition of said stocks in the manner directed by the said plaintiff, this defendant was wholly unable to realize the said \$7,833, and realized only therefrom the sum of \$7,701. And the defendant avers that the said plaintiff for a sufficient consideration then and there paid him did guaranty and warrant to this defendant the receipt by him as aforesaid, that he failed to realize the said sum so guaranteed and warranted by the plaintiff by the said sum of \$725. Wherefore defendant says that the said plaintiff is indebted to him in the sum of \$725, with the interest thereon, from the ——— day of ———, 189—, which defendant offers to set off or recoup against the demands of the plaintiff, and asks judgment for the excess.

"(14) Further answering the plaintiff's complaint, this defendant says that the said plaintiff as a part of its business has what is commonly known as safety deposit boxes, which it lets or hires to its customers and others for hire, for the safe-keeping of valuable papers; that this defendant did rent or hire from the said plaintiff one of its said safety boxes, and in which he deposited with the said plaintiff and under its care and keeping valuable papers, consisting of deeds and mortgages, etc.; that by some means unknown to this defendant, while the said plaintiff had the custody and control of the said safety box having in it defendant's said valuable papers, the said box was broken open by some means unknown to the defendant, and the defendant's said papers were lost, and by reason of the loss of the said papers this defendant has suffered damage in the sum of \$500, which defendant offers to set off against the demand of the plaintiff, and asks judgment for the excess.

"(15) For further answer to the plaintiff's complaint this defendant says that by reason of the loss of the said papers mentioned in the plea last above, and in the effort to avoid the effect of such loss, it has been necessary for him (defendant) to incur traveling expenses in coming from his place of abode at Pretoria, Ga., to Anniston three or more times; that the said trips were made with the knowledge and at the request of the said plaintiff; that in addition to the expenses of said trips defendant lost valuable time, viz., some eight or ten days, and all, as defendant avers, on account of the loss of said papers so left in said box in plaintiff's care; that the said traveling expenses of said trips and loss of time have cost this defendant the sum of \$300, which he offers to set off against the demand of the plaintiff, and asks judgment for the excess.

"(16) For further answer to the plaintiff's complaint this defendant says that by reason of the loss of said papers so lost from said safety box, which was deposited for safe-keeping with the said plaintiff, among which

papers were title deeds to a house and lot in Anniston, that the said house and lot were sold by this defendant, but by reason of his inability to furnish to the purchaser his title deeds, which were lost aforesaid, there was delay in closing up the said sale, during which time this defendant was in default in making a conveyance of said house and lot, and by reason of said delay and the loss of said title deeds defendant was damaged in a large sum, to wit, the sum of \$300, all of which was known to the plaintiff, and which said sum the defendant offers to set off against the demand of the plaintiff, and asks judgment for the excess.

"(17) For further answer to the complaint this defendant says that the said plaintiff is indebted to the defendant in the sum of \$300 for money paid by the defendant to the said plaintiff by mistake, and which amount he offers to set off against the demand of the plaintiff, and asks judgment for the excess.

"(18) For further answer to the complaint defendant says that the consideration for which said note was given has failed in this: That the note was given to the plaintiff for a part of the purchase price of certain property, which the said plaintiff sold and transferred to the defendant; that the said plaintiff guaranteed and warranted to this defendant that the said property was of the value of \$3,250, and that the defendant could and would receive that amount for the same; and defendant avers that he did not and could not realize from the said property the said sum of \$3,250, lacking at least \$1,200 of doing so. Wherefore the defendant says that the consideration for said note has failed."

"(25) That at the time of maturity of plaintiff's said cause of action the said plaintiff was indebted to the defendant in the sum of \$500 for money had and received as follows, viz.: Defendant was the surety on a promissory note made by the Coal City Coal Company, bearing date about the 1st day of December, 1903, for \$3,000, to which note a large number of accounts from various persons (whose names and amounts of each and all such accounts are unknown to defendant) were attached and pledged as collateral security by said Coal City Company; that said plaintiff collected upon said accounts so assigned and pledged to it by said Coal City Company the sum of \$3,000, which was agreed and understood, at the time of defendant's becoming such surety for such Coal City Coal Company, would upon collection and payment be applied to the payment of said note for \$3,000; but defendant avers that the said plaintiff has collected large amounts upon said pledges, which it has failed to credit upon said \$3,000 note, and represented to this defendant that said plaintiff was unable to collect such collateral so pledged, and required and demanded that this defendant pay said Coal City note for \$3,000. Defendant averred that upon the representation that plaintiff had not realized

on said collaterals defendant paid said sum of \$3,000 to the plaintiff. Wherefore the defendant avers that the amounts collected are due to this defendant, and were so due at the time of the accrual of said alleged cause of action, and which amount, to wit, the sum of \$3,000 so collected from said defendant upon said collaterals, defendant offers to set off against the demands of the plaintiff, and asks judgment for the excess.

"(26) For further answer to the first, second, and third counts of the complaint, defendant says that the said plaintiff is indebted to defendant in the sum of \$3,000 for money paid to the plaintiff by mistake [and here follows the allegation in more elaborate form set out in plea 9 above]. For further answer to said count, defendant says that the consideration of said note has failed [and here follows an elaboration of the averments in plea 9 above set out]."

Plea 28 is an elaboration of the averments contained in plea 10 above set out.

Plea 30: "For further answer to said complaint as amended, defendant says that said plaintiff is indebted to said defendant in the sum of \$4,000 damages for the conversion by plaintiff of 49 shares of the capital stock of the Anniston City Land Company, in this: That said plaintiff, having in its possession 49 shares of the capital stock of the Anniston City Land Company, a corporation organized under the laws of Alabama, which was the property of the defendant, applied and appropriated the same to its own use, and which was of the value of the sum of \$4,000, which said sum, with interest thereon, the defendant offers to set off against the demands of the plaintiff and asks judgment for the excess, which stock defendant has demanded of plaintiff, and which it fails and refuses to surrender to him."

Plea 32 is an elaboration of plea 13 above set out, except as to amounts; in this plea the amount alleged to have been realized being \$7,107.50.

In plea 33 defendant offers to set off the sum of \$500, which he alleges plaintiff owes him by reason of the fact that plaintiff held a mortgage on certain property of defendant, and in order to raise money to pay off the mortgage defendant made a sale of the property with plaintiff's consent, and before he could consummate the sale it was necessary for plaintiff to cancel and deliver said mortgage which it failed for an unreasonable time to do. Wherefore defendant had to make several trips, three in all, at a cost of \$50 per trip, and lost 10 days, at \$10 per day, in procuring a cancellation of the mortgage, and that said trips and expenses were made necessary solely by the action of the plaintiff in failing to surrender the said mortgage, so that the sale could be closed up.

The plaintiff filed the following demurrers to plea No. 7: "(1) It does contain a blank date as to the month and the year. (2)

There is a blank amount of dollars not filled in said plea. (3) Defendant is not entitled to set off in this action the amounts collected from the collaterals of the Coal City Company. (4) The surety, when sued on note, is not entitled to set off collaterals of the principal deposit or hypothecated with the payee of a note. (5) It does not appear that the defendant has paid the debt."

To the ninth and tenth pleas the following grounds were assigned: "(1) The mistake relied on is not sufficiently set up. (2) It is not shown what part of the note sued on is based on said John Noble's interest in said Rome property. (3) It is not sufficiently shown what the John W. Noble interest in said Rome property has to do with the note sued on. (4) The meaning of said plea is obscure and unintelligible. (5) It is not averred that plaintiff is insolvent. (6) It is not averred how or wherein the consideration for said note sued on has failed. (7) It presents an immaterial issue." To the tenth plea the following additional ground is interposed: "It is not shown how or wherein said note sued on is void."

To the thirteenth plea the following are the grounds assigned: "(1) Said plea contains blanks. * * * (3) Said certain contract is not sufficiently set out, and its said brief not sufficiently averred. (4) It is not shown that there was any consideration for said guaranty alleged to have been made by the plaintiff."

To the fourteenth plea the following grounds were assigned: "(1) Said plea seeks to set off a claim sounding in damages merely. (2) It is not stated when the defendant rented or hired the said safety or deposit box from plaintiff. (3) It is not stated what valuable papers were contained in said box. (4) It is not stated what writings, deeds, or mortgages were given by the defendant to plaintiff. (5) No sufficient negligence of plaintiff is averred in said plea."

To the fifteenth plea the grounds of demurrer assigned to the fourteenth plea, with this addition: "The defendant's said traveling expenses are too remote, and the amount due defendant for said eight or ten days' loss of time is not recoverable."

To the sixteenth plea the same grounds assigned to the fourteenth plea and the following additional grounds: "(1) It is not shown how or wherein the defendant was damaged to the extent of \$3,000. (2) It is not shown what was the delay in clearing up said sale. (3) It is not shown that the facts set out in said plea are the proper subject of set-off."

To the seventeenth plea: "(1) It is not shown how, or wherein, or what was the mistake by which defendant paid plaintiff the sum of \$3,000. (2) It is not shown under what circumstances or conditions the said defendant paid the said \$3,000. (3) There is nothing in said plea to apprise the plaintiff of what said mistake consisted in."

To plea 18 the following grounds were as-

signed: "(1) It is not averred that plaintiff is insolvent. (2) It is not averred that there was any consideration for said alleged guaranty of plaintiff. (3) Said contract is not sufficiently set forth. (4) The breach of said contract is not sufficiently set out. (5) It appears that the statement of plaintiff in said plea was nothing more than an opinion of the plaintiff, for which an action will not lie."

To the twenty-fifth plea is assigned the following grounds of demurrer: "(2) Defendant is not entitled to set off in said action the amounts alleged to have been collected from the collaterals of the Coal City Company. (3) The amounts collected from the Coal City Company were not due to the defendant, and he is not entitled to use said amounts as a basis for a set-off. (4) Said plea is insufficient as a set-off, in that it does not show that defendant has a valid counter demand owing him."

To plea 26 the following grounds were assigned: "(2) Said plea is self-repugnant, in this: The first part of said plea counts on misrepresentations made by the plaintiff to defendant, and second part of said plea avers that said \$3,000, was paid by mistake of defendant. * * * (4) It is not shown what part of the note or notes sued on is based upon said John Noble's interest in said Rome property. * * * (8) Said plea does not negative or deny the fact that defendant acquired the John Noble interest in the Rome Foundry Company through his trade with plaintiff. (9) Said misrepresentations are not sufficiently set out." To plea 27 the same grounds are assigned as to plea 26, and in addition: "It does not sufficiently appear how or wherein the consideration of said note has failed." To plea 28 the same grounds are assigned as those assigned to pleas 26 and 27.

To plea 30 are assigned the following: "(1) Said plea seeks to set off a claim sounding in damages merely. (2) There is no averment of any demand on plaintiff for said stock or the value thereof. (3) It is not shown by said plea that plaintiff received or had any money to the defendant's use or to which defendant was entitled. (4) It is not shown from whom said plaintiff received said money."

To plea 32 the following were assigned: "(1) It is not averred that there was any consideration for said alleged guaranty of plaintiff. (2) Said contract does not sufficiently set forth. * * * (4) The breach of said contract is not sufficiently set forth."

"To plea 33 the following grounds were assigned: "(1) Said plea is insufficient as a plea of set-off. (2) The damages claimed in said plea are too remote. (3) The claim set forth in said plea sounds in damages merely."

W. F. Johnson, for appellant. J. J. Willett, for appellee.

DOWDELL, J. The only questions presented by the record arise on the rulings of the lower court on the pleadings. Demurrers were sustained to the defendant's pleas numbered 4, 7, 9, 10, 13, 14, 15, 16, 17, 18, 25, 26, 27, 30, 32, and 33.

Plea No. 4 invokes the statute of frauds in defense of the action. There was but a single ground assigned in the demurrer to this plea, and that was that the plea did not state for whose debt, default, or miscarriage the note sued upon was given. Whatever other faults the plea may have possessed, it did not possess the one pointed out by the demurrer, and the court therefore erred in sustaining the demurrer to the plea.

Plea No. 7 was subject to the first five grounds of the demurrer to this plea. A surety is not entitled to set off the amount collected on collaterals given by the principal defendant against the plaintiff's demand.

Pleas 9 and 10 were both defective, and both subject to one or more of the grounds of demurrer assigned as to these pleas.

The thirteenth plea was subject to the first, third, and fourth grounds assigned in the demurrer to this plea.

The fourteenth, fifteenth, sixteenth, seventeenth and eighteenth pleas were each faulty in one or more respects, as pointed out by the several demurrers to these pleas.

Plea 25 was subject to the second, third, and fourth grounds assigned by the demurrer.

Plea 26 was subject to the second, fourth, eighth, and ninth grounds assigned by the demurrer to this plea.

Plea 27 was subject to the tenth ground of demurrer assigned to the plea, besides being in other respects faulty.

Plea 28 was faulty in one or more of the respects pointed out in the demurrer to this plea.

Plea 30 was not open to any of the grounds of demurrer assigned, and the court erred in sustaining the demurrer to this plea.

Plea 32 was subject to the first, second, and fourth grounds assigned in the demurrer to this plea.

No reversible error was committed in sustaining the demurrer to plea 33.

For the errors pointed out, the judgment of the court will be reversed, and the cause remanded.

Reversed and remanded.

HARALSON, ANDERSON, and DENSON,
J., concur.

THOMAS v. THOMAS.

(Supreme Court of Alabama. April 28, 1906.)

1. PLEADING—SET-OFF AND COUNTERCLAIM—ACTION FOR PRICE OF GOODS—RECOUPMENT—TITLE OF PLEADING.

In an action for the price of a stock of millinery goods, a plea termed by the defendant a "plea of recoupment," claiming a sum had

and received by plaintiff, which the defendant offers as a set-off against the demands of the plaintiff and claims judgment for the excess, was not demurrable, being good as a set-off, though not as a plea of recoupment.

2. SALES—REQUISITES OF CONTRACT—EXECUTED OR EXECUTORY CONTRACT.

A contract for the sale of a stock of millinery goods, under which nothing remained to be done to determine the quality, quantity, or value of the goods, and all that remained to be done was to check up the invoice furnished by the seller to ascertain what deduction should be made on account of goods sold out of the stock subsequent to the time the invoice was furnished, was an executed, and not an executory, contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 162-170.]

3. SAME—ACTION FOR PRICE—EVIDENCE.

In an action for the price of a stock of millinery goods, where the only pleas were the general issue and a plea of set-off, evidence of a breach of warranty or of fraud was inadmissible.

4. SAME—EXPRESS WARRANTIES.

A contract of sale containing an express warranty excluded the idea of any other warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 760.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"To be officially reported."

Action by Mary J. Thomas against Annie Thomas. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

This action was begun by attachment at the suit of Mary J. Thomas, doing business under the name and style of "Madame Demans," against Annie Thomas, alleged to be Mrs. R. Y. Thomas, and sought recovery in damages for failure on the part of the defendant to take the goods mentioned in the certain contract hereinafter set out, and the refusal of the defendant to pay the rent of a certain storehouse for the month of March. The contract is set out in the complaint and is in words and figures as follows:

"This contract, made and entered into by and between Madame Demans, of the city of Birmingham, Ala., party of the first part, and Mrs. R. Y. Thomas, Jr., of Central City, Ky., party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of \$460, \$50 of which said sum is paid in cash, the receipt of which is hereby acknowledged, and the balance, \$410, to be paid upon the delivery by the first party to the second party of the property hereinafter set out, said payment not to be made later than April 1, 1904, in any event, does hereby sell and convey to party of the second part all the millinery goods, stocks, and fixtures now belonging to the party of the first part as shown by invoice of same sent heretofore by party of the first part to party of the second part, and also the lease of the house in Birmingham, Ala., to October 1, 1904, in which said party of the first part is now conducting

a millinery business, at \$60, the price now paid by party of the first part, or whatever that price may be, not to exceed \$60 per month. Said goods and fixtures are now situated in No. 317 19th St., in the city of Birmingham, Ala. The said party of the first part warrants said goods, stocks, and fixtures free of any debt, mortgage, incumbrance, or adverse claim of any kind. Should the goods not turn out as per said invoice, or party of the second part fails to secure said house to October 1, 1904, or the length of term lease of the party of the first part runs, then this contract is null and void. The party of the first part also, as part of the consideration, agrees to sell the good will of said business, and agrees not to engage in the millinery business in that county, in Birmingham, while the party of the second part is engaged in said business at said place or city. Should any of the conditions of this contract be violated as to the stock and fixtures or lease of said business, then the party of the first part agrees to refund to party of the second part said \$50. Witness our hands this the 26th day of February, 1904. [Signed] Mrs. R. Y. Thomas, Jr., Madame Demans.

"I accept this proposition as modified by telegrams sent and received by the parties since this contract is forwarded. Telegram: 'Received at 1919 1st Ave., Birmingham, Ala. Feb. 19, 1904, dated Central City, Ky., 19. To Mrs. Demans, 317 19th St.: I will allow \$60.00 wholesale price shortage, will claim one-half wholesale price for all over. If go, must leave tomorrow night for East. Answer quick. Mrs. R. Y. Thomas.' Telegram. 'Birmingham, Ala., Feb. 20th, Mrs. R. Y. Thomas, Central City, Ky.: Telegram received. Proposition accepted provided you pay March rent and all cash on delivery of store before March 1st. Wire answer. Madame Demans.' Telegram: 'Madame Demans, 317 19th St., Birmingham, Ala.: Will pay March rent. Balance cash as soon as can get there and check stock. Answer. Mrs. R. Y. Thomas.' Telegram: 'Birmingham, Ala., 20. Mrs. R. Y. Thomas, Central City, Ky.: Proposition accepted. Will sign contract as modified. M. Demans.'"

Plea 1 was the general issue and plea 4 was as follows: "And by way of recoupment to the demand of plaintiff defendant claims of the plaintiff the sum of \$50 money had and received by plaintiff on the 26th day of February, 1904, and due at the time of the commencement of this action for the use of defendant, which amount is due and unpaid, and which defendant here offers as an offset against the demands of plaintiff and claims judgment for the excess."

On the trial of the cause the court permitted testimony in reference to the value of the goods and the character of the goods, and permitted it to be shown that the prices paid as shown by the invoice called for first-class goods, and that the goods sold were not

worth the price paid; and the court permitted the invoice to be testified to item by item as to the price mentioned on it and the value of the goods sold in it, to show that the goods were not worth the price paid.

Sterling A. Wood and Kerr & Haley, for appellant. Leadbetter & Johnston, for appellee.

DOWDELL, J. This is an action to recover damages for the breach of a contract. The contract was in writing and is set out in full in the complaint. The cause was tried in the court below on issue joined on pleas Nos. 1 and 4. A demurrer was interposed to plea 4, which was overruled, and the ruling of the court constitutes the ground of the first assignment of error. Plea 4 is termed by the pleader a plea of recoupment, and as such was insufficient, but was good as a plea of set-off. There was, therefore, no error prejudicial to the plaintiff in overruling the demurrer to this plea.

The contract set out in the complaint is an executed, and not an executory, contract. There was nothing which remained to be done between the parties to determine the quality, quantity, or value of the goods. All that remained to be done was to check up the invoice furnished by plaintiff to the defendant for the purpose of ascertaining what deduction should be made on account of goods sold out of the stock subsequent to the time that the said invoice was furnished. *Hudson v. Weir*, 29 Ala. 294; 4 Mayfield's Dig. p. 745, § 50. Plea No. 1 was the general issue, and, as we have said, plea No. 4 was the plea of set-off. These were the only pleas upon which the case was tried. In the absence of special pleas of a breach of warranty or of fraud, evidence of such matters is irrelevant, and should not be admitted against the objection of the party against whom it is offered. There was evidence of this character admitted against the objection of the plaintiff, and in this respect the trial court committed error.

The contract sued upon contains the following express warranty: "The said party of the first part warrants said goods, stock, and fixtures free of any debt, mortgage, incumbrance, or adverse claim of any kind." And the contract contains the further clause: "Should the goods not turn out as per said invoice, or the party of the second part fail to secure said house to October 1, 1904, or the length of term lease of the party of the first part runs, then this contract is null and void." The contract containing an express warranty excludes the idea of any other warranty than that so expressed. Moreover, as was said in *West v. Cunningham*, 9 Port. 104, 33 Am. Dec. 300: "The rule that a sound price warrants sound property, and unless there be a special agreement to take the property, sound or unsound, is not according to the course of judicial decisions of common law, and is not the law of

this state." But we need not pursue the discussion along this line, since, under the issues in the case, evidence of misrepresentation in the sale of the goods was not competent, and should not have been admitted against the objections of the plaintiff.

For the errors pointed out, the judgment of the court will be reversed, and the cause remanded.

Reversed and remanded.

HARALSON, ANDERSON, and DENSON, JJ., concur.

HUTCHINSON et al. v. NATIONAL BANK OF COMMERCE.

(Supreme Court of Alabama. April 28, 1906.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—RIGHT OF CREDITOR TO ASSERT THAT A FUND IS A TRUST FUND—ESTOPPEL.

A creditor of an insolvent, filing a petition before the register in chancery seeking a preference over other creditors, is not thereby estopped from asserting that a fund in the hands of the assignee is a trust fund held for his benefit.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, §§ 1016-1020.]

2. BANKS AND BANKING — COLLECTION OF DRAFTS — RELATION BETWEEN BANK AND HOLDER—CONTRACT.

A holder of a draft sent it to a bank for collection, with instructions to collect and remit the proceeds to a banker for the holder's credit. Held that, in view of the instructions, the relation between the bank and holder was that of principal and agent, and not that of creditor and debtor or general depositor, and the bank could not, without the consent of the holder, change the relation by any conduct in dealing with the proceeds.

3. TRUSTS—FOLLOWING TRUST FUNDS.

So long as trust property can be followed, the property into which it has been converted remains subject to the trust, and, where one mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 520.]

4. SAME.

The doctrine that, so long as trust property can be followed, the property into which it has been converted remains subject to the trust, applies in every case of a trust relation, and applies to moneys deposited in a bank and to the debt thereby created.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 514.]

5. SAME.

A holder of a draft sent it to a bank for collection, with instruction to collect and remit the proceeds to a banker for the holder's credit. The drawee of the draft paid it by his draft on a third person, which was sent by the bank to its correspondent. The correspondent collected the money from the third person, and afterwards paid the proceeds to the assignee of the bank, which was insolvent at the time it received the draft for collection. Held, that the holder traced the proceeds into the hands of the assignee, and showed that such proceeds constituted trust property for his benefit.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 526; vol. 6, Cent. Dig. Banks and Banking, § 575½.]

Appeal from Chancery Court, Lee County; W. W. Whiteside, Chancellor.

"To be officially reported."

Action by the National Bank of Commerce against J. N. Hutchinson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This cause was tried upon an agreed statement of facts, upon petition of the National Bank of Commerce to declare a trust in its favor on money in the hands of the assignees of the insolvent Shapard Bank and objections filed to the petition by the other creditors of the insolvent bank and the assignees. The agreed statement of fact is in the following words: "It is agreed that on February 19, 1905, the National Bank of Commerce in St. Louis sent to the Shapard Bank a draft on Erwin & Co. for \$572.63, with exchange, bill of lading attached, instructing that bank to collect the amount and remit in New York exchange to Messrs. Kountze Bros., bankers, New York City, for its credit, advising it by its numbers; that on the 24th day of February, 1904, said Erwin & Co. paid said draft by giving the Shapard Bank a draft on Charles Schuessler & Sons, at La Fayette, Ala., for \$640, which was the amount of the draft on Erwin & Co. and the amount of the freight on the shipment of corn covered by said bill of lading; that the Shapard Bank forwarded this Schuessler draft to the Bank of La Fayette for collection on February 25, 1904; that Charles Schuessler & Sons paid said draft to the Bank of La Fayette, and said bank placed the amount thus paid to the credit of the Shapard Bank; that on the 26th day of February, 1904, the said Shapard Bank, instead of following the instructions of the Bank of Commerce of St. Louis, sent it at St. Louis its draft No. 17,130 on the Hanover Bank, New York City, payable to the order of the Commercial Bank in St. Louis, for \$572.63, as proceeds of the collection of said draft, which the Commercial Bank forwarded on the 29th day of February, the day of its receipt, to the National Park Bank, of New York City for its credit; that on the day of the arrival of said draft No. 17,130 in New York City it was presented to the Hanover National Bank, which declined to pay the same, stating that the Shapard Bank was in the hands of the bank department; that the Shapard Bank closed its doors and ceased to do business after banking hours on the 26th day of February, 1904; that the Shapard Bank made an assignment of all of its property and assets to N. P. Renfro and A. L. Dowdell on the 3d day of March, 1904, at which time the Bank of La Fayette was indebted to the Shapard Bank in the said sum of \$640, paid it by Schuessler & Sons on the draft of Erwin & Co.; that after said assignment the said Bank of La Fayette paid the said sum of \$640 to Renfro and Dowdell as assignees of said Shapard Bank, and that said assignees now hold said sum of \$640 in their

hands as said assignees; that at the time the National Bank of Commerce sent the Shapard Bank the draft on Erwin & Co. for collection, and for several weeks prior thereto, the Shapard Bank was in an insolvent condition, in that its liabilities far exceeded its available assets, which ought to have been known to the officers of said bank and was not known to the National Bank of Commerce in St. Louis; that since said assignment said Shapard Bank has been ascertained by sworn appraisers to be hopelessly insolvent and is so reported by the assignees; that A. E. Barnett and other objecting creditors represented by him are creditors of the said Shapard Bank."

Albert E. Barnett, for appellants. George P. Harrison, for appellee.

DOWDELL, J. The Shapard Bank, being insolvent, made an assignment for the benefit of its creditors. This trust was being administered in the chancery court under chapter 113, §§ 4152, 4173, of the Code of 1896. The money claimed by the Bank of Commerce as being held in trust for its benefit was in the hands of the assignees of the Shapard Bank, and held and claimed by the assignees under the deed of assignment. The Bank of Commerce, in filing its petition before the register in chancery seeking a preference over the insolvent bank's creditors, did not thereby estop itself from asserting a claim to the fund in question as a trust fund held for its benefit. *Winston v. Miller*, 139 Ala. 259, 35 South. 853. Under the agreed statement of facts, on which the case was heard by the chancellor, the relation between the Bank of Commerce and the Shapard Bank was neither that of creditor and debtor in the ordinary sense, nor of general depositor, but rather that of principal and agent. The draft on Erwin & Co., with bill of lading attached, sent to the Shapard Bank for collection by the Bank of Commerce, was coupled with instructions from the latter bank for specific application of the proceeds of the draft when collected. These specific instructions took the particular transaction without the ordinary course between corresponding banks, in which the relation of creditor and debtor, or general depositor, would result; and the collecting bank could not, without the consent of the initial bank and in violation of the latter's instructions, alter or change the relation so created by any subsequent conduct or action of its own in dealing with the proceeds of the draft when collected. The Shapard Bank was insolvent at the time it received the draft for collection, which fact was known to the officers of said bank, but unknown to the Bank of Commerce. To permit the insolvent bank under such circumstances, by its dealings in the collection of the draft and in violation of the instructions given, to prejudice the right of the owner of the funds when collected, would be contrary to every principle of equity and justice. The

principles above stated, we think, are fully sustained by authority. *Morse on Banking* (4th Ed.) vol. 2, § 568, and volume 1 of the same author, §§ 185, 188, 248; *Zane on Banks and Banking*, §§ 174, 190, 344; 3 Am. & Eng. Ency. Law (2d Ed.) p. 847, and note 4; *Grant v. Walsh* (N. Y.) 45 Am. St. Rep. 626.

The doctrine is well established that, so long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if one mixes trust funds with his own, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in a bank, and to the debt thereby created, as to every other description of property. *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693; *Evansville Bank v. German Bank*, 155 U. S. 556, 15 Sup. Ct. 221, 39 L. Ed. 259; *St. Louis Brewing Co. v. Austin*, 100 Ala. 313, 13 South. 908; *Bircher v. Walther*, 163 Mo. 461, 63 S. W. 681; *Paul v. Draper*, 153 Mo. 197, 59 S. W. 77, 81 Am. St. Rep. 296. In the case at bar, it is shown that Erwin & Co. paid the draft of the Bank of Commerce by their draft on Schuessler & Sons, which was sent by the Shapard Bank to the Bank of La Fayette. The last-named bank collected the money from Schuessler & Sons, which it afterwards paid to the assignees of the Shapard Bank. So the fund in question is traced directly into the hands of the assignees, and was accompanied with the trust character with which it was originally impressed. We concur in the conclusion of the chancellor, and his decree will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

FORD v. LEWIS.

(Supreme Court of Alabama. April 28, 1906.)

1. MORTGAGES — FORECLOSURE — MATURITY OF DEBT — NONPAYMENT.

Where a mortgage provided for a sale of the mortgaged property in case the mortgagor failed to pay the secured indebtedness or "any part thereof when due," it authorized a sale on default of any one of the notes, which default would operate as a forfeiture *pro tanto*.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1019.]

2. SAME — BALANCE OF DEBT — MATURITY.

Where a mortgage provided for payment of the debt in installments, the mortgagor's failure to pay either of the notes at maturity did not make the other notes fall due, in the absence of a provision in the contract to that effect.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1019.]

3. SAME — POWER OF SALE — SUBSEQUENT SALES.

Where a mortgage provided for a sale in case the mortgagor failed to pay the secured

indebtedness or any part thereof when due, but contained no power of sale from time to time as the indebtedness might mature, or authority to make more than one sale, a sale for nonpayment of a previous installment extinguished the power of sale, though the mortgagee was entitled to retain enough of the proceeds to satisfy the balance of the debt.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1019.]

4. FORCIBLE ENTRY AND DETAINER—MORTGAGES—REDEMPTION—RIGHTS OF CREDITORS.

Where a judgment creditor of a mortgagor complied with Code 1896, §§ 3507, 3510, authorizing a redemption of land from a mortgage foreclosure sale by a payment or tender to the purchaser of the purchase money, with 10 per cent. interest and all other lawful charges, etc., he was entitled to bring an action of unlawful detainer to recover the land, as provided by section 3513.

Appeal from Circuit Court, Marion County; E. B. Almon, Judge.

"To be officially reported."

Bill by Will B. Ford against J. C. Lewis. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Walter Nesmith, for appellant. C. M. Mitchell and J. T. Johnson, for appellee.

HARALSON, J. The mortgage in the case at bar is unlike the one in the case of Keith v. McLaughlin, 105 Ala. 342, 16 South. 898, as the mortgage in that case provided that there should not be a foreclosure until October 1st, 1882, the date of maturity of the last payment. The mortgage in the case at bar provides for a sale in case the mortgagor failed to pay the secured indebtedness or any part thereof when due, thus authorizing a sale upon default of any one of the notes, which said default would operate as a forfeiture pro tanto. Fudgham v. Morris, 75 Ala. 245; McLean v. Presley, 56 Ala. 211.

The promise in the mortgage was to pay in installments and when the mortgagor failed to pay either of the notes at maturity, he committed a breach of the contract and the mortgagee was authorized to take possession and sell. But the failure to pay one of the notes did not make the others fall due in the absence of a provision in the contract to that effect. The mortgage contains no power to sell from time to time, as the indebtedness may mature, or to make more than one sale, and, as the first one that was made was authorized, the second one was invalid. It has been held by this court that if the sale is made upon default of one instrument the mortgagee may retain enough of the proceeds to satisfy the others but he cannot make more than one sale of the property unless specially authorized to do so. McLean v. Presley, supra. The trial court, therefore, erred in allowing the defendant to prove the second sale.

The plaintiff having complied with the statute, sections 3507 and 3510 of the Code of 1896, was authorized under section 3513 of the Code of 1896 to bring this action. First National Bank of Anniston v. Elliott, 125

Ala. 646, 27 South. 7, 47 L. R. A. 742, 82 Am. St. Rep. 268.

The trial court erred in giving the general affirmative charge for the defendant, and should have given the one requested by the plaintiff.

Reversed and remanded.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

CENTRAL IRON & COAL CO. v. VANDERHEURK.

(Supreme Court of Alabama. April 28, 1906.)

INJUNCTION—CONTINUING TRESPASSES.

An injunction will lie to restrain the continuous throwing of rocks, by blasting, upon complainant's residence and grounds, though there is no showing of negligence in the blasting, and though no personal injuries have ensued.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 101.]

Appeal from Chancery Court, Tuscaloosa County; Alfred H. Benners, Chancellor.

"To be officially reported."

Suit by J. W. Vanderheurk against the Central Iron & Coal Company. From a decree for complainant, defendant appeals. Affirmed.

Henry A. Jones, for appellant. Vaughan & Davidson and Smith & Smith, for appellee.

ANDERSON, J. It is an elementary principle in reference to private rights that every individual is entitled to the undisturbed possession and enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others; otherwise, it might be made destructive to their rights altogether. In the case of Hay v. Cohoes, 2 N. Y. 159, 51 Am. Dec. 279, where the declaration charged that by the defendant and its agents and servants, while constructing a canal on their own premises, which they had the right and authority to do, large quantities of gravel, slate, and stone were thrown upon plaintiff's lands, the court said: "The use of land by the proprietor is not, therefore, an absolute right, but qualified and limited by the higher rights of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motive of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful business." Alfred's Case, 9 Coke, 58. "He may excavate a canal, but he cannot cast the dirt and stone upon the lands of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all

damages arising therefrom. He will not be permitted to accomplish a legal object in an unlawful manner." And it would seem that one who makes a blast on his own land, and thereby causes rock to fall upon the lands of another, or upon one on the highway, is liable as a trespasser for injuries inflicted, although the blast is fired for a lawful purpose and without negligence or want of skill. *Sullivan, Adm'r, v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; *People's Gas Co. v. Tyner* (Ind. Sup.) 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433.

It is true that the bill avers that the rocks were thrown on complainant's premises because of the negligent manner of blasting, and the undisputed evidence of respondents is that there was no negligent blasting; yet the bill avers that the rocks were constantly thrown on complainant's premises, and this fact was proven by his witnesses, and was contradicted only by circumstances and inferences. The complainant, consequently, made out a case for equitable relief, although he fails to prove that the blasting was negligently done, which was merely cumulative, and the nonexistence of which could not defeat the bill. *Noble's Adm'r v. Moses*, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175. While a complaining party cannot use a court of equity for the purpose of avoiding an action at law, which would afford redress, and which would doubtless give sufficient relief in a case of trespass to realty, and which involved no consideration for equitable interference, yet, if the wrong is of such a character that it makes out a case for which an action at law affords no adequate relief, a court of equity will prevent the wrong by injunction. *Wilson v. Meyer* (Ala.) 39 South. 317. "The chief forms in which inadequacy of the common law—the fundamental basis of all equity jurisdiction over torts—manifests itself are cases of irreparable injury, and cases of continuous or repeated nuisances involving a multiplicity of suits at law." *Pom. Equity*, vol. 5, p. 514. In the case of *Rogers v. Hanfield*, 14 Daly (N. Y.) 339, it was held that an injunction was proper to prevent a party, while blasting, from hurling large quantities of loose rock upon the premises of the complainant, notwithstanding he was doing so under instructions of a city ordinance. See, also, on this subject, *Hill v. Schneider* (Sup.) 43 N. Y. Supp. 1; *Pom. Eq. Juri.* 1357.

According to the averments of the bill and the proof, the wrongs are of a continuous character, constantly interfering with the enjoyment by the complainant and his family of his premises, and which do not fall short of a nuisance, and for which the complainant can not obtain adequate redress in a court of law. The fact that none of the occupants have thus far been hurt may weaken to some extent the complainant's proof, but it does not deprive the bill of equity. The

law does not consider that a man has the free enjoyment of his home, when large rocks are frequently hurled upon his house-top, in his yard, and upon his highway, simply because he has thus far escaped physical hurt. Nor does it help matters that the respondents give a warning signal before every blast, as the law does not require that it is incumbent upon a man to have to seek shelter for himself and family from a wrongful bombardment of his premises, although the aggressive party gives timely notice before committing the dangerous act. It must be also observed that if the defendants' theory is correct as to the manner of operating its quarry, and that the rock would not be hurled beyond its own land, then it cannot sustain any hurt or hindrance in the prosecution of its business by the decree of the chancellor, as the injunction does not restrain it from blasting, but simply from doing so in such a way as to molest the complainant.

The decree of the chancellor is affirmed.

WEAKLEY, C. J., and HARALSON, TYSON, SIMPSON, and DENSON, JJ., concur.

BIRMINGHAM RY., LIGHT & POWER CO. v. JONES.

(Supreme Court of Alabama. April 28, 1906.)

1. STREET RAILROADS—INJURIES TO PEDESTRIAN ON TRACK—COMPLAINT—ALLEGATION OF NEGLIGENCE.

A complaint in an action against a street railway company for the death of a child struck by a car, which alleges that a car ran against the child, and that he died by reason of and as a proximate consequence of the negligence of the company in or about the management of the car, sufficiently charges simple negligence in the management of the car.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 224.]

2. SAME.

A complaint in an action against a street railway company for the death of a child struck by a car, which alleges that the company wantonly caused or allowed the car to run against the child, and thereby wantonly and intentionally caused the death of the child, sufficiently charges an intentional wrong.

3. NEGLIGENCE—WANTONNESS—CONTRIBUTORY NEGLIGENCE—DEFENSE..

Contributory negligence is no defense to a count charging the intentional killing of a person.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 85.]

4. TRIAL—INSTRUCTIONS—ASSUMPTION OF UNDISPUTED FACTS.

It is not reversible error to assume in an instruction an undisputed fact.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 432-434.]

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFANTS.

A child between 7 and 14 years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 124.]

6. STREET RAILROADS—INJURY TO PEDESTRIAN ON TRACK—INSTRUCTIONS.

An instruction in an action against a street railroad company for the death of a child struck by a car, which, after hypothesizing the failure of the motorman to do all that a reasonably prudent motorman would have done under the circumstances to save the life of the child, fails to further hypothesize that the failure proximately caused the injury, is erroneous.

7. TRIAL—ERRORS IN INSTRUCTIONS—CURED BY OTHER INSTRUCTIONS.

An error in an instruction in an action against a street railway company for the death of a child struck by a car, arising from the failure to hypothesize that the failure of the motorman to do what a reasonably prudent person would have done under the circumstances to save the life of the child proximately caused the injury, is cured by an instruction that if the motorman failed, after he became aware of the peril of the child, to do all in his power with the means at hand to save the child, and that the death was the proximate cause of such failure, the motorman was guilty of wantonness, authorizing a verdict for plaintiff, though the child was guilty of contributory negligence.

8. SAME—DUTY TO REQUEST INSTRUCTION.

Where the complaint in an action against a street railway company for the death of a child struck by a car charged that the company was guilty of simple negligence, and of wantonness and an intentional killing, and the court charged that plaintiff's case was made out on the jury being satisfied that either the first or second count of the complaint was true, it was the duty of the company to request a charge explanatory of the effect of contributory negligence on the count charging simple negligence, if it deemed that important.

9. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFANTS.

Mere capacity on the part of a child under 14 years of age to know danger is not necessarily sufficient to make him guilty of contributory negligence in doing a thing which would be negligence in one of mature age.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 125, 126.]

10. TRIAL—INSTRUCTIONS—IGNORING FACTS.

An instruction in an action against a street railway company for the death of a child struck by a car, which ignores the duty of the motorman to keep a lookout for persons on the track, is properly refused.

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

"To be officially reported."

Action by Bettie Jones, administratrix, against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Count 1: "Plaintiff claims of the defendant \$20,000 damages, for that on the 23d day of July defendant was operating a certain car by means of electricity upon a railway in Birmingham, Ala.; that when said car was at a point upon said railway where same was on grade with a certain street, to wit, Twenty-Second street, at or near its intersection with Avenue D, in said city, said car ran upon or against plaintiff's intestate, Harry Lee Jones, who was under 14 years of age, to wit, of 9 years of age, and so injured him that he died. Plaintiff alleges that said car ran upon or against her said in-

testate, and that he died as aforesaid, by reason of and as a proximate consequence of the negligence of the defendant in or about the management of said car." Count 2: "Plaintiff refers to and adopts all the words and figures of the first count, from the beginning thereof to and including the words 'that he died,' where they first occur together in said count. Plaintiff adds thereto the following words of averment: Defendant, through its agents upon said car, wantonly or intentionally caused or allowed said car to run upon or against said intestate as aforesaid, and thereby wantonly or intentionally caused the death of plaintiff's said intestate as aforesaid. The defendant interposed several grounds of demurrers to these counts, which were overruled, whereupon defendant interposed pleas of the general issue and several counts of contributory negligence, in that he was negligent in the way in which he went upon and conducted himself while on the track of the defendant, and that he negligently went upon and remained on the street railway track of the defendant without stopping or looking or listening for approaching cars upon such track, and that he negligently went upon or remained upon defendant's street railway track in front of an approaching car on said track."

Demurrers were sustained to the pleas of contributory negligence as answer to the second count of the complaint. The evidence for the plaintiff tended to show that the plaintiff's intestate was killed by a car on defendant's railway at or near the crossing of Twenty-Third street and Avenue B, in the city of Birmingham, on the date mentioned in the complaint. It further tended to show that he crossed the track about 125 feet in front of the car, walking pretty fast; that after crossing the track his hat blew off and fell right in the middle of the car line. He turned back to get it, and while stooping down to pick it up the car struck him; that when he stooped down to pick up the hat the car was then about 10 feet from him. Evidence also tended to show that no whistle was blown and the gong was not rung before it struck him. It is further shown that the car was going at a speed indicating no intention on the part of the motorman to stop it. The evidence for the defendant tended to show that at the time the boy was struck the bell on the car was being rung fast and loud; that the boy came out of an alley diagonally across the track; that the boy was running, and looked back to see how far the car was, and as the car was getting pretty close to where he was the boy increased his speed, as if to try to get across the track before the car got there; that the motorman was ringing the bell and holding onto his brake pretty tightly; that the car was 2 or 2½ feet from the boy when he got on the track; and that the car ran about 35 or 40 feet after it struck him.

The plaintiff requested the following charges, which were given: Charge 1: "Under the undisputed evidence in this case, if the jury believe it, plaintiff's intestate was under 14 years of age." Charge 2: "A boy under 14 years of age is prima facie presumed to be too young to be held responsible for lack of care and diligence for his own safety." Charge 3: "Even if the jury should be satisfied from the evidence that plaintiff's intestate was guilty of contributory negligence in subjecting himself to danger of being run upon by the car, yet if the jury are further reasonably satisfied from the evidence that, after the motorman became aware of the danger of plaintiff's intestate, he failed to do all that a reasonably prudent and cautious motorman could and would have done under the same circumstances to save the life of plaintiff's intestate, then such contributory negligence of plaintiff's intestate is not the proximate cause of his death, and the jury cannot find for the defendant under its plea of contributory negligence." Charge 4: "If the jury are reasonably satisfied from the evidence that the defendant's motorman in charge of the car consciously failed, after he became aware of the peril of plaintiff's intestate, to do all in his power with the means at hand known to him to save the life of plaintiff's intestate, and that the death of plaintiff's intestate was the proximate cause of such failure, as charged in the second count of the complaint, then the motorman would be guilty of wantonness, and the jury will find for plaintiff, even though the jury should believe that plaintiff's intestate was himself guilty of contributory negligence which proximately helped to bring about his death." Charge 5: "In this cause it is not necessary for plaintiff to prove her case beyond a reasonable doubt, but plaintiff's case is made out if the jury are reasonably satisfied from the evidence that either the first or second count of plaintiff's complaint is true." Charge 9: "Mere capacity to know danger, though it is this in a boy under 14 years old, is not necessarily sufficient to make him guilty of contributory negligence in doing a thing which would be negligence in one of mature age."

The defendant requested the following charges, which were refused: Charge 3: "If from all this evidence you believe that the motorman did everything that could have been done to prevent the car from running over the boy, you must render your verdict in favor of the defendant." Charge 5: "If you believe from the evidence that the motorman saw the boy running in a diagonal direction towards the track, that when he saw the boy running towards the track the motorman sounded his gong repeatedly to warn the boy of the approach of the car, that when the boy was 8 or 10 feet from the track and the car was 8 or 10 feet from the boy he looked towards the car and immediately in-

creased his efforts to get across the track in front of the car, that as soon as the motorman saw the boy running towards the track he put the brake on the car and reduced the speed of the car from 7 or 8 miles an hour to 4 or 5 miles an hour, that when the boy looked towards the car the speed of the car had been reduced to 4 or 5 miles an hour, and as soon as the motorman saw that the boy was going upon the track in front of the car the motorman reversed the car and did all he could to stop the car and prevent striking the boy, you must find your verdict for the defendant."

There was verdict and judgment for plaintiff for \$5,000.

Tillman, Grub, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

HARALSON, J. The first count was sufficient to charge simple negligence, the negligence complained of relating to the management or control of the car. *L. & N. R. R. Co. v. Marbury Lumber Co.* 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 South. 700; *C. of G. R. R. Co. v. Freeman*, 134 Ala. 354, 32 South. 778; *M. & O. R. R. Co. v. George*, 94 Ala. 216, 10 South. 145.

The second count properly charged wantonness or an intentional wrong. *Russell v. Huntsville R. R.*, 137 Ala. 627, 34 South. 855; *C. of G. R. R. v. Foshee*, 125 Ala. 226, 27 South. 1006.

Contributory negligence is no defense to a count charging wantonness and the intentional killing of deceased, and the demurrers to said pleas setting up that defense, as to the second count, were properly sustained. *L. & N. R. R. Co. v. York*, 128 Ala. 305, 30 South. 676; *Highland Avenue & Belt R. R. v. Robbins*, 124 Ala. 118, 27 South. 422, 82 Am. St. Rep. 153; *L. & N. R. R. Co. v. Markee*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21.

Charge 1 for plaintiff stated an undisputed fact, and while the trial court would not be reversed for refusing it, it was not reversible error to give it.

A child between 7 and 14 years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity. There was no error in giving charge 2. *Pratt Coal Co. v. Brawley*, 83 Ala. 371, 3 South. 555, 3 Am. St. Rep. 751; *Government St. R. R. Co., v. Hanlon*, 53 Ala. 70.

Charge 3, for the plaintiff, if not faulty in other respects, after hypothesizing the failure of the motorman to do all that a reasonably prudent and cautious motorman could and would have done under the circumstances to save the life of plaintiff's intestate, fails to further hypothesize, that such failure itself proximately caused the injury, without which averment the charge was fault-

ty, and its giving was error. *L. & N. R. R. Co. v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116.

Charge 4 requested by the plaintiff contains the averments lacking in the third charge, and this redeems it from error.

Charge 5 stated a truism. The plaintiff made out her case if either count was proved. The defendant could have requested a charge explanatory of the effect of contributory negligence upon the 1st count, if it deemed that important.

We have not been shown that there was reversible error in giving charge 9, requested by the plaintiff.

Charge 3, refused to the defendant, was misleading if not otherwise faulty. It ignores the duty of the motorman to keep a lookout for persons or obstructions on the track.

The fifth charge refused to the defendant was argumentative and gave undue prominence to one phase of the evidence. *Ross v. State*, 139 Ala. 144, 36 South. 718. Besides, the charge given for defendant on top of page 10 of the transcript, which we have marked A, was in effect substantially the same as this refused charge and equally as favorable to the defendant.

The judgment of the city court is reversed and the cause remanded.

Reversed and remanded.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

W. J. BENNETT & CO. v. BROOKE.

(Supreme Court of Alabama. April 28, 1906.)

1. APPEAL—REVIEW—HARMLESS ERROR—STRIKING OUT SPECIAL PLEAS.

The striking out of special pleas as being frivolous, where issue was joined on the general issue with leave to introduce in evidence any special matter of defense which might be specially pleaded under that issue, was not reversible error.

2. SALES—TITLE AS TO THIRD PERSONS.

Where one purchased cotton seed hulls from one who had no title thereto, he could acquire no better title than the seller, though he purchased without notice of the real owner's title and for a valuable consideration.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 692.]

3. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTION.

Where the affirmative charge was properly given for plaintiff, there was no error in refusing charges requested by the defendant.

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

"To be officially reported."

Action by George W. Brooke against W. J. Bennett & Co. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The complaint in this case was in the following language: "Plaintiff claims of the defendants \$500 damages for the conversion by them between the months of November,

1901, and September, 1902, of the following chattels, to wit: 1,130 bales of cotton seed hulls, of the average weight of 66½ pounds, the property of plaintiff. The defendants interposed the general issue and the following special pleas: "(2) The defendants for plea allege that Leo H. Johnson did business in Huntsville, Madison county, Ala., during the period from 1901 to September, 1903; that he was a broker and wholesale dealer in corn, hay, potatoes, and other foodstuff; that his store or warehouse was situated in Huntsville, Ala., on West Clainton street, near depot of the Nashville, Chattanooga & St. Louis Railway Company; that defendants bought corn, hay, and other produce from said Johnson's said store or warehouse at different times; that defendants purchased the cotton seed hulls, the conversion of which is sued for, from said Johnson and from his said store and warehouse in the ordinary course of trade, for a valuable consideration, and without notice of any claim of ownership or other claim to said cotton seed hulls by any one; and that defendants are bona fide purchasers for value without notice. (3) And defendants for plea allege that the plaintiff herein, George W. Brooke, did, on the 5th day of December, 1903, bring a suit in trover against Leo Johnson for conversion of cotton seed hulls, a part of which said Leo Johnson had sold defendants; that subsequently, at November, 1903, term of this court, plaintiff, Brooke, dismissed his said plea against said Johnson, and said case is numbered 3,800 on the docket of this court; and defendants allege that on the 7th of August, 1903, said Brooke bought his suit in detinue, suit numbered 3,761 on the docket of this court, against the said Johnson for cotton seed hulls, part of which had been sold to defendant, who are bona fide purchasers for value and without notice, by said Leo Johnson, who was in the business of a broker or merchant, who sold at wholesale corn, hay, and other foodstuffs from a store or warehouse, and that at the November term, 1903, of this court, said Brooke dismissed said cause; and defendants plead the dismissal of said suits brought by Brooke covering the subject-matter of this suit against said Johnson as a defense in bar of this action. (4) Defendants say that Leo Johnson was a broker and merchant dealing in food and feed stuffs as his principal business from November, 1901, to about November, 1902, in the city of Huntsville, Ala.; that his principal business was that of a warehouseman, but he sold his own food and feed stuffs from said store or warehouse, and that defendants were customers of said Johnson and bought articles sold by said Johnson from his said store or warehouse; and that defendants bought cotton seed hulls, the conversion of which is here sued for, in the regular course of business from his said store or warehouse, and this for valuable consideration and without

notice, actual or constructive, of any title or claim in another. (5) Defendants say that plaintiff became indebted to Leo Johnson for storage of a large amount of cotton seed hulls, the conversion of part of which is here sued for, and that plaintiff did not pay said Johnson when payment was requested for such storage, and that said Johnson sold part of the cotton seed hulls so stored, and applied the proceeds of such sale on what plaintiff owed for storage; that Brooke instituted two suits in this court against said Johnson, one in detinue, numbered 3,761 on the dockets of this court, and another in trover, numbered 3,800 on the docket of this court, and defendants aver that said suits were dismissed by plaintiff therein, George W. Brooke, plaintiff herein, and defendants aver that said Johnson applied the proceeds of the cotton seed hulls sold by him, stored by plaintiff, on what plaintiff owed him for storage of a large amount of cotton seed hulls, and that said Brooke, in dismissing his said suits against said Johnson, acquiesced in such sale and application of the proceeds, and that in paying his own debt in full or in part to said Johnson for storage by dismissing said suits settled and liquidated any claim which he had against said Johnson for conversion of said cotton seed hulls; and defendants plead such settlement in bar of this suit, and aver that a settlement for conversion between plaintiff and said Johnson of the said cotton seed hulls settles and wipes out any claims which plaintiff might have against defendants, who are the vendees of Johnson. (6) Defendants say that plaintiff became indebted to Leo Johnson for storage for a large amount of cotton seed hulls, the conversion of part of which is here sued for, and that plaintiff, George W. Brooke, did not pay said Johnson when payment was requested for such storage, and that said Johnson sold part of the said cotton seed hulls so stored to defendants, the conversion of which is here sued for, and applied the proceeds of such sale on what plaintiff owed for storage, and defendants would show that said Johnson notified plaintiff that he would sell said cotton seed for storage unless the storage charges were paid; and defendants aver that there is no statute in Alabama prescribing the methods of warehousemen in such case with Johnson, and directing how property stored may be sold for charges unpaid; and defendants aver that there was no contract, expressed or implied, between said Johnson and plaintiff, directing any method of sale of the stored hulls, charges remaining unpaid; and defendants aver that said Johnson had a right to sell so much of said hulls as might be necessary to pay storage charges unpaid after notice to plaintiff, the owner which was given."

On motion orally made by the plaintiff the court struck the special pleas numbered 2, 3, 4, 5, and 6, because they were frivolous, and issue was joined on the general issue,

with leave to introduce in evidence any special matter of defense which might be specially pleaded under said issue. Evidence showed that plaintiff had stored a lot of hulls with Johnson as warehouseman, and had taken his receipt for the same as such warehouseman; that the hulls here sued for were sold by Johnson to the defendant; and that he had never accounted to plaintiff for the proceeds of said sale. The court directed a verdict for the plaintiff.

Jerry Murphy, Jr., for appellant. Cooper & Foster, for appellee.

ANDERSON, J. If any one of the pleas that were stricken did not come within the influence of section 3286 of the Code of 1896, then the defense attempted thereunder was available under the general issue, and the action of the court in sustaining the motion to strike was not reversible error.

The undisputed evidence showed that the hulls belonged to the plaintiff when converted by the defendants, who got them from Johnson, and, as the said Johnson had no title thereto, his vendee could acquire no better title than he had, whether purchased with or without notice of plaintiff's title and for a valuable consideration. "One who, though acting in good faith, purchases a chattel from a person in possession, but without title or authority or indicia of authority, from the true owner to sell, acquires as against the true owner, no title, and the latter may maintain trover for its conversion." 26 Am. & Eng. Ency. Law (2d Ed.) p. 702; *Blackman v. Lehman*, 68 Ala. 547, 35 Am. Rep. 57; *Milner & Kettig Co. v. De Loach Mfg. Co.*, 139 Ala. 645, 36 South. 765, 101 Am. St. Rep. 63.

The court properly gave the general affirmative charge for the plaintiff. As the affirmative charge was properly given for plaintiff, there was no error in refusing the charges requested by the defendant.

None of the evidence offered or attempted to be brought out by the interrogatories to which objection was sustained had any tendency to weaken plaintiff's title or set up other facts to defeat his recovery, and the ruling of the trial court thereon was free from error.

The judgment of the circuit court is affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

EBERSOLE v. SOUTHERN BUILDING & LOAN ASS'N.

(Supreme Court of Alabama. April 28, 1906.)

1. PRINCIPAL AND AGENT—POWERS OF AGENT—BURDEN OF PROOF.

In an action against a building association by a stockholder, claiming that defendant by its solicitor had guaranteed maturity of the stock

in 72 months, the burden was on plaintiff to show the agency of one making the guaranty and that it was within the scope of his authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 36, 400.]

2. BUILDING AND LOAN ASSOCIATIONS—MATURITY OF SHARES.

An estimate made by a building and loan association as to the time when stock will mature cannot be held to be a guaranty, but is merely the expression of an opinion.

3. DEPOSITIONS.

Under Code 1896, § 1841, making it the duty of a commissioner to reduce the answers of a witness to writing, or cause it to be done by the witness himself or some impartial person, a commissioner is not required to himself take down the answers of a witness in the commissioner's own handwriting.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 149.]

Appeal from Chancery Court, Jefferson County; John C. Carmichael, Chancellor.

"To be officially reported."

Suit by C. D. Ebersole against the Southern Building & Loan Association. From a decree dismissing the bill, complainant appeals. Affirmed.

A. Latardy, for appellant. Cabaniss & Weakley, for appellee.

HARALSON, J. The certificates of stock of the complainant in the defendant Association, recited that the shares of stock were subscribed for, "subject to all the conditions, rules, regulations and by-laws of said Association now in force or which may be hereafter enacted."

In his application for shares of stock, which formed part of his contract with the Association, complainant agreed "to abide by all the terms, conditions and by-laws" of the company.

Section 1, art. 2 of the by-laws provides, "The certificates, terms and conditions of shares of the Association, the by-laws and the application for membership, form the contract," with the company.

The bill as originally filed,—and this is the controlling point in litigation,—alleged that the complainant, in July, 1889, subscribed for and had issued to him twenty (20) shares of the stock of the defendant Association of the par value of \$1000.00, and at the time said subscription was made, the Association guaranteed to him that the stock would mature after seventy-two (72) monthly payments thereon; that afterwards, on the 5th day of October, complainant subscribed for twenty (20) additional shares, on the faith of a similar guaranty, as to the maturity thereof; that complainant had borrowed of the Association various sums of money, aggregating more than fifteen hundred (\$1,500.00) dollars, to secure which, all of said shares of said stock had been pledged to the Association, and a mortgage had been executed by him, also, on certain real estate, to secure one of the loans of \$1,000.00; that complainant had made seventy-two monthly

payments on all of said shares, but that the Association had failed to mature the same, and was taking steps to foreclose said mortgage. The bill prayed for an injunction against said Association; that the mortgage might be canceled, and also asked for an accounting.

The answer denied that said Association made any promise or agreement with complainant that said stock would mature in seventy-two months, as alleged in the second and third paragraphs of the bill, and denied specifically; that the Association ever, at any time, made any promise or agreement with complainant, that any of the shares of stock would mature at any definite time, or on the payment of any definite number of monthly installments on said stock. On final hearing on pleadings and proof, the chancellor dissolved the injunction theretofore granted, and dismissed the bill.

The complainant testified, that he was solicited to take the stock by one Mr. Hammon, who guaranteed that the stock would mature in seventy-two months; and W. A. Simmons testified, in substance, to the same thing; but on his cross-examination he testified substantially that the literature of the company which Hammon handled, contained the guaranty; but it is not anywhere satisfactorily shown, that Hammon stated to the complainant, that the Association would guaranty the stock to mature in the time stated, nor that it was so represented in the Association's literature. It does not even clearly appear that Hammon was an agent of the company and there is an entire lack of evidence to show that he had any authority to make a guaranty for the company. From aught appearing, he may have been engaged, merely, in soliciting stock under some agent of the Association; and whatever Hammon may have said to, or agreed with complainant in respect to the maturity of the stock, was not binding on the Association. It was done so far as appears, without the authority or approval of the Association. The burden was on the complainant to show the agency and that the guaranty was within the scope of the agent's authority, neither of which was established. Across one of the applications for stock was printed in red ink, "Agents have no authority to inspect property, or to promise a loan, at any given time, or make any promise not in conformity with our printed matter."

The witness, S. R. Cruse, examined by defendant, who was the secretary of the Association, was asked by complainant on the cross, if it was not a fact that the Association undertook that all its shares both to investors and borrowers, alike, should mature on the basis of seventy-two monthly payments, and he replied, "I do not know of any literature originally issued by the Association setting forth such an undertaking on the part of the Association. The literature of the Association has always been upon

the basis of an estimate; that is, an estimate simply of the amounts that would probably be realized in about six years. * * * The original by-laws do not provide for maturity after making seventy-two payments. Section 18 of the by-laws fully sets forth about the maturity of the shares, but no mention is made as to the number of payments being 72." Attached to the deposition appears what purports to be a bulletin, as a part of the literature of the Association setting forth its objects, plans, etc., in which appears, as a part of its plan, the following: "The Southern Building & Loan Association issues shares (limited by the laws of the state of Alabama) of \$50.00 each. Any person may become a shareholder and apply for a number of shares. Whenever the amount in the loan fund to the credit of the share (from maturity payments and profits) equals \$50.00, such shares shall be fully paid in and be considered to have fully matured, and no more monthly payments shall be required. All shares are estimated to mature in about six years from their date, and the member may withdraw such shares and receive \$50.00 therefor." In all that appears in evidence, it would seem to be fully established, with nothing to the contrary,—except the vague and uncertain evidence of complainant and Simmons as to what Hammon stated to them, and their uncertain recollection of what the literature of the company contained,—that no definite time was ever stated to those witnesses or published to the world in the literature of the Association, as to when the shares would certainly mature. It does appear, that it was estimated that the shares would mature in about six years or seventy-two months. But there was no guaranty to this effect. Furthermore, it appears from the evidence, that complainant discontinued the payments of maturity installments on his shares before the amount in the loan fund to the credit of his shares, from maturity payments and forfeits, equaled \$50.00 for each share, and that the payments were discontinued prior to the time when maturity could be declared. At the time he ceased to pay on the shares, or discontinued payment of dues, the value of one of his certificates, number 429, was \$658.28, and of the other, number 4,590, was \$612.36.

It is true that the Association, for several years after it commenced business, estimated that its stock would mature after seventy-two monthly payments. Every association doing a similar business, must, necessarily make such an estimate, that its stockholders and borrowers may form some idea when the stock will mature; but such an estimate cannot be held, and was never held, so far as we know, to be a guaranty of the time of the maturity of the stock. Such representations were no more than the expression of opinion on matter equally open to the observation and inquiry by both parties, and cannot be treated as false representations.

We have had occasion heretofore, to treat of this subject very fully, and will not now do so again. *Beyer v. National Building & Loan Association*, 131 Ala. 876, 31 South. 113; *Motes v. People's Building & Loan Association*, 137 Ala. 374, 34 South. 344; *Johnson v. Southern Building & Loan Association*, 121 Ala. 524, 26 South. 201.

The motion to suppress the deposition of Cruse, on the grounds stated therefor, was properly overruled. There is no rule or statute that requires the commissioner, himself, to take down the answers of a witness in his own handwriting. "It is the duty of the commissioner to reduce the answers of the witness to writing, or cause it to be done by the witness himself, or some impartial person, as near as may be, in the language of the witness," etc. Code 1896, § 1841.

There are other questions raised and discussed, but they are unimportant, as what we have said disposes of the case.

Affirmed.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

WARE v. STATE.

(Supreme Court of Alabama. May 8, 1906.)

INDICTMENT — NECESSITY — ENTICING EMPLOYÉS.

Acts 1898-99, p. 257, creating the county court of Elmore county, does not give that court jurisdiction to try without indictment a defendant tried and bound over by a justice of the peace for violation of Code 1896, § 5506, as amended by Acts 1901, p. 1215, prohibiting any person from enticing away employés of another.

Appeal from Elmore County Court; H. J. Lancaster, Judge.

"To be officially reported."

Alonzo Ware was convicted of crime, and appeals. Judgment of county court dismissed, and judgment rendered discharging defendant.

E. S. Thigpen, for appellant. Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. The defendant was tried by a justice of the peace for the violation of section 5506 of the Code of 1896, as amended by Acts 1901, p. 1215, upon an affidavit made before him, and upon a warrant issued by and returnable to him. He had no jurisdiction to try the case, except as a committing magistrate, and as such bind him over to the next term of the county court of Elmore county. The legal effect of binding the defendant over was that he await the action of the grand jury, and until he was indicted he could not have been tried upon said charge by the county or circuit court.

The act creating the county court of Elmore county (Acts 1898-99, p. 257) does not dispense with the necessity of an indictment in cases similar to this one. The county court

not having jurisdiction to try this case upon the affidavit, the prosecution should have been dismissed.

The judgment of the county court is dismissed, and one is here rendered discharging the defendant.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

WARE et al. v. MOBILE COUNTY.

(Supreme Court of Alabama. May 8, 1906.)

1. LICENSES — DEALING IN FUTURES — INTERSTATE COMMERCE.

A broker, engaged in buying and selling cotton for future delivery, employed a local agent to take orders of those desiring to buy or sell future cotton contracts, which were executed by the broker at the New York or New Orleans exchange. The customer, at the time of giving the order, deposited with the agent money as margin to protect the broker against loss in the event the course of the market was adverse to the customer. The broker furnished the customer with a memorandum reserving the right to close the transaction when the margin deposited was exhausted, and to settle the contract in accordance with the customs of the exchange at which the order was placed. The order of the customer was transmitted by wire by the agent to the broker's office in New York or New Orleans, where it was executed. Held, that the contracts entered into by the broker with his customers were not interstate commerce, and the broker was properly chargeable with the tax imposed by Gen. Acts 1903, p. 207, imposing a tax on persons engaged in the business of buying and selling futures for speculation.

2. SAME.

A shipment of cotton in discharge of such contract, though made from one state to another, was not interstate commerce by virtue of the contract, but by the subsequent and independent act of a party thereto; and the fact that the contracts were sometimes discharged by the delivery of cotton did not relieve the broker of the liability to pay the tax imposed.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by Mobile county against J. H. Ware and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This suit was commenced by Mobile county, and sought to recover of the defendants license tax for the year 1903 of \$250 for engaging in the business of buying and selling futures on commission for other persons in the city of Mobile, in the county of Mobile. The pleas were: (1) The general issue. "(2) Actio non, because they say that they paid the plaintiff the amount due for engaging in the business of buying and selling futures for other persons in the city of Mobile, such purchases and sales being made outside of the state of Alabama, and did obtain a license so to do prior to the passage of the act of the Legislature of Alabama approved — day of March, 1903, fixing said license at \$500 to be paid the state of Alabama and \$250 to Mobile county, and that they did engage in and carry on the business they were authorized

to do by said license so obtained by them as aforesaid; and the defendants aver that the license so obtained by them has never been revoked or canceled by the state of Alabama—all of which these defendants are ready and willing to verify. (3) Actio non, because they say that their agent in the city of Mobile, in the state of Alabama, receives orders from the customers of the defendants to buy and sell cotton futures upon the New York Cotton Exchange, in the city of New York, in the state of New York, said cotton so bought or sold to be received or delivered in said city of New York, in the state of New York; said agents of defendant sending said orders to defendant in the city of New York by telegram. And the defendants further aver that said agent of the defendant in the city of Mobile, in the state of Alabama, also receives orders from the customers of the defendants for the purchase and sale of future cotton upon and in the New Orleans Cotton Exchange, in the city of New Orleans, in the state of Louisiana. All of said cotton so bought or sold to be received or delivered in said city of New Orleans in the state of Louisiana. That the said agent of the defendants in the city of Mobile, in the state of Alabama, telegraphed said orders to the agent of the defendants in the city of New Orleans, in the state of Louisiana, who executes the same upon and in said Cotton Exchange." And the same allegations made as to future cotton are made as to grain and other things for future delivery. "(4) The defendant amends the second and third plea by inserting in the place thereof the following: And for further answer to each count of the complaint defendants say that the only business which they did in this state of Alabama, in the city of Mobile, during the time charged in the complaint, was interstate commerce business, and that they could not be required by the state of Alabama, or Mobile county, in said state, to pay a license for doing such business because the levy of such license tax on such business was an unlawful interference with interstate commerce business, and in violation of article 1, § 8, par. 3, of the Constitution of the United States."

The cause was tried on the following agreed statement of facts: "During the whole of the year 1903 defendants had an office in the city of Mobile, in the county of Mobile, in the state of Alabama. They also had offices in the city of New York, in the state of New York, and in the city of New Orleans, in the state of Louisiana, and in the city of Chicago, in the state of Illinois, each of which offices was connected by private telegraph wires with the said Mobile office. Said Mobile office was in charge of their agent, one Robbins, and was engaged in the business of buying and selling cotton futures for delivery on commission for the public generally and for special customers, said business being conducted in the following way, and in no other way: They would un-

dertake, through their agent, to buy or sell a cotton future contract for a customer in the cotton exchange in New York or in New Orleans, as he might select; he making at the time a deposit of money with his as a margin to protect them against law in making such transaction for him. When the customer gave the order to Ware & Leland either for a sale or a purchase of a future contract, it was not usual for anything to be said between them about a natural delivery of the cotton; but when the transaction was commenced by a purchase or sale of the cotton, Ware & Leland would immediately furnish to the customer a memorandum thereof, partly written and partly printed, upon which the following stipulations were printed: 'On all marginal business we reserve the right to close transactions without further notice when margins are about exhausted, and to settle contracts in accordance with the rules and customs of the exchange on which the order is placed; it being understood and agreed in all trade that actual delivery is contemplated.' And: 'All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations, and customs of the exchange on which the order is placed, and the rules, regulations, and requirements of the board of managers of said exchange, and all amendments that may be made thereto.' Such agent would thereupon transmit such order by their private telegraph line to the defendants' office in the city, without the state of Alabama, selected for such transaction. Such order would be thereupon executed by defendant by the purchase or sale, as directed, of a future cotton contract for such customer in the cotton exchange of the city to which such order was sent, and subject to the rules and regulations of such cotton exchange, which rules and regulations may be introduced in evidence by the defendants in this cause. Said contract would be held by defendant for such customer until he ordered the same closed up, when they would sell or buy another cotton contract against it, as might be necessary to cover the same or close it out, or receive or deliver the cotton on said contract. If a profit was made on the transaction, defendants remitted it to its agent in Mobile, who paid it over to the customer. If a loss was made, it was taken by the agent out of the customer's margin, or, if that was insufficient therefor, the customer was called on for the balance. Said business was done on a commission paid defendants by the customer. No actual delivery of cotton or grain was ever made on any such contract, except in a few instances, when such deliveries were made where the contract was executed, to wit, in New York, or in New Orleans, or in Chicago. When any such delivery of cotton was made to defendant for the customer on a purchase by him, it was held by the defendant for account of the customer at the place of delivery, either in New York

or New Orleans, until ordered sold by the customer, and was then sold by them for the account of the customer, and the proceeds accounted for by them to such customer. When they made delivery of cotton on a sale of futures made by them for a customer, the cotton was shipped by the customer for whom such sale was made from Alabama to the place of sale, and there delivered through defendants to the buyer. A similar future grain business was done by defendants at their said office in Mobile, Ala., for customers, through their office in Chicago, in the state of Illinois; said orders being executed on the Chicago, Ill., Board of Trade, and subject to its rules and regulations, which contemplated and provided for the actual receipt or delivery of grain bought or sold therein, such delivery to be made in Chicago, Ill. During the whole year 1903 said city of Mobile, Ala., was a city of more than 20,000 inhabitants. Defendant paid to plaintiff a license tax of \$100 for doing such business in said city for the year 1903, which payment was made prior to the 4th day of March 1903. They have not paid any further license tax to plaintiff for doing such business in said year. It is agreed between the parties to this cause that if, upon the foregoing facts and such other evidence as may be introduced, the business so done by defendants was interstate commerce business, and a license tax thereupon would be an unlawful interference with interstate commerce business, and in violation of article 1, § 8, par. 3, of the Constitution of the United States, then defendants are entitled to a verdict."

B. B. Boone, for appellants. R. H. & N. R. Clarke, for appellee.

TYSON, J. Subdivision 40 of the act "to better provide for the revenue of the state" (Gen. Acts 1903, p. 207) reads as follows: "For each person engaged in the business of buying and selling futures for speculation or on a commission either for themselves or for other persons, and each place of business commonly known as cotton exchanges, or stock exchanges and sometimes called 'bucket shops' in towns and cities of twenty thousand inhabitants or more, five hundred dollars; in all other towns and cities, two hundred and fifty dollars; but this shall not be held to legalize any contract which would otherwise be invalid." It appears from the agreed statement of facts, upon which the case was tried, that during the whole of the year 1903 defendants conducted the business in the city of Mobile, a city of more than 20,000 inhabitants, of buying and selling cotton for future delivery on commission, for the public generally and for special customers. The local agent in that city would take the order of those desiring to buy or sell future cotton contracts, which would be executed by defendants upon the New York or New Orleans exchange; the customer at the time of giving the order,

depositing with the local agent a sum of money as margin to protect the defendants against loss in the event the course of the market was adverse to the side of the customer. When the order was given, it was not usual to say anything about an actual delivery of the cotton; but defendants furnished the customer with a memorandum reserving the right to close the transaction when the margin deposited was about exhausted and to settle the contract in accordance with the rules and customs of the exchange on which the order was placed. This memorandum also contained the stipulation that "in all trades actual delivery is contemplated," and the further stipulation that "all purchases and sales made by us for you are made in accordance with and subject to the rules, regulations, and contracts of the exchange on which the order is placed," etc. The order of the customer was then transmitted by wire by defendants to their office in the city of New York or New Orleans, where it was executed. The contract thus purchased or sold, as the case may be, was held by defendants for the buyer or seller, their customer, until the same was ordered closed out, which was done by buying or selling another contract against it, as might be necessary to cover it or close it out, or receive or deliver cotton on the contract. If a profit were made in the transaction, it was remitted by defendants from the office where made to the Mobile office and there paid over to the customer. If a loss was incurred, it was taken by the Mobile office out of the customer's margin, and, if that was insufficient to pay the loss, the customer was called on for the balance. No actual delivery of cotton was ever made on such contracts, except in a few instances, and then at the place of its execution, to wit, New York or New Orleans. When the cotton was delivered on a contract of purchase, it was held by defendants for the purchaser, as his agents, until they were ordered to sell it. When the delivery was made upon a contract of sale, the seller would ship the cotton from Alabama to New York or New Orleans, the place of delivery, and defendants, as his agents, would there deliver it to the buyer.

The only question presented for our consideration is whether the business thus shown to have been engaged in by defendants was interstate commerce, and therefore not subject to the license tax sought to be collected of them; for clearly, if the business is not subject to be taxed, although the one for which defendants are here sought to be made liable may be characterized as an occupation tax, there can be no recovery in this case. *Stratford v. City Council of Montgomery*, 110 Ala. 619, 20 South. 127. But the defendants' business of making contracts of buying and selling future cotton for their customers is not interstate commerce. Indeed, these contracts are not articles of commerce at all. 17 Am. & Eng.

Ency. Law (2d Ed.) p. 61. As was said by the Supreme Court of the United States in *Paul v. Virginia*, 8 Wall. 183, 19 L. Ed. 357, in speaking of policies of insurance: "These contracts are not contracts of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. "See, also, *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *N. Y. Life Ins. Co. v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116. This principle, we think, clearly controls in this case, and its application to the facts makes the defendants liable. The contracts entered into by defendants for their customers, if discharged by the payment of differences in the market values, though executed in another state by and through their agents, the defendants, are clearly not articles of commerce; and the transaction was not different from one that the customer himself in person executed the order on the exchange in New York or New Orleans. Nor is it of consequence, in so far as the question here is involved, that the contracts were sometimes discharged by the delivery of the cotton. While it is true the cotton may have become an article of interstate commerce, it never became an article of trade from one state to another until it begun to move, and this movement did not begin until the cotton was shipped or was started for transportation from the one state to the other. *Kidd v. Pearson*, 128 U. S. 25, 9 Sup. Ct. 6, 32 L. Ed. 346.

There is no stipulation shown in the agreed statement of facts which required the seller to ship cotton from any point. He was at liberty to acquire the cotton in the market of delivery or elsewhere; hence a shipment from one state to another for delivery under the contract would not be interstate commerce by virtue of the contract, but by the subsequent and independent act of the seller, and the shipment in that event would not become interstate commerce until the cotton had commenced to be transported. The case of *Stratford v. City Council*, supra, relied upon by appellants, clearly has no application. In that case *Stratford* was a broker representing several nonresident wholesale dealers in grain and provisions who lived and carried on their business in other states, and every order for goods from local merchants received or obtained by him was forwarded to his principal, subject to the approval of such principal; and if the order was accepted by the nonresident deal-

er, he shipped the goods from his place of business to the purchaser, who did business in the city of Montgomery.

Affirmed.

WEAKLEY, O. J., and SIMPSON and ANDERSON, JJ., concur.

WARE et al. v. STATE.

(Supreme Court of Alabama. May 8, 1906.)

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"Not officially reported."

Action by the state against J. H. Ware and others. From the judgment, defendants appeal. Affirmed.

B. B. Boone, for appellants. R. H. & N. K. Clarke, for the State.

PER CURIAM. Affirmed, upon the authority of Ware et al v. Mobile County (decided at this term) 41 South. 153.

BROOKS v. STATE.

(Supreme Court of Alabama. May 8, 1906.)

1. PHYSICIANS AND SURGEONS—LICENSE TO PRACTICE—CERTIFICATES—STATUTES—EFFECT.

Code 1896, § 5333, provides that any person who practices medicine or surgery without first obtaining a certificate of qualification from one of the authorized boards of medical examiners of the state, on conviction, shall be fined. Section 3262 declares that the standard of qualification, etc., shall be prescribed by the medical association of the state. *Held*, that such sections conferred on such associations full authority to prescribe rules and regulations governing the issuance of certificates of medical practitioners.

2. SAME—RULES—COUNTERSIGNING—CERTIFICATES.

The State Medical Association having adopted a rule in 1899 that all medical certificates issued by county boards of examiners should be countersigned by the senior censor of the State Medical Association before they should become valid, as authorized by Code 1896, §§ 3262, 5333, a certificate subsequently issued, not so countersigned, was insufficient to authorize the holder to practice medicine.

3. SAME—OFFENSES—PROSECUTION—EVIDENCE.

In a prosecution of a physician for practicing without a certificate countersigned by the senior censor of the State Medical Association, in violation of Code 1896, § 5333, defendant's diploma and proof of the length of time he practiced medicine were inadmissible.

4. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

Where, in a prosecution of a physician for practicing medicine without a certificate, it was undisputed that he actually practiced medicine for pay, he was not prejudiced by the allowance of a question as to whether or not he held himself out to the world as a practicing physician.

5. PHYSICIANS AND SURGEONS—RIGHT TO PRACTICE—PROSECUTION—EVIDENCE.

In a prosecution of a physician for practicing without a certificate countersigned by the senior censor of the State Medical Association, evidence that other physicians had no such

certificates and had not taken examinations was inadmissible.

6. CRIMINAL LAW—WITNESSES—RULES.

In a criminal prosecution, it was within the discretion of the court to excuse one of the witnesses from the operation of the rule.

7. SAME—EVIDENCE—GENERAL OBJECTIONS—SUFFICIENCY.

A general objection to documentary evidence offered in a criminal case, stating no grounds of objection, is insufficient to present the ruling for review on appeal.

Appeal from Circuit Court, Marion County; E. B. Almon, Judge.

"To be officially reported."

T. P. W. Brooks was convicted of practicing medicine or surgery without first obtaining a certificate of qualification, and he appeals. Affirmed.

C. P. Almon, J. D. McLester, and C. E. Mitchell, for appellant. Davis & Fite, and Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. The defendant was convicted in the lower court for the violation of section 5333 of the Code of 1896, which reads as follows: "Any person, who practices medicine or surgery without having first obtained a certificate of qualification from one of the authorized boards of medical examiners of this state, must, on conviction, be fined not less than twenty-five, nor more than one hundred dollars." Section 3262 of the Code of 1896 says: "The standard of qualification, the method or system, and the subjects of examination of practitioners of medicine, shall be prescribed by the Medical Association of the State of Alabama, and must be observed by the boards of medical examiners." It will be observed that the lawmakers have clothed the Medical Association of the State of Alabama with full authority to prescribe the rules and regulations governing the issuance of certificates to medical practitioners. And our statutes in this respect are not only intended as a means of maintaining a high standard in the ranks of the medical profession, but are designed to protect the public from imposition and fraud by authorizing the State Medical Association to prescribe the rules and restrictions governing the issuance of certificates to those engaged in or desiring to engage in the practice of medicine.

The State Medical Board adopted in 1899 the following ordinance: "Be it ordained by the Medical Association of the State of Alabama that hereafter all certificates conferring the privilege of practicing medicine in this state, issued by county boards of examiners, shall be countersigned by the senior censor of the State Association before the same shall become legal and valid." It is to be noted that every certificate issued by a county board after the adoption of the above had to be countersigned by the senior censor; else it would be invalid. The state proved a prima facie case against the defendant, who attempted to defend under

a certificate issued by the county board, January 29, 1900, but which had not been countersigned by the senior censor of the state, and which was insufficient, and the objection by the state to the introduction of same was properly sustained.

There was no error in sustaining the state's objections to the defendant's attempt to introduce a diploma or proof of the length of time he had practiced medicine. These facts may have been sufficient to authorize the county board to issue him a certificate without undergoing an examination, but could in no sense make valid a certificate not issued in conformity with the rules of the State Association.

If there was any error in the ruling upon the question to witness Green: "State whether or not he held himself out to the world as a practicing physician?" it was error without injury, as the undisputed evidence was that he actually practiced medicine for pay. Code 1896, § 4333.

The conversations between the defendant and Dr. Moorman were clearly immaterial, and the objection thereto was properly sustained. Nor was it competent for defendant to show the action of the Medical Society of Marion County, since he did not show that it issued him a certificate prior to the adoption of the ordinance in 1899. Neither was it competent to show that other physicians had no certificates or had not stood examinations. If they were violating the law, it did not justify the defendant in doing so.

The trial court had a discretion in excusing Dr. Sanders from the rule. *Riley v. State*, 88 Ala. 193, 7 South. 149.

The trial court cannot be put in error for the ruling on the introduction of the book containing the constitution and ordinances of the State Medical Association, since the objection was but a general one; no grounds of objection having been assigned.

There was no error in giving the general affirmative charge requested by the state, and in refusing the one requested by the defendant.

The judgment of the circuit court is affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

PATTERSON v. STATE.

(Supreme Court of Alabama. May 8, 1906.)

1. CRIMINAL LAW—VENUE—COUNTY LINE.

Under Code 1896, § 4972, providing that when an offense is committed on the boundary of two or more counties, or within a quarter of a mile thereof, the jurisdiction thereof is in the court of either county, the circuit court of Lawrence county had jurisdiction to try defendant for a murder committed on an island in the Tennessee river, within a quarter of a mile of such county, though a little nearer to the Limestone county line.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 229.]

2. SAME — JURISDICTION OVER NAVIGABLE STREAMS.

The court also had jurisdiction under Code 1896, § 1400, providing that the jurisdiction over navigable streams not included within the limits of any county belongs to the county or counties whose jurisdiction extends to the margin thereof.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 229.]

3. HOMICIDE—EVIDENCE—WEAPONS—MATERIALITY.

Where, in a prosecution for homicide, it was claimed that deceased brandished a hand ax at defendant and stated that he was going to split defendant's head open, evidence as to whether defendant saw the hand ax at a certain mill on the morning of the homicide was material, as showing where the ax was.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 374.]

4. SAME—PREVIOUS DIFFICULTY.

In a prosecution for homicide, evidence of the particulars of a previous difficulty between defendant and deceased was properly excluded.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 343, 398.]

5. SAME—DUTY TO RETREAT.

In a prosecution for homicide, defendant cannot excuse his failure to retreat unless the circumstances are such that his peril would have been increased thereby beyond that to which he would have been subjected had he stood and defended himself against his assailant, or were such as to impress the mind of a reasonable man that the peril would have been increased, and that defendant was so impressed.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 168-171.]

6. CRIMINAL LAW—INSTRUCTIONS—REQUEST TO CHARGE.

The refusal of a request asked by accused is not error, where it is substantially the same as another instruction given at his instance.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

7. HOMICIDE—INSTRUCTIONS—ENTERING DIFFICULTY.

In a prosecution for homicide, an instruction that if defendant was free from fault in bringing on the difficulty which resulted in deceased's death, and at the time of the fatal encounter deceased was advancing on defendant with a deadly weapon and in a threatening manner, and defendant had no means of retreat without increasing his danger, he had a right to shoot and kill deceased in order to protect his own life, was properly refused for failure to hypothesize that defendant did not willingly enter into the difficulty.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 628.]

8. CRIMINAL LAW—ARGUMENTATIVE INSTRUCTIONS—REFUSAL.

In a prosecution for homicide, an instruction that the jury might consider the fact, if it was a fact, that defendant was a one-armed man, and the further fact, if it was a fact, that deceased was a strong and vigorous man, in determining whether or not defendant could have retreated with safety to himself, was properly refused as argumentative.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1959, 1960.]

9. HOMICIDE—INSTRUCTIONS.

In a prosecution for homicide, an instruction that if, at the time defendant fired the fatal shot, he was acting in defense of his own life or to prevent great bodily harm, he should be acquitted, was properly refused for failure to hypothesize freedom from fault on defendant's part in bringing on the difficulty and the im-

minence of the danger and defendant's ability to retreat.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 627-630.]

10. CRIMINAL LAW — ARGUMENTATIVE INSTRUCTIONS.

In a prosecution for homicide, an instruction that the fact that defendant was a one-armed man was a circumstance which the jury might consider in determining whether defendant could have safely withdrawn from the combat was properly refused as argumentative.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1959, 1960.]

11. HOMICIDE—INSTRUCTIONS — BRANDISHING WEAPON.

In a prosecution for homicide, an instruction that if defendant and deceased met on the river bank, and deceased brandished a hand ax at defendant and stated that he was going to split defendant's head open, and if defendant was free from fault in bringing on the difficulty and had no safe means of escaping without materially increasing his danger, he was not guilty, was properly refused, as the mere brandishing of an ax did not necessarily show that deceased was about to use it on defendant, or that defendant had reason to believe he was in imminent peril.

12. CRIMINAL LAW—REASONABLE DOUBT—INSTRUCTIONS.

In a prosecution for homicide, a request to charge that if the evidence, or any part thereof, after a consideration of the whole of such evidence, generates a well-founded doubt of defendant's guilt, the jury must acquit, was correct, and was improperly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1912.]

Appeal from Circuit Court, Lawrence County; D. W. Speake, Judge.

"To be officially reported."

Steve Patterson was convicted of murder, and he appeals. Reversed.

The defendant was indicted and tried for murder. After the state had closed, the defendant introduced one John Lang, and offered to show by him that witness and defendant had gone down to the lower point of the island to feed the hogs, and they found deceased there with the wagon, and that while they were there a stranger came over from the north side of the river and proposed a game of craps to the deceased, and that deceased borrowed a dollar from the defendant and soon lost it in the game of craps with the stranger, who returned to the other side of the river. The deceased then remarked: "Well, Patterson, I don't owe you anything. I paid you back the dollar that I borrowed." Defendant replied that he had not paid him back the dollar, and the deceased then stated that the defendant was a g——d d——n liar, at the same time striking the defendant in the face and knocking him down. Deceased then stated that he could prove by the witness that he paid the dollar back, and witness said that, if he had paid it back, he didn't see it, and that deceased then called the witness a liar, and knocked him down with a piece of plank, and that he also knocked defendant down the second time, and cut him in the head with a mallet. The state objected to this

testimony, and the court sustained the objection.

The court, in its oral charge to the jury, said: "I charge you, gentlemen of the jury, that malice in law does not necessarily mean hate or ill will, but is defined as any unlawful act willfully done without just cause or legal excuse." The court further said in its oral charge: "In order for the defendant to sustain his plea of self-defense, it was necessary for him to retreat, if he could have done so without materially increasing his danger, and in this connection you can take into consideration the circumstances and conditions surrounding him."

The defendant then requested these written charges, which the court refused: Charge 2½: "If the jury believe from the evidence that at the time the defendant fired the fatal shot he was in imminent peril of life or limb, and that he was free from fault in bringing on the difficulty, and that he had no safe means of escape without materially increasing his danger, then you must find the defendant not guilty." Charge 3: "I charge you, gentlemen of the jury, that if you believe from the evidence that Patterson was free from fault in bringing on the difficulty which resulted in the death of Davis, and you further believe from the evidence that at the time of the fatal encounter Davis was advancing on Patterson with a deadly weapon and in a threatening manner, and you further believe from the evidence that Patterson had no means of retreat without increasing his danger, then Patterson had the right to shoot and kill Davis in order to protect his own life, then you will find the defendant not guilty." Charge 8½: The jury can look to the fact, if it be a fact, that Patterson was a one-armed man, and the further fact, if it be a fact, that Davis was a strong and vigorous young man, in determining whether or not Patterson could have retreated with safety to himself." Charge 16: "I charge you, gentlemen of the jury, that if the evidence, or any part thereof, after a consideration of the whole of such evidence, generates a well-founded doubt of defendant's guilt, the jury must acquit him." Charge 17: "If the jury believe from the evidence that at the time the defendant fired the fatal shot he was acting in defense of his life or to prevent great bodily harm, you must find the defendant not guilty." Charge 18: "The fact that defendant is a one-armed man is a circumstance to which the jury may look in determining whether the defendant could have safely withdrawn from the combat." Charge 20: "If the jury believe from the evidence that defendant and Davis met on the river bank, and that Davis brandished a hand ax at defendant, and stated that he was going to split his head open, and if they further believe from the evidence that defendant was free from fault in bringing on the difficulty, and that he had no safe means of escape without materially increasing his

danger, you must find the defendant not guilty."

C. M. Sherrodd, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The defendant was convicted under an indictment charging murder, committed in Lawrence county. The position taken by appellee that the venue was not proved, because the offense was committed (if at all) on an island in the Tennessee river, a little nearer the Limestone county line than to that of Lawrence county, is untenable. The place was evidently within a fourth of a mile of the county line, as provided by section 4972 of the Code of 1896; but, aside from that, this court has held that under section 1400 of the Code of 1896 each county has jurisdiction over the Tennessee river to the margin of the stream on the opposite side. *Jackson v. State*, 90 Ala. 590, 8 South. 862.

The exception to the question to the witness Davis, and the answer thereto, as to whether the defendant saw the hand ax at the mill in the morning, was properly overruled, as this was a material circumstance tending to show where the ax was.

There was no error in excluding the testimony of the witness Lang as to the particulars of the previous difficulty. *Wood v. State*, 128 Ala. 27, 31, 29 South. 557, 86 Am. St. Rep. 71.

We find a conflict in our decisions as to whether definition of malice and the distinction between express malice and legal malice, as given by the court in its oral charge, is proper in a murder case. In *Cribbs v. State*, 86 Ala. 613, 6 South. 109, a similar charge was held erroneous, whereas, in *Boulden v. State* (also a murder case) 102 Ala. 84, 15 South. 341, a charge in legal principle the same was held to be correct. As the judgment of the lower court must be reversed for other reasons, it suffices to say that it will be safer upon another trial to so define malice as not to make the definition subject to the criticism of Clopton, J., in the *Cribbs* Case, *supra*. We do not determine whether we would or would not reverse the judgment upon that part of the oral charge referred to, if that were the pivotal point in this case.

That part of the oral charge of the court on the duty of a retreat is correct. "The law is that, to excuse the failure to retreat, the circumstances must be such as that the defendant's peril would have been increased thereby beyond that to which he would have been subjected had he stood and defended himself against his assailant, or were such as to impress the mind of a reasonable man that the peril would have been increased and that he was so impressed." *Bell v. State*, 115 Ala. 25, 29, 22 South. 526. The expression here used, "materially increased his danger," embodies the same words.

Charge 2½, requested by the defendant,

was substantially the same as charge 5, given by the court on request of defendant. Consequently there was no error in refusing it.

Charge 3, requested by the defendant, was properly refused, as it failed to hypothesize that the defendant did not willingly enter into the difficulty. *Gilmore's Case*, 126 Ala. 22, 28 South. 595.

Charge 8½, requested by the defendant, was argumentative and properly refused.

Charge 17 failed to hypothesize freedom from fault on the part of the defendant in bringing on the difficulty, nor did it hypothesize the imminence of the danger, nor inability to retreat, or the danger thereof.

Charge 18 was argumentative and properly refused.

Charge 20 was properly refused. Merely "brandishing" the ax did not necessarily show that deceased was about to use it on defendant, or that he was in imminent peril, or that defendant had reason to believe that he was in great peril.

Charge 16 asserts a correct principle of law and should have been given. *Hunt v. State*, 135 Ala. 2, 33 South. 329.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded. All the Justices concur.

ALLEN v. ALSTON.

(Supreme Court of Alabama. May 9, 1906.)

1. ATTORNEY AND CLIENT—MONEY COLLECTED—ACTION BY CLIENT—PARTIES PLAINTIFF—REAL PARTIES IN INTEREST.

The claim of a client for money collected by his attorney is on an implied contract, within Code 1896, § 28, providing that every action on a contract, express or implied, must be brought in the name of the person really interested.

2. APPEAL—RECORD—BILL OF EXCEPTIONS—QUESTIONS FOR REVIEW.

Where the action of the trial court on motion to strike certain pleas and parts thereof is not presented by bill of exceptions, it will not be considered on appeal.

3. CORPORATIONS—ASSIGNMENT OF CLAIM—SUFFICIENCY—EVIDENCE.

An assignment of a claim, executed in the name of a corporation by its vice president, to which the corporate seal was not attached, was not admissible in evidence in an action by the assignee, where there was no evidence that the vice president was authorized to execute the contract.

Appeal from Circuit Court, Colbert County; D. W. Speake, Judge.

"To be officially reported."

Action by J. V. Allen against Robert C. Alston. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The original complaint was brought in the name of the Scovel-Irwin Construction Company, for the use of J. V. Allen, against the defendant, and counted on the collection by defendant's testator of a certain sum of money as an attorney for the Scovel-Irwin Construction Company, and shows an assignment

of said claim of the Scovel-Irwin Construction Company to J. V. Allen before the bringing of this suit. It alleges that demand was made on defendant's testator both by the original party and by its assignee, said Allen, for repayment of the sum so collected. Demurrers were interposed to this complaint (1) because it failed to state a cause of action; (2) because it appears from the complaint that J. V. Allen is the real and beneficial owner of the subject-matter of the suit; (3) it appears from said complaint that the plaintiff in said cause, the Scovel-Irwin Construction Company, is not the owner of the subject-matter of the suit; (4) it appears from said complaint that the suit is not instituted in the name of the party owning the subject-matter of the suit. These demurrers were sustained by the court, and plaintiff amended his complaint by making J. V. Allen the sole party plaintiff.

The plaintiff offered the following as evidence, after showing that H. S. Jackson was the vice president of the Scovel-Irwin Construction Company on the 4th day of February, 1902, and that as such vice president he signed the assignment which follows: "For value received the Scovel-Irwin Construction Company hereby sells, transfers, and assigns unto Joseph V. Allen that certain judgment rendered in favor of the Scovel-Irwin Construction Company in the circuit court of Colbert county, state of Alabama, on the 7th day of January, 1897, against the Sheffield Land & Iron Co. of Alabama for the sum of \$1,185, and that said Scovel-Irwin Construction Company transfers and assigns unto the said J. V. Allen all its rights and equities therein and thereunder, hereby authorizing said Allen or his assigns to bring any action in its name, either at law or in equity, for the collection of said judgment or its proceeds. In testimony whereof, the Scovel-Irwin Construction Company has executed these presents by its vice president, who is duly authorized to execute the same in the name and under the seal this the 4th day of February, 1902. [Signed] Scovel-Irwin Construction Co., by H. S. Jackson, V. P." There is no seal shown. The defendants objected to the introduction of the assignment, because it was not under seal, and because it was not shown that Jackson was authorized by the corporation to execute it for and in its name. The court sustained defendant's objection, stating that, as the alleged transfer was not under seal of the corporation, there was no presumption that Jackson, although vice president, was authorized to execute the same so as to bind the corporation.

R. H. Wilhoite, for appellant. Kirk, Carmichael & Rather, for appellee.

ANDERSON, J. This suit was brought in the name of Scovel-Irwin Construction Company for the use of J. V. Allen. The facts set out in the complaint show an implied

contract on the part of Tompkins to pay over the money collected by him, and bring the case within the influence of section 28 of the Code of 1896, and the suit should have been brought in the name of the party really interested. There was no error in sustaining the demurrer to the complaint.

As the action of the trial court upon the motion to strike certain pleas and parts thereof is not presented for review by the bill of exceptions, we cannot consider the same. *Dothan Guano Co. v. Ward*, 132 Ala. 380, 81 South. 748; *Mouton v. L. & N. R. R. Co.*, 128 Ala. 537, 29 South. 602.

The assignment offered did not have the corporate seal attached, nor was there any proof that Jackson had the authority to execute the same. Indeed, the assignment itself recites that Jackson is authorized to "execute the same in the name and under the seal," yet fails to show that it was so executed. *American Association v. Smith*, 122 Ala. 505, 27 South. 919; *Goodyear Rubber Co. v. Scott Co.*, 96 Ala. 439, 11 South. 370; *Cook on Stocks*, § 712. The trial court properly sustained the objection to the introduction of the assignment in evidence.

The judgment of the court is affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

COLLINS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Alabama. May 9, 1906.)

1. TELEGRAPHS—ACTIONS FOR DAMAGES—EVIDENCE.

In an action against a telegraph company for failure to deliver a message, the message delivered to plaintiff by defendant was admissible, though he had not produced or accounted for the absence of the message lodged with defendant, nor given notice to produce it.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 62.]

2. SAME—PLEADING.

If there were terms or conditions on the telegraph form employed by a sender which would defeat an action against a telegraph company for failure to deliver a message to plaintiff, they should be brought into the case by plea.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 56.]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

"To be officially reported."

Action by Milton H. Collins against the Western Union Telegraph Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

The complaint in this cause contained two counts, as follows: "(1) Plaintiff claims of the defendant \$1,500 as damages, for that heretofore, during the month of August, 1901, defendant was a common carrier of telegraphic messages, among other places, from Albertville, Ala., to Birmingham and to North

Birmingham, Ala.; that at said time plaintiff was a practicing physician, residing in said North Birmingham, and having an office in said Birmingham, and plaintiff at said time had a patient, who was also his sister-in-law, and had been wholly or partially raised by plaintiff as a member of his family, who was at or near said Albertville, and who was sick; that during said month, on the 16th day thereof, plaintiff, by his agent at said Albertville caused to be delivered to defendant at said Albertville a message as follows: 'Patient not doing well. Come up in the morning'—which message was addressed to plaintiff at said Birmingham. Defendant received said message at said Albertville for transmission by telegraph and delivery to plaintiff, and it then and there became the duty to promptly transmit said message by telegraph, and to promptly deliver same to plaintiff; but, notwithstanding said duty, defendant negligently failed to promptly deliver said telegram to plaintiff, and as a proximate consequence thereof plaintiff was prevented from going to see said patient for a long time, to wit, 48 hours, and was put to great and unnecessary expense in and about going to see said patient; and plaintiff, having treated and considered said patient as his adopted daughter, was made to suffer great mental pain and anxiety, and he further lost the cost of said telegram paid to defendant, and was caused to drive in the rain and mud and at night, and was subjected to great trouble, inconvenience, and annoyance in and about traveling as aforesaid. Count 2. [Same as first count down to and including the words "having an office in said Birmingham."] That during said time, on, to wit, 16th day of August, 1901, and thereafter, plaintiff's sister-in-law, who was also a patient of plaintiff and had been wholly or partially reared by plaintiff as a member of his family, was sick in or near Albertville, and on said day a message was delivered to defendant as a common carrier of telegraphic messages as aforesaid at said Albertville, addressed to plaintiff, to be transmitted by telegraph and delivered to plaintiff. Defendant received said telegram at said Albertville on the 16th day of August, 1901, for the purpose of transmitting and delivering it to the plaintiff, and it then and there became and was the duty of defendant to promptly transmit and deliver to plaintiff the said telegram; but, notwithstanding said duty, defendant negligently failed to promptly deliver to plaintiff the said telegram, which telegram was in words and figures as follows: 'Patient not doing well. Come up in the morning.' And as a proximate consequence of defendant's said negligent failure to promptly deliver said telegram, plaintiff suffered the injuries and damages set out in the first count of the complaint."

The defendant demurred to the complaint, and to each count thereof, as follows: "(1) It does not appear from said count who the

sender of the telegram was. (2) It does not appear that the contract was made to send said message, or by whom it was made. (3) It does not appear that the plaintiff had suffered in person or estate by reason of the alleged failure to deliver the telegram. (4) It does not appear where the message was sent, or by what address the plaintiff was addressed, or where he was addressed." And to the second count, the following grounds: "(1) The averment in respect to the damages suffered by the plaintiff is too vague, indefinite, and uncertain. (2) The averment in respect to damages suffered by the plaintiff is improper and insufficient, in that it refers to the damages alleged in the first count in a manner that is too vague, indefinite, and uncertain."

The court overruled the demurrers to the first count and sustained the demurrers to the second count. The plaintiff identified and offered in evidence the telegram which was handed him by defendant's agents at Birmingham. The telegram was signed "T. A. Casey," at Albertville, Ala., and addressed to Dr. M. H. Collins, Birmingham, Ala. It was marked, "Received at 19:19 Avenue, Birmingham, Ala. Aug. 16, 7:10 P. M.," and it was marked, "9 Paid." The defendant objected to the introduction of the telegram in evidence because it was not the original telegram, and because the original telegram delivered to defendant at Albertville was the original telegram, and that no notice to produce the original had been given to defendant. It was shown that the telegram was not delivered until some time during the morning of the 17th of August. Plaintiff also offered the envelope in which the telegram was delivered, and the indorsement thereon, as follows: "Dr. M. H. Collins, 21st Ave., between 27th and 28th St., Charges Paid." At the request of the defendant, the court instructed the jury to return a verdict for the defendant.

Bowman, Harsh & Beddow, for appellant.
Walker, Till, Campbell & Walker, for appellee.

WEAKLEY, C. J. This action was brought, not for a failure to transmit or deliver a telegraphic message, but the gravamen of the complaint is that the message which the plaintiff actually received was not promptly delivered. The plaintiff did not produce or account for the absence of the written message lodged with the defendant's agent at Albertville, nor give notice to defendant to produce that message; and the city court, being of opinion that the written message prepared by the sender, plaintiff's agent, and delivered to the defendant at Albertville, was to be deemed the original message, in the situation of this case, refused to allow the plaintiff to introduce the message, or the envelope inclosing the same, which the defendant actually delivered to him at Birmingham. In this ruling there was error.

There was no claim that any mistake had intervened in the transmission of the message, nor that the message delivered was not the very message received by the defendant from the sender. Under these circumstances the presumption is that the message delivered is a correct reproduction of that received, and it was admissible in support of the complaint. *Western Union Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Conyers v. Postal Tel. Co.*, 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100; 2 *Thompson on Neg.* § 2521; 25 Am. & Eng. Ency. Law (1st Ed.) p. 880.

We do not find that the cases relied on by appellee to support the ruling of the city court conflict with what we now hold. *American Union Tel. Co. v. Daugherty*, 89 Ala. 191, 7 South. 660 (s. c. sub nom. *Daugherty v. Telegraph Co.*, 75 Ala. 168, 51 Am. Rep. 435), was a suit for the nondelivery of a message, and there the whole effort was to introduce secondary evidence of the message lodged with the defendant at the point whence it was to be transmitted. The exact and only point there decided, so far as it is necessary for us now to inquire, was that incompetent evidence had been admitted to prove the destruction of the message delivered to the company for transmission. In *Whilden v. National Bank*, 64 Ala. 1, 38 Am. Rep. 1, it was said: "There is some difficulty in determining whether the message delivered to a telegraphic office, or that which is delivered to the person to whom it may be addressed at the point of destination, is to be regarded as the original. Perhaps, under some circumstances, the one or the other may be considered the original. It is not now necessary to enter on that inquiry." And the court proceeds to hold that the message received by the sendee was admissible upon two distinct grounds: First, because the message as written by the sender was without the jurisdiction of the court; and, second, because the appellants had voluntarily admitted to the witness the genuineness of the dispatch offered in evidence. So far from there being any holding that the message delivered to the sendee was secondary, not the original, there is obviously in the opinion a studied and cautious purpose to avoid such holding. The case, however, supports rather than conflicts with the view we have taken. The delivery of the message to the plaintiff was the equivalent of an assertion by the defendant that it was the message it had received for transmission, and was equivalent of an admission of its genuineness and correctness. If there were any valid terms or conditions upon the form employed by the sender which the message as prepared at Albertville would have disclosed, and which would have defeated the action, they could and should have been brought forward by plea. No such plea was interposed.

There was no error in sustaining the demurrer to the second count of the complaint.

The court failed to connect the plaintiff with the sending of the message, or to show any breach of duty to him of which he could complain.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

ODOM v. MOORE.

(Supreme Court of Alabama. May 9, 1906.)

1. APPEAL—RULINGS FAVORABLE TO APPELLANT—REVIEW.

Where the trial court overrules a demurrer to a plea, no question of its sufficiency arises on an appeal taken by defendant.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4053.]

2. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST—SUBSEQUENT SETTLEMENT OF ESTATE—EFFECT.

A personal representative, administering a solvent estate, cannot defeat a suit against him to enforce a liability against the estate by subsequently ignoring the liability, making a final settlement, surrendering the assets either to the legatees or the probate judge, and obtaining a discharge from the probate court.

3. SAME—PLEADING—PLEAS IN BAR.

Pleas in an action against an executrix for attorney's fees for services rendered decedent which aver that subsequent to the institution of the suit she was discharged as executrix, and that she delivered over the assets of the estate as required by law, was not in bar of the suit, but in bar of its further maintenance.

4. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST—PLEADINGS—SUFFICIENCY.

In an action against an executrix for attorney's fees for services rendered decedent, defendant pleaded a subsequent discharge as executrix and a settlement of the estate. The replication alleged that the claim was duly filed in the probate court and presented to the executrix and subsequently sued on, at which time the executrix had sufficient assets to pay the indebtedness of the estate, including the claim sued on, and that the executrix, without declaring the estate insolvent and without paying the claim, procured an order finally discharging her as executrix. Held that, as the replication was designed to defeat the pleas and to justify the further maintenance of the suit, it was permissible, and sufficient against a demurrer.

5. APPEAL—REVIEW—QUESTIONS NOT RAISED IN LOWER COURT.

The question of variance between the complaint and proof, not raised in the trial court, will not be determined on appeal.

6. SAME—HARMLESS ERROR—VERDICT.

Where the evidence warranted the allowance of a larger sum than that allowed by the jury, the refusal to grant a new trial on the application of the defeated party was not erroneous.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4035.]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

"To be officially reported."

Action by John J. Moore against Augustine M. Odom, executrix of P. Chavagnat, deceased, for attorney's fees for services rendered deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant, after pleading the general issue in three different forms, filed plea No. 4, as follows: "For further answer to the complaint defendant says she ought not to be required to further defend this cause, for that she has been discharged by the probate court of Jefferson county from her position as executrix of the estate of said Chavagnat, and is no longer the executrix of said estate, in which capacity she is sued." The plaintiff demurred to this plea, because said plea fails to allege that the defendant was discharged by the probate court from her position as executrix prior to the institution of this suit, and it appears that the defendant had been discharged since the institution of this suit and since the filing of other pleas herein, and said plea is not verified. Thereupon defendant filed plea No. 5, as follows: "Comes the defendant and says she ought not to be required to further defend this suit, for that she has been finally discharged from her position as executrix of the estate of Chavagnat by the probate court of Jefferson county; and she avers she has settled her account and delivered over the assets as required by law, which such discharge occurred since the institution of this suit; and this the defendant verifies." The plaintiff filed demurrers to this plea in all respects similar to those filed to the fourth plea, whereupon defendant filed the sixth plea, as follows: "Comes the defendant and for special plea says she ought not to be required to further defend this cause, for that heretofore, to wit, on the 6th day of September, 1900, defendant was appointed as executrix of the estate of P. Chavagnat, and entered upon the discharge of her duties as such; that on July 13, 1901, the plaintiff filed his claim against said estate in the probate court of Jefferson county, but no order was made allowing the same; that thereafter defendant delivered and surrendered all assets in her hands as provided by law; that thereafter, on December 18, 1901, defendant filed her account for settlement of said administration, and thereupon the court made an order setting said cause for hearing on January 10, 1902, and requiring notice of such order to be posted for three weeks from December 18, 1901, as required by law; that on January 10th said hearing was continued until January 18, 1902, and, no objections being lodged against her discharge, on January 18, 1902, said probate court made an order forever and finally discharging defendant from all other and further liability for or on account of her execution of said will; and this defendant verifies." The plaintiff filed demurrers to this plea.

The court overruled the demurrers to the fourth, fifth, and sixth pleas, whereupon the plaintiff by way of replication joined issue on the first, second, and third plea, and "for replication to pleas Nos. 4, 5, and 6 says that on the 6th day of September defendant was appointed executrix of the estate of Chavagnat, and she entered upon the dis-

charge of her duties as such, and that said estate was indebted to certain parties, among others the plaintiff, in the sum of \$230, which said claim against said estate was duly filed according to law in the probate court of Jefferson county, Ala.; that it was also presented to the executrix of said estate, and was on, to wit, the 26th day of October, 1901, sued on in the city court of Birmingham, at which time the defendant was executrix to said estate and acting as such. The plaintiff further avers that all the assets of said defendant's testator which came to said defendant's hands were sufficient to pay off all of the indebtedness of said estate, including the aforesaid claim of plaintiff, and that it was the duty of said defendant as such executrix to settle said claim out of the assets of said testator. And plaintiff for further replication says that the said executrix, without declaring said estate insolvent and without paying the debt of plaintiff, procured an order of the probate court of Jefferson county on the 18th day of January, 1902, to forever and finally discharge defendant from all other and further liability for and on account of her execution of said will; that said order in no wise affected the rights of the plaintiff to have his claim paid out of the assets of said estate, and that said order was obtained voluntarily; and that there were assets in the hands of said executrix at that time more than sufficient for the payment of plaintiff's demand now declared on. And plaintiff claims of said defendant the said sum mentioned in plaintiff's complaint." The defendant filed demurrers to this replication, assigning various grounds, which demurrers were overruled by the court, whereupon the trial was had upon issues joined on the pleas on replication, and verdict rendered for the plaintiff in the sum of \$80. The other facts sufficiently appear in the opinion.

Denson & Ullman, for appellant. W. F. Dickinson, for appellee.

WEAKLEY, C. J. The court below overruled the plaintiff's demurrers to pleas 5 and 6, and thereupon the plaintiff filed a special replication to these pleas. The facts of the case, out of which arises the main question of law presented for decision, are fully presented by the pleas and replication, taken together. Those facts are that, after suit duly brought by the plaintiff against the defendant as executrix upon a claim which had been properly presented, the executrix, having received assets sufficient to pay off all the indebtedness of the estate, including that due the plaintiff, and without declaring the estate insolvent or paying the plaintiff's debt, filed her accounts for a settlement of the administration and procured an order from the probate court finally discharging her from further liability for or on account of her execution of the will; there being at the time she voluntarily obtained the order

assets in her hands more than sufficient for the payment of plaintiff's demand. The plea alleges that the defendant had "delivered and surrendered all assets in her hands as provided by law," which means, no doubt, that she had delivered the assets to the legatees, or to the probate judge for them. The pleas do not allege a resignation by the defendant, and are somewhat meager and obscure; but as the court overruled the demurrer to the pleas, no question as to their legal sufficiency arises on this appeal, taken by the defendant.

Treating them as sufficient, the question is whether the replication constituted an answer to them. Upon the principles declared and the reasoning employed in *Whitfield v. Woolf*, 51 Ala. 202, it must be held that the administratrix could not defeat the suit by ignoring the existence of the plaintiff's demand, making final settlement, surrendering the assets either to the legatees or the probate judge, and obtaining a discharge from the probate court. If such action upon the part of a personal representative, administering a solvent estate, could defeat pending suits, creditors would, indeed, be in a sorry plight. The discharge of the executrix by the probate court from further liability cannot affect the plaintiff. The liability to him could not have been enforced in the probate court, since his claim was not in litigation in that court, and could not have been drawn within its jurisdiction without a report of insolvency. The replication was a complete answer to the pleas, and was no departure from the cause of action set up in the complaint. The pleas were not in bar of the suit, but in bar of its further maintenance; and the facts alleged in the replication were designed to defeat the pleas and to justify the further maintenance of the suit for a recovery by the plaintiff upon the very cause of action in the complaint alleged. This was permissible and proper practice. *Whitfield v. Woolf*, supra; *Draper v. Walker*, 93 Ala. 310, 314, 13 South. 595. The demurrer to the replication was properly overruled.

Upon the contention of appellant that there was a variance between the case alleged in the complaint and that made by the proof, it suffices to say that no charge was asked or objection made in the court below presenting the question of variance; and hence we are not called upon to express an opinion in reference to this question. There was abundant evidence to support the verdict. Indeed, the jury, upon the evidence, might have allowed a larger sum than they did allow. This court will not reverse the action of the lower court, refusing a new trial, in this state of the evidence. *Terrell Coal Co. v. Lacey* (Ala.) 31 South. 109.

No error appearing in the record, the judgment is affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

BOYD et al. v. SOUTHERN MUT. AID ASS'N et al.

(Supreme Court of Alabama. May 9, 1906.)

INSURANCE—MUTUAL BENEFIT INSURANCE—CONTRACT—VALIDITY.

A mutual aid association, organized under Code 1896, § 1116 et seq., and authorized by its charter to pay sick and death benefits from funds accumulated by assessments on members, has no authority to issue policies under which assessments are to be returned at the expiration of a certain time, less benefits paid; such policies being ultra vires and destructive of mutuality of obligations.

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

"To be officially reported."

Suit by Lula Boyd and others against the Southern Mutual Aid Association and others. From the decree granting complainants partial relief, all parties appeal. Affirmed in part, and in part reversed and rendered.

The bill in this case was filed by two persons, holders of ordinary benefit certificates, for themselves and on behalf of such other holders of like ordinary benefit certificates who would come in and make themselves parties. The allegations made by the bill are: That the respondent, the Southern Mutual Aid Association, and its president and secretary were incorporated under and derived their powers from part 2, tit. 1, c. 3, §§ 1547-1552, of the Code of 1896, brought into the Code of 1896 as chapter 28, art. 3, §§ 1116-1121. That on October 25, 1901, respondent corporation procured an amendment to its original charter, and in the amendatory declaration claimed and sought to obtain additional powers: "To purchase, own and convey real estate necessary for officers, not to exceed \$100,000; to receive conveyances of real estate in payment of debts due to the corporation; to issue certificates to or agreements with the members of the association upon the birth of any child, or upon decease, sickness, or physical disability of such member, whether by accident or otherwise, to pay money or render aid to him or those dependent upon him, or any beneficiary designated by him, and to receive and collect from said members dues or assessments at stated intervals for such agreements or certificates; to accumulate a fund for meeting and providing for the payment of such certificates, and to invest the money thus accumulated in bonds or other securities, or to lend the same on notes or notes secured by mortgage." The original purpose of the corporation, before amendment of its charter, was to comfort and assist all who may become members of said association, morally, socially and financially; to furnish financial aid to sick and destitute members of this association in the form of a stated weekly indemnity in case of sickness and a stated funeral benefit in case of death, graduated and determined by the amount of endowment secured and carried

by each member upon his admission into the association. That pursuant to its powers the association has issued a large number of certificates for sick benefit, birth of child, or decease, sickness, or physical disability of its members, upon the payment of the weekly dues assessed, about 18,000 in all. That it has gone beyond its powers and issued certificates providing for the repayment to the holder of such certificate at the end of 10 years from the issuance thereof all the dues paid in during the 10 years by the holder, less such weekly indemnity, sick benefit, etc., received by the member holding the certificate. That the association has no funds other than a weekly assessment or dues paid by the holder of the certificates, and that this fund is no more than enough to pay the expenses of the association and provide money to meet the sick, funeral, and other benefit arising under the ordinary certificate; and that, in order to provide sufficient funds to meet the requirement of the 10-year certificates which are alleged to be about due, all the members of the association will be heavily assessed without receiving any benefit therefrom. The prayer is for an injunction prohibiting the association or its officers or agents from paying out of the fund of said association any money or sums of money to the holders of said 10-year policies, or any of them, and from levying or collecting any special or additional assessment upon the policy holders for the purpose of paying said 10-year policies, and to declare the action of the association in issuing said 10-year policies ultra vires and void.

Caldwell & Carmichael, for appellants.
Garrett & Dickinson, for appellees.

TYSON, J. The Southern Mutual Aid Association is strictly a mutual aid association under section 1116 et seq. of the Code. The scope of the business of the corporation in the way of the payment of money, except for debts contracted in the usual and ordinary conduct of its business, as defined in its original charter is "to furnish financial aid to sick and destitute members * * * In the form of a weekly indemnity in case of sickness and a stated funeral benefit in case of death," and by an amendment to its charter, "to issue certificates to or agreements with the members * * * upon the birth of any child, upon decease, sickness or physical disability of such member, * * * to pay money or to render aid to him or those dependent upon him, or any beneficiary designated by him, and to receive and collect from said members, dues or assessments at stated intervals for such agreements or certificates," etc.; "to accumulate a fund for meeting and providing for the payment of such certificates and to invest the money thus accumulated," etc. The association, besides its ordinary business in issuing and providing for the certificates and agreements indicated in the quotations

from its charter above mentioned, and which were clearly within its powers, undertook to issue certificates or policies binding the company, in consideration of certain dues and assessments to be paid, not only to pay the amount for which the certificate was issued upon the death of the member, or in case of sickness to pay the weekly benefit named therein as in ordinary cases, but at the expiration of 10 years from the date of the certificate, upon its surrender, "to return the amount of dues paid to the said association less the amounts (if any) the person herein named may have drawn in case of sickness during that time." A large number of such certificates were issued, but, objection having been made to them by some of the officers of the state having supervision of insurance companies, the practice was discontinued and a number of the certificates were taken up by substituting the ordinary policies; but a number of such certificates, amounting to about 400, are still outstanding and will soon mature or commence maturing. This being the condition of affairs, the complainants below, as holders of the ordinary certificates issued by the company, and in behalf of themselves and of other holders and owners of policies issued by the corporation, except those holding the 10-year policies, filed their bill to prevent the collection of dues for the payment of said 10-year policies and to declare them invalid. Upon the final hearing of the case, the court below enjoined the collection of the said 10-year policies by assessments against the holders of the ordinary certificates, but in other respects held the said policies good, and thereupon cross-appeals are prosecuted against the decree—one of the appellants contending that the provision in said 10-year policies "to return the amount of dues paid to said association, less the amounts (if any) the person herein insured may have drawn in case of sickness during that time" is wholly void; the other, that such stipulation is entirely valid and that the court erred in restricting the collection of dues at large to discharge said policies.

To determine the question here involved, it is first necessary to observe that the character of the particular kind of corporation, defendant in this case, is very different from ordinary private corporations. It appears to be strictly a trustee for its members, having no property of its own, and having no object in the way of accumulating property and profits for itself, but only for the benefit of its members, in order to distribute the burden of individual misfortunes of a specific class among the entire membership. The distinguishing feature of such association is the strict mutuality of obligations and objects of benefits, and that "these must not in any respect be wanting, superseded, or impaired," *Kennan v. Rundle*, 81 Wis. 212, 51 N. W. 480; *Hall v. West Travelers' Acc. Association*, (Neb.) 96 N. W. 170;

Knights T. & M. L. I. Co. v. Vail, 206 Ill. 404, 68 N. E. 1103. And it is a general proposition, universally recognized, that corporations have only such powers as are expressly given in their charters, with such incidental powers as are necessary for the carrying out of the objects of their charters. *Central R. R. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344, 6 South. 122, 5 L. R. A. 100.

In this case it is insisted, in the first place, that the express powers of this corporation are limited by the charter to the payment of policies in case of sickness and to provide a funeral in the case of death of the member, and by the amendment of its charter to pay policies upon the birth of any child, or upon decease, sickness, or physical disability of members, and that the stipulation in this instance to pay policies at the expiration of 10 years is ultra vires and unauthorized by the charter. In the next place, it is insisted that the mutuality of the obligations and benefits is destroyed by levying assessments upon the membership at large to pay the holders of the 10-year policies upon their maturity. Upon consideration, we are of the opinion that both of these contentions are correct.

Taking up the first question, we find that there is nothing in the charter authorizing the maturity of policies at any given period, or upon any event which could be predetermined. They are authorized only on birth of a child, or sickness, death, or physical disability. So strict is the law in this regard in reference to these particular corporations that it is held that they have no power to consolidate with other like associations, and that they have no power to receive a bond of indemnity to provide for lawful maturing obligations. Such corporations can neither do things not authorized nor use means not contemplated in the scheme of association. *Bankers' Union of the World v. Crawford* (Kan.) 73 Pac. 79, 100 Am. St. Rep. 465; *Simmons v. Troy Iron-Works*, 92 Ala. 427, 9 South. 160; *Kennan v. Rundle*, 81 Wis. 212, 51 N. W. 430; *Dietrich v. Association*, 45 Wis. 79; *Jemison v. Bank*, 122 N. Y. 135, 25 N. E. 264, 9 L. R. A. 708, 19 Am. St. Rep. 482; *Rundle v. Kennan*, 79 Wis. 492, 48 N. W. 516; *Bank v. Earle*, 13 Pet. (U. S.) 589, 10 L. Ed. 274; *Rockhold v. C. M. M. B. Soc.* 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420.

Taking up the second question, and bearing in mind that the essential and distinguishing feature of the mutual aid associations its mutuality of obligations and benefits, it seems evident that the class of contracts assailed in this case violates this principle. Holders of ordinary certificates must pay assessments to meet the death, sickness, and other legitimate claims as they occur, and they get nothing back until accident or misfortune has fallen to their lot. This is strictly mutual. But a holder of the 10-year policy does not at all contribute to pay the

losses of others, since at the end of 10 years, though in perfect health, he receives back all his contributions, less what he has already received. And in case of his death or sickness before the expiration of 10 years, he receives the full benefit of his policy, to be paid from the general fund of the society; that is, from assessments upon the members at large. There is no mutuality in this, and any such contract is unauthorized by the charter of the organization, and destructive of the organic law of the association prescribing mutuality of obligations and benefits as absolutely essential. The case of *Kennan v. Rundle*, 81 Wis. 214, 51 N. W. 426, treats the subject of mutual aid associations very fully, and in the opinion the leading authorities are cited sustaining this view, and we deem it unnecessary to refer to them specifically. The aid association, as a trustee and as a corporation, has no right to enter into a stipulation to return to a class of members their contributions at the expiration of 10 years, less what they have already been paid. The lower court, therefore erred in not granting the full relief prayed for by complainants, and did not err in enjoining the collection of assessments from the members at large for the payment of the 10-year policies.

On the cross-appeal of the complainants below the decree is reversed, and a decree will be here entered granting the relief prayed for in their bill; and on the appeal of the respondents below the decree of the lower court is affirmed.

Affirmed in part, and in part reversed and rendered.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

MOOG v. STATE.

(Supreme Court of Alabama. May 9, 1906.)

1. COMMERCE—REGULATION—INTOXICATING LIQUORS—WILSON ACT—APPLICATION.

Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], provides that all intoxicating liquors transported into any state or remaining therein for use, consumption, sale, or storage shall on arrival be subject to the operation of state laws enacted in the exercise of the state's police power, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise, has no application to any part of a transaction for the sale of liquors by a traveling salesman to be transported into the state prior to the completion of the transportation.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, § 30.]

2. SAME—STATE LAWS—INTERSTATE COMMERCE—REGULATIONS.

Code 1896, § 5087, prohibiting the soliciting of orders for spirituous, vinous, or malt liquors to be shipped into a district in which the sale of such liquors is prohibited, in so far as it purports to apply to residents of other states soliciting orders for spirituous liquors to be transported from another state into Alabama, is

violative of the commerce clause of the federal Constitution.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Commerce, § 80.]

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

"To be officially reported."

Herbert Moog was convicted of soliciting an order for the sale of spirituous liquors to be shipped into a district where the sale of liquors was prohibited, and he appeals. Reversed.

The indictment in this case charges that Herbert Moog within the limits of a district, in which the sale of spirituous, vinous, or malt liquors was prohibited by law, did solicit an order from Luke Sawyer for spirituous, vinous, or malt liquors to be shipped or sent into such district. The defendant demurred to the indictment (1) because it does not appear from said indictment that the defendant is a citizen of the state of Alabama, or that he solicited or received said orders to be sent to any whisky dealer or any person located in the state of Alabama; (2) because the statute under which this indictment is framed is in violation of the commerce clause of the Constitution of the United States, in this; that it fails to exempt from its operation nonresidents of the state of Alabama, traveling and soliciting orders for such liquors for dealers who are nonresidents, and whose only place of business is outside of the state of Alabama; (3) because the statute under which this indictment is found is void, inoperative, and unconstitutional as against this defendant, because the said defendant was, at the time of the alleged offense, a nonresident of the state of Alabama, traveling and soliciting orders for liquors for A. Moog, a lawfully licensed whisky dealer, whose only place of business was, at the time of the alleged offense, in the city of Pensacola, state of Florida.

These demurrers were overruled, whereupon the defendant filed the following plea: "Now comes the defendant, Hubert Moog, who is indicted as Herbert Moog, and, for the purposes of this trial only, waives all defects as to his correct name, and in this case waives his right to any plea of misnomer, and waiving no other right, for amended plea to this indictment filed, by leave of the court says: That he is indicted under section 5087, of the Code of 1896 of Alabama, which provides that any person who, within the limits of any district in which the sale of spirituous, vinous, or malt liquors is prohibited by law, solicits or receives any order for spirituous, vinous, or malt liquors in any quantity, to be shipped or sent into any such district, must, on conviction, be fined. That the said defendant is a citizen and resident of the state of Florida, his place of residence being Pensacola, Escambia county, Florida. That his occupation is that of a commercial traveler, commonly called a drummer. That his res-

idence and occupation at the time of the finding of the indictment, on the 22d day of July, 1905, and for more than two years immediately previous thereto, was as above set forth. That he was not on said date, nor at any time within two years immediately previous thereto, a citizen of the state of Alabama, nor was he on said date or at any time within two years previous thereto, in the employ of or drumming or soliciting for any house, person, firm, or corporation located or doing business in the state of Alabama. That on said date, and for more than two years immediately previous thereto, he was a traveling salesman or drummer for Alfred Moog, a wholesale and retail dealer in liquor and was engaged in no other business. That he was employed by said Moog during all of said period, receiving a salary from said Moog for his services. That the said A. Moog on said date, and for more than two years immediately previous thereto, was engaged in the business of a wholesale and retail dealer in spirituous, vinous, and malt liquors in Escambia County, Florida, but was not engaged in said business in any other state or county. That the said A. Moog at said time and during said period was a lawful, licensed dealer in such liquors in said state of Florida, and Escambia county, having complied with all laws of said state which were a prerequisite to his engaging in said business. That the defendant came from the city of Pensacola, Escambia county, state of Florida, at the direction of said A. Moog, into the county of Monroe, state of Alabama, and within 12 months prior to the finding of this indictment, then and there within said time solicited and received from one Luke Sawyer, in the county of Monroe and state of Alabama, an order for spirituous liquors, to wit, whisky. That said order was solicited and received by the said defendant in Monroe county, Alabama, and was by him in due course of mail transmitted to A. Moog, in the city of Pensacola, state of Florida, for his acceptance or rejection. That said defendant did not deliver or attempt to deliver the said liquor, or any spirituous, vinous, or malt liquors in said county of Monroe, but only solicited and accepted the order therefor in the said county, and transmitted same to A. Moog, in Pensacola, Fla., for his acceptance or rejection. That at the time of the acceptance of the said order from the said Luke Sawyer for the said liquor the said defendant did not demand, accept, or receive any money or other thing of value in payment of, for, or on said liquor. The defendant further avers that the said order which he solicited and received was for whisky for the lawful use and consumption of one Luke Sawyer. That defendant, being a nonresident of the state of Alabama at that time, and traveling for a nonresident dealer, at said time as aforesaid, was by virtue thereof exempt from the provisions of the said statute. And that

the said statute, in so far as it relates to this defendant, he being a nonresident and traveling and soliciting for a nonresident dealer in such liquor, was and is in violation of the commerce clause of the Constitution of the United States, and therefore unconstitutional and void in its operation as to this defendant. Wherefore this defendant says he is entitled to his discharge." Said plea was duly verified by affidavit.

The state demurred to the plea (1) because said plea avers no ground sufficient in law to abate said indictment or involve the same; (2) because said plea admits on its face that said defendant did within the limits of Monroe county, Alabama, a district in which the sale of spirituous liquors is prohibited by law, solicit or receive an order from one Luke Sawyer, the party named in the indictment for spirituous, vinous, or malt liquors to be shipped into said district, and alleges no fact to show that the statute under which said indictment was found was and is in violation of the commerce clause of the Constitution of the United States; (3) said plea is not sufficient answer to said indictment.

The court sustained this indictment, and the case was tried on a plea of not guilty. Upon an agreed statement of facts in all respects like the matters and facts as set out in defendant's special plea above. Whereupon the court gave the affirmative charge of the state.

McCorvey & Hare and Kehoe & Smithwick, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The defendant in this case was convicted under an indictment charging that defendant "did solicit an order * * * for spirituous, vinous, or malt liquors to be shipped or sent into" a district in which the sale of such liquors was prohibited. The case was tried upon an agreed statement of facts, which showed that the defendant, as a traveling salesman, representing a house in Pensacola, Fla., solicited and received an order from one Luke Sawyer, in Monroe county, Ala., which is a prohibition county, for whisky for the personal use of said Sawyer; that said order was transmitted by defendant to said house in Pensacola, and no money was demanded or received by defendant. The defense, raised in various ways, is that section 5087 of the Code of 1896, in so far as it applies to a nonresident, traveling and soliciting orders for a nonresident dealer, is violative of the interstate commerce clause of the Constitution of the United States. This clause has been the subject of a large number of decisions by the Supreme Court of the United States, and of many very able dissenting opinions. So, whatever may be our opinion upon the points raised, it is important to keep in view simply the points decided by that able tribunal and try to

conform our decisions thereto, and to avoid, as far as possible, confusing the issue by too numerous and extensive citation of authorities.

The clause in question reserves to the Congress of the United States the power "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." Const. U. S. art. 1, § 8. It was early held that this power to regulate commerce included, not only the means and manner of transportation and the keeping open of free communication between the people, but also the subjects of commerce; and it was said: "Since the passage of the embargo and non-intercourse laws, and the repeated judicial sanctions those statutes have received, it can scarcely at this day be open to doubt that every subject falling within the legitimate sphere of commercial regulation may be partially or wholly excluded. * * * It may operate on any and every subject of commerce to which the legislative discretion may apply it." *U. S. v. Marigold*, 9 How. (U. S.) 560, 568, 567, 13 L. Ed. 257. In the *Robbins* Case and others which followed on the "drummer tax" question, it is decided, first, that the power of Congress to regulate commerce between the states is exclusive; second, that the failure of Congress to make any express regulation in regard to any subject indicates its will that the subject shall be left free from any restrictions or impositions; third, that the fact of the right to unrestricted commerce on any subject necessarily carries with it the right of the citizen of one state, either by himself or agent, to go into the other state and solicit business. An exception was also made in favor of the police power of the state to provide for the security of the lives, health, and comfort of its citizens, and among other things mentioned as illustrations is that of regulating or restricting the sale of articles deemed injurious to the health or morals of the community. This power is then qualified with the restriction that, in exercising this police power, no taxes can be imposed upon persons passing through the state, nor upon property imported, so long as it is in the original package, and "no regulation can be made directly affecting interstate commerce." *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

As to just what is left of this exception, after applying the qualification, it is difficult to say. Possibly it leaves such matters as had been previously decided as regulating the liability for marine torts. *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819. The original package cases held that legitimate articles of interstate commerce cannot be interfered with by taxation or otherwise, so long as they remain in the original package in which they were imported; and ardent spirits and tobacco are recognized among the legiti

mate objects of commerce. *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224 and cases cited. In one of the oleomargarine cases, the court reviews a number of cases, notes the fact that the court in one of the spirituous liquor cases (*Walling v. Michigan*, 116 U. S. 446, 459, 6 Sup. Ct. 454, 29 L. Ed. 691) placed its decision on the discrimination made, and in answer to the suggestion that the act (prohibiting certain persons from soliciting the sale of intoxicating liquors) was an exercise of the police power remarks, "This would be a perfect justification of the act, if it did not discriminate against the citizens and products of other states," then draws the distinction between the case in point and the case of *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, and others, to the effect that there was no deception or fraud in the sale of the spirits, and finally holds that the act to prohibit the sale of oleomargarine, colored to look like butter, was valid even as to sales in original packages by a nonresident, because "the Constitution of the United States does not secure to any one the privilege of defrauding the public." The decision winds up with the expression: "The judiciary of the United States should not strike down a legitimate enactment of a state, especially if it has direct connection with the social order, the health, and the morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the national convention, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern." *Plumley v. Massachusetts*, 155 U. S. 461, 470, 471, 479, 480, 15 Sup. Ct. 154, 39 L. Ed. 223.

Notwithstanding the expression referred to in the Michigan case, which might seem to indicate the contrary, we think that the other cases make it clear that the Supreme Court of the United States would hold that our statute, in question, is violative of the interstate commerce clause, unless it is relieved by the act known as the "Wilson Act," which provides that all intoxicating liquors "transported into any state, or remaining therein for use, consumption, sale or storage, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Act Cong. Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177]; 3 Fed. St. Ann. p. 853. This statute was considered by the United States Supreme Court in the *Rahrer Case*, in which the defendant, who was acting for a nonresident firm, was arrested for selling whisky in Kansas in original packages on the day after the Wilson act

went into effect, and sued out a writ of habeas corpus. The Circuit Court discharged the petitioner, but the Supreme Court reversed the case, Chief Justice Fuller delivering the opinion, in which he recognizes the right of the state, in the exercise of its police power, to prohibit the sale of spirits, restricted, however, by the inability of the state to interfere with the importation of articles of trade, which Congress, by nonaction had declared should be unmolested, and goes on to hold that the case of *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, and others, did not declare the state acts invalid, but merely limited their operation to property strictly within the jurisdiction of the state, and that the Wilson act simply "removed the impediment to the enforcement of the state laws in respect to imported packages in their original condition," and allowed imported property to fall at once upon arrival within the local jurisdiction. In *re Rahrer*, 140 U. S. 545, 564, 11 Sup. Ct. 865, 35 L. Ed. 572. This was followed by the Iowa case, in which the court held that the effect of the Wilson act was to "divest them [objects of inter-state commerce shipments] of that character at an earlier period of time than would otherwise be the case," to wit, after the object had reached its destination, it fell under the control of state legislation, so that it could not be sold even in the original package, but before it reached the destination, it continued to be an object of inter-state commerce, so that the express company could not be made liable, under the state law, for moving it from its platform to its warehouse. *Rhodes v. Iowa*, 412, 426, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088.

There can be no doubt that there is nothing in the law to prevent a resident of Florida, by correspondence or otherwise from selling to a resident of Monroe county, Ala., spirituous liquor, and, as held in the "Drummer Cases," that right carries with it the right to personally solicit business. The decisions of the Supreme Court of the United States, supra, make it clear that the Wilson act does not attach to any part of the transaction prior to the time when the transportation is completed. It results that, in so far as section 5087 applies to residents of other states soliciting orders for spirituous liquors to be transported from one state into the other, said section is violative of section 8, art. 1, of the United States Constitution. This does not affect the operation of the statute on persons within the state. We are borne out in this conclusion by *In re Bergen* (C. C.) 115 Fed. 339; *State v. Hanaphy* (Iowa) 90 N. W. 601. The Supreme Court of Kansas seems to have taken a different view, although the point was not really necessary to the decision of the case. *Westheimer v. Welsman*, 60 Kan. 753, 57 Pac. 969.

The judgment of the court is reversed,

and, as the defendant cannot be convicted under the indictment, he will be discharged. Reversed and rendered.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

DUKE v. STATE.

(Supreme Court of Alabama. May 9, 1906.)

1. INTOXICATING LIQUORS — SALE WITHOUT LICENSE—EVIDENCE—SUFFICIENCY.

On a trial for selling liquor without a license, it appeared that the liquor sold by accused was paid for by two metal checks issued by a company, good for 50 cents each, at the company's commissary store. Any one holding the checks could take them to the company's office and get money on them. Held sufficient to prove a sale.

2. CRIMINAL LAW—REMARKS OF COUNSEL.

Where, on a trial for selling liquor without a license, there was no evidence that a witness was the informant, it was proper to sustain an objection to the remarks of counsel for accused that the jury, in determining the credibility of the witness, should consider the fact that the informant was entitled to a half of the fine imposed.

Appeal from Circuit Court, Clarke County; John T. Lackland, Judge.

"To be officially reported."

Robert Duke was convicted of selling liquor without a license, and he appeals. Affirmed.

Davis & Davis, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The defendant in this case was convicted of the offense of selling spirituous liquor "without a license and contrary to law, within the limits of Clarke county, Alabama." The evidence on the part of the state tended to show that the whisky, which it is claimed was sold by the defendant, was paid for by "two metal checks" which had been issued by the "Scotch Lumber Company," which company issued these checks each day to their employes, on each of which checks there was stamped an amount, such as "25 cts.," "50 cts.," that said checks were good for the amount stamped thereon at said company's commissary store, and that on the 21st day of each month said checks could be taken to the office of said company, where they would be redeemed in money. The checks in question were of the denomination of 50 cents each.

The first question which presents itself is whether or not the transaction described constitutes a sale of the liquor, within the meaning of the statute, and as charged in the indictment. Generally speaking, a sale is defined as "a transfer of property from one person to another in consideration of a price to be paid in current money." 25 Am. & Eng. Ency. Law, 284. In an early case this court drew the distinction between a sale and an exchange or barter of articles of personal

property. to the effect that, if parties exchange one article for another, the price or value not being measured in money terms, the transaction is an exchange or barter and not a sale, but "sales include all agreements by which property is parted with for a valuable consideration, whether there be a money payment or not, provided the bargain be made and the value measured in money terms." Gunter v. Leckey, 30 Ala. 591, 596. This distinction is quoted with approval in a later case (Coker v. State, 91 Ala. 92, 94, 8 South. 874), and it is based upon abundant authority.

In the present case the character of the checks, as explained in the evidence, shows that such checks represented a certain money value. Consequently the price of the whisky was "measured in money terms," and the transaction was a sale. While it is true, as suggested by counsel for defendant, that the witness for the state did, on cross-examination, use the expression that these checks were "not transferable," yet we cannot say that they were worthless, as the witness testified that "any one holding said checks could take them to said office and get the money on them." They were evidently taken as of the money value stamped on them. Consequently there was no error in the action of the court in refusing to exclude the evidence from the jury. The remarks by counsel for the defendant, in argument, to the effect that the special act of this county "entitled the informant in such cases to half the fine imposed on the defendant, is a fact to consider in determining the credibility of the witness Benson," was improper, and the objection thereto was properly sustained. There was no evidence before the jury that Benson was the informer.

There being no error in the record, the judgment of the court is affirmed.

Affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

UNTREINER v. STATE.

(Supreme Court of Alabama. May 10, 1906.)

1. CRIMINAL LAW — EVIDENCE — OTHER OFFENSES.

In a prosecution for violation of liquor laws, where the testimony of the first witness for the state merely afforded an inference that beer purchased by him was the property of defendant, and that the sale was made by defendant, evidence of other sales by her was admissible to prove her identity as the person who in reality made the sale.

[Ed. Note.—For cases in point, see vol. 14. Cent. Dig. Criminal Law, § 824.]

2. INDICTMENT — ELECTION BETWEEN COUNTS — VIOLATION OF LIQUOR LAW.

Where the first count of an indictment charges the sale of liquors without license, and the second count charges sales in quantity less than a quart without license, and the third

charges sales of liquors which were drunk on or about the premises without a license, a motion to require the state to elect for which offense it would prosecute, was properly denied.

3. STATUTES—EFFECT OF PARTIAL INVALIDITY—SALE OF LIQUOR.

That the local prohibition acts (Acts 1880-81, p. 169; Acts 1884-85, p. 601), contain provisions relating to keeping liquors for sale and to intoxicating bitters, which subjects are not expressed in the titles of the acts, does not affect the validity of their remaining provisions.

Appeal from Circuit Court, Monroe County; C. J. Torrey, Special Judge.

"To be officially reported."

L. Untreinier was convicted of violation of the liquor law, and appeals. Affirmed.

The indictment in this case charges the defendant in the first count with selling spirituous, vinous, or malt liquors without license and contrary to law. The second count charges that the defendant sold spirituous, vinous, or malt liquors, or intoxicating bitters, in quantities less than one quart, without license and contrary to law. The third count charges the defendant with selling spirituous, vinous, or malt liquors, which were drunk on or about the premises, without a license and contrary to law. There was a judgment of conviction, and motion was made in arrest of judgment for the reasons set out in the opinion. Several witnesses were introduced by the state, and were permitted to testify each to separate purchasers of beer and whisky, over the objection of the defendant.

Barnett & Bugg and J. M. Miller, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. The testimony of the first witness examined in behalf of the state simply afforded an inference that the beer purchased by him was the property of defendant, and that the sale was made by defendant. The first of these inferences is deducible from the fact that it was bought in defendant's place of business, and the second that it was bought from another in her presence. Being mere inferences, it was competent for the state, for the purpose of showing ownership of the beer, and that the person making the sale was authoritatively acting for defendant—thus to establish her identity as the person who in reality made the sale of the beer—to prove other sales by her, notwithstanding these latter sales constituted separate and distinct offenses. *McIntosh v. State*, 140 Ala. 137, 37 South. 223, and cases there cited. And when the indictment contains only one count, care should be observed that the probative force of such testimony be not extended beyond the limits indicated; that it be not used by the state for the purpose of convicting the defendant for these offenses, each being separate and distinct. In each case the defendant, upon such testimony being admitted, has the right to require the

solicitor to state and elect for which offense he will prosecute.

But when the indictment contains a number of counts, as this one does, charging several distinct offenses, which may be joined, the prosecution has the right to introduce testimony to establish the offense alleged in each count, independent of the rule above declared, and may have a conviction upon each of the counts. *Wooster v. State*, 55 Ala. 217; *Covy v. State*, 4 Port. 86; *Bishop on Crim. Pro.* 3452, and cases in note 1; *Swanson v. State*, 120 Ala. 376, 25 South. 213; *Lowe v. State*, 134 Ala. 15, 32 South. 273; *Crittenden v. State*, 134 Ala. 145, 32 South. 273. And when, as here, there are several counts, and evidence is offered tending to prove the separate and distinct offenses as alleged in each, the doctrine of election does not apply until there has been an election by the prosecution under each separate count. *Carleton v. State*, 100 Ala. 130, 14 South. 472; *Elam v. State*, 26 Ala. 48; *Wooster v. State*, supra. Applying this principle to the facts as shown by the testimony, there was no error committed by the trial court in overruling the motion to exclude the evidence tending to show other sales of liquor by defendant, and of denying her motion to require the state to elect for which of the offenses it would prosecute. This also disposes of one of the criticisms to that portion of the oral charge excepted to. The other criticism, that the court omitted to instruct the jury as to the defendant's ownership of the liquors sold, is clearly without merit. To see that this is true, we need only read the whole of the extract of the charge to which the exception was reserved.

The motion in arrest of judgment is predicated upon the unconstitutionality of the local prohibition acts under which the indictment is preferred. Acts 1880-81, p. 169, Acts 1884-85, p. 601. The objection here urged is based upon the fact that the body of each of these acts, the latter being strictly amendatory of the former, contains subjects not expressed in the title. This is undoubtedly true, and the contention is sound; but the extraneous subjects embodied in each of them may be eliminated without affecting the validity of the act as a whole. In other words, after eliminating the extraneous subjects, "keep for sale" and "intoxicating bitters," from the bodies of the acts, the remaining subjects contained in the acts, being in conformity to those expressed in their titles, the acts are valid and complete laws as to those subjects. *Watson v. State*, 140 Ala. 134, 37 South. 225; *State v. Davis*, 130 Ala. 148, 30 South. 344, 89 Am. St. Rep. 23. Neither of the counts charge the defendant with keeping for sale any of the liquors, but each charges a sale of such liquors, and only one of them, the second, charges the sale by her of "intoxicating bitters." This one, of course, was defective; but no demur

rer was interposed to it. So, then, we have two good counts to which the judgment of conviction must be referred. This being true, the motion in arrest of judgment was properly denied. *Grant v. State* (Ala.) 40 South. 80. Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

CHANNEY v. STATE.

(Supreme Court of Alabama. May 19, 1906.)

1. STATUTES—PARTIAL INVALIDITY—EFFECT—INTOXICATING LIQUORS.

In Acts 1880-81, p. 170, prohibiting the manufacture or disposition of intoxicating liquors in a certain county, the invalidity of a provision that one-half of all the fines collected shall go to the informant does not affect the balance of the act.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-66.]

2. SAME—TITLE OF ACT—SUBJECT OF ACT.

That Acts 1880-81, p. 170, prohibits both the manufacture and sale or disposition of intoxicating liquors, does not render it invalid as containing separate and independent subjects.

Appeal from Circuit Court, Clarke County; John C. Anderson, Judge.

"To be officially reported."

Green Chaney was convicted of violation of the liquor laws, and appeals. Affirmed.

Wilson, Granade & Aldridge, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. The title to the act under which the indictment is preferred is as follows: "An act to prohibit the manufacture or sale or other disposition of vinous, spirituous, malt or other intoxicating liquors, within the limits of Clarke county, in this state." Acts 1880-81, p. 170. It is first insisted that the act is unconstitutional, because the body of it embraces a subject not expressed in the title. The provision against which this objection is urged provides "that all fines imposed under this act shall be paid only in lawful money of the United States, and one-half of the fine, in all cases, shall go to the informant." The attack seems to be aimed at the last clause quoted. If it be conceded that the point is well taken, yet this would not invalidate the whole act. This clause may be eliminated entirely, and yet the remaining portion of the act, being a complete enactment, must stand. *Untreiner v. State* (at present term) 41 South. 170.

The next insistence seems to be that the title contains two subjects, both of which are dealt with in the body of the act. This seems to proceed upon the theory that the prohibition against the manufacture of the liquors mentioned and the sale or other disposition of them are two separate and independent subjects, and therefore cannot be incorporated in the same act. We think this is clearly untenable. The manifest purpose

of the act, as shown both by its title and body, is to place the liquors named beyond the reach of the people of the county. The act may be and is subject to other constitutional objections, but not to the ones raised. They do not, however, impair its validity to the extent of invalidating it as a whole, or affect the sufficiency of the indictment upon which this conviction was had. *Untreiner's Case*, supra.

There is no error shown by the record, and the judgment is affirmed.

DOWDELL, SIMPSON, and DENSON, JJ., concur.

FRYER v. STATE.

(Supreme Court of Alabama. May 10, 1906.)

GRAND JURY—POWER TO ORDER—ADJOURNED TERM.

The order for a grand jury organized at an adjourned term, which is but a prolongation of the regular term, and not a special term, showing by its terms that it was made under Code 1896, § 5001, which has application solely to special terms, and not under section 5000, which confers the only authority for organizing a second grand jury at the same term of court, an indictment found by such grand jury is invalid and should be quashed.

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

"To be officially reported."

Jimmie Fryer was convicted of homicide, and appeals. Reversed and remanded.

The defendant was charged with unlawfully and with malice aforethought killing Julius Wheeler by shooting him with a gun or by cutting him with a knife, and it appears from the face of the indictment that it was preferred at an adjourned term of the circuit court of Monroe county. Motion was made to quash the indictment on the ground that it was preferred by an illegally organized grand jury and by a grand jury organized and held at a time not allowed by law. Motion to quash was overruled, and on trial the defendant was convicted, and sentenced to the penitentiary for fifteen years. From this conviction, this appeal is prosecuted.

J. N. Miller and Bayles, Hyart & Burns, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. The indictment upon which this defendant was convicted was preferred by a grand jury organized at an adjourned term of the court, after discharge of the former grand jury which was organized at the previous session of the same term. The only authority for organizing a second grand jury at the same term of the court (and an adjourned term is but a prolongation of the regular term) is conferred by section 5000 of the Code of 1896, which is as follows, "When any indictable offense is committed during the session of the court and after the

grand jury has been discharged, the court may in its discretion, cause an order to be entered on the minutes commanding the sheriff forthwith to summon eighteen persons possessing the requisite qualifications of grand jurors," etc. The order making provision for the grand jury, entered on the day of the convening of the adjourned term, to wit, July 17, 1905, is in this language: "It being made known to the court that since its adjournment, and since the discharge of the regular grand jury summoned for the term of the court, numerous indictable offenses and homicides had been committed within the county, and parties charged with said offenses are now confined in the jail of the county, and that in the opinion of the presiding judge the public good requires that a grand jury be organized for the purpose of investigating the alleged indictable offenses and homicides, it was [is] ordered that the sheriff of the county forthwith summon eighteen persons from the qualified citizens of said county, possessing the requisite qualifications of grand jurors, to appear on Wednesday, July 19, 1905, and serve as grand jurors for the said adjourned term."

It is entirely clear from this language that the order was not made under the section above quoted, but was made under section 5001 of the Code. *O'Brien v. State*, 91 Ala. 16, 17, 8 South. 559. This latter section has no application to adjourned terms, but applies solely to special terms. The distinction between a special term and an adjourned term of the court is so obvious under our statutes, and has been so often pointed out by the court, that it is unnecessary to do so here. 1 *Mayfield's Dig.* §§ 915, 916, 917. So, then, independent of the question of power or authority of the grand jury to investigate and indict for the offense alleged in the indictment, because not committed during the session of the court, it is invalid, and should have been quashed, for the reason that the judge was without authority to order a grand jury to be summoned under section 5001 of the Code of 1896. This conclusion is clearly supported by the *O'Brien* Case, *supra*. See, also, *O'Byrnes v. State*, 51 Ala. 25. The case of *Oakley v. State*, 135 Ala. 15, 33 South. 23, is clearly not opposed to these views. In that case the act establishing the Walker county law and equity court expressly authorized the judge of that court to "order a grand jury to be drawn, summoned and empanelled for said court and county of Walker, whether or not a grand jury shall have already been had for said term of said court." Nor does section 5269 of the Code have any application. *O'Byrnes' Case*, *supra*. As said in that case: "We cannot doubt that a grand jury, constituted in any other manner than prescribed by the statute, * * * is without legal warrant. A grand jury is not a mere assemblage of 15 or 18 persons in the jury box, congregated by an order of the court or by their own volition, or at the sum-

mons or on the behest of an unauthorized person. It is a constituent element of a circuit or city court, having criminal jurisdiction, sitting at a regular term, drawn selected and summoned in a mode clearly prescribed, under the superintendence and in the exercise of the sound judgment, of sworn officers of law." The motion to quash the indictment should have been granted.

Reversed and remanded.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

HALL v. STATE.

(Supreme Court of Alabama. May 10, 1906.)

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

"To be officially reported."

Tom Hall appeals from a conviction. Reversed and remanded.

Massey Wilson, Atty. Gen., for the State.

TYSON, J. The indictment in this case should be quashed, on the authority of *Fryer v. State* (Ala.) 41 South. 172.

Reversed and remanded.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

SOUTHERN RY. CO. v. GOLDSTEIN BROS.

(Supreme Court of Alabama. May 10, 1906.)

CARRIERS—CONNECTING CARRIERS—DUTY OF INITIAL CARRIER—BILL OF LADING.

Where a bill of lading limited the carrier's liability to its own line, and required delivery to another carrier on the route to destination, if the destination was not on the initial carrier's own line, such carrier's duty might be discharged by delivery to the connecting carrier designated in the bill, or, if none be designated and there were several, by a delivery to a proper connecting carrier on the route "in the usual and customary way."

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

"To be officially reported."

Action by Goldstein Bros. against the Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Weatherly & Stokely, for appellant. George Huddleston, for appellees.

SIMPSON, J. This was a suit brought by the appellees (plaintiffs) against the appellant (defendant) for failure to deliver certain goods which were shipped from Birmingham, Ala., to Baltimore, Md. The facts are not disputed that the goods were received by the defendant as a common carrier, at Birmingham, Ala., for which was issued what is called a "standard bill of lading," reciting the name of the consignee, "L. & L. Trimmed Hat Company, Baltimore, Md.," and "Route

No. ———, Baltimore Steam Packet Co." Said bill of lading states that "said carrier agrees to carry to said destination, if on its road, or otherwise to deliver to another carrier on the route to said destination," and also has the usual provision as to each carrier being only severally liable. It is admitted that the goods were delivered by the defendant to the Seaboard Air Line Railway at Atlanta, Ga.; also that defendant's line does not run to Baltimore.

The evidence does not show what the "Baltimore Steam Packet Company" is, nor between what points it carries goods, nor whether either the defendant road or the Seaboard Air Line Railway touches any point where connection can be made with such packet company, nor does it show where the Seaboard Air Line Railway is. There was evidence tending to show that a similar package of goods was received at the dock of said Baltimore Steam Packet Company at Baltimore, but it was not shown whence said package had been shipped, nor was there any other evidence to definitely identify the goods received there. It is also shown that both the L. & L. Trimmed Hat Company and the Baltimore Steam Packet docks were destroyed by fire February 7, 1904. It is true that, under such a bill of lading, the initial carrier may discharge its duty, and relieve itself of responsibility by delivery to the connecting carrier, if one be designated in the bill, or, if none be designated and there be several, it discharges its duty by a delivery to a connecting carrier on the route "in the usual and customary way," and it is authorized to select any reasonable or usual, direct, and safe route by which to forward. Hutchinson on Carriers (2d Ed.) § 102a; Ray's Negligence of Imposed Duties (Freight Carriers) pp. 392, 393. From the evidence, as stated, this court cannot say that there was such error in the finding of the court as to justify a reversal.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

WINSTON v. STATE.

(Supreme Court of Alabama. May 10, 1906.)

1. GAMING—PUBLIC PLACE—USE OF BUILDING.

Where a building had ceased to be used as a boarding house, and was used as a private residence or lodging house at the time certain games in question were played therein, it was not per se a "public place," within Code 1896, § 4792, prohibiting gaming at a public place.

2. SAME—PROOF OF OTHER GAMES.

Where, in a prosecution for gaming at a public place in violation of Code 1896, § 4792, the building in which the games were played was not per se a public place, proof of other games played therein was proper to show that it was a public place within the statute.

3. CRIMINAL LAW—EVIDENCE—QUESTIONS.

In a prosecution for gaming in a public place, the indefiniteness of a question as to

other games played there was cured by the answer that witness saw parties playing there several times during the current year before the incident concerning which he had testified, which occurred on March 1st.

4. CRIMINAL LAW—PROSECUTION BY AFFIDAVIT—ELECTION.

Where a prosecution for gaming was tried on an affidavit, the state was not bound to elect to rely for conviction on the game the witness had in mind when he made the affidavit.

Appeal from Law and Equity Court, Walker County; Peyton Norvell, Judge.

"To be officially reported."

John Winston was convicted of gaming in a public place, and he appeals. Affirmed.

Ray, Leith & Shephard, for appellant. Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. This defendant was tried and convicted under an affidavit charging him with gaming at a public place, under section 4792 of the Code of 1896.

The evidence showed that the building was at one time a boarding house, but that it had ceased to be used as such previous to the playing, and that at the time of the playing it was used as a private residence or lodging house. The place was not one of the places named in the statute, either when the game was played or previous thereto. A boarding house is not an inn, and is not per se a public place. Foster v. State, 84 Ala. 51, 4 South. 833. It was therefore incumbent upon the state to show that the place was a public one, and proof of other games was proper for this purpose. Dennis v. State, 139 Ala. 109, 35 South. 651; Lee v. State, 136 Ala. 31, 33 South. 894.

If the question to the witness as to other games was vague and indefinite, the answer made the games sufficiently definite: "I have seen them playing there several times during this year, before this time I have spoken about." The game spoken about was played about March 1st, so the several other games were within a period of two months. The trial court committed no error with reference to this evidence.

Since this case was tried upon an affidavit, there is no merit in the point made by defendant that the state was bound to elect the game the witness had in mind when he made the affidavit. Sullivan v. State, 68 Ala. 525.

The judgment of the lower court is affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

KYLE et al. v. ALABAMA STATE LAND CO.

(Supreme Court of Alabama. May 10, 1906.)

QUIETING TITLE—POSSESSION OF PLAINTIFF.

Code 1896, § 809, provides that one in peaceable possession of land, either actual or constructive, claiming ownership, and whose title is disputed, may maintain a suit in equity

to settle the same. *Held*, that the constructive possession which exists in the holder of title is sufficient possession.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 44.]

Appeal from Chancery Court, Tuscaloosa County; H. B. Foster, Chancellor.

"Not officially reported."

Action by A. M. Kyle and others against the Alabama State Land Company. From a decree in favor of defendant, complainants appeal. Affirmed.

Daniel Collier and M. P. Ormond, for appellants. J. A. W. Smith and Henry Fitts, for appellee.

SIMPSON, J. The appellee (complainant) filed his bill against the ancestor of appellants (respondents) under the statute. Section 809, Code 1896. The testimony in this case shows that the legal title to the land is in the complainant, and the chancellor correctly held, in accordance with the previous decisions of this court, that "the constructive possessions of the complainants, which exists in contemplation of law in the holder of the title, was * * * sufficient possession on which to found the right to maintain the bill." *Friedman & Loveman v. Shamblin*, 117 Ala. 454, 458, 23 South. 821. The claim of the respondents was based entirely on adverse possession under color of title. Upon a careful examination of the evidence on the part of the respondents, it appears to be entirely too uncertain and fragmentary, either to establish title as against the complainant, or to disturb the possession which the law imputes to it, to such an extent as to render it obnoxious to the requirements of the statute as to "peaceable possession." *Adler v. Sullivan*, 115 Ala. 582, 22 South. 87; *Chastang v. Chastang*, 141 Ala. 451, 37 South. 799.

The decree of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

CRAWLEY v. STATE.

(Supreme Court of Alabama. May 10, 1906.)

VAGRANCY—ELEMENTS OF OFFENSE—HUSBAND AND WIFE—DESEXTION BY HUSBAND—STATUTES—RETROSPECTIVE OPERATION.

Gen. Acts 1903, p. 244, making a man who quits his house and leaves his wife and children without means of subsistence guilty of vagrancy, does not apply where the accused left his wife and children before the passage of the act, though he remained away from them after that time.

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

"To be officially reported."

Patrick Crawley was convicted of crime, and appeals. Reversed and remanded.

Frank S. White & Sons, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. The ruling of the court on the motion to quash the affidavit is not shown by the judgment entry. It is therefore not revisable. *Gaston v. Marengo County*, 139 Ala. 487, 36 South. 738; *Spraggins v. State*, 139 Ala. 102, 35 South. 1000; *Wright v. State*, 136 Ala. 145, 34 South. 233.

The affidavit upon which defendant was tried and convicted was made on the 2d day of February, 1905. It charges that within 12 months before its making defendant, being an able-bodied person, did quit his house and leave his wife and children without means of subsistence. It is apparent that the offense here charged is one prescribed by the act of the General Assembly approved September 22, 1903, entitled "An act to define and punish vagrancy." Gen. Acts 1903, p. 244. We may premit a discussion of all other questions except the motion of defendant to exclude all of the testimony introduced by the state. That testimony showed that the act of the defendant, and upon which the prosecution relied for a conviction, in quitting his house and leaving his wife without means of subsistence, occurred in January, 1903, nearly nine months previous to the passage of the act of the General Assembly referred to above, and nearly two years before the commencement of the prosecution. The statute prescribing the offense charged in the affidavit did not operate to make his past act, as shown by the testimony, an offense, and, indeed, could not have constitutionally done so. Furthermore, if it could be held that the statute had that effect, the prosecution was barred by the statute of limitations of one year, unless (section 5071 of the Code of 1896) his act of quitting his house and leaving his wife was a continuing one. The theory of the prosecution is that it was; that each day the defendant remained away and failed to provide means of subsistence for his wife was an act of quitting and leaving. And, undoubtedly, if this be correct, the statute referred to would operate upon his act of quitting, etc., and it would be an offense under it for which he could be convicted, and the statute of limitations could never operate as a bar, so long as he remained away. Nor would a judgment of conviction or acquittal be a bar to subsequent prosecutions. For, clearly, if his act of quitting and leaving be a continuing one, he quits and leaves every day until he returns, and each day he remains away he commits a new, separate, and distinct offense. And if it be true that his act is a continuing one, it is wholly illogical to say that, because he quit his house and left his wife prior to the passage of the statute, it cannot operate upon his conduct after its passage, thereby relieving such conduct of its criminality. So, then, the question as to whether his act of quitting and leaving is a continuing one is necessarily presented and must be determined.

To constitute the offense there must be an

actual desertion, followed by a failure or refusal to provide means of subsistence for the wife and children. The absence of either would prevent the offense being made out. And after a completed act of desertion there cannot be a new act of quitting his house and leaving his wife and children without subsistence until a return to the discharge of the marital and parental obligation and another act of quitting, etc., occurs. *Gay v. State* (Ga.) 31 S. E. 569, 70 Am. St. Rep. 68. It is of no consequence that there are some acts of vagrancy, as defined in the statute, of a continuous character. This is clearly not one of them. Nor, in our opinion, can an affidavit or indictment be framed under the statute so as to make the offense here attempted to be charged a continuing one. It follows from what has been said that the motion to exclude all the testimony introduced by the state should have been granted, because no offense was proven.

Reversed and remanded.

ANDERSON and DENSON, JJ., concur in the foregoing views. WEAKLEY, C. J., and HARALSON, DOWDELL, and SIMPSON, JJ., concur in the result, but place their concurrence upon the ground that the act of quitting and leaving the wife and children, which is essential to fix the status of vagrancy, occurred prior to the passage of the act of the Legislature upon which the prosecution is based. Whether, if the act of quitting were committed after the enactment of the statute, and the abandonment continued, the status of vagrancy would be so fixed as to continue until the return to the family and the provision for them of means of subsistence, and to justify a prosecution at any time under a proper affidavit for such vagrancy, is, they think, a question which does not arise in this case and is not necessary to be decided at this time; and they prefer not to commit themselves to the conclusion announced by TYSON, J., in the concluding paragraph of his opinion.

WALKER v. STATE.

(Supreme Court of Alabama. May 11, 1906.)

1. CRIMINAL LAW—VENUE—PROOF.

The affirmative charge should be given at the request of the defendant in a criminal prosecution, where there was no evidence tending to establish the venue of the offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1727.]

2. GAMING—CRIMINAL RESPONSIBILITY—PUBLIC PLACE.

A place in a private yard, completely shut out of view from the public highway, was not a public place, within the law relating to gaming in public places.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 168.]

3. SAME—BOARDING HOUSE.

That the place at which a game of cards was played was in the yard of a boarding house, in

the absence of evidence that any other game had ever been played there, did not make it a public one.

Appeal from Macon County Court; M. B. Abercrombie, Judge.

"Not officially reported."

Ernest Walker was convicted of playing at a game of cards at a public place, and appeals. Reversed and remanded.

The defendant was tried under a warrant charging him with "playing at a game of cards at a public place in the town of Notasulga," was convicted, and fined \$20. The evidence showed that the playing was done under a chinaberry tree in the yard of one Harriet Show, who kept a boarding house; that the playing was under a chinaberry tree about 5 feet from the porch and about 15 feet from the public road; that there were a lot of sheets and other things hanging on a wire between the place where the game was played and the public road; that one passing along a public road could not see the parties or the place where the parties were playing; that one could not see unless they left the public road and came around behind where the sheets and other things were hanging. The principal witness for the state testified that he was passing along the public road and was attracted by some one talking, went into the yard behind the sheet and saw the game in progress, but that he could see no one from the road. It was not shown in what county the game was played. The defendant requested the affirmative charge, which the court refused.

H. P. Merritt, for appellant. Massey Wil-son, Atty. Gen., for the State.

TYSON, J. The affirmative charge requested by defendant should have been given; there being no evidence tending in any degree to establish the venue of the offense charged. Furthermore, it was erroneously refused for the reason, under the undisputed evidence, that the place at which the game was played was not a public place. It was hidden from view of travelers along the public road, in a private yard, and the players could not have been seen, except by entering the yard and going behind the obstruction, which completely shut out the view of the traveling public. It is of no consequence that all sides of the place where the game was played was not surrounded by obstructions, so as to prevent the players from being seen from every point of view. Suffice it to say the view of it was shut off from the public road. *Graham v. State*, 105 Ala. 130, 16 South. 934.

There is nothing in the testimony tending to show that what was being said by the players, and that was heard by the state's witness while in the public highway, showed that the parties whose voices were heard by him were engaged in playing cards. The facts of the case clearly differentiate it from *Lee v. State*, 136 Ala. 31, 33 South. 894, and

cases of a similar nature. In those cases the players were near enough to be seen by travelers passing along the public highway.

Nor does the mere fact that the place at which the game was played was in the yard of a boarding house, in the absence of evidence that any other game had ever been played there, make it a public one. A boarding house is not per se a public place. Neither is it an inn or tavern, in the absence of evidence tending to show such to be its character. *Foster v. State*, 84 Ala. 451, 4 South. 833; 5 Mayfield's Dig. p. 481, § 23.

Reversed and remanded.

WEAKLEY, C. J. and SIMPSON and ANDERSON, JJ., concur.

REEDER v. HUFFMAN et al.

(Supreme Court of Alabama. May 15, 1906.)

1. SHERIFFS AND CONSTABLES—FAILURE TO SERVE PROCESS—PLEADING—CONJUNCTIVE ALLEGATIONS—PROOF.

Where plaintiff alleged that defendant a constable "refused and wholly failed" to execute two writs for the seizure of personal property, etc., the allegation being conjunctive, plaintiff was bound to prove, not only that the constable failed to exercise due diligence, but that he refused to execute the process.

2. TRIAL—AFFIRMATIVE CHARGE—EVIDENCE—CONFLICT.

Where the evidence was in conflict in respect to the averments of the complaint, an affirmative charge in favor of plaintiff was properly refused.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 379, 391.]

3. EVIDENCE—UNCOMMUNICATED MOTIVE.

Evidence concerning the uncommunicated motive or purpose of a witness with reference to certain acts to which he had testified was inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 440.]

4. SAME.

In an action against a constable for refusal and failure to execute certain writs for the seizure of personal property, it was not permissible to inquire of a witness whether he would have told the constable he had the property, if the constable had inquired of him concerning it.

Appeal from Circuit Court, Lauderdale County; E. B. Almon, Judge.

"To be officially reported."

Action by J. T. Reeder, as surviving partner, etc., against J. A. Huffman and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This was an action on the constable's bond, and the gravamen of the charge is that said constable refused and wholly failed to execute two executions placed in his hands. The complaint alleges the judgments on which the executions were issued, the situs of the property subject to these executions, and other matters necessary to show a breach of the constable's bond. The evidence was in conflict in reference to the failure to levy the execution and as to the opportunity for levy-

ing them. It was in sharp conflict as to refusal to levy them. In fact, the evidence tended strongly to show an effort to levy the execution. The defendant requested the court to give the following charges, which the court did: "(1) If the jury believe from the evidence that the defendant failed to act with diligence in his effort to execute the writs, then, if the jury are reasonably satisfied from the evidence that a diligent effort would have been unsuccessful, your verdict will be for the defendant. (2) Unless the jury are reasonably satisfied from the evidence that the defendant failed to act with diligence in his efforts to execute the writ, then you will find for the defendant."

Simpson & Jones, for appellant. John T. Ashcraft, for appellee.

WEAKLEY, C. J. This is an action for damages for breach of a constable's bond, and the breach alleged is that Huffman, the constable, "did refuse and wholly fail to execute two writs for the seizure of personal property, which the plaintiff had recovered in detinue. The plaintiff's evidence tended to show a refusal by the defendant to execute the writs, accompanied by the statement that they were not worth the paper on which they were written; but the main defendant denied such refusal and statement, thus making a question for the jury's decision. A failure and refusal being alleged conjunctively, it was essential to a recovery to prove, not only that the constable failed to exercise due diligence, but that he refused to execute the process. *L. & N. R. R. Co. v. Dancy*, 97 Ala. 338, 11 South. 796.

The evidence was in conflict in respect of the averments of the complaint, and hence the affirmative charge for the plaintiff was properly refused.

In support of the assignments of error predicated upon the two charges given at the request of the defendants, it is argued merely that the charges were erroneous, because, it is said, the court should have given the affirmative charge, and should have passed on the evidence as a matter of law. We have already shown why that course could not have been properly pursued.

The first interrogatory propounded to the witness Bud Haynes called merely for the uncommunicated motive or purpose of the witness in performing certain acts to which he had testified; and it was not permissible to inquire of the witness whether he would have told the constable he had the property if the constable had inquired of him about it; no such inquiry having been made. A witness should not be asked what he would have done or said if something else, which was not done, had happened. This would be to indulge in mere speculation. The two interrogatories were propounded as one question. There was one refusal to allow both to be answered, and one exception.

There would be no error, unless both subdivisions of the question were such as should have been allowed, and this cannot be asserted of them. No error was committed in sustaining the objection to the double question.

There is no error in the record.

Affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

JACKSON v. STATE.

(Supreme Court of Alabama. May 19, 1906.)

1. HOMICIDE — EVIDENCE — POSSESSION OF WEAPON.

Evidence that a policeman examined deceased immediately after he was shot by defendant and found no weapon on deceased was admissible to show that deceased had no weapon during the difficulty.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 416.]

2. CRIMINAL LAW — CHARACTER — GENERAL REPUTATION—PARTICULAR ACTS.

Where, in a criminal prosecution, character is properly in issue, it must be proved by general reputation, and not by evidence of particular acts or conduct.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 844.]

3. HOMICIDE—HABITS OF DECEASED—CARRYING WEAPONS—KNOWLEDGE BY DEFENDANT.

The fact that deceased was in the habit of carrying a concealed weapon was admissible in a prosecution for homicide only when coupled with an offer to prove that defendant had knowledge of the fact before the homicide.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 396, 416.]

4. SAME—APPEARANCE OF DECEASED.

Evidence as to how the appearance and manner of deceased when intoxicated would impress a stranger or one who had but a slight acquaintance with him, and that it would make him resort to prompt action in defending himself against deceased, was admissible.

5. CRIMINAL LAW—POLLING JURY.

It was proper for the court to refuse to permit accused or his counsel to poll the jury and to require such duty to be performed by the clerk.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2085.]

6. HOMICIDE—INSTRUCTIONS.

An instruction that it was not necessary that there should be actual danger of death or great bodily harm in order to justify the taking of human life, but, if the circumstances attending the firing of the fatal shot were such as to impress defendant with a reasonable belief at the time of the firing that it was necessary in order to prevent death or great bodily harm to his person, defendant was entitled to an acquittal, unless he was not free from fault in bringing on the difficulty, was properly refused for failure to hypothesize defendant's belief that he was in imminent peril.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 614-632.]

7. SAME—DUTY TO RETREAT.

Where, in a prosecution for homicide, the question of defendant's duty to retreat was for the jury under all the evidence, instructions on self-defense ignoring such duty were properly refused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 614-632.]

8. CRIMINAL LAW—VERDICT—MOTIVES OF JURORS.

Where the jury, on being polled, assented to their verdict convicting defendant of manslaughter, it was proper for the court to refuse to permit them to be asked concerning the motives which influenced them or the reasons by which they were governed in rendering such verdict.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2087.]

9. SAME—NEW TRIAL—DENIAL—REVIEW.

The denial of a motion for a new trial in a criminal case cannot be reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3067.]

Appeal from Criminal Court, Jefferson County; D. A. Greene, Judge.

"Not officially reported."

George W. Jackson was convicted of manslaughter, and he appeals. Affirmed.

The state, on the trial of the cause, was permitted to ask the witness Aikin if, after the shooting, witness examined McDermott, and if he found the weapon on him. McDermott was the man killed. The witness replied: "I searched the body and found no weapon on the deceased." Having asked the witness what McDermott's reputation was, and the witness having answered that it was not good, the defendant sought by question to elicit from the witness various acts of the deceased tending to support the answer above made that his reputation was not good. Objection to all these questions was sustained on motion of the state. The same questions were propounded to other witnesses, and objections sustained to them. After the jury had returned their verdict, and before they were discharged, defendant's counsel asked to be permitted to ask each and every individual member if he or any member of the jury had said, while discussing their verdict in the juryroom, that he would convict the defendant upon his appearance alone, if for nothing else. This the court declined to do. The defendant's counsel then requested the court to ask each and every individual member the same question.

The defendant requested the court to give the following written charges: "(A) The court charges you, gentlemen of the jury, that it is not necessary that there should be actual danger of death or great bodily harm in order to justify the taking of human life; but, if the jury are satisfied from all the evidence in the case that the circumstances attending the firing of the fatal shot were such as to impress the defendant with a reasonable belief at the time of the firing that it was necessary in order to prevent death or great bodily harm to his person, then they must acquit the defendant, unless they further find that the defendant was not free from fault in bringing on the difficulty. (B) The court charges you, gentlemen of the jury, that it is not necessary that there should be actual danger of death or great bodily harm in order to justify the taking of hu-

man life; but if the jury are satisfied, from all the evidence in the case, that the circumstances attending the firing of the fatal shot were such as to impress the defendant with a reasonable belief at the time of the firing that it was necessary in order to prevent death or great bodily harm to his person, then they must acquit the defendant. (C) The court charges you, gentlemen of the jury, if the circumstances were such as to create a reasonable belief in the minds of the accused that his danger was imminent, then the law says he may strike in self-defense. (D) The court charges you, gentlemen of the jury, if you believe from the evidence the deceased was of such a character as would justify prompt and decisive action upon the defendant's part to protect himself, you must find the defendant not guilty, if you further believe the defendant knew of such character of deceased and acted in good faith to protect his own life. (E) The court charges you, gentlemen of the jury, that the evidence in this case shows you beyond a reasonable doubt that the defendant was under no duty to retreat. (F) That if you believe the evidence in this case, you must believe that George W. Jackson owed no duty to retreat. (G) That if you believe the evidence in this case, you must believe that it was impossible for defendant to further retreat, and that he was not at fault in provoking the difficulty; and if you believe from the evidence he acted in good faith to protect his own life, you must find the defendant not guilty. (I) That if you believe from the evidence that deceased advanced towards defendant and placed his hands in the direction of his pistol pocket, in such a manner as to indicate to a reasonable mind that his purpose was to draw and fire, then the defendant was authorized to anticipate him and fire first; and the rule would not be varied if it should turn out that the deceased was in fact unarmed. (J) That if you have a reasonable doubt whether the circumstances were such as to impress the mind of a reasonable man that he was in great danger of bodily harm at the time of the killing, you must give the prisoner the benefit of the doubt and acquit him."

There was motion for a new trial which was refused.

George Bondurant, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. It was competent to be shown by the state, that when the policeman, Alkin, went to the deceased, immediately after the shooting, he found no weapon on him, as this evidence tended to show, that he had no weapon during the difficulty.

Whenever character is properly in issue, it must be proved by general reputation, and evidence of particular acts or conduct is not admissible. *Jones v. State*, 76 Ala. 9; *Davenport v. State*, 85 Ala. 336, 5 South. 152. All those questions, therefore, numbered on

the margin, from 2 to 20, inclusive, called for illegal and irrelevant evidence, and were properly excluded.

It is proper to add, that it was competent to prove, that deceased was in the habit of carrying a concealed weapon, if that fact was known to the defendant. The offer in this case, was simply to prove that deceased was in the habit of carrying a concealed weapon, uncoupled with proof or offer to prove, that defendant knew that fact, and that the evidence was properly disallowed. *Sims v. State*, 139 Ala. 79, 36 South. 138, 101 Am. St. Rep. 17.

The defendant, when afterwards examined as a witness for himself, testified that he knew deceased was in the habit of carrying a concealed pistol. The evidence of the habit of deceased in this respect which had been previously disallowed, was not again offered in connection with this proof by defendant of the existence of this habit, and that he knew of such habit. If this had been done, the court might have admitted it; but without such offer, the court was not bound, of its own motion, to apply it to its former ruling on the subject.

The evidence offered by defendant, as to how the appearance and manner of deceased, when drunk, would impress a stranger, or one who had but slight acquaintance with him, and make him resort to prompt action in defending himself against deceased, was without the issues in the case, and clearly incompetent. The other rulings of the court on the exclusion of evidence, were free from error.

Polling the jury is a practice whereby the jurors are asked individually, whether they assented and still assent to the verdict. The clerk or the judge may propound the questions, and it would not be erroneous for another to do so, but it must be done under the direction of the court. 22 Ency. Pl. & Pr. 932. In this instance, the court, at the request of the defendant, permitted the jury to be polled, but declined to allow the defendant or his attorney to do the polling. In this there was no error.

Charge A, requested by defendant and refused, is a copy of a similar charge in *Keith v. State*, 97 Ala. 32, 11 South. 914, and which was there held to be proper and its refusal error; but, this case (*Keith's Case*) on that point was overruled in *Goodwin v. State*, 102 Ala. 89, 15 South. 571, in that it ignored the duty to retreat.

It is contended by defendant's counsel that this doctrine does not apply to this case, since it appears that there was at the time no opportunity for retreat open to the defendant, and the court should have so instructed the jury; but whether the defendant could or could not safely retreat, was a question under all the evidence, for the jury. *Storey v. State*, 71 Ala. 329; *De Arman v. State*, 77 Ala. 11, 17. Moreover, the charge does not

hypothesize the belief of the defendant that he was in imminent peril. The language of this charge, and of charges B and C was, if the circumstances were such "as to impress the defendant, with a reasonable belief," or "such as to create a reasonable belief in the mind," etc. They do not hypothesize his belief of danger. Each of the charges also ignore duty to retreat, as do charges D, I, J and K. *Goodwin v. State*, 102 Ala. 89, 15 South. 571.

As we have seen, the question of retreat is one for the determination of the jury under all the evidence. Charges E, F and G, which sought to take that question away from the jury and place it on the court, were likewise erroneous.

The jury, after the return of their verdict, were, as before stated, duly polled. It was not shown that the verdict was not unanimous. The process of polling is the means provided by the statute for ascertaining that each juror agrees to the verdict. Code 1896, § 5308. "The motives which influenced, or the reasons that governed the juror, cannot be inquired into." *Winslow v. State*, 76 Ala. 49.

Furthermore, the ruling of the trial court on the motion for a new trial in a criminal case is not reviewable on appeal. *Thomas v. State*, 139 Ala. 85, 36 South. 734.

Affirmed.

WEAKLEY, C. J., and DOWDELL and SIMPSON, JJ., concur.

STATE ex rel. FREDERICK et al. v. BRODIE.

(Supreme Court of Alabama. May 15, 1906.)

1. STATUTES—ENACTMENT—REGULARITY—EVIDENCE.

Courts will not hear evidence outside the journals of the houses to sustain or defeat a statute.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 55, 383-385.]

2. SAME—LOCAL LAWS—NOTICE OF APPLICATION—PUBLICATION—PROOF—SUFFICIENCY.

Under Const. § 106, declaring that, with certain exceptions, no special, private, or local law shall be passed unless notice of intention to apply therefor shall have been published, which notice shall state the substance of the proposed law, and that proof by affidavit that notice has been given shall be exhibited to each house of the Legislature, the journals of which must affirmatively show that the bill has passed in accordance with this provision, a mere affidavit of the publisher of a newspaper that a notice containing the substance of a local act was published in his paper, but not setting forth the contents of the notice, stated only a conclusion of the affiant that the notice contained the substance of the proposed law, and was not sufficient proof on that point.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"To be officially reported."

Information of the nature of quo warranto by the state, on the relation of Robert Frede-

rick and others against James Brodie. From a judgment sustaining demurrers to the information, relators appeal. Affirmed.

Robert Frederick, on the relation of the state, filed an information against one James Brodie, alleging that he had unlawfully usurped and was unlawfully exercising the rights and jurisdiction pertaining to the office of justice of the peace in precinct 45, Jefferson county, Ala. The information further alleges that precinct 45 lies partly within the city of Ensley, an incorporated town having more than 1,500 inhabitants. The information further sets up that by an act of the Legislature (Act No. 373, p. 698, approved Oct. 1, 1903) the office of justice of the peace and notary public with justice jurisdiction was abolished, and that in its stead was created by said acts a court of inferior jurisdiction. The information further alleges the constitutional passage of said act. To this information respondent filed demurrers raising the question of want of proper notice of intention to introduce the act, a failure of the journals of the Senate and House to show proof of such notice, and other grounds of demurrer raising various and sundry other objections to the constitutionality of the act not necessary to be here set out. The court sustained the demurrers, and the informant declined to plead over, and prosecutes this appeal.

Frank Deedmeyer and James A. Mitchell, for appellants. John H. Miller and A. Leo Oberdorfer, for appellee.

HARALSON, J. We need not follow counsel in all they say touching the unconstitutionality of the act, "To establish an inferior court in precinct 45 in Jefferson county, Alabama, etc., approved October 1, 1903." Loc. Acts 1903, p. 698, No. 373. If the act be held to be unconstitutional, on some one or more of the grounds brought forward, it is unnecessary to consider the others.

Section 106 of the Constitution requires that "no special, private or local law shall be passed on any subject so enumerated in section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state," in the manner prescribed, "which notice shall state the substance of the proposed law, and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof by affidavit that said notice has been given shall be exhibited to each house of the Legislature," and the journals must affirmatively show that the bill has passed, in order to make it valid, in accordance with this provision.

When the bill for the act in question was introduced into the Senate, the affidavit of one J. W. Minor, the president of the Ensley Publishing Company, accompanied the bill, in which he states as to notice required to be given. "that notice stating the substance of the foregoing bill, and the intention to apply for the enactment for such into law, was duly published in the Ensley Herald, at least once a week for four consecutive weeks, prior to the day hereof."

After the bill passed the Senate, it went to the House, where a similar affidavit was spread upon the journal. The notice as published was not, so far as can be ascertained, spread upon the journal of either house, and it is admitted, that all that appears upon the journals in the nature of proof, are the said affidavits. To these we are confined for the notice. Courts will not hear evidence dehors the journals of the houses to sustain or defeat a statute. Ex parte Howard-Harrison Iron Co., 119 Ala. 484, 24 South. 516, 72 Am. St. Rep. 928; Montgomery Beer Bottling Works v. Gaston, 126 Ala. 445, 28 South. 497. 51 L. R. A. 396, 85 Am. St. Rep. 42; State v. Buckley, 54 Ala. 613.

We have the question then, which does not appear to be difficult of solution, whether an affidavit, which merely states that a notice containing the substance of the proposed law, was published, without attempting to state the contents of the notice, or to make it a part of his affidavit, is a compliance with section 106 of the Constitution, providing that the notice to be given shall state the substance of the proposed law. The affidavit before us is a bare statement of affiant that the notice he refers to, and which is not set out anywhere in the legislative journals, and of the contents of which we know nothing, does set forth the substance of the bill. This is merely his ipse dixit or conclusion in respect to the notice, about which he may have been mistaken. It would not be evidence in any tribunal, and certainly could not rise to the dignity of proof. "The word 'proof,' when used in a legislative enactment, means competent and legal evidence, or, in other words, testimony that conforms to the fundamental rules of proof, one of which excludes hearsay evidence, however trustworthy the informant, or however implicit may be the deponent's belief in the truth of what he has heard." *Inglis v. Schreiner*, 58 N. J. Law, 120, 32 Atl. 131.

The Legislature, and not the affiant in that affidavit, was constituted the judge of whether or not the notice containing the substance of the proposed law was given; and the bare statement of an irresponsible person, it may be, that a certain undefined notice did contain the substance of the law, usurps the legislative function, and emasculates the constitutional provision, of the real purpose it was designed to subserve.

The court below sustained a demurrer to the information and petition for quo warranto, and petitioner declining to plead further, or to amend the petition, it was dismissed.

The judgment of the court below is affirmed.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

WARE v. STATE.

(Supreme Court of Alabama. May 17, 1906.)

HOMICIDE—TRIAL—INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.

Where there was no evidence that a killing was unintentional or lawful, but, on the contrary, it appeared without dispute that it was intentional and not lawful, there was no necessity for a charge on involuntary manslaughter.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 655.]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

"Not officially reported."

Mattie Ware was convicted of crime, and appeals. Affirmed.

W. T. Stewart and W. K. Terry, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. The case is here on errors alleged in rulings of the court in the admission and exclusion of evidence, on the refusal of the court to give the general affirmative charge for defendant, and in its general charge to the jury, in not instructing them on the law of manslaughter in the second degree.

It is unnecessary to review the court's rulings on the admission of evidence of the witness, Mattie Williams, and on the exclusion of that of the witness Davis. The first ruling was so manifestly proper, and the evidence excluded was so palpably improper as not to require consideration.

On what ground the affirmative charge could be given for the defendant does not appear, nor is there any thing in evidence, tending to show that defendant was, when she cut the deceased, in the performance of an act which would make it manslaughter in the second degree. There is nothing to show that the cutting was unintentional or lawful. On the other hand, it appears, without dispute, that the cutting was intentional and not lawful. There was, therefore, no occasion to charge the jury on involuntary manslaughter. *Johnson v. State*, 94 Ala. 41, 10 South. 687.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

SHELBY IRON CO. v. DUPREE.

(Supreme Court of Alabama. May 17, 1906.)

1. EVIDENCE—PAROL EVIDENCE VARYING CONTRACT—CONTRACT OF SALE.

A contract of sale by which the seller agrees to deliver coal "by wagons to their [defendant's] furnaces," and the purchaser agrees to pay a certain sum per bushel, "to be measured in the cabs" of the purchaser "at their furnaces," cannot be modified or explained by parol evidence of a custom of the purchaser and others; the purpose of such evidence being to show that the amount of coal should be determined by its bulk at the elevator or furnace proper.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1787, 1789, 1792.]

2. SALES—CONSTRUCTION—QUANTITY—ASCERTAINMENT.

A seller agreed to deliver coal "by wagons to their [defendant's] furnaces," and the purchaser agreed to pay a certain sum per bushel of 2,748 cubic inches, "to be measured in the cabs" of the purchaser "at their furnaces." The purchaser received the coal from the wagons into the cabs at the furnace sheds 75 or 100 feet from the furnace stack, receipting for it as there delivered. The five-peck bushel was adopted to compensate for spaces between the coal as loaded into the cabs. *Held*, that the place of measurement was the place of delivery, and not the furnace stack, in transportation to which the coal settled.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 194.]

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

"To be officially reported."

Action by Benjamin W. Dupree against the Shelby Iron Company. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

Knox, Dixon & Burr, for appellant. Sam Will John, for appellee.

SIMPSON, J. This is an action by appellee (plaintiff) against appellant (defendant) for \$750, claimed to be due for charcoal delivered under a contract originally made between appellant and one Christian, whose interest in the contract passed to the plaintiff. The contract is set out in the record, and the plaintiff claims that he has delivered more coal than he has received payment for, while the defendant contends that he has delivered only the amount for which payment has been made. The controversy arises from the contention of plaintiff, on one side, that the written contract is definite in all of its terms and is the sole exposition of the agreement between the parties, and the contention of the defendant, on the other, that certain questions should have been permitted to be asked of the witness to prove: (1) That it has been the established and well-known custom of the defendant to have the cabs so filled (with the charcoal) at the wagons or loading place that they would be full when they reached the furnace or elevator; and (2) that such was the well-known custom and usage of all well-regulated furnaces in this district. In other

words, the defendant's contention is that, although the cabs may have been heaped up, above a level measure, at the place where the coal was received, yet if, after transportation from the place of delivery to the furnace stack, the coal did not rest above the level of the sides of the cab, then the defendant was liable only for the amount of coal which it is agreed that said cabs held by measurement.

The material parts of the contract are that the plaintiff "is to furnish and deliver the coal by wagons to their [defendant's] furnaces at Shelby, Ala.," and that the defendant "agrees to pay to said party of the first part, for each bushel of 2,748 cubic inches of charcoal, delivered under this contract, to be measured in the cabs of said party of the second part [defendant] at their furnaces, the sum of 6 cents, free, at their furnaces, at Shelby, Ala." The evidence is uncontroverted that said cabs were "60 inches long, 30 inches wide, and 30 inches deep, all inside measurement. So it was a matter of easy calculation as to how many bushels of the required dimensions would be held in the cabs, when loaded, so as to be level with the sides of the cab. The bill of exceptions also states that "the evidence showed without conflict" that this "five-peck" bushel of 2,748 cubic inches had been adopted in place of the regular bushel "to compensate for the space between the pieces of coal as loaded into cabs." The evidence is without conflict also, that the coal which was delivered was hauled in wagons to a shed on the furnace company's grounds, about 75 or 100 feet from the furnace stack, being the place designated by said company; that at said place the coal was emptied from the wagons, and the company's employes filled the cabs by forking the coal into them; that near by said place, so as to be convenient thereto, the defendant company had put up and maintained a box, in which were a number of paddles or boards with numbers on them to correspond to the number of the wagon delivering the coal; that when the forkers (servants of defendant) forked the coal which had been dumped from the wagon into the cab, they would make a score or mark on the board or paddle which had the same number as the wagon delivering the coal, and each day the agent of defendant, whose duty it was to inspect and receive the coal, would take up these boards or paddles, and from them ascertain how many bushels had been delivered.

Proof of custom or usage is not permissible to vary the terms of a contract, but where the language used is ambiguous, or its meaning is uncertain, usage is admissible to show what is meant thereby. Evidence is admitted to annex incidents to a contract, where it is apparent that the parties have omitted to state important parts, but not to add incidents inconsistent with the express terms

of the contract. 29 Am. & Eng. Ency. Law, 427, 436; see, also, 12 Cyc. p. 1093, 1095, 1096, and notes. Where freight was received, "to be delivered to a railroad agent," at a certain place, proof was permitted of a custom to deposit in a warehouse there, because the agent did receive it, and the contract was silent as to what he should do with it after receiving. Ala. & Tenn. Rivers R. R. v. Kidd, 29 Ala. 222. In the case of Montgomery & E. Ry. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54, it was not a question of contradicting a written contract, but the paper that was contradicted by custom was merely a circular which the railroad had issued instructing its agents not to receive goods, without receipting for them, etc., and the proof showed that they had constantly disregarded those rules, and the custom as to how they did receive cotton was properly admitted. In that case Judge Stone says: "When persons enter into express stipulations, expressing the terms in which they enter into contracts, it is a reasonable rule, subject to only a few exceptions, that neither custom or usage will be allowed to dispense with such express stipulations." Page 40. So, where the contract was that the hirer of a slave was to "lose the negro's lost time," it was inadmissible to prove a custom that that meant time lost by sickness, etc., and not time lost by death. Barlow v. Lambert, 28 Ala. 704, 65 Am. Dec. 374.

Where the parties differed as to what the price agreed on was, custom was not admissible to show what the price was, the court saying: "Evidence of usage and custom is not permitted to prevail over and nullify the express provisions and stipulations of the contract." Quoting also: "It may be that the very object of the contract was to avoid the effect of usage, and no evidence of usage can be admitted to contradict the [express] terms of the contract, or control its legal interpretation and effect." Wilkinson v. Williamson, 76 Ala. 163; Wilson v. Smith, 111 Ala. 170, 175, 20 South. 134. Where a tenant signed a written agreement to pay 20 bales of cotton as rent, the landlord was not allowed to show "that it was a rule or custom he had made on his plantation that he should have all the cotton seed, even though this fact was known to the defendant, as this was a mere personal mode of dealing on the part of the plaintiff, * * * and it would seem to contradict the express terms of the rent note." Powell v. Thompson, 80 Ala. 51, 55. The Supreme Court of the United States, speaking through Justice Miller, has said: "The tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transactions took place, had gone quite as far as sound policy can justify. It places in the hands of corporations, such as banks, insurance companies, and others, by compelling

individuals to comply with rules established for the interests alone of the former, a power of establishing those rules as usage or custom with the force of law. When this is confined to establishing an implied contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing, and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well-expressed intention of the parties made in writing. No such extension of the doctrine is consistent, either with authority, or with the principles which govern the law of contracts." Partridge v. Insurance Co. 15 Wall. (U. S.) 573, 579, 21 L. Ed. 229.

We hold that in this case the parties have expressed their contract in writing. There is no term omitted, no ambiguous term, no technical words needing explanation, and it is not open to explanation or addition by proof of custom. The contract expresses that the defendant is to deliver the coal "by wagons to their furnaces, and to pay so much for each 2,748 cubic inches of charcoal delivered * * * to be measured in the cab * * * at their furnaces." "At their furnaces" evidently means on their furnace grounds at such a place as they may designate. When they received it in their shed, that was at their furnace, and certainly that was the construction given to it by the parties themselves, for it was to be hauled to the place of delivery by the wagons. It was thrown into the cabs there, by their own hands, noted on the boards, and receipts given, so that the delivery was complete, and that was the place of measurement. To hold otherwise would be to say that, although the contract says you are to deliver 2,748 cubic inches in the cab, yet by custom I have a right to take 2,748 inches in the cab and then pile several bushels on top, to insure me against shrinkage, notwithstanding we have already added a peck to each bushel and put it in the contract for that purpose.

The construction of the contract was for the court, and we hold that the court construed it correctly. The evidence does not raise any question as to the quality of the coal.

The judgment of the court is affirmed.

TYSON, ANDERSON, and DENSON, JJ., concur.

TRIBBLE v. STATE.

(Supreme Court of Alabama. May 19, 1906.)

1. COSTS—RETAXATION—MOTION—CRIMINAL PROSECUTION.

Code 1896, §§ 1344, 1345, authorizing the re-taxation of costs, does not authorize the re-

covery from the clerk of court, after release on habeas corpus, of costs paid under an execution in a criminal prosecution, by motion for retaxation of costs.

2. SAME—RECOVERY OF COSTS FROM STATE.

Costs paid by accused in a criminal prosecution and turned over to the state treasury cannot be recovered, after release on habeas corpus, by motion to retax costs.

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

"Not officially reported."

Newt Tribble was convicted of crime, and released on habeas corpus. From an order denying a motion to retax costs, he appeals. Affirmed.

M. K. Clements, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. This appeal is prosecuted from an order denying a motion to retax costs. The motion is based upon two grounds: (1) Because the sentence of the court is void, being pronounced upon a void judgment. (2) Because the costs that accrued prior to the nol. pros. of the indictment for murder in the second degree is included in the bill of costs assessed against the defendant.

Briefly stated, the facts are as follows: On April 14, 1905, movant here was convicted in the Limestone circuit court of manslaughter in the first degree and sentenced to serve one year in the penitentiary. He was released by habeas corpus proceedings had before Judge A. D. Sayre of the Montgomery city court on July 5, 1905. Execution for costs was issued, whether before or after movant's release is not shown by the record, and the costs, amounting to \$256.50, were paid to the clerk of the circuit court of Limestone county, and some of it by him covered into the state treasury before this motion was entered on the record. It further appears that the costs paid contained an item for a feed bill for 167 days at 30 cents per day, accruing between the finding of the nol. pros'd indictment and the indictment upon which movant was convicted.

If the ultimate end of the motion was to obtain a judgment against the clerk for the costs paid by the movant, the court correctly denied it. A motion of this character cannot be used to obtain a summary judgment against the officer collecting or recovering costs under proper execution. Such is not the purpose or intention of the statute. Code 1896, §§ 1344, 1345. And as to the money paid by the clerk into the state treasury the motion could avail nothing, since it cannot be recovered from the state. To permit the state to be made liable in this proceeding would be to permit by indirection that which cannot be directly done. Ala. Industrial School v. Reynolds (Ala.) 42 South. —.

Without deciding whether movant has a legal remedy under the facts in this case, we

are clear that he cannot pursue the remedy here resorted to.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

STALLWORTH v. STATE.

(Supreme Court of Alabama. May 19, 1906.)

1. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES—SHOWING—DENIAL—DISCRETION—ABUSE.

Where defendant applied for a continuance because of the absence of a witness, it was not an abuse of discretion to require defendant to make a showing as to what the witness was expected to testify, and deny the continuance on the state solicitor's agreeing to admit the facts stated, subject to legal exceptions.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1342-1347.]

2. HOMICIDE—APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

Where, in a prosecution for homicide, it was undisputed that deceased was killed by a bullet fired from a pistol striking him in the forehead, the admission of evidence that witness heard a pistol fired and that the hole in deceased's forehead was caused by a bullet from a pistol, if error, was harmless.

3. INDICTMENT AND INFORMATION—IDENTIFICATION OF DECEASED—ASSUMED NAME.

A person may acquire an assumed name by reputation, which may be used in an indictment to identify him as effectively as his true name.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 216-218.]

4. CRIMINAL LAW—EVIDENCE—IDENTIFICATION OF ACCUSED—ASSUMED NAME—HEARSAY.

Where accused was referred to in an indictment by an assumed name, proof of such name could not be established by a statement made to a witness by a third person that accused's name was the name alleged in the indictment; such evidence being mere hearsay.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 973-983.]

5. HOMICIDE—PREVIOUS DIFFICULTY—DETAILS.

Where, in a prosecution for homicide, the state offered evidence of a previous difficulty between defendant and deceased, the court properly limited the same to proof of the bare fact of such previous difficulty, exclusive of details.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 288-292.]

6. CRIMINAL LAW—IDENTITY—EVIDENCE—HEARSAY.

Where deceased was referred to in an indictment by the name "Bounce McLeod," evidence that the negroes on witness' place, where deceased, a negro, resided, were usually called by the name "McLeod," was inadmissible to showing that deceased's surname was as alleged in the indictment, and not another name, as claimed by defendant.

7. HOMICIDE—EVIDENCE—ACTS OF DEFENDANT.

Evidence that defendant left a certain store and went to the place where the shooting occurred, and what took place between accused and deceased at the time of the killing, was admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 341-350.]

8. SAME—DEGREES—CONVICTION OF LOWER DEGREE—EFFECT.

Where accused was convicted of murder in the second degree, such conviction operated as an acquittal of murder in the first degree.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 682.]

9. CRIMINAL LAW—DIRECTION OF VERDICT—EVIDENCE.

Where, in a prosecution for homicide, whether deceased's name was correctly laid in the indictment was, under the evidence, a question for the jury, an instruction that if the jury believed the evidence they should find defendant not guilty was properly refused.

10. HOMICIDE—PROVOKING DIFFICULTY—SELF-DEFENSE.

Where, in a prosecution for homicide, defendant's evidence showed his willingness to engage in a deadly combat, and his replies to deceased just prior to the shooting were such as to provoke deceased to advance on him and to precipitate the apparent necessity to take his life, defendant could not invoke the doctrine of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 145-150.]

11. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT—HOMICIDE—PROOF OF DECEASED'S NAME.

Where, in a prosecution for homicide, defendant denied under his plea of not guilty that deceased's name was properly alleged in the indictment, it was error for the court to refuse to charge that in order to justify a conviction the jury must believe beyond a reasonable doubt that deceased's name was correctly alleged.

Appeal from Circuit Court, Monroe County; C. J. Torrey, Special Judge.

"To be officially reported."

Jim Stallworth was convicted of murder, and he appeals. Reversed.

The defendant was indicted and tried for the killing of B. McLeod by shooting him with a pistol. When the case was called for trial, and the state had announced ready, the defendant moved for a continuance on account of the absence of the witness Seigler, and it was shown to the court that said witness lived at Bell's Landing in Monroe county, Ala., and that he was a material witness for defendant, whereupon the court put the defendant to making a showing as to what said witness would testify, and the defendant excepted. Upon tendering this showing to the solicitor, he agreed to admit the same subject to legal exceptions, and the court required the defendant to proceed with the trial, and to this the defendant excepted. Witness Stallworth testified that he had known the deceased for about two years, and that he had always heard him called "Bounce," with one exception, and that was when a Mr. Miller told him that the deceased was named "Bounce McLeod." The defendant moved the court to exclude the answer of the witness as to what Miller had told him. The court overruled the motion and the defendant excepted. The solicitor was permitted to ask the witness McLeod: "Were negroes on your place usually called by the name of McLeod?" Defendant objected to this question, and the court over-

ruled the objection, and permitted the witness to answer: "They sometimes do." Defendant objected to the answer and moved to exclude it.

The defendant requested the court to give the following charges, which were refused: "(2) The court charges the jury that if they believe the evidence they must find the defendant not guilty. (3) The court charges the jury that they must believe beyond a reasonable doubt that the deceased's name was Bounce McLeod before you can convict the defendant. (4) The court charges the jury that if, at the time the defendant fired the fatal shot that killed deceased, the facts and circumstances were such as to create in the mind of a reasonable man the belief that he was about to suffer great bodily harm, and the defendant was free from fault in bringing on the difficulty, then in that event the defendant would have the right to anticipate his assailants and fire first, and that the appearances need not have been real. (5) The court charges the jury that if, at the time the deceased put his right hand in the back pocket of his pants, his actions at that time would have impressed a reasonable man's mind that the life of Jim Stallworth was in imminent peril, or that Jim Stallworth was in danger of great bodily harm at that time, and Jim Stallworth was free from fault in bringing on the difficulty, then you must find the defendant not guilty."

The defendant was convicted of murder in the second degree and sentenced to 45 years in the penitentiary.

Bayles & Hybart, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. It cannot be affirmed that the court abused its discretion in refusing to continue the cause and in putting the defendant on a showing for the absent witness, Seigler. House v. State, 139 Ala. 132, 36 South. 732.

The statement of witness Stallworth that he heard a pistol fire and that the hole in the forehead of deceased was caused by a bullet from a pistol, if error, became one on account of being an opinion of the witness not an expert on the subject, was clearly without injury, since the undisputed testimony, including that of defendant, shows that deceased was killed by a bullet fired from a pistol striking him in the forehead.

While it is true that a person may acquire by reputation a name which would as certainly identify him as his true name, and the assumed name or the one acquired by reputation may be used in the indictment just as effectively to identify him as his true name, yet proof of the assumed name or the one acquired by reputation cannot be established by the statement made to the witness by a third person that his name was the one alleged in the indictment. This is pure hearsay testimony, and should not have been admitted. Nor, for that matter, can the true name of a per-

son be proven in this way. The witness should have a personal knowledge of the fact to which he deposes, and not be allowed to predicate his knowledge purely upon what some one has told him in the absence of the accused. It is undoubtedly true that the prosecution can show that the deceased was as well known by the name alleged in the indictment as by his true name, if the one alleged is not his true name, for the purpose of identification, and therefore to establish that averment: but this cannot be done in the manner attempted on the trial, as shown by the examination of the witness Stallworth.

The court correctly confined the state and defendant to proof of the bare fact of a previous difficulty between the deceased and the defendant, excluding the details of it. *Gordon v. State*, 140 Ala. 29, 37, 38 South. 1009.

The answer of witness McLeod in response to a question propounded to him by the solicitor on cross-examination was clearly incompetent and should have been excluded. The assumed name of the deceased or the one acquired by him by reputation could not be proven in this way. It "was too uncertain, indefinite, and remote to come within that class of evidentiary facts regarded as relevant." It had no legitimate tendency to prove the same fact to be true in the particular case of the deceased. In other words, the fact that negroes living on McLeod's place are sometimes called by the name of McLeod, does not tend to prove that deceased's surname was McLeod, and not Moseley. Such testimony is entirely outside of the inference of the principle permitting evidence of custom or usage. *White v. State*, 72 Ala. 195, 199.

That portion of the showing of Selgler remaining after eliminating the details of what occurred between deceased and defendant at the store of Hybart & Co. should have been admitted. It contained nothing more than the fact of defendant leaving the store and going to the place where the shooting occurred, and what took place between deceased and defendant at the time of the killing.

We will not discuss in detail the other exceptions reserved upon the trial to the rulings of the court upon the admission of evidence. Suffice it to say there was no error in any of them.

As the judgment must be reversed, and the cause remanded for a new trial, we deem it unnecessary to review the exceptions taken to portions of the oral charge of the court, since it will not, in all probability, be tried again by the special judge who tried this cause. We will, however, review the written instructions requested and refused to the defendant.

The first of them, if erroneously refused, is not available to work a reversal, because the defendant was convicted of murder in the second degree, which operates under our decisions as an acquittal of murder in the

first degree. The second was correctly refused for the reason that under the evidence that was admitted, though erroneous, it was for the jury to determine whether the deceased's name was correctly laid in the indictment. It certainly could not have been asked upon the theory that the homicide, which was admittedly committed by defendant, was excusable. On the contrary, the testimony admitted by the court shows without dispute that defendant was at fault in bringing on the difficulty. His own testimony showed his willingness to engage in the deadly combat. His replies to deceased just before the shooting were of such a character as to provoke the deceased to advance upon him and to precipitate the apparent necessity to take his life. This being true, he cannot invoke the protection which the law accords to those who take human life in defense of their person. A slayer of a human being must not be unmindful of his words or acts on the occasion of the homicide, which are likely to produce the deadly combat. And if by his words, acts, or conduct he shows a willingness to enter the conflict, or if by his words or acts he invites it, he must be held to have produced the necessity for slaying his adversary, and cannot invoke the doctrine of self-defense. *Reese v. State*, 135 Ala. 13, 33 South. 672; 5 Mayfield's Dig. p. 863. This also disposes of charges 4 and 5 adversely to defendant.

Charge 3 should have been given. It asserts no more than that the burden of proof was upon the state to establish by the evidence the name of the deceased, as alleged in the indictment, by that degree of proof required in criminal cases. The plea of not guilty put in issue this allegation, and the state undertook to prove it, and properly so. It was a controverted issue of fact in the case, and a material averment in the indictment. *Underwood v. State*, 72 Ala. 220.

Reversed and remanded.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

CONNER et al. v. GRAY et al.

(Supreme Court of Mississippi. June 11, 1906.)

1. INJUNCTION—SUBJECTS OF RELIEF—OFFICIAL ACTS—HOLDING ELECTION.

The chancery court has jurisdiction to enjoin the holding of an election, where it is in violation of the Constitution and laws of the state, but not otherwise.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 151.]

2. SAME—FORMATION OF NEW COUNTY—CONSTITUTIONAL PROVISION.

Where an act providing for an election to determine whether a new county shall be created complies with Const. § 260, giving the Legislature power to form new counties, subject to the restriction that it shall be submitted to the vote of the qualified electors in each part of the counties proposed to be dismembered and embraced in the new county, and that no new

county shall contain less than 400 square miles, it is not within the power of the chancery court to stop the election or to prevent the commissioners from making their returns to the Secretary of State.

3. COUNTIES—CREATION OF NEW COUNTY—EXPENSE TO TAXPAYERS—CONSTITUTIONAL LAW.

An act creating a new county from parts of old counties is not unconstitutional, and will not be enjoined because it entails additional expense on the taxpayers.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, §§ 7-9.]

4. INJUNCTION—PARTIES—INTEREST IN SUBJECT-MATTER.

A justice of the peace and members of the board of supervisors of a county cannot maintain a bill to enjoin an election to determine whether a new county shall be created, on the ground that their right to office would be affected thereby, since they have no right to complain of the act of the Legislature with relation to the creation of the county until they become directly affected by it.

5. COUNTIES—CREATION OF NEW COUNTY—CONSTITUTIONAL LAW—CONFLICTING PROVISIONS.

An act creating a new county in accordance with the provisions of Const. § 260, is not unconstitutional, because it deprives certain officers of the right to hold office for the balance of their term; the section cited being more specific than those provisions of the Constitution relating to districting the county into beats and districts and providing the terms of officers.

6. SAME.

Where an act provides for the creation of a new county out of parts of two old counties, and the two old counties do not complain of the act, it will not be declared unconstitutional as depriving them of a legal board of supervisors, or as affecting the senatorial districts apportioned by Const. § 255, or as violating Const. § 87, relating to local laws.

Appeal from Chancery Court, Covington County; T. A. Wood, Chancellor.

Suit by O. W. Conner and others against L. W. Gray and others. From an order dissolving a temporary injunction, petitioners appeal. Affirmed.

Suit in the chancery court of Covington county, instituted by certain citizens and taxpayers of Lawrence and Covington counties, one of whom was a justice of the peace in Lawrence county, to restrain the election commissioners appointed by the Governor from holding an election under an act of the Legislature of 1906 creating the new county of Jefferson Davis out of portions of Lawrence and Covington counties. The allegation of the bill most relied on was the contention that the act of the Legislature creating Jefferson Davis county was unconstitutional, in that the Legislature incorporated into the new county the territory of the two old counties and provided for the selection of new county officers for the new county so created, and thereby vacated certain offices in the old counties held by residents of the portions of the dismembered counties which were included in the new county, alleging that one of the complainants, who was a justice of the peace and elected to hold office for a term

of four years, would be deprived of his office by having his district included in the new county. A temporary injunction was granted, which, though it did not restrain the election commissioners from holding the election, did enjoin them from making the returns thereof to the Secretary of State. The defendant made a motion to dissolve the injunction on the ground that the chancery court had no authority to interfere with a political election, that the remedy, if any, lay in quo warranto proceedings, and that no rights existed in any officer of Lawrence or Covington county which could warrant the court for declaring the act of the Legislature void or unconstitutional. The chancellor sustained the motion to dissolve the injunction, and petitioners appeal.

R. D. Cooper and Longino, Willing & Willson, for appellants.

The chancery court has jurisdiction and power to restrain by injunction any violation of the Constitution in the organization of new counties. *Simpson Co. v. Buckley*, 85 Miss. 713, 38 South. 104; *Hinton v. Perry Co.*, 84 Miss. 536, 36 South. 565; *Maury Co. v. Lewis Co.*, 1 Swan (Tenn.) 236; *Ford v. Farmer*, 9 Humph. (Tenn.) 152; *Humphreys Co. v. Houston Co.*, 4 Baxt. (Tenn.) 593; *Bridgenor v. Rodgers*, 1 Cold. (Tenn.) 259; *Bradley v. Commissioners*, 2 Humph. (Tenn.) 428, 37 Am. Dec. 563; *Layton v. Mayor*, 50 La. Ann. 121, 23 South. 99; *Mayor v. Hughes*, 110 Ga. 795, 36 S. E. 247; *Railroad Company v. Commissioner*, 108 N. C. 56, 12 S. E. 952; *State v. Eggleston*, 34 Kan. 714, 10 Pac. 3; *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; *Solomon v. Fleming*, 34 Neb. 40, 51 N. W. 304; *Am. & Eng. Ency. Law vol. 7* (2d Ed.) p. 912; *High on Injunctions*, vol 2 (4th Ed.) p. 1260.

The act creating Jefferson Davis county is unconstitutional. *Gibbs v. McIntosh*, 78 Miss. 648, 29 South. 465; *Gibbs v. Green*, 51 Miss. 612; *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671; *Illinois Central Railroad Co. v. Garrison*, 81 Miss. 257, 32 South. 990, 95 Am. St. Rep. 469; *Crawford v. Railroad Co.*, 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476; *Runnels v. State*, Walk. 146; *Hyde v. State*, 52 Miss. 665; *Lehman, Ex parte*, 60 Miss. 967; *Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686; *Fant v. Gibbs*, 54 Miss. 390; *Holder v. Sykes*, 77 Miss. 64, 24 South. 261; *Bittle v. Stuart*, 34 Ark. 224.

McIntosh Bros., Alexander & Alexander, and Geo. B. Power, for appellee.

Equity has no power to enjoin holding elections. *McCrary on Elections*, §§ 220, 318, 340; *Dickey v. Reed*, 78 Ill. 261; *Peck v. Weddell*, 17 Ohio St. 271; *Sanders v. Metcalf*, 1 Tenn. Ch. 419; *Willeford v. State*, 43 Ark. 67; 15 Cyc. p. 394, and citations; 18 Cent. Dig. 245, 251; *Am. & Eng. Encyc.* (2d

Ed.) vol. 10, p. 817; *Harris v. Schryock*, 82 Ill. 119; *Smith v. McCarthy*, 56 Pa. 359; *Darst v. People*, 62 Ill. 306; *Guebelle v. Epley*, 1 Colo. App. 199, 28 Pac. 89; *Walton v. Develing*, 61 Ill. 201; *Hardesty v. Taft*, 23 Md. 512, 87 Am. Dec. 584; 27 Cent. Dig. § 151.

The power to alter the territorial jurisdiction of a justice of the peace necessarily arises from the constitutional power vested in the Legislature to create new counties. *Ex parte McCollum*, 1 Cow. (N. Y.) 450; *Portwood v. Montgomery County*, 52 Miss. 525.

Every presumption is in favor of the constitutionality of a statute, and the judicial department will be justified in pronouncing it unconstitutional only when it becomes manifest usurpation of power. *Am. & Eng. Ency.* (2d Ed.) vol. 6, p. 1086; *Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686; *People v. Allen*, 42 N. Y. 381; *Macomber v. Mayor*, 17 Abb. Prac. (N. Y.) 35; *People v. Supervisors*, 17 N. Y. 241; *Van Dyck Case*, 27 N. Y. 460.

Part of a statute may be unconstitutional, and the residue constitutional and valid. 20 *Am. & Eng. Ency. Law* (2d Ed.) p. 570; *Marshall Field & Co. v. Clark*, U. S. Inspector Customs, 143 U. S. 676, 12 Sup. Ct. 495, 36 L. Ed. 294; *Cronly v. Tucson* (Ariz.) 56 Pac. 876.

MAYES, J. It seems to us that the jurisdiction of the chancery court to enjoin the holding of an election, which is in violation of the Constitution and laws of the state, is well sustained on authority. On the other hand, the courts will not interfere in any election where it is not called in violation of the Constitution and laws of the state. In all the cases cited by counsel for appellant, where the chancery court has enjoined, without a single exception, it has been in cases where the election was attempted to be held under authority void under the Constitution and laws of the state. Where the authority which conferred the right to hold the election is itself unconstitutional and void, it is unquestioned that the chancery court has the power to enjoin it at the instance of any suitor who shows that a direct injury will be inflicted upon him by the holding of such an election. In support of the proposition that under such circumstances the court can enjoin, we refer to the cases cited by counsel for appellants. Thus, in the case of *Simpson County v. Buckley*, 81 Miss. 474, 33 South. 650, it was decided that any citizen or taxpayer had the right to invoke the aid of chancery to prevent a violation of the Constitution. In the case of *Maury County v. Lewis County*, 1 Swan (Tenn.) 236, the right of the chancery court to enjoin the officers of the new county from exercising jurisdiction within its limits was enjoined upon the ground that the creation of a new county was unconstitutional and void. So it was in

the case of *Ford v. Farmer*, 9 Humph. (Tenn.) 152, and *Humphreys County v. Houston County*, 4 Baxt. (Tenn.) 593, and in fact it is put upon this ground in every case cited by counsel for appellants where the right to enjoin has been sustained.

On the other hand, in the authorities cited by counsel for appellees, where the courts have denied this right, it has been in cases where the authority providing for the holding of the election was, in itself, not violative of the Constitution and laws of the state. We cite the authorities cited in the brief of counsel on each side as authority for these propositions. As was said in the case of *Humphreys County v. Houston County*, supra, "the creation of a new county is a legislative and not a judicial function, but the chancery court has jurisdiction to prevent a violation of the Constitution and laws in fixing the boundaries of new counties or in securing to the old counties out of which the new one is carved so much of their territory as is declared inviolable, or by protecting such other rights as are guaranteed by the organic law." This announcement of the law is in no way in conflict with the law as announced in the case of *Gibbs et al. v. McIntosh et al.*, 78 Miss. 648, 29 South. 465. We reannounce what is said in that case, that "it is not the policy of this state to have elections and other political matters of government reserved to legislative discretion interfered with by the judges and officers of the judicial department of the government," and it will only be done in a case where the Legislature has not the power to authorize the holding of an election under the Constitution, or where, having the power, they have exercised it in a way which is in plain violation of the Constitution of the state, but in both instances it must appear from the act itself that it is unconstitutional.

With this announcement as to the circumstances under which the chancery court will entertain jurisdiction to enjoin elections, we proceed now to a discussion of the particular case before us. Section 260 of the Constitution expressly gives the power to the Legislature to form new counties, subject only to the restriction that it shall be submitted to the vote of the qualified electors in each part of the county or counties proposed to be dismembered and embraced in a new county, and that it shall not be formed unless a majority of the qualified electors voting in each part of the county or counties proposed to be dismembered and embraced in a new county shall separately vote therefor, and subject to the further restriction that no new county shall contain less than 400 square miles, nor shall any existing county be reduced below that size. Thus we see that by express provision of the Constitution itself authority is given to the Legislature to create a new county by calling an election for that purpose and submitting it to the electors specified in the

section. This they did in an act which upon its face in every way conformed to the requirements of the Constitution. This was a power conferred by the Constitution upon the Legislature, which they have exercised in strict conformity with their rights under the Constitution; and having done so, and called an election, it is not within the power of the chancery court to stop that election, or to prevent the commissioners from making their returns to the Secretary of State. It is admitted in the brief of counsel for appellants, though they charge in their bill that the new county has not the area required by the Constitution, that this allegation is unfounded, and we may remark here that there is no attempt in the proof to sustain this allegation. Therefore there is absolutely nothing on the face of the act, from the first section to the last, which shows that it is in any way violative of the Constitution of the state.

It is contended by counsel that the holding of this election will entail additional expense on the taxpayers; that the act is unconstitutional, and for that reason may be enjoined by any taxpayer. But the only ground in the bill which appellants contend makes the act unconstitutional is that by the creation of the new county a justice of the peace and some members of the board of supervisors, elected under the Constitution for the term of four years, will be taken out of the county in which they now hold office and be included in the new county created by the act, and that because under the Constitution they are elected for a term of four years, and this act, if held to be valid and the new county created, will have the effect of placing them in a new county and cutting short their terms of office, and create confusion by conflict of authority with those who may hereafter be selected to serve as officers in the new county, this act, because of this, is unconstitutional. The justice of the peace and members of the board of supervisors so affected are also made parties complainant in the bill. By the Constitution of the state the power is given to the Legislature to call the election, and this they have done agreeably to the Constitution. The Legislature, having the right to call this election and being all-powerful as to the making of the laws, except in such cases as are prohibited by the Constitution, has made this additional expense necessary by calling the election, and whatever burdens by way of taxation may fall upon the individual taxpayer in these counties is lawfully imposed by the authority having the power to impose it, and therefore no taxpayer has any right to complain of any incidental expense which may accrue to him by reason of the act, when it is passed by express power given by the Constitution. Therefore the taxpayer has utterly failed to prove him-

self within the provision of the law as stated in *Gibbs v. Green*, 54 Miss. 592, in that he has failed to show, not only "that the act about to be performed is unconstitutional," but also failed to show that he will be injured in any way. This disposes of the contention so far as the taxpayer is concerned.

We next take up the question of the right that the justice of the peace and members of the board of supervisors may have to complain of this act because by the creation of a new county they are taken out of the county for which they were elected and placed in the new territory, or a different county. Does it abridge any rights which they have under the Constitution? In the first place, that section of the Constitution which empowers the Legislature to make provision for the creation of new counties is just as much a part of the Constitution as the section which provides for the districts of the justices of the peace and boards of supervisors. This being the case, and the especial power being conferred on the Legislature in the same Constitution to create new counties, notwithstanding the other provisions as to how long an officer shall hold his office, and as to the number of districts there shall be in a county, the Legislature has the right to exercise the power conferred upon it, irrespective of any other rights or powers which may be given to other departments or officers of the government, and until those in the particular department of the government or office, become immediately affected by the legislative act, it is of no concern to them; but, when they are affected, then it becomes a question as to which is the more specific and which the more general provision of the Constitution, the former controlling. There is no limitation as to legislative discretion in the creation of new counties, except as to area, as stated in *Portwood v. Montgomery County*, 52 Miss. 523, except that before any county can be created it must be submitted to an election. Neither the members of the board of supervisors, nor the justice of the peace, have any right to complain of the exercise by the Legislature of its constitutional power in the creation of a county until they become directly affected by it. They cannot maintain this bill simply because they fear some invasion may be made upon their rights as officers. *Gibbs v. Green*, supra.

We might here rest our decision without saying more; but since the question is one of public importance, and it is charged in the bill that the officers named will be deprived of some constitutional rights which they have to hold office, and this feature of the case is argued to the court, we feel that we should go further and pass upon this right also. The Constitution of the state stands as a whole, and all its provisions are to be construed together as one entirety. That section

of the Constitution which provides for the creation of new counties is a particular power granted to the Legislature, more far-reaching and greater in its effect upon the body politic than those provisions of the Constitution which provide for the districting of the county into beats and districts and providing for the terms of officers, and its exercise by the Legislature contains a necessary implication against anything contrary to it. The Legislature cannot legislate out of office any constitutional officer, where the purpose of the act is to accomplish this alone; but where the power is given to the Legislature by the Constitution to legislate upon any specific subject-matter, and in strict conformity to the power they do legislate, and it has the incidental effect of abolishing certain office holders holding office under the general provisions of the Constitution, those officers will be presumed to have been elected and to have accepted their offices in subservience to the power which existed in the Legislature, by the exercise of its constitutional power, to dispense with the office holders as the incidental effect of the passage of the act creating the new county. The general provisions of the Constitution must yield when they come in conflict with other provisions of the Constitution of a more specific, greater, and more general effect. It cannot be contended that the constitutional convention ever intended to give to the Legislature the power to create new counties, and then to have that right abridged by the fact that, when they undertake to do so, some officer's term will be shortened.

There are many reasons argued by counsel for appellants why this act should be declared unconstitutional—because, they say, it deprives the counties of Lawrence and Covington of a legal board of supervisors; because Jefferson Davis county, as created and attached to the Eighth senatorial district, violates section 255 of the Constitution; because the act violates section 87 of the Constitution. We see no merit in any of these contentions. Lincoln and Lawrence counties in the first place are not complaining as to their senatorial districts being affected, and there is ample provision in the law to meet every emergency raised by brief of appellants, even if the record properly presented them, which it does not.

It is further contended that the chancellor allowed too large a counsel fee; but, upon examination of the record in reference to the testimony taken upon this subject, we do not feel warranted in interfering with his decision. We specially refer to the authorities cited by counsel on both sides, and, since the law has been so well collated by them, we refer to their citations of authority for the contention of each side.

Let the cause be affirmed, and the bill dismissed.

FLORIDA PACKING & ICE CO. v. CARNEY.

(Supreme Court of Florida, Division B. March 27, 1906.)

1. TAXATION—COLLECTION OF ILLEGAL TAX—LIABILITY OF COLLECTOR.

Where a tax collector transcends his authority, and by the seizure, detention, and threatened sale of property, forcibly and against the consent and protests of a party, collects from him a sum for taxes which such party was under no legal obligation to pay, and was in no way legally liable for or subject to, and which such officer had no legal authority to demand or collect from him, such party has the right to sue such officer individually for and to recover of him the sum with interest so wrongfully collected.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1091, 1260.]

2. LICENSES—WHOLESALE MEAT DEALERS—CONSTRUCTION.

Under the provisions of the following section 16, c. 5106, p. 9, Laws of 1903: "That all wholesale dealers in fresh meats packed or refrigerated shall pay to the state a license tax of one hundred dollars in each county and for each place of business"—the word "dealer" does not comprehend a person who merely buys a commodity in one form and converts it by his skill and labor into an entirely different commodity, and then sells it, such, for example, as one who buys lumber with which he manufactures furniture or any other useful commodity that he sells, cannot be termed a "dealer in lumber." The true meaning of the word "dealer," as it is used in this statute is one who habitually and constantly as a business deals in and sells any given commodity; and a wholesale dealer therein, comprehends one who sells in large or wholesale quantities as contradistinguished from one who sells in small lots at retail.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Licenses, § 37.]

3. SAME—FRESH MEATS.

The tax imposed by section 16 of chapter 5106, p. 9, Laws of 1903, is upon the wholesale dealer in "fresh" meats only. Whether the same be either "packed or refrigerated" it must be, at the time that he sells it in the ordinary course of his business, in that state where it can properly be termed "fresh meat," as contradistinguished from cured or salted meats, in order to render him liable to the occupational tax imposed by said section.

4. SAME—CURED MEATS.

Meats technically known as "cured," from having been treated with salt, smoke, etc., keep in an edible condition indefinitely even in the warmest latitudes, whereas the same meats when untreated and fresh, though capable of being kept in their fresh and natural condition for long periods in a low temperature either natural or artificial, quickly spoil, become putrid, and unfit for food when subjected to high or even mean or ordinary temperatures. It is upon the wholesale dealer in the last-described commodity that the said section 16 of chapter 5106, p. 9, Laws of 1903 imposes the license tax, and not upon the dealers in cured or salted meats.

(Syllabus by the Court.)

Error to Circuit Court, Marion County; William S. Bullock, Judge.

Action by the Florida Packing & Ice Company against Ephriam L. Carney. Judgment for defendant, and plaintiff brings error. Reversed.

R. L. Anderson, for plaintiff in error. R. A. Burford, for defendant in error.

TAYLOR, J. The plaintiff in error as plaintiff below sued the defendant in error in the circuit court of Marion county in an action of trespass on the case. The declaration alleged as follows: "Plaintiff sues the defendant for that the defendant on or about the 3d day of September, 1904, being then the tax collector of Marion county, seized, levied upon and took into his custody and possession the following described personal property of the plaintiff, viz.: one wagon, one black mule, and one set of harness; that said property was then needed and in actual use by the plaintiff in distributing and delivering ice to its customers in Ocala in said county; that said defendant seized and levied upon said property solely for the purpose of enforcing and compelling plaintiff to pay a license or occupational tax under the provisions of section 16, c. 5106, p. 9, Laws 1903, of Florida, which said defendant claimed and demanded that plaintiff should pay, and which the plaintiff refused to pay. Plaintiff further says that it was not, and never became, liable to pay said license or occupational tax, and that it was not on said 3d day of September, 1904, nor at any time prior thereto, a wholesale dealer in fresh meats packed, or refrigerated, and that the attempted collection and enforcement of the same from the plaintiff was illegal and without authority of law; that the plaintiff was on the 3d day of September, 1904, and prior thereto had been, engaged in said Marion county in the business of purchasing fresh pork from farmers and stockraisers, all of which when so purchased was by the plaintiff placed in refrigerating rooms of its ice plant, and cured and treated by being salted, pickled, and smoked and converted into breakfast bacon, hams, shoulders, and sides before selling the same, and that none of said meat was sold or disposed of at wholesale by plaintiff while it was in a fresh state, nor until after it had been so changed and converted into cured and salt meats as aforesaid. Plaintiff further says that the defendant seized and detained said property under said illegal and wrongful claim, and that in order to recover the use and possession of said property which plaintiff needed and required in order to conduct its business as aforesaid, the plaintiff was compelled to and did pay to said defendant on or about October, 1904, the sum of \$150, being amount of said tax so illegally demanded, and that the plaintiff was constrained by the demand and seizure of said property made and done by the defendant under said pretended legal authority to pay said sum of money to the defendant, and was compelled against its will, and against its protest and objections to submit to said illegal demand in order to release its said property so illegally seized and detained by the defendant.

Plaintiff says that defendant was without legal right or authority to seize, levy upon, or take its said property. That said sum of \$150 was unlawfully and wrongfully collected, received, and taken by the defendant from the plaintiff, and claims damages in the sum of \$300."

This declaration was demurred to by the defendant upon the following grounds:

"(1) Because it fails to state a cause of action against this defendant.

(2) Because it appears from the allegations of the declaration that the plaintiff was liable to pay the license tax sought to be enforced.

(3) Because it appears from the allegations of said declaration that the plaintiff was a wholesale dealer in fresh meats, packed or refrigerated, within the meaning of section 16, c. 5106, p. 9, Laws of Florida, and was liable to the payment of the license tax demanded by this defendant, and now sought to be recovered in this cause.

(4) Because said declaration states a conclusion of law inconsistent with the facts given therein."

At the hearing the court below sustained this demurrer, and, the plaintiff declining to amend its declaration, rendered final judgment that the plaintiff take nothing by its plaint, that the defendant go hence without day and recover his costs, etc. To have this judgment reviewed the plaintiff brings the case here by writ of error, and assigns as error the order sustaining the defendant's demurrer to its declaration, and the entry of final judgment.

The right of the plaintiff to sue for and recover from the defendant tax collector the amount of money alleged to have been forcibly collected from the plaintiff by him by seizure and detention of its property, in the event, from the interpretation of the statute under which the defendant acted, it be found that the plaintiff was not legally liable for the alleged tax so collected, is not questioned. We do not think that there can be any serious doubt but that where an executive officer, such as a tax collector, transcends his authority, and by the seizure, detention, and threatened sale of property, forcibly, and against the consent and protests of a party, collects a sum for taxes for which such party was under no legal obligation to pay, and was in no way legally liable for or subject to, and which such officer had no legal authority to demand or collect from him, that such party has the right to sue such officer individually for and recover of him the sum with interest so wrongfully collected. Webb's Pollock on Torts, p. 141 et seq; American Bank v. Mumford, 4 R. I. 478; Eames v. Johnson, 4 Allen (Mass.) 382; Hubbard v. Kelley, 8 W. Va. 46. The legality of the enforced collection of the alleged tax from the plaintiff by the defendant as tax collector depends, under the allegations of the declaration that are admitted by

the demurrer, upon the correct interpretation of the following section 16, c. 5106, p. 9, Laws 1903:

"That all wholesale dealers in fresh meats packed or refrigerated shall pay to the state a license tax of one hundred dollars in each county and for each place of business."

The word "dealer" as used in this statute does not comprehend a person who merely buys a commodity in one form and converts it by his skill and labor into an entirely different commodity and then sells it; such, for example, as one who buys lumber with which he manufactures furniture or any other useful commodity that he sells, cannot be termed a "dealer in lumber." The true meaning of the word "dealer," as it is used in this statute is one who habitually and constantly as a business deals in and sells any given commodity, and a wholesale dealer therein, comprehends one who sells in large or wholesale quantities as contradistinguished from one who sells in small lots at retail. *Goodwin v. Clark*, 65 Me. 280; *Commonwealth v. Gormly*, 173 Pa. 586, 34 Atl. 282; *Overall v. Bezeau*, 37 Mich. 506. The tax imposed by the quoted section of the statute is upon the wholesale dealer in "fresh" meats only. Whether the same be either "packed or refrigerated" it must be, at the time that he sells it in the ordinary course of his business, in that state where it can properly be termed "fresh meat," as contradistinguished from cured or salted meats, in order to render him liable to the occupational tax here imposed. Meats technically known as "cured," from having been treated with salt, smoke, etc., keep in an edible condition indefinitely even in the warmest latitudes, whereas the same meats when untreated and fresh, though capable of being kept in their fresh and natural condition for long periods in a low temperature either natural or artificial, quickly spoil, become putrid, and unfit for use when subjected to high or even mean or ordinary temperatures. It is upon the wholesale dealer in the last-described commodity that the quoted section of the statute imposes the license tax, and not upon the dealer in cured or salted meats. *Cross v. Seeberger, Collector*, (C. C.) 30 Fed. 427. According to the allegations of the declaration in this case, that are all admitted to be true by the demurrer, the plaintiff was not a wholesale dealer in fresh meats within the meaning of this statute, and was not subject to or liable for the tax that it imposes upon such dealers, and the defendant as tax collector transcended his authority in its collection and enforcement against him, and the plaintiff has the right to recover it back from him as he seeks to do by this suit. No question is presented of immunity of the officer from liability here by reason of the existence of any warrant issued by some other official, body or tribunal under, and in, obedience to which he acted in the collection of this tax, since the statute seems to leave the ascertainment

of the fact as to who are liable to the license taxes it imposes entirely in the air, without any prior listing or assessment by any official or board. In general terms it prohibits, under penalties, the conduct of any of the occupations taxed, without having a license, which can be procured only by payment of the sum imposed as the tax on the given business. It then in general terms makes it the duty of the tax collector to enforce the payment of such tax by seizure and sale of property, leaving the fact as to who is subject to such tax to be ascertained by the collector in the best way that he can, and prescribes no warrant or other writ or process under which he shall act in making the required seizure, and sale of property for its enforcement.

From what has been said it follows that the court below erred in sustaining the demurrer of the defendant to the plaintiff's declaration. The judgment of the circuit court is, therefore, hereby reversed at the cost of the defendant in error, with directions to overrule the defendant's demurrer to the second count of the plaintiff's declaration.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

CEPERO v. HARTRIDGE.

(Supreme Court of Florida, Division B. April 18, 1906.)

1. EQUITY—MASTER'S REPORT—NOTICE—NECESSITY.

Rule 84 of the rules of the circuit courts in suits in equity is to be construed in connection with section 1425 of the Revised Statutes of 1892, and, so construed, it is the proper practice for a master in chancery to give the respective parties notice when his report is ready to be filed in order that they may make such objections and take such exceptions as they may be advised are necessary in order that they may be in a situation to present them to the court; and it is a further duty of the master to give notice to the parties of the filing of his report, in order that they may be able to avail themselves of the right of exception given them by said rule 84.

2. SAME—PROCEDURE.

Where the record fails to show that notice was given the appellant of the filing of the master's report, and there is nothing to show that appellant either expressly or impliedly waived notice, and the record fails to show that the case was set down for hearing as provided in rules 85 and 86 of the rules of the circuit court in suits in equity, and it appears that the cause was finally heard and a final decree made without notice to appellant, the decree appealed from will be reversed.

(Syllabus by the Court.)

Appeal from Circuit Court, Duval County: R. M. Call, Judge.

Bill by John E. Hartridge against Annie E. Cepero. Judgment for plaintiff, and defendant appeals. Reversed, and remanded.

Samuel W. Fox, for appellant. M. C. Jordan, for appellee.

HOCKER, J. John E. Hartridge, by M. C. Jordan, his solicitor, on February 25, 1905, filed a bill in the circuit court of Duval county to foreclose a mortgage given to him to secure the payment of a note for \$200, with interest, against Annie E. Cepero (née Annie Jackson), the maker of the note and mortgage, and George F. Markillie, who was alleged to have or claim an interest in the mortgaged property subordinate to the mortgage lien. Annie Cepero filed an answer, setting up, amongst other defenses, part payment. A replication was filed to this answer, and testimony taken by a special master appointed by the court and ordered to make findings of law and fact. On the 6th of September, 1905, the special master filed his report in the clerk's office, making findings therein of law and fact, upon which a final decree in favor of the complainant was made by the circuit judge on the 9th of October, 1905, decreeing a lien on the mortgaged property for \$350.34, principal and interest, and \$125.03 solicitor's fees. From this decree an appeal was taken to this court.

There are several errors assigned, among them that no notice of the filing of said report of said master was given to or served upon the appellant or her counsel of record, and that the testimony of two witnesses for complainant was taken by the master without notice to the appellant. The record does not show that the cause was set down for hearing as provided for in rules 85 and 86 of the rules of the circuit court in suits in equity, nor does the final decree or anything in the record show that the appellant or her counsel had notice of the filing of the master's report or was present when the final decree was made, or that she had notice of the final hearing. Rule 84 of the rules of the circuit court in suits in equity does not expressly provide that a master must give the parties notice of the filing of his report, but the proper construction of this rule, which is a copy (except in particulars not necessary to be considered here) of rules 83 and 84 of the rules of practice for the courts of equity of the United States, is to be construed in connection with the law as it existed when the rule was adopted. Section 1425, Rev. St. 1892, which is brought into the Revised Statutes from the previous statute, provides: "In the absence of provisions of the law or rules of practice of this state, the rules of practice in the courts of equity of the United States, as prescribed by the Supreme Court thereof under the act of Congress of the 8th of May, onethousandsevenhundred and ninety-two, shall be rules for the practice of the courts of this state when exercising equity jurisdiction; and when the rules of practice so directed by the Supreme Court do not apply, the practice of the courts shall be regulated by the practice of the High Court of Chancery of England." This statute was construed by this court in *Kahn v. Weinlander*, 39 Fla. 210, 22 South. 653; *Long v. Ander-*

son, 48 Fla. 279, 37 South. 216. The federal courts, including the United States Supreme Court, seem to hold that the English practice is not abolished by the equity rule referred to, and that objections to the findings of a master or rulings by him, must be made before him. If objections are not made or exceptions taken before the master, a party will not be allowed to except or object afterwards. *Gay Manufacturing Company v. Camp*, 15 C. C. A. 226, 68 Fed. 67; *Topliff v. Topliff*, 145 U. S. 156, text 173, 174, 12 Sup. Ct. 825, 36 L. Ed. 658; *Celluloid Manufacturing Co. v. Cellonite Manufacturing Co.* (C. C.) 40 Fed. 476; *Troy Iron & Nail Factory v. Corning*, 6 Blatchf. (U. S.) 328, Fed. Cas. No. 14,196. An interesting treatment of the rule for the government of the proceedings before the master may be found in 2 *Bates on Federal Equity Proc.* § 772 et seq. The English rule requires the master to prepare a draft of his report, and to give notice to the parties that the report is ready, in order that they may attend before the master, inspect the report, obtain copies, suggest changes, and file objections thereto; for, under the English practice, after the report has been signed and settled no objections will be received, nor any changes made by the master, and the court will not consider an objection which was not made before the master. Therefore notice is required to be given the parties that they may have opportunities to object, and have their objections made of record before the report is signed and settled, and passed beyond the control of the master. It would seem, from some of the cases cited supra, that this is the proper procedure in the courts of the United States, and that the equity rule referred to (83) has made no change therein. It seems to us, however, that, while that practice may be proper and unobjectionable, yet that under the rule (84) a party may file his exceptions to a master's report within one month from the time of its being filed in the clerk's office, and that he cannot be debarred of this privilege by any failure of the master to give him notice and opportunity to object to the report before the time of its filing or afterwards. Where proper notice of the filing of his report has not been given by the master, his report should not be confirmed, and no decree should be entered thereon without the consent of all the parties expressly or impliedly given. In 2 *Bates*, § 772, supra, it is said: "It is a fundamental principle of all just and enlightened judicial procedure that in subordinate courts the parties shall have an opportunity to make objections and reserve exceptions for the purposes of a review in a supreme tribunal, and this right is secured in the master's office by the most rigid rules which the master cannot disregard without having the report set aside, or referred back to him by the court, with the direction that he observe the regular procedure and respect the rights of the parties by

giving them an opportunity to interpose their objections." Inasmuch as our records show a very loose practice in many cases in regard to the appointment of masters and in conferring powers upon them of making findings on the law as well as the facts, as well as in their methods of procedure, we cannot refrain from calling the attention of the profession to the whole of chapter 30, in 2 Bates on Federal Equity Procedure, which in most respects is applicable to our system.

Because the record fails to show that notice was given the appellant of the filing of the master's report, and there is nothing therein to show that she either expressly or impliedly waived notice, and the cause was apparently heard finally and the final decree made without notice to her, the decree appealed from is reversed at the cost of the appellee, and the cause remanded for further proceedings in accordance with law.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

HOODLESS v. JERNIGAN.

(Supreme Court of Florida, Division A. April 24, 1906.)

1. APPEAL AND ERROR—BURDEN OF SHOWING ERROR.

The duty devolves upon the plaintiff in error or his counsel upon resort to an appellate court to make the errors complained of clearly to appear, if they in truth exist, by a proper record of all the facts and circumstances pertinent to, and connected with such alleged error, and in exhibiting them the duty likewise devolves upon him to exhibit all such facts and circumstances fairly and truly.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3670.]

2. EXCEPTIONS, BILL OF—CONTENTS—ADMISSION AND REJECTION OF EVIDENCE.

The rules contemplate that in making up bills of exceptions based upon the admission or rejection of evidence, where the evidence admitted or rejected, forming the subject of the exception, does not in and of itself show upon its face its pertinency and relevancy to the issue being tried, and there is other evidence either admitted, or proffered and rejected, that will connect it with the case and show its relevance or pertinence, such other connecting evidence should be set forth in the bill of exceptions so as to enable the appellate court fully and fairly to pass upon the propriety or impropriety of the admission or rejection thereof.

3. APPEAL AND ERROR—PRIOR DECISION—LAW OF THE CASE.

The principles enunciated in the former opinion in this case (*Hoodless v. Jernigan*, 35 South. 656, 46 Fla. 213) have become the law of this case, and cannot be reviewed or reversed upon this writ of error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4358.]

4. TRIAL—OBJECTIONS TO EVIDENCE—DEPENDENCE ON EXTRANEOUS FACTS.

Objections interposed to the introduction in evidence of written instruments which do not appear upon the face thereof, but would

have to be proved by extraneous evidence should be overruled, unless such extraneous evidence has been previously introduced.

5. SAME—INTRODUCTION OF EVIDENCE—ORDER.

In both civil and criminal cases the trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court when a clear abuse thereof is made to appear.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3851; vol. 15, Cent. Dig. Criminal Law, § 3063.]

6. SAME—MOTION TO STRIKE OUT.

A motion to strike out from the evidence several documents or instruments as an entirety should be denied if any of said instruments was properly admitted.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 248.]

7. APPEAL AND ERROR—MATTERS REVIEWABLE—OBJECTIONS NOT RAISED BELOW.

An appellate court will not consider any grounds of objection to the admissibility of evidence, except such as were made in the court below; the plaintiff in error being confined to the specific grounds of objection made by him in the trial court.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1258.]

8. SAME—PRESUMPTIONS—MATTERS NOT SHOWN BY RECORD.

Where the bill of exceptions fails to show at what stage of the proofs certain evidence was offered or for what purpose and the grounds upon which the introduction of such evidence was objected to and the grounds upon which the same was excluded, we cannot presume error in the exclusion of such evidence, every presumption being in favor of the correctness of the rulings made by the trial judge.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3735-3737.]

9. SAME—FAILURE TO EXCEPT.

When the bill of exceptions does not show the ruling of the court upon a motion for a new trial or any exception to such ruling, an appellate court cannot consider the merits of such motion or any assignment of error based thereon.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2944-2946.]

10. COURTS—RULES OF COURT—EFFECT.

An appellate court, equally with suitors, is bound by its rules, and they must be construed as statutes would be construed.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 295.]

(Syllabus by the Court.)

Error to Circuit Court, Santa Rosa County; Francis B. Carter, Judge.

Action by W. L. Jernigan against John Hoodless. There was judgment for plaintiff, and defendant brings error. Affirmed.

Amos & West, for plaintiff in error. Daniel Campbell & Son, for defendant in error.

SHACKLEFORD, C. J. The defendant in error as plaintiff brought an action of ejectment against the plaintiff in error as defendant in the circuit court for Santa Rosa county to recover the possession of a certain described tract of land, and for mesne profits. A trial was had at the Spring term, 1905, of said court, which resulted in a verdict and

judgment for the plaintiff, to which judgment the defendant took a writ of error returnable to the present term.

This is the second time this case has been brought here by the defendant. See *Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 656. That judgment was reversed for certain errors and irregularities found in the verdict and judgment.

Twenty-one errors are assigned, some of which, however, are expressly abandoned, and others are not argued. In his brief the plaintiff in error says that "the assignments of error numbered from 1 to 5 raise the same questions, practically, as those numbered from 9 to 14, inclusive, and will be considered together." We shall follow his example in so treating them, so far as we can do so, and at the same time make this opinion clear and intelligible. However, before taking up these assignments it may be well to call attention to the fact that the transcript contains both an ordinary and an evidentiary bill of exceptions, which were made up and presented to the trial judge prior to the 15th day of May, 1905, on which date the new rules adopted by this court on the 2d day of March, 1905, went into effect, therefore, the new rules have no applicability in the instant case. The sixth, seventh and eighth headnotes of the former opinion rendered by us in this case (*Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 656) will prove instructive. They are as follows:

"(6) The evidentiary and ordinary bills of exceptions must be made up separate and distinct from each other, and each must be sufficient and complete in itself to review the errors designed to be presented, and a reference by the court from one to the other is not permissible, to aid defects in either.

"(7) The duty devolves upon the plaintiff in error or his counsel upon resort to an appellate court to make the errors complained of clearly to appear, if they in truth exist, by a proper record of all the facts and circumstances pertinent to, and connected with such alleged error, and in exhibiting them the duty likewise devolves upon him to exhibit all such facts and circumstances fairly and truly.

"(8) The rules contemplate that in making up bills of exceptions based upon the admission or rejection of evidence, where the evidence admitted or rejected, forming the subject of the exception, does not in and of itself show upon its face its pertinency and relevancy to the issue being tried, and there is other evidence either admitted, or proffered and rejected, that will connect it with the case and show its relevance or pertinence, such other connecting evidence should be set forth in the bill of exceptions so as to enable the appellate court fully and fairly to pass upon the propriety or impropriety of the admission or rejection thereof."

Also see the authorities cited in that opin-

ion, and *Daytona Bridge Company v. Bond*, 47 Fla. 136, 36 South. 445; *Florida Land Rock Phosphate Co. v. Anderson* (Fla.) 39 South. 392. The principles enunciated in the headnotes which we have just set forth, as well as those found in our former opinion generally, have become the law of this case. See *Anderson v. Northrop*, 44 Fla. 472, 33 South. 419; *Louisville & Nashville R. R. Co. v. Jones* (Fla.) 39 South. 485.

The first five assignments are based upon rulings of the trial court admitting in evidence, over the defendant's objections, certain specified written instruments, which we deem it unnecessary to describe in detail or to set forth at length the objections interposed thereto. Generally, it will suffice to repeat what we said in our former opinion, 46 Fla. 213, text 220, 35 South. 656, text 659: "As we have seen, being confined to the ordinary bill of exceptions, we can consider only what it presents. We find that it fails to state at what stage of the proofs the evidence was offered and admitted over defendant's objections, which forms the basis of this assignment. Neither are we informed for what purpose the same was offered." For all practical purposes this language is applicable to all of the first five assignments. This being true, unless the grounds of objection to the introduction in evidence of these several instruments are apparent on the face thereof, we must hold that no error was committed in admitting them, especially as they were all admitted subject to a motion to strike. In other words, if extraneous evidence was necessary to show the inadmissibility of the instruments and it has not been made to appear to us that such evidence had been introduced in the trial court, at the time these instruments were offered, we could not hold that any error was committed. See *Thomas v. Williamson* (decided here at the present term) 40 South. 831. It is also settled law in this court that the trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court where clearly abused. See *Pittman v. State* (decided here at the present term) 41 South. 385, and authorities therein cited; 15 Ency. Pl. & Pr., 383 et seq.; *Abbott's Trial Brief, Civil Jury Trials* (2d Ed.) 114, 120.

Tested by these principles, it seems to us that each and every of the first five assignments must fail.

The ninth to the thirteenth assignments, inclusive, are based upon the denial of the defendant's motion to strike out the several instruments offered and admitted in evidence over the defendant's objections, and which admission formed the basis for the first five assignments which we have just treated. We find that the ordinary bill of exceptions discloses the following proceedings concerning the motion in question, the denial of

which forms the predicate for the five assignments which we are now considering: "The said plaintiff having concluded and submitted his evidence, the said defendant moved the court to strike out the following papers offered in evidence by the plaintiff, viz: The deed from B. N. Jernigan to W. L. Jernigan; the deed from L. M. Rhoda, commissioner, to B. N. Jernigan; the order of sale and order confirming sale and the record of the probate court in reference to commissioner's sale of the real estate of the estate of John Woods; the sheriff's deed from John W. Butler, sheriff, to John Woods; the certified copies of the minutes of the court re-establishing two judgments and executions in cases of A. & G. Forsheimer and J. Gundersheimer & Co. against Crigler, Batchelder & Pooley, on the grounds stated in each instance in the objections of defendant to the admission of said paper or papers in evidence at the time of its being offered, all of which said objections are now renewed and urged in support of this motion to strike. But the said judge overruled the said motion and permitted the said papers to remain in evidence, to which ruling the defendant then and there excepted."

It will be observed that the motion sought to have stricken out all of the several papers enumerated therein as an entirety we have repeatedly decided that a motion to strike out the whole of a witness' testimony should be denied if any portion of said testimony so sought to have stricken was admissible. See *Freeman v. State* (Fla.) 39 South. 785, and authorities therein cited. It necessarily follows that a motion to strike out several documents or instruments as an entirety should be denied if any of said instruments was properly admitted. This is practically what we held in the opinion rendered by us in the instant case when it was here before. 46 Fla. 213, 35 South. 656. Also see *Markey v. State*, 47 Fla. 38, 37 South. 53, and authorities therein cited. It will also be noted that the only grounds stated in the motion to strike out were the objections made to the admission in evidence of the several instruments, which were renewed and urged in support of the motion to strike. To the grounds of objection the plaintiff in error is restricted here. We have already decided that no error has been made to appear to us in the admission of any of these papers, and we must now hold that no error has been made to appear in the denial of this motion. We also call attention to what we have said concerning motions to strike out evidence in *Walker v. Lee*, 40 South. 881, and *Pittman v. State*, 41 South. 385, both of which were decided here at the present term. Also see the authorities cited in those two opinions.

The sixth assignment is predicated upon the ruling of the trial court in refusing to permit the defendant to propound the following question to witness, W. L. Jernigan:

"Were you acquainted with that portion of the property being about three acres in the northwest quarter of the south half of lot 2 in controversy in this suit?" The assignment of error also sets forth another question, the refusal to permit the answer to which is also sought to have reviewed here, but, as the question we have copied above is the only one argued by plaintiff in error, we confine ourselves to it. We find that even this question is not properly before us for consideration for the reason that the ordinary bill of exceptions shows nothing except the propounding of this question by the defendant to the witness on his cross-examination and the fact that plaintiff objected thereto, which objection was sustained, to which an exception was noted. We are not advised in what connection the question was asked or for what purpose, and have no information as to what facts he had testified to on his examination in chief. We are not even advised as to what the grounds of the objection were or in what way the defendant was harmed by the witness not being permitted to answer it. Unless the contrary is clearly made to appear, every presumption is in favor of the correctness of the rulings made by the trial judge. See *Clements v. State*, decided here at the present term, and authorities therein cited. We also refer to *Volusia County Bank v. Bigelow*, 45 Fla. 638, 33 South. 704, tenth headnote, as being in point.

What we have said in disposing of the sixth assignment is also applicable to the seventh assignment.

The remaining assignments are either abandoned or not argued, with the exception of the twenty-first, which is based upon the denial of defendant's motion for a new trial. However, the ordinary bill of exceptions fails to show any ruling of the court on this motion, or any exception thereto, therefore we cannot consider it. *Parnell v. State*, 47 Fla. 90, 36 South. 165; *Jacksonville Electric Co. v. Adams* (Fla.) 39 South. 183.

We regret that these various assignments are not so presented to us that we can consider them, but as we have several times enunciated, "the appellate court, equally with suitors, is bound by its rules, and they must be construed as statutes would be construed." See *Florida Land Rock Phosphate Co. v. Anderson*, 50 Fla. 516, 39 South. 392, and authorities there cited.

No error having been made to appear to us, the judgment must be affirmed, and it is so ordered, at the cost of the plaintiff in error.

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR and HOCKER, JJ., concur in the opinion.

PARKHILL, J., disqualified.

LOGAN v. CHILDS.

(Supreme Court of Florida, Division A. April 10, 1906. On Rehearing, May 1, 1906.)

1. HABEAS CORPUS—SCOPE OF REMEDY.

Our power to review by the writ of habeas corpus convictions in a municipal court is restricted. Where its findings show a violation of an ordinance, and the sentence is within its penalty, further findings may be rejected.

2. MUNICIPAL CORPORATIONS—SEWAGE—USE OF CESSPOOLS.

The denunciation by statute of certain uses of the contents of cesspools does not inhibit to municipalities the adoption of cesspools as a part of its system of sanitation.

3. EVIDENCE—JUDICIAL NOTICE.

The court does not know judicially that a municipal ordinance providing for cesspools in its system of sanitation is oppressive or unreasonable.

4. CONSTITUTIONAL LAW—POLICE POWER—HEALTH REGULATIONS.

Inferential and consequential damage to private property arising out of health laws does not violate the federal Constitution.

On Rehearing.**5. HEALTH—STATE AND LOCAL BOARDS—MUNICIPAL CORPORATIONS—CONTROL BY STATE.**

Article 15, § 3, of the Constitution, conferring "supervision" of matters of public health upon the state board, subject to legislative control, has no application when it is shown the board declines to interfere with a municipal ordinance.

6. JUDGMENT—SCOPE OF DETERMINATION—PARTIES.

A board and its officer not being parties to a record, the court should not undertake to define the officer's powers.

(Syllabus by the Court.)

Error to Circuit Court, Polk County; Joseph B. Wall, Judge.

Petition by H. P. Logan against J. E. Childs for a writ of habeas corpus to secure petitioner's discharge from custody. A motion for a discharge was denied, and petitioner was remanded to custody, and brings error. Affirmed.

H. K. Olliphant, for plaintiff in error.
Wilson & Boswell, for defendant in error.

COCKRELL, J. In his petition for a habeas corpus, H. P. Logan alleged that he was under unlawful arrest and imprisonment by J. E. Childs, the marshal of Bartow, Fla., under a charge in the mayor's court "of not removing or tearing down a closet or closets of his, the petitioner, in block 10, of said city; that said petitioner has violated no law, and said acts of said mayor are void; any ordinance of said city, if there be such, requiring the petitioner to tear down or move his closet is void and unconstitutional." The writ was issued by a court commissioner upon this petition returnable before the circuit judge. The marshal's return set forth the proceedings of the mayor's court, showing the conviction of the petitioner "of owing and maintaining a closet, and refusing to remove the same from his property, but that the defendant does not use the closet," and fining him \$100 and costs with the alternative penalty

that he be put to labor on the streets, or other public works of the city for the term of 60 days. The ordinance violated is entitled "An ordinance for the preservation of the health of the city of Bartow and its inhabitants and providing for the locating, making and construction of cesspools, and requiring all water-closets and privies in blocks where cesspools shall be located to be connected therewith, and providing a penalty for the violation of the provision of the same." The first section provides for the location of cesspools. The second requires all closets in blocks where cesspools are located to be flush closets and connected in scientific and sanitary manner with said cesspools, under supervision and declares it unlawful for any person "to own, use, or maintain any open water-closet or privy in said block" under penalty of a fine not exceeding \$100 or by imprisonment in the city jail not to exceed 90 days or by both fine and imprisonment at the discretion of the mayor. The third section makes it the duty of the mayor to notify those using, maintaining, or owning open water-closets or privies in said block to immediately discontinue the use of and remove the same, and upon failure and refusal to comply with the notice for 30 days to issue his warrant, and have them brought before him to be dealt with in accordance with the ordinance. The fourth and last section merely puts the ordinance in force upon approval.

Upon this return the petitioner moved for his discharge alleging the invalidity of the ordinance upon the grounds that it is in conflict with chapter 4348, p. 113, Acts of 1895, that it deprives him of liberty and property without due process of law, and that it is oppressive and unreasonable.

The motion was denied, and the petitioner remanded to the custody of the marshal, but a writ of error was allowed which has been made returnable April 2, 1906.

This is not an appeal de novo nor a writ of error to the judgment of the mayor's court; all appealable matters merely are finally adjudged in the circuit court, which has jurisdiction over such when properly invoked. This restriction or limitation upon our jurisdiction renders unnecessary a discussion of some of the propositions advanced in the brief filed for the plaintiff in error.

Under the ordinance the mayor's court was authorized to impose the penalty that was imposed for its violation by one who should own or use or maintain an open water-closet, and there is a specific finding that the petitioner did own and maintain a closet and the further finding that he does not use the closet, and refuses to remove the same from his property, may, on this hearing at least, be rejected as surplusage.

We find nothing in section 2, c. 4348, p. 113, of the Laws of 1895, in conflict with the ordinance, nor in the general supervision and duties therein cast upon the state health officer. There is much in that statute that is

difficult if not impossible of comprehension, but if it be that the Legislature could, and has therein conferred upon the health officer power to override municipal ordinances upon matters relating to the health of its citizens, it has not undertaken to take away all the power theretofore conferred upon municipalities found in section 677 of the Revised Statutes of 1892, unless and except and until the said officer shall ratify and approve what may be done by them. Section 2 of the act does not declare cesspools "sanitary nuisances," but only denounces the "contents" thereof together with filth, offal garbage, foul water, dye water, urine, stable manure, and other offensive substance detrimental to health, which are thrown, placed, or allowed to remain upon private premises, streets, avenues, alleys, sidewalks, gutters, public reservation or open lots within any city, town, or village. Upon the face of the ordinance there is no positive showing of a violation of this statute.

There is an entire absence of proof by way of expert testimony or otherwise, should such testimony be admissible in this proceeding, to show the ordinance offensive and unreasonable, and as our judicial knowledge upon the question of sanitation, as to which those learned in such matters differ, is necessarily limited, we do not feel disposed to interpose our opinion as against that of those who are by law intrusted therewith.

The federal question sought to be raised is, to our minds, conclusively answered in the negative by the Supreme Court of the United States in the recent case of California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U. S. 306, 26 Sup. Ct. 100, 50 L. Ed. —. The injury to property is incidental and consequential and such as all citizens may be made to suffer in the interests of the public health. The reasoning of the case cited is conclusive upon several of the points raised here and we are content without further discussion, to rest upon arguments there used by Mr. Justice Harlan who pronounced the opinion for that court.

The judgment is affirmed, at the cost of the plaintiff in error.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

On Rehearing.

COCKRELL, J. In his petition for rehearing the plaintiff in error suggests that we overlooked section 2, art. 15, of the Constitution, which reads: "The state board of health shall have supervision of all matters relating to public health, with such duties, powers and responsibilities as may be prescribed by law." This section was not overlooked but has no application to the case

in that it does not appear the state board of health exercised or sought to exercise any supervision in the premises; on the contrary, the only proffer of evidence in that direction was to the effect that the board would not interfere.

Neither the state board of health nor its health officer are parties to this cause and we should not therefore comply with the petitioner's request to define more clearly the health officer's powers.

The petition is denied.

(116 La.)

No. 15, 820.

HOLLIDAY v. HAMMOND STATE BANK
et al. (CALMES, Intervener).

(Supreme Court of Louisiana. March 26, 1906.)

1. DEPOSITARIES—CONTRACT—CONSTRUCTION—LIABILITIES.

Where real estate is sold by authentic act, but the buyer does not take possession under the act, and the price, instead of being paid, is deposited in bank subject to the condition that it shall not be paid to the vendor until the title shall have been examined and found to be good, the money so deposited is, alike, placed beyond the control of the purchaser, and withheld from the seller, and the bank, not having been advised by both parties of either, the failure or the fulfillment of the condition, the purchaser has no right to draw the money, and the seller has no right to demand that it be turned over to him and the bank incurs no liability for damages for refusing to honor the check of the purchaser therefor.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositaries, §§ 3, 9, 11.]

2. SAME.

Where the purchaser of real estate has signed the completed act of purchase, but does not take possession thereunder, and, instead of paying the price, by agreement with the seller, deposits the same in bank, subject to the condition that it shall not be paid to the latter until the title to the property shall have been examined and found to be good, and where it appears that there is a defect in the title, of which the purchaser was informed, when the act was signed by him, and which it was the purpose of the agreement and the deposit to give the seller a reasonable opportunity to cure. *Held*, that the money cannot be withdrawn by the purchaser, without the consent of the seller, until such reasonable opportunity shall have been exhausted.

3. SAME—EVIDENCE OF AGREEMENT.

Where money has been deposited in bank to await the result of the examination of a title to real estate, a completed act of sale of which has already been signed, and suit is brought against the bank for its recovery by the purchaser, and by the seller intervening and claiming it as the purchase price of the property sold by him, the objection urged on behalf of the bank and of the intervener that the purchaser cannot prove by parol the circumstances under which the deposit was made, because he would thereby contradict the recital in the act of sale, to the effect that the sale had been made for cash in hand paid, is one which, under the circumstances, neither the bank nor the intervener has any standing to urge.

(Syllabus by the Court.)

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Clay Elliot, Judge.

Action by L. H. Holliday against the Hammond State Bank. Dallas L. Calmes intervenes. Judgment for defendant and intervenor, and plaintiff appeals. Judgment reversed and rendered.

William Hutchinson McClendon and Warren Moses Wright, for appellant. Stephen Dudley Ellis and Reid & Purser, for appellees.

Statement of the Case.

MONROE, J. Plaintiff alleges that he had an account as a depositor in the Hammond State Bank herein named as defendant; that, on November 9, or 10, 1904, he deposited to the credit of the said account, and subject to his check, \$4,950, in the shape of New Orleans Exchange, payable to the order of the Hammond State Bank, and that on the same, or the following, day he deposited a similar draft for \$1,000; that, on November 25, 1904, there being then to the credit of the said account the sum of \$7,075.10, he drew his check for \$5,950 against the same, upon which payment was demanded and refused, and the check was protested for nonpayment, and that he thereby sustained damage to his credit, etc., in the sum of \$1,707.50, plus the cost of protest. He therefore prays for judgment against the bank for the full sum of his deposit, and for the damages alleged.

Dallas L. Calmes intervenes, and alleges that plaintiff paid him for an option on certain property in the town of Independence, the sum of \$50, but that he subsequently concluded to buy, and did buy, a farm owned by intervenor, for the sum of \$5,000, of which the \$50 paid was regarded as part, and that for the balance of \$4,950, plaintiff caused the Bank of Independence to send its New Orleans exchange to the Hammond State Bank, defendant herein, and instructed said defendant to place the same to the credit of intervenor; that thereafter plaintiff becoming dissatisfied with his purchase offered intervenor an additional \$1,000 for the town property, which offer was accepted, and that the act of sale for the farm was destroyed, and an act conveying the town property prepared and executed (the price, at the request of the plaintiff, being stated at \$5,000, instead of \$6,000); that after giving intervenor a check for \$1,000, plaintiff asked that it be returned to him, stating that he preferred to give exchange such as he had already caused to be sent to the defendant (i. e., New Orleans exchange, payable to the order of the Hammond State Bank), and that, his request being complied with, plaintiff gave intervenor the draft for \$1,000, which intervenor delivered to the Hammond State Bank, where it was placed to the credit of intervenor's account. He alleges that the act of sale of the town property was duly recorded; that he moved his family out from the property, and that the plaintiff took and has retained possession thereof. He alleges that plaintiff afterwards offered him \$250, and then \$500,

to rescind the sale so made, and that the offers were refused; that plaintiff drew the check referred to in his petition on the Hammond State Bank well knowing that he had no funds there, and that intervenor is entitled to have the purchase price of the property sold by him as aforesaid, which is in said bank, decreed to belong to him. Wherefore he prays that plaintiff and defendant be cited, and, after due proceedings, that he have judgment decreeing him to be the owner of and entitled to the \$5,950 deposited in the said Hammond State Bank, as set forth in plaintiff's petition.

The defendant bank admits that the check referred to in the petition was refused payment, and alleges that it was so refused because plaintiff had not sufficient funds on deposit to meet it. It denies that it received drafts on New Orleans for \$4,950 and \$1,000 for account of plaintiff, as alleged in the petition, and denies that plaintiff had on deposit, upon the day upon which the check was refused payment, the sum of \$7,075.10, but avers that he had to his credit on that day the sum of \$1,125, which defendant was and is ready to pay upon a proper check. It alleges that plaintiff's suit is frivolous and malicious, and prays that it be dismissed. The plaintiff, for answer to the intervention of Calmes, admits the payment of \$50 for an option on intervenor's farm, at \$5,000, and the execution, on November 9th, of the deed to the farm, and he alleges that on the date mentioned he deposited \$4,950 in the Hammond State Bank with instructions to the president that the same should be held subject to his order, pending an investigation of the title, and that the option was then canceled, the \$50 paid therefor to go in payment of the purchase price. He admits that on November 10th the sale of the farm was rescinded, and that a deed was executed whereby the intervenor sold him certain town property for \$6,000, and he alleges that it was agreed that to the \$4,950 deposited there should be added \$1,000, and that the whole amount should be retained by the bank until the title to the property should have been investigated and found good, in which event it should be paid to the intervenor; but that, should said title be found defective, the sale should be rescinded and the \$50 paid returned, and that, in accordance with said agreement, he deposited the additional \$1,000, and instructed the bank to hold the same subject, with the \$4,950 already received to his further instructions. He alleges that the sale in question was never completed for the reason that its completion was dependent upon the result of the examination of the title, and that the title proved to be defective, in this, to wit: That the property had been acquired by David Y. Gaines whilst married, under the régime of the community, to the widow Bennett, who died, leaving children and grand children, and that the interest of

Gaines therein had been sold after the death of his wife, but that the interest of her heirs had never been divested, and that a number of them, whose names are given, reside in the parish. He alleges that he informed intervener of the situation, and that intervener suggested that a further investigation be made, after which, if the title proved to be defective, he would consent to rescind the sale; that further investigation was made, with the same result as before, but that intervener refused to rescind the sale. Plaintiff admits that he took possession of the property, but alleges that he did so for the benefit of all concerned, and without waiving his rights; that, since the filing of the petition herein, certain mortgages which had been resting thereon in favor of the defendant have been canceled, as of date November 14, 1904; that since the filing of the intervention herein, a petitory action has been brought against him by the heirs of Mrs. Gaines for the recovery of their interest in said property and that the defects of the title are such that he is not bound to accept it, but is entitled to have the sale rescinded, and to recover his expenses in the way of attorney's fees and the damages to which he has been and will be subjected in the matter, as also the \$50 paid for the option; and he prays for judgment accordingly. The defendant, answering the intervention, admits that it received the two drafts described therein, and that it placed the proceeds to the credit of the intervener, "by his instructions and request and, as respondent is informed, by agreement with Mr. Holliday." We find the following to be the facts as disclosed by the record, to wit: On November 4, 1904, the plaintiff, Holliday, paid the intervener, Calmes, \$50 for the privilege of buying, within 30 days, for \$5,000, certain property owned by Calmes in the town of Independence; in other words, he obtained an option on the property at the price stated, with the understanding that in the event of his becoming the purchaser, the \$50 so paid was to be credited on the price. He then employed W. B. Kemp to examine the title, and on November 9th, he and Kemp and Calmes met at Independence, and Kemp reported that the title was not clear because of a missing power of attorney, which was needed in connection with one of the sales, and because the property had been purchased by D. Y. Gaines whilst living under the régime of the community, and sold by him, after the death of his wife, without regard to the rights of her heirs. After some negotiation it was agreed that, instead of buying the town property, Holliday should buy (for the same price and subject to the same conditions, including the condition that the title should prove satisfactory) a farm which Calmes owned a short distance from the town, and an act of sale thereof was accordingly prepared and signed, and in order to

protect himself with respect to the title and at the same time show his good faith and ability to pay the price, Holliday obtained from the Bank of Independence its draft for \$4,950 on the State National Bank of New Orleans, payable to the order of the Hammond State Bank (defendant), which draft he forwarded by mail to the Hammond State Bank with instructions (given by Mr. Kemp, on behalf of Holliday, through the telephone) that the proceeds were to be held to await the examination of the title, and were, on no account, to be paid out until further instructions should be received from the depositor, in all of which the bank acquiesced. By the following day (November 10th) Holliday had found that his family did not take very kindly to the idea of living on the farm, and he offered Calmes \$500 to rue the bargain, which offer Calmes declined. There was then some further negotiation, and finally Holliday agreed that in order to get released from the obligation to buy the farm, he would pay \$8,000, instead of \$5,000, as had been previously agreed, for the town property, always subject to the condition that, upon further examination, the title should prove to be good. The deed to the farm was therefore destroyed, and an act of sale conveying the town property from Calmes to Holliday was drawn up and signed, and Holliday gave Calmes his check, payable to the order of the latter, for \$1,000; but, an hour or two later, stated to him that he had made a mistake in so doing and requested him to return the check, which Calmes did, and Holliday, then, obtained from the Bank of Independence a draft similar (in all other respects save as to the amount) to that which he had obtained upon the day before, and gave it to Calmes to be mailed or delivered to the Hammond State Bank, with instructions that the proceeds were to be held with and subject to the same conditions as the \$4,950 already on deposit, to wit: that it was not to be paid out until the depositor (Holliday) reported that he was satisfied with the title of the property of which it was, in that event, intended to be the purchase price. The bank, however, held Calmes' notes, secured by mortgages on both the town property and the farm and, being no doubt desirous of facilitating the sale in order that it might realize, on November 14th, sent the notes to the mortgage office with instructions to the recorder to cancel the mortgages by which they were secured, but, at the same time, observed the precaution of taking from Calmes a new note for the whole amount due by him, secured by a new mortgage, which it held, and still holds.

It may be remarked, en passant, that the letter, addressed to the recorder of mortgages was mislaid by that officer, and that the bank's mortgages were not really canceled for a month or six weeks. In the meanwhile several propositions and counter propositions

had passed between Holliday and Calmes, and, finally, towards the latter part of November, they met in the office of one of the counsel, whom Holliday had consulted, and who states the result of the interview as follows, to wit:

"They, then, made an agreement of which I made a memorandum in lead pencil, and read it to them after I had written it down * * *, and they agreed that it should be the basis for their settlement and Mr. Calmes instructed Mr. Holliday and myself to have Mr. Lillie write up a contract in accordance with the terms of that memorandum, which I had made, and to bring it to Independence and he would execute it."

The memorandum and the projet of contract (prepared by Lillie, who is the president of the defendant bank, and has acted for it in all this business) are in the record, and the projet, drawn in conformity to the memorandum, reads in part as follows:

"That whereas there has been a dispute relative to the title to property in the town of Independence, La. * * *, which property said Calmes had conveyed to said Holliday for \$5,000 cash, the money being deposited in the Hammond State Bank, to be paid over whenever both of the parties had mutually agreed; * * * now, therefore, the said Calmes agrees to release said money, now in the bank, which shall remain there subject to the order of Holliday whenever titles are completed as hereafter set forth. The said Calmes agrees to execute a contract with said Holliday for the sale of the same property, * * * for the price of \$6,000, said contract to stipulate that a clear warranty title shall be given, free from any lien or incumbrances, and, especially against any claim, right or title arising out of the Gaines heirs, so called, over which the present controversy arises, said title to be completed and deed to be delivered on or before six months from this date. Said Holliday agrees to make a present quitclaim deed to said Calmes for all right, title, and interest he may now have in said property from said first original act, with full warranty as to his own acts in the premises. Said Holliday to have immediate possession, with full use of the same, and, in the event of a failure to make title, free from all liens and incumbrances and defects, within the time here agreed, then said property to be surrendered up to the possession of said Calmes in as good condition, as when taken, reasonable use and wear thereof excepted, and without rent or charge. Said Calmes agrees to bear all expenses which have now been incurred or which may be incurred in the investigation of said title made as herein provided."

The agreement with reference to this instrument took place at Hammond on November 23, 1904, but Calmes said that he was unable to wait for it to be drawn up and that it could be brought to him, later, at his house, at Independence (some six miles distant). When, therefore, it was prepared, Holliday took it to him, at his home, and presented it for signature, but Calmes, acting under the advice of his counsel who was there present, refused to sign it, and subsequently moved away, leaving the house vacant. Thereupon Holliday, by the advice of his counsel, with a view to its protection from fire, depredators, etc., and to the minimizing of the loss, for the benefit of whom

it might eventually concern, and after notice to Calmes of his intention and of the reservation of his rights, took, and has since retained possession. Holliday, then, in December, drew his check on the defendant bank for \$5,950, which was refused payment (the fact being that exclusive of the amount which had been deposited under the agreement with Calmes, he had to his credit but \$1,125.10). He then brought this suit, and whilst it was still pending, a petitory action was brought against him and Calmes by some of the heirs of Mrs. Gaines (entitled Preston Bennett et als. v. D. L. Calmes et al., 40 South. 911), for the recovery of the property, which action, for the purposes of the argument in the district court, was consolidated with this and was decided in favor of the defendants, and the judgment so rendered is this day affirmed by this court. Not all of the heirs of Mrs. Gaines joined in that suit, however. That lady, it seems, was twice married, and had nine children by her first husband, Bennett, and two by her second husband, Gaines. One of the Bennett children (Alex) died a number of years ago leaving five children who were all minors when this case was tried, and whilst as to the suit of the other heirs, the plea of the prescription of 10 years was maintained; the judge a quo seems to have been of the opinion that such plea would not be good as to the minors. In the opinion which we find in the record, he says (inter alia):

"There is a suit in this court, however, entitled David R. Robertson, Tutor vs. D. L. Calmes et als., * * * which has not been tried, and which one of the counsel in this case on behalf of the defendant and intervener admitted that prescription had not run against heirs of Alex Bennett the minor heirs. * * * But their interest in the land is but $\frac{1}{10}$ of $\frac{1}{2}$ * * * too small to justify dissolving the sale on that account. But I will treat their action as a demand in warranty, made by Holliday against Mr. D. L. Calmes."

The judgment which is the subject of the present review accordingly reads, in part, as follows, to wit:

"It is ordered * * * that there be judgment in favor of the defendant, Hammond State Bank, and against plaintiff, L. H. Holliday, rejecting plaintiff's demands. It is further ordered * * * that intervener, Dallas L. Calmes, have * * * judgment * * * against plaintiff * * * and defendant * * * in the sum of \$6,000 of which amount, \$450 shall remain in the custody of the Hammond State Bank to abide the result of the suit entitled David R. Robertson, Tutor, vs. D. L. Calmes et als., No. 641 of the docket of this court, the same or so much thereof as may be necessary to be used in defraying and recouping plaintiff, * * * for such expenses and damages as may be decided to be due him on account of said suit No. 641, and to be delivered to him at the termination of same. The part thereof not so used to be delivered * * * to said Dallas L. Calmes at the termination of said suit; the said sum of \$6,000 being the purchase price of a tract of land involved in the suit of Preston Bennett et als. vs. Dallas L. Calmes et als., No. 581, of the docket of this court, and sold by said Calmes to Holliday.

It is further ordered that said plaintiff, L. H. Holliday, pay all costs of this suit."

Opinion.

Counsel for the defendant and for the intervener (who have joined in the same brief) objected on the trial, and urge the objection here, that parol evidence was inadmissible to contradict the recitals of an authentic act, and hence that it was incompetent for the plaintiff to prove by parol evidence that he had not paid the price for the property purchased by him. The issue between the plaintiff and the defendant (premitting plaintiff's claim for damages) is whether the defendant has made a proper disposition of the sum of \$5,950, which the plaintiff deposited with it, and upon that issue the question of the plaintiff's right to contradict the act of sale from Calmes to him has no immediate bearing, since, if the defendant turned the money deposited with it by the plaintiff over to Calmes, as in payment of the price of the property sold by him without authority from plaintiff, it is liable to him for the injury that he may thereby suffer. As to the intervener; he has interfered in a controversy which, if he has been paid for his property, does not concern him. Upon the other hand, if the money which he and the plaintiff are seeking to recover from defendant, and for which he has obtained judgment against both defendant and plaintiff, is a particular sum deposited by plaintiff with defendant, subject to the condition that it should be turned over to the intervener in payment of the price of his property, when and if the title to that property should be found good, and not otherwise, then the intervener is here attacking the act of sale invoked in behalf of the objection urged by his counsel, which act contains the recital:

"Personally, * * * came and appeared Dallas L. Calmes * * * who declares that for and in consideration of the price * * * of \$5,000 cash in hand paid, the receipt whereof is hereby acknowledged and good acquittance and discharge given for the same, he did and does sell * * * unto Lawrence H. Holliday," etc. [describing the property which is the subject of this litigation]."

We are therefore of opinion that the objection is inapplicable to the case, and if otherwise applicable that neither the defendant nor the intervener have any standing to urge it on the merits; having found as a fact that the money here claimed was deposited by plaintiff, with the defendant, as representing the price of the property which he had purchased from the intervener, and subject to the condition that it should not be paid to the intervener unless, and until defendant should be advised by plaintiff that he had found the title to the property to be good; and, having also found that intervener was a party to and accepted the benefit of the contract so made, we conclude that the negative condition upon which the deposit was

made; i. e., that the money should not be paid to intervener unless and until, etc., was pregnant with the affirmative, that the money should be paid upon the fulfillment of the condition, and hence that the purpose and effect of the deposit was to place the money beyond the control of plaintiff, and, at the same time, to withhold it as a payment of the price of the property, from intervener; from which it follows that the money was not subject to plaintiff's check at the time that the check was drawn, and that plaintiff, therefore, sustained no injury by reason of its nonpayment; and, since the title to the property has not been cleared, that the money was not, and is not, subject to the demand of intervener, as that demand is here made.

The case differs from those in which title having passed merely by public adjudication, and, the adjudicatee not having paid the price or otherwise accepted title or possession, it has been held that he could cause the sale to be rescinded by showing the existence of an adverse outstanding title. *Pont. R. R. Co. v. Durel*, 6 La. 484. It also differs from cases in which the purchaser, having accepted the title, and paid part of the price, and having taken and enjoyed possession, as owner, it has been held that he had no standing to sue for a rescission of the sale merely because of his discovery of defects in the title. *Rousseau v. Tete*, 6 Rob. 471.

In the instant case the plaintiff was informed of the defect in the title, and hence of the danger of eviction, before signing; but he nevertheless signed, and accepted title by notarial act. He, however, stopped at that point, and did not pay the price; nor can it be said that he took such possession as to affect the rights which he now asserts—his taking possession having been a commendable act, advised by his counsel, the announced and only purpose of which was to minimize the threatened loss, which, had he done otherwise, might have proved serious, and which sooner or later must have fallen either upon him or defendant. Under the circumstances the case of the plaintiff would fall within the exception (relating to those who buy, knowing the defects in the title to the property) contained in the last paragraph of Civ. Code, art. 2557, and he would not be entitled to withhold the price were it not for the agreement between him and the intervener upon that subject which is the law of the case, and, as a result of which, the amount representing the price was deposited in bank. We are of opinion that the meaning of that agreement was that the intervener should have a reasonable opportunity to clear up the title, and it stands as a substitute for the provisions of the law (Civ. Code, art. 2558) under which, if there had been no agreement, the intervener might have demanded that the price of the property be paid him on his giving security, or, if he were unable to give security, that it be de-

posited subject to the order of court until he should have caused the disturbance of the title which he had conveyed to plaintiff to cease. Civ. Code, art. 2357. As matters stand, one cause of disturbance is removed by the judgment this day rendered in the case of Preston Bennett et al. v. D. L. Calmes et al., 40 South, 911. Whether the remaining cause (the claim of the minors Bennett) will be removed by the termination of the litigation in which it is at issue, it would be premature to decide; but, under his agreement, plaintiff should be required to await that event before being allowed to withdraw, without the consent of Intervener, the money deposited as the price of the property purchased by him, and Intervener should be allowed, in the meanwhile, to remove the disturbance in some other way if he thinks proper.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and, proceeding to render such judgment as should be rendered in the case, it is now ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, Lawrence H. Holliday, and against the defendant, the Hammond State Bank, for the sum of \$1,125.10, with legal interest thereon from judicial demand until paid; that the demand of the plaintiff for the further sum of \$5,950, deposited by him in said bank be dismissed as in case of nonsuit, and that all further demands of the plaintiff against said defendant, save as may be hereinafter specified in this decree be rejected. It is further adjudged and decreed that the demands of the Intervener, as against defendant and plaintiff, respectively, and the demands of plaintiff against the Intervener, save as may be hereinafter specified in this decree, be rejected. It is further adjudged that there be judgment in favor of the plaintiff and the Intervener, on their respective demands against each other, and against the defendant, to the effect that the defendant holds as a deposit the sum of \$5,950 for which execution may issue at the instance of the plaintiff and Intervener, acting together, or which, acting together, they may withdraw, but which is otherwise to be held by the defendant to await the final decision of the court in the case of David R. Robertson v. D. L. Calmes, et al., now pending in the district court; said sum to be paid by defendant to Intervener in the event that by such judgment the property purchased by plaintiff is cleared of the claim of the plaintiffs in said suit, and to be paid to the plaintiff herein in the event that said property is not so cleared of said claim, and is not cleared by Intervener, by paying or settling the same before or after judgment. It is further adjudged and decreed that the costs incurred in the district court on the main demand be paid by the defendant; those incurred in

the prosecution of the intervention by the plaintiff (Holliday), and that the costs of the appeal be paid by the defendant (bank) and the Intervener.

(116 La.)

No. 15,875.

WEBB PRESS CO., Limited, v. BIERCE et al.
(Supreme Court of Louisiana. April 9, 1906.)

CONTRACTS—PUBLIC POLICY—RESTRAINT OF TRADE.

A contract whereby a party, who contemplates engaging in a lawful business in a particular place, for a pecuniary consideration paid and promised, binds himself not to do so, in favor of another, with whom he had no previous business relations and who is about engaging in the same business at the same place, is void, under the general commercial law, as in unreasonable restraint of trade, and a fortiori is it unenforceable when in contravention of an express prohibition of the law of the place where it was made and is to be executed.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 542, 553.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walker Byers Sommerville, Judge.

Action by the Webb Press Company, Limited, against William W. Bierce and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Pierson, Walton & Pierson, for appellant.
Fenner, Henderson & Fenner, for appellees.

Statement.

MONROE, J. Plaintiff sues on a promissory note for \$2,500, received under an agreement of date June 8, 1898, which is made part of its petition and which reads, so far as it needs be quoted, as follows, to wit:

First: "The party of the first part [Bierce et al.] * * * agrees to pay to the party of the second part [Webb Company] * * * \$5,000, one-half of which shall be payable immediately * * * and one-half payable one year from date; * * * said \$2,500 to be evidenced by a promissory note."

Second: "The party of the second part is the owner" of a certain lot in Oklahoma City, "and upon the consideration expressed * * * agrees that said land * * * and no other real property now owned or controlled or hereafter acquired by it within 100 miles of Oklahoma City shall be used or sold by said party of the second part to be used in any matter for cotton compress purposes, or for railroad tracks or switches leading to any compress, for a period of two years."

Third: "Upon consideration of the mutual promises herein contained and as to the party of the second part upon the further consideration of the payment of the sum above mentioned, the parties * * * agree * * * not to erect * * * or operate, or to be interested * * * in the construction * * * or operation, of a cotton compress at any point within a radius of 100 miles of the post office of Oklahoma City, and not to sell or barter * * * or to be interested in selling or bartering a cotton compress to be erected or operated within said radius, for a period of two years, * * * without a written consent of the other. * * *"

Fourth: "The party of the second part shall place J. Y. Webb, Jr., at its own expenses, for the next thirty days, or as much thereof as the party of the first part may deem expedient, at the disposal of the party of the first part, for the purpose of visiting cotton buyers * * * and securing their patronage for the Oklahoma Cotton Compress Company and securing subscriptions to their capital stock, it being expressly understood that the provisions of paragraph 3 hereof have no application to the construction and operation of a compress at or near Oklahoma City by the Oklahoma Cotton Compress Company, and the party of the second part expressly agrees that its officers and agents will and shall not, nor will its employees, with the knowledge and consent of its officers, * * * do or declare any act or thing calculated to injure the business of Oklahoma Cotton Compress Company within two years of this date."

Fifth: "If there shall be erected * * * at or immediately about Oklahoma City, or within 25 miles thereof, the cotton compress, within one year from this date, in whole or in part, with a view to the use of the same for the compressing of cotton, then the consideration of said notes shall be deemed to have failed, and the same shall not be paid, but shall be returned to the maker thereof," etc.

Sixth: "The parties hereto being interested in the cotton compress business at Oklahoma City and vicinity, and the party of the second part desiring to sell his interest and good will therein to the party of the first part, it is expressly agreed * * * that the good will of the said Webb Press Company limited in the cotton compress business at said Oklahoma City and within said radius is part of the consideration for the payment of said \$5,000 and the making of this contract, which good will is hereby sold and transferred to the said party of the first part."

Seventh: "If there shall be any breach of any of the terms of * * * paragraphs * * * 3 and 4 hereof, the party upon whose part said breach * * * shall occur * * * agrees to pay to other party hereto the sum of \$10,000 as liquidated damages," etc.

The defendants, for answer, admit the execution of the note and contract sued on, but allege that they evidence an agreement in restraint of trade and in violation of the law of the place where they were made and were to be executed; that plaintiff had no authority to bind J. Y. Webb, who was not a party to the agreement and who rendered no service thereunder, and that plaintiff was not interested in any cotton compress business in Oklahoma City or its vicinity. They further allege that, should the agreement be held valid, there has been a failure of consideration as to the note sued on, in that plaintiff violated articles 3 and 4 of the contract pursuant to which it was given, and they pray for judgment, in reconvention, for \$10,000 as liquidated damages.

From the evidence and admissions in the record, we find the facts to be as follows: The statutes of Oklahoma provide that:

"Every contract by which one is restrained from exercising a lawful profession, trade, or business, of any kind, otherwise than as provided by the next two sections, is, to that extent, void. * * * One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof, so long as the buyer, or any person deriving title to the

good will from him, carries on a like business therein." Wilson's Rev. & Ann. St. Okl. 1903, §§ 819, 820.

Section 821 relates to agreements between partners.

It is admitted that the common law prevails in Oklahoma, save as changed by statute. Oklahoma City is about six miles from the line dividing Oklahoma county from Cleveland county, and about nine miles from the line dividing it from Canadian county. Plaintiff and defendants are the respective owners of patented compresses known as the "Webb Press" and the "Bierce Hydraulic Press," and prior to and at the time of the making of the contract sued on there had been, and was, hot competition between them in the business of selling and establishing their presses. Defendants (the firm of William W. Bierce, composed of William W. and Columbus Bierce) had gone to Oklahoma early in the spring of 1898 with a view of establishing one of their presses, and as an inducement to them to do so the city, in April of that year, had donated to the corporation known as the "Oklahoma Cotton Compress Company" (which the Bierces organized and to the stock of which they were the largest, though not the only, subscribers) a lot of ground worth \$3,000; and not only had contracts been entered into for the establishment of the press, but some material was on the ground and the work of putting in the foundations had actually begun. At that juncture, say about June 1st, plaintiff's representatives appeared and became active (to the extent that they bought a lot of ground for which they paid \$2,500) in the matter of establishing one of its presses, and, that being the situation, some negotiation took place between them and defendants concerning which there is a direct conflict of testimony. Plaintiff's representatives say that the suggestion came from defendants, through an employé, that the establishment of two presses at Oklahoma City would be bad business for both of them, and that, the parties having come together, it was agreed that they should pool their interests as follows: That one party should fix a price at which a press should be built (on the lot which had been donated by the city) and the other should name the press to be built; that the party whose press was named should build it at the price fixed, and that the other party, by contributing half of the cost, should acquire a half interest in the enterprise. They further say that it was then agreed that they (or one of them, R. D. Webb) should fix the price, and that, knowing that they could put up a Webb press for \$16,000 and make a profit, and believing that defendants could not put up a Bierce for less than \$26,000, they fixed the price at \$16,000, but that defendants, nevertheless, named the Bierce press as the press to be built; the result being that plaintiff became entitled,

on payment of \$8,000, to a half interest in a press which, so far as appears from the record, it would have cost the defendants \$28,000 to build, and to a half interest in the lot which had been donated by the city to the Oklahoma Cotton Compress Company, and was worth \$3,000—their calculation, according to their testimony, being that plaintiff made a clear profit on the transaction of \$6,500. They say, however, that on the following day defendants offered to buy out the interest which plaintiff had thus acquired (thereby, if the offer were accepted, bringing matters back to the point from which they started, save that the defendants would be \$3,000 out of pocket); that they (plaintiffs) declined the offer, but after some further negotiation agreed to give or take \$5,000 and call the previous agreement off; and that defendants accepted the proposition and agreed to give the \$5,000, subject to the conditions contained in the contract sued on, which, plaintiff's witnesses say, were added as afterthoughts, but which do not appear in that light in the contract.

Mr. R. D. Webb, who seems to have been the spokesman of his side, gives the following, with other, testimony, to wit:

"Q. I understand you to say * * * that after this original proposition had been made, the next day, it was proposed, in lieu of finally consummating that proposition, to substitute this other one, which was finally put in shape: Is that a fact? A. The first proposition was accepted and agreed upon in the morning; the next proposition [referring to the offer of \$3,000] was made by Mr. Hill, coming from Mr. Bierce, and we refused the second proposition, leaving the first one in vogue. Q. The second proposition? A. No writing was gone into on these propositions, up to that time. Q. Well, of course, if this partnership proposition that you are talking about—it was contemplated that it should be in writing about that? A. Yes, sir; we would have had it if we hadn't had the other trade. Q. You would never dream, as a business man, of going into such a contract as that without writing it? A. No, sir; before we left them we would have had to have a written agreement, signed by all parties. Q. There were all sorts of details, in connection with that thing, which would have to be worked out and reduced to writing? A. There were details—not all sorts, but a great many details. Q. Well, there were details with regard to the press, exactly what it was to be, and all the plans and specifications in regard to it? A. Yes, sir; that was all talked over. We went even so far as to talk over the question of the lumber. Q. And it was understood that all that was to be put in writing, in the shape of a formal contract? A. Yes, sir; we were to get one-half of the stock of the company for our interest. Q. In other words, there was a contract which Mr. Bierce and Mr. Hill proposed should be made with the Oklahoma Cotton Compress Company—they were the owners of the land? A. Yes, sir; but Mr. Bierce controlled everything. Everything that he did was to go, no matter what it was."

J. Y. Webb, another of the plaintiff's witnesses, says:

"The defendants had secured from the city of Oklahoma a lot worth about \$3,000, with the understanding that they erect one of their

compresses on it and operate the press. * * * My understanding was that the press which the donation called for was a Bierce press, and therefore the erection of any other would have made the donation null and void. * * * It was about this time that the plaintiff, through its agents, were in Oklahoma City for the purpose of locating and operating a compress. Competition was hot between plaintiff and defendants, at this time, as to who should build the press. Both presses could not exist there on a paying basis. No press had been erected, and both parties knew that only one would pay at that point."

The defendants as witnesses deny that any agreement was made looking to the pooling of interests, and testify that the \$5,000, called for by the contract, of which it is admitted that \$2,500 was paid, in cash, was to be paid for no other consideration than the obligation of the plaintiff to abandon its threatened competition in, and within 100 miles of, Oklahoma City.

Plaintiff's witnesses say, in one breath, that they were calculating on acquiring a half interest in the lot which the City had donated to the Oklahoma Cotton Compress Company, and in another (substantially) that the price of the press to be built was fixed by them at \$16,000, with the idea that a Bierce press could not be built for that amount, and hence that the Webb press would necessarily be named, and yet they admit that the erection of any other than the Bierce press would have annulled the donation of the lot. They say that on payment of the \$8,000 they were to get one-half of the stock of the Oklahoma Company (in the name and as the property of which the press was to have been operated); but the Bierces did not own all the stock in that company, and if they had transferred one-half of it to plaintiff they would, at once, have lost their control of the enterprise, besides giving away for the Oklahoma Company of which they were stockholders, \$6,500 worth of property. Other features readily suggest themselves which render it difficult to believe that the defendants, if they are sane men, as they appear to be, could have entered into a contract such as that which we are now considering (referring, of course, to the alleged verbal contract).

And it is almost as difficult to believe that, if plaintiff had acquired the advantage which it is said to have acquired by that contract, it would have surrendered it at such an apparent pecuniary sacrifice. That there was discussion is very likely, but, as R. D. Webb testifies, there were many details to be considered, which, as the parties never reached the point of closing, by reducing to writing, any contract save that sued on, were never considered or provided for. Upon the whole, our conclusion is that the alleged verbal contract never passed beyond the inchoate stage.

Opinion.

The conclusion as to the facts which has been stated—that plaintiff acquired no interest in the compress business which the

defendants, as promoters of the Oklahoma Company were about establishing in Oklahoma City, leaves nothing of the contract sued on but a bald agreement in restraint of trade and in violation of the *lex loci*. If plaintiff owned any good will in Oklahoma, it consisted of the tendency of the public to buy its presses, rather than those of some other vendor, but it did not sell to defendant the right to vend those presses. It merely restrained itself from exercising a lawful business, thereby suppressing the "hot competition" which, according to the testimony of its witnesses, would have been prejudicial to the interests of both, but from which the public might have derived an advantage.

Our learned Brother of the district court has examined the questions presented with great care, and, after expressing his view, in an able and elaborate opinion, has rejected plaintiff's demands. Among the authorities by which his conclusion is supported are: *Tuscaloosa Ice Co. v. Williams*, 28 South. 669, 50 L. R. A. 175, 85 Am. St. Rep. 125 (Supreme Court of Alabama, through McLellan, C. J.), and *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64, 22 L. Ed. 315. To these may be added, as sustaining the proposition that "agreements in general restraint of trade are invalid because they deprive the public of the services of men in the sphere in which they are likely to be most useful and expose the community to the evils of monopoly", the following authorities, cited in Benjamin's *Principles of Contracts*, p. 94, to wit: *Alger v. Thatcher*, 19 Pick. (Mass.) 51, 31 Am. Dec. 119; *Bishop v. Palmer*, 146 Mass. 469, 16 N. E. 299, 4 Am. St. Rep. 339; *Keeler v. Taylor*, 53 Pa. 467, 91 Am. Dec. 221; *Bank v. Morris Coal Co.*, 68 N. Y. 585; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171.

Judgment affirmed.

(116 La.)

No. 15,867.

Succession of GERARD.

(Supreme Court of Louisiana. March 12, 1906.
Rehearing Denied April 9, 1906.)

EXECUTORS—REMOVAL.

After the final account of a succession has been filed and homologated, and nothing remains to be settled except such matters as may be more properly settled among the heirs in a partition proceeding, and it is evidently to the interest of all parties concerned that the executor should not be removed, and there is presented no peremptory ground for removal, the executor will not be removed.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

In the matter of the succession of Anna McLean Gerard, widow of Thomas H. Howard. From an order refusing to dismiss the executor, Leigh and George Howard appeal. Affirmed.

Leigh Howard, for appellants. Merrick & Lewis, for appellee Bankers' Surety Co. Patrick John Hennessey, for appellee Hawkins. James J. McLoughlin, for appellee executor.

PROVOSTY, J. The oral argument in this case took a wide range, but on examining the transcript the court finds that the only matter appealed from is the refusal of the lower court to remove the administrator. This court must, as a matter of course, restrict itself to the matter presented by the appeal, and is without authority to inquire into anything else. For an intelligent judgment in said matter it becomes necessary, however, to review the proceedings had in the lower court in the course of the settlement of the succession.

The *de cujus* died testate in February, 1901, leaving six children and naming two executors. An inventory was made, and the executors duly qualified.

In April, 1901, two of the heirs, namely, Gerard Howard and Leigh Howard, brought suit to annul the will. The petition alleged, *inter alia*, that the will required the two petitioners to collate \$2,500, when as a matter of fact they had never received anything; whereas their coheirs, Earl, Charley, and Lula Howard, had received \$1,800, \$1,700, and \$2,500, respectively. It was prayed that these heirs be made to collate. The remaining heir, Fay Howard, intervened in the suit, maintaining the validity of the will, and asking that all her coheirs be required to collate.

In June, 1902, the several demands for collation were rejected as being premature.

In November, 1902, Leigh Howard filed a petition asking that one of the executors be removed on the ground that he had defaulted as a notary public and absconded.

Fay Howard, who was the wife of Richard Hawkins, having died, her said husband qualified as natural tutor of her six children, and in January, 1903, filed a petition substituting himself as a party plaintiff in the petition theretofore filed by his wife.

In May, 1903, Charley Howard filed a petition asking to be appointed dative testamentary executor, alleging that Earl Howard, one of the executors named by the will, had died, and that the other executor, Emile J. Barnett, had been destituted by judgment of court.

In June, 1903, the court rendered judgment destituting the executor Emile J. Barnett.

In August, 1903, Leigh Howard took a rule on Messrs. McCloskey & Benedict, attorneys, to show cause why they should not "bring into court the French spoliation claims belonging to the succession."

In September, 1903, Charley Howard was appointed dative testamentary executor, without opposition: and he duly qualified, by taking oath and giving bond according to law.

A new inventory was ordered to be made, and was accordingly made.

In December, 1903, the attorney for absent heirs ruled the dative executor to show cause why he should not file an account.

In February, 1904, Leigh Howard filed a supplemental petition, praying that, in the event the court should decide that he is bound to collate \$2,500 and that the collation is due for the farm he occupies in the parish of Jefferson, he be put in full possession of said farm.

On March 11, 1904, the executor asked that the movable property of the succession be sold, and an order was accordingly so made.

Four days afterwards, on March 15th, Leigh Howard, for himself and as administrator of Earl Howard, and Gerard Howard, filed a petition asking an injunction against the sale of the movable property, on the ground: First. That there was no legal inventory, "one-half of the heirs were never notified, not knowing where they could be found." Second. That there are ten minors who are heirs to two-sixths of the estate. Third. That interdiction proceedings have been entered against Charley Howard, the executor; that he has never put on the inventory more than two-thirds of the movable property of the succession; and that he has removed half of the movable property that he had on the inventory and hauled it away in wagons within the last four weeks. Fourth. "That he has rented the house No. 4005 Camp street, on December 1, 1903, for \$15 per month; that he has received rent enough to pay the taxes on that piece of property; that the case is on trial now to decide in the property in Jefferson parish whether it belongs to the estate or not. Fifth. That the other debts that James J. McLoughlin claims cannot be put against the estate until after the interdiction case is tried on its merits."

On this petition a rule nisi issued, addressed to Charley Howard and James J. McLoughlin.

On March 17, 1904, the rule was dismissed, and a commission was issued to J. L. Onorato, auctioneer, to make the sale. He made it on April 5, 1904, at the Real Estate Exchange. His procès verbal shows as follows:

"First. Two certificates of the New Orleans Debenture Co. adjudicated to Charley Howard for \$50.

"Second. One lot of furniture, adjudicated to Charley Howard for \$84.

"Third. One lot of jewelry, adjudicated to Charley Howard for \$20.

"Fourth. One lot of books, adjudicated to Leigh Howard for \$5."

The procès verbal recites that the adjudications were made because the adjudicatees were the highest bidders.

On the next day, April 6, 1904, Leigh Howard filed in court the following:

"Succession of Mrs. Anna Gerard Howard.

"No. 64,517. Civil District Court, Division A.

"To the Hon. Judge Ellis: I Leigh Howard here come into your Honorable Court and pray that you set aside the sale of movable property of this succession that J. L. Onorato made on April 5th, 1904, at 12 m., under the grounds that they were not sold according to the agreement that all of the heirs of this succession made on March 30th, 1904; that the said Onorato did not show any of the goods; that he did not give any description of them; that the sale was made for the administration to buy in everything; that the administration bought in everything except some books and I bought them and made a demand on Onorato for them and he said he didn't have them and that he could not deliver them; and that the administration of this succession had no right to bid on anything. Therefore I pray your Honor to set aside this sale because it was not according to law.

"[Signed] Leigh Howard.

"Sworn to and subscribed before me this 6th, April, 1904.

"[Signed] T. C. W. Ellis, Judge."

Upon this the judge made the following order:

"Order: Let proceedings be stayed as they are by the auctioneer until the further orders of the court, and let all interested parties show cause on Friday, April 8, 1904, at 11 a. m., why the relief prayed for should not be granted.

"[Signed] T. C. W. Ellis, Judge.

"N. O., La., April 6, 1904."

On the 8th of April, 1904, the auctioneer answered that he had sold the property at public auction according to law after legal advertisement, all as shown by his procès verbal.

On the 12th of April, 1904, the executor filed a list of debts and asked that the real estate of the succession be sold to pay same; and an order was made accordingly.

On April 29, 1904, the rule to set aside the sale was tried; no appearance being made for the defendant. Gerard Howard testified that at the sale he asked the auctioneer where the property was, and that the auctioneer told him he didn't know anything about it; that everything was sold to Charley Howard except a set of books. Leigh Howard testified as follows:

"The auctioneer read the advertisement, and said he would make the sale by the advertisement according to the inventory. I objected to the sale on the ground that he did not produce the stuff, and it wasn't in his possession, and he could not sell it. I do not know who had possession of the property, nor where it was. I know Charley Howard removed two bedroom sets seven or eight weeks ago from where it was, and he sold everything to Charley Howard except one lot of books. I bid in them books, to get four books of my father's writings, at \$5. That same day I went to Mr. Onorato and asked the delivery of the books. I objected to the sale because there were a lot of buyers there, and when they saw how things was they went away, and second-hand dealers. Mr. Onorato told me he could not deliver these books; that he didn't have them and didn't know nothing about them."

On May 3, 1904, the court rendered the following judgment:

"Succession of Anna Gerard Howard.

"No. 64,517. Civil District Court for the Parish of Orleans.

"Considering the agreement of the parties hereto, copy whereof will be filed, the law and the evidence being considered.

"It is ordered, adjudged, and decreed that said agreement be now ratified and made effective, and accordingly that all opposition to the will of the deceased by act before Felix J. Puig, notary public, of this city, be withdrawn.

"It is further ordered and decreed that the order of court heretofore issued, ordering that sufficient property of the succession be sold in order to pay debts, be ratified and made effective.

"It is further ordered and decreed under said consent and agreement that the direction of said will as to collation be decreed null and of no effect, and accordingly that the remaining assets of said succession be partitioned among all the heirs, share and share alike, and that all costs be paid by the mass.

"Judgment read and rendered in open court April 26, 1904.

"Judgment signed in open court May 3, 1904.

"[Signed] T. C. W. Ellis, Judge."

On the 31st of May the court rendered the following judgment:

"Succession of Anna Gerard Howard.

"No. 64,517. Civil District Court, Division A.

"For the reasons assigned in the written opinion of the court placed upon the rule for the production of property purchased.

"It is ordered that the administrator of this succession and the auctioneer, who made the sale of the movables bought by movers, be and they are hereby ordered to make delivery thereof to the purchasers within 20 days from the service hereof, and that in default thereof that the sale be annulled and set aside as to any property not delivered at that time, and that copy hereof be served upon the parties. Defendants to pay costs. Judgment read and rendered in open court May 25, 1904.

"Judgment signed in open court May 31, 1904.

"[Signed] T. C. W. Ellis, Judge."

From this last judgment Leigh Howard took an appeal to the Court of Appeal. The judgment of the Court of Appeal is not in the record, and it is not reported. From references to it here, and the testimony, we infer, however, that it affirmed the judgment of Judge Ellis.

On June 30, 1904, Charley Howard, executor, filed his final account. In the petition filed with the account and praying for its homologation he alleged that he had caused all the personal property of the succession and also one piece of real estate to be sold; that Onorato, the auctioneer, had not yet settled with him for the proceeds of the personal property, because of a lawsuit pending between him and the heirs; and that he cannot turn over the proceeds until the suit is adjusted. The account shows \$1,478.14 for distribution, and \$1,199.44 of privileged debts, and \$144 of ordinary debts, and \$134.70 to be divided among the heirs.

On July 1, 1904, F. Rivers Richardson, attorney for absent heirs, filed an opposition opposing the account in each and every partic-

ular; that the debts placed thereon are not due, and, if due, are grossly excessive; that the assets of the estate are not accounted for and the receipts are not correctly stated. He alleged that as attorney for absent heirs he was entitled to be placed on the account for a fee of \$25, and he prayed accordingly, and that the other claims placed on the account be rejected or reduced to the proper figure, and that the executor be ordered to account for the remaining assets of the succession.

On July 12, 1904, the account was homologated in so far as not opposed.

On July 13, 1904, Leigh Howard filed the following opposition:

"Succession of Mrs. Anna McLean Howard.

"No. 64,517. Civil District Court, Division A.

"To the Honorable Civil District Court: I Leigh Howard, opposes the commission claim which he has as No. 2 and No. 6 Jefferson Parish, Taxes No. 9 Charley Howard, Commission No. 14, Stenographer Fees Nos. 15 and 16. McCloskey & Benedict 17 Not. Pub. 18 McLaughlin Fees No. 19 McLaughlin No. 20 Sale of personal property No. 21 Real estate sale, and the ordinary. I fact I think that the Honorable Court aurt to order all creditors to prove claims.

"[Signed]

Leigh Howard."

On the 18th of July Leigh Howard filed the following:

"Succession of Mrs. Anna McLean Howard.

"No. 64,517. Civil District Court, Division A.

"Roul for Charley Howard the Administrator of this succession to show cause why he should not put the foweling property in this succession if he has it in his percussion and if not on Monday Aug. 15th, 1904 at 11 o'clock a. m. what became of it:

1 Masonic Quilt	1 lot wash tubs.
1 lot gold Masonic	8 bars.
Emblems	1 trunk.
2 Arm chairs	1 Parrot and cage.
1 locket and chain	1 Marking bird.
2 Chandlers	1 Lot French Spolia-
2 Brass Syp Glasses	tion claim.
1 Wedding dress	1 Roller Top desk.
2 Armoirs of Linen	1 Lot oil cloth in din-
1 Gents Gold Watch	ing room.
1 Lady's Gold Watch	1 Silver soup ladle.
1 Silver basket	1 Electric Batery.
1 Book case	\$2000.00 Government
1 Sewing basket	bonds.
3 linen window	
shades	

"And the following that was on the inventory:

6 Family pictures	1 Sewing machine
1 Plated Bell	1 Plated bread basket
1 Plated cake basket	1 Family Bible.

"[Signed]

Leigh Howard."

On the 19th of September, 1904, Charley Howard filed an answer to the above rule. In this answer he says that he knows nothing about "1 Lot of gold Masonic Emblems, 1 locket and chain, 2 Armoirs of Linen, 1 Gent's gold watch, 1 Mocking bird and cage, 1 Lot French Spoliation Claims, 1 Silver soup Ladle, \$2000 Government bonds."

The answer proceeds as follows:

"Honorable T. C. W. Ellis: In answer to notice July 18th, 1904, I will say as follows: "Arm chairs one of these may have been my desk chair. This I have proved my ownership

to Mr. Lewis who was then representing Frank Kawe. The Roller Top Desk and the chandelers were also at the same time to be my property, and since that time I have disposed of them. The second arm chair I nothing of about, unless it was in the parlor set. 1 Locket and chain. This I know nothing about. 2 Brass Spy Glasses, this may mean one pair of field glasses and a pair of Opera Glasses that I bought in St. Louis of last year from the Simons Hardware Co., of Broadway, St. Louis. If these are not the ones I know not what is meant in the petition.

"1 Wedding dress, this one not down in the inventory, it is very much moth eaten has no commercial value, it being a heirloom in the family, I being the youngest in the family took possession of it, it has since been sent to New York City.

"1 Ladies gold watch, this means my mother's watch which was bought at auction with other things. 1 Silver basket. This was bought at auction. 1 book case, this was bought at auction. 3 Linen Window shades, these were bought at auction. 1 Lot wash tubs. I had some slats laundry tubs in the yard that I bought from Frank B. Hayne. These are what is meant. 3 Bars these were bought at auction with the furniture. 1 Trunk. This probably means an old black trunk that the silver ware was kept in, this could not be sold for 25 cts.

"1 Parrot and cage. This is my personal property and my mother never laid claim to it. 1 Lot oil cloth. This was not worth taking up. Mrs. Fisher and Mrs. Smith both put matting over it and when Mrs. Smith moved it was then on the floor. 1 Silver Soup ladle. This I know nothing about 1 Electric Battery. By this is meant a burglar's alarm Annunciator which was my property. \$2000.00 Gov. bonds. 6 Family pictures. One of these I gave to Richard Harkins as he had a right to it and the other five had no commercial value so I took possession of them. 1 Sewing Machine. There were two machines in the house, one was the property of my sister and one was the property of my mother, mother's machine was sold with the rest of the furniture. 1 Plate Bell was in the Silver-ware. 1 Plate cake Basket was in the silver-ware. 1 Silver Bread Basket. This was in the silver-ware and was sold at auction. This was taken for the 11 article of petition. 1 Family Bible. This was valued at \$2.50 with other books, the other books were bid in by Frank Rowe at the auction. I was told by my attorney that the bible had no Commercial value so I sent it to New York. I will pay the assessed value of Bible and Books which would be \$2.50.

"[Signed] Charles Howard.

"Sworn to and subscribed before me at New Orleans this 16th day of September, 1904.

"[Signed] Bus Rouen, Not Pub."

Evidence was heard on the trial of this rule. Five witnesses were examined. All the testimony is mere hearsay, except that of Mrs. Susan Parker, who traces into the possession of Charley Howard a number of things as to which he says above that he knows nothing. But it is evident that she had had a falling out with Charley Howard, because of his refusal to let her take some old sheets, and that her testimony is not above suspicion. Charley Howard did not testify, but the note of evidence recites:

"We produce Charley Howard for examination, if desired."

No judgment was rendered on this rule. It seems to have been lost sight of.

On November 9, 1904, Leigh Howard filed a petition praying the removal of the executor and alleging as follows:

"Your petitions petitions this Honorable Court that Charley Howard the Administrator of the Succession be removed and another Administrator be appointed; that Charley Howard has robbed this estate of movables that was on the inventory and that was not on the inventory, that he neglected the Real Estate. that he allowed Three Pieces of property in Pass Christian Miss to be sold for Taxes. tha he allowed the Piece in Jefferson Parish this State to be advertised for taxes. That he has left this state and thair is noe one to look out for this property and that the Bondsman, the Bankers Security Co be held untill a new Adminstration is Apointed."

On November 9, 1904, he prayed that a curator be appointed to represent the absent executor, and accordingly James J. McLoughlin, Esq., was appointed.

On January 10, 1905, Leigh Howard filed the following petition:

"Succession of Mrs. Anna McLean Gerard Howard.

"No. 64,517. Civil District Court, Division A.

"Your petitioner, Leigh Howard, a resident of Jefferson parish, this state, who represents one half of this succession.

"Now comes into this Honorable Court and Petitions to have the sale of the movable property of this succession set aside and annulled. Because it was not sold according to Agreement Between all of the Hairsk that everything would be produced and sold, James J. McLoughlin acting for Charley Howard, will full power to act as he said. that the books that I bought whitch were 25 on the inventory, Jos. L. Onorato offered me 29 Books. That in the Lot of Books that Belongs to this succession were 1 Family Bible with \$100.00 4 Scrap Books of my Family writings with \$500.00 1. Famley Albin worth \$50.00 the others 19 Books I dont know the titles But they were at least 12 inches long, if this sale is not annulled your petitioner claims Jos L. Onorato and James J. McLoughlin and Charley Howard is jointly indebted to me for the value of these books, which is \$650.00 and what ever the other 19 may be worth.

"Your pertitioner prays that Jos. L. Onorato, James J. McLoughlin and Chaorley Howard may be cited to show cause why this sale should not be annulled and your petitioner granted his full rites or they pay me \$650.00 what that jestly owe me for the value of the Books that I bought with costs and interest as I am entitled to.

"[Signed] Leigh Howard."

To this petition J. J. McLoughlin, curator ad hoc, pleaded res judicata, based on the judgment in the former suit to annul the same sale.

On January 10, 1905, Leigh Howard took a rule on J. J. McLoughlin, Esq., "to show what right he had to take the money of the succession and keep it on deposit in bank in his own name, and if he has the right to keep this money why he should not give bond." Mr. McLoughlin answered that the executor had paid the debts not opposed on the account to the amount of \$438.84, and that, "being about to leave New Orleans, he had turned over to him (Mr. McLoughlin)

the balance of the funds, \$1,039.30, and that he (Mr. McLoughlin) now deposited said amount in court, in accordance with an order theretofore rendered by the court at his request that he do so."

On June 12, 1906, the court rendered judgment sustaining the opposition of F. Rivers Richardson to the extent of requiring that he be put down on the tableau of the succession for \$10, and dismissing the opposition of Leigh Howard as having been filed too late, and ordering the funds to be distributed according to the account.

On the same day the court rejected the demand for the dismissal of the executor, "with reservation of the rights of all the heirs against each other, to be asserted upon the partition of the estate."

From this last judgment, Leigh Howard has appealed. He has not appealed from the other.

The reasons given by Judge Ellis for his judgment are the following:

"The plaintiff alleges that the defendant executor (his brother) has robbed the succession of certain movables, inventoried and not inventoried; that he allowed three pieces of property at Pass Christian, Miss., to be sold for taxes; that he allowed the property in Jefferson parish to be advertised for taxes, and incurred costs and penalties; that he left the state, and there is no one to look out for the property.

"On these allegations, general and wholly wanting in specification, he prays that the executor be dismissed and that a new administrator be appointed.

"The proof shows that certain real estate in Mississippi was sold for taxes, but that the time for redeeming the same has not yet expired. This property, though owned by the deceased, lies outside of the state of Louisiana, and was never under the administration of the defendant executor. Any one of the heirs could redeem it. Any one of them could do so to-day, and the defendant was under no more obligation to redeem the property than the petitioner. The amount wasted by this litigation would have more than redeemed the property in Mississippi.

"The property in Jefferson was advertised to be sold for taxes, and the executor paid the taxes, penalties, and costs. The proof shows that he had no funds of the succession with which to pay said taxes prior to the time that he paid them. The petitioner in this suit has been living on this property in Jefferson, pays no rent for it, derives whatever revenues or fruits it produces, and enjoys its use. As an heir, he had, and has exercised, this right of occupancy subject to the rights of his coheirs, to be settled on the partition; but, as an heir, the executor was under no personal obligation to pay the taxes, more than was the petitioner, and, under the facts shown, not as much personally as an heir, and when he received funds of the succession then he paid the taxes. It is true that costs and penalties had been incurred, but then it does not seem to have been his fault.

"The charge is made that the executor robbed the succession of movable property. The movable property inventoried was sold by the auctioneer, and the procsa verbal shows the sale, to wit, that everything in this sale was bought in by the executor, he being an heir, except a small lot of books, which was bid in by the plaintiff. It seems that there was some trouble about the delivery of the movables to plaintiff, as purchaser of said books, and he took a rule

to set aside the sale for nondelivery, and this rule was made absolute as to everything which was not delivered. It seems, since that matter was tried and decided, that the auctioneer all the while had possession of the books, and that the plaintiff could have received the books if he had demanded the same.

"The auctioneer during this trial has sent the books to this court, subject to the order of the plaintiff as their purchaser, should he see fit to take them, or, if not, then to be turned over to the heirs, as an asset of the succession, for partition. The movables sold to the executor, as an heir, can be settled for by him on the partition, and on this score there is no seeming complaint.

"Evidence was given on this trial, and also on the trial of a rule on the executor to account for certain property, in regard to a family Bible of the deceased; also a wedding dress, and a certain spy glass or field glass; and the plaintiff claims that the executor has wrongfully made way with these things. The executor admitted that he sent the family Bible and the wedding dress to New York. He says that he thought he had a right, as an heir, to do this; that the Bible was of little value, and the wedding dress old and of no real value, except its sentimental value as an heirloom. The dress was not inventoried, nor was the Bible separately inventoried, and I do not find that the spy glass or field glass was entered on the inventory. There is much hearsay testimony in the record about these articles, and the proof, especially in regard to value, is by no means satisfactory. The hearsay part of it was objected to, and, of course, is not evidence. The return of the executor to the rule taken, and above referred to, is sworn to by him.

"While the proof is not satisfactory as to these movables, and while the executor has no right to send away the dress and Bible, no matter how small he may have deemed their value, nor what he thought was his right as an heir, still there can be no justification for his conduct in sending them away from the state, without the consent of his coheirs, or of the court, if they were sent away by him after he received his letters as executor. The time when he sent them away does not seem to be fixed by evidence, even approximately, and inasmuch as he can be charged on the partition, in favor of his coheirs, with whatever may be the value of these articles, and as it is not certain whether he sent them away after he became executor, I do not find in this conduct, reprehensible though it be, legal justification for his dismissal.

"As to the spy glass or field glass, the testimony of the executor, in the rule above alluded to, was that he knew of no such article owned by the succession, and that the spy glass which he had was his own property.

"There was evidence, vague enough, in regard to certain articles of furniture, a bird and a bird cage and some other things; but the evidence is too vague and inconclusive to fasten liability upon anybody in regard to the same.

"The last charge is that the executor left the state and there is no one to care for the affairs for this succession. The proof is that he left this state to be gone for some time, but that he will return the coming fall. He left the succession funds in the hands of his counsel, Mr. J. J. McLoughlin, the same being in bank, and these funds have been paid by Mr. McLoughlin into the registry of the court. The real estate in this city and movables have been sold, and the executor has filed his account and it had been homologated, except as to two oppositions, one for \$8 and one for \$25, prior to the institution of this suit and while the executor was here. There was nothing else for the executor to do in the way of administration, all debts and charges then due by the estate having been

settled, and but for this litigation I have no doubt that full settlement would have been made soon after the homologation of said account. The executor was harassed by rules, motions, and litigation at the suit of this petitioner, about little matters of small value, that produced costs and trouble, rather than profit to anybody, and, besides this, the personal terms between the executor (his brother) were acrimonious and bitter, and most disagreeable to everybody compelled to have aught to do with said petty litigation.

"If the purpose of the executor in leaving this city for a time was to avoid trouble with his brother, he is to be commended. It seems that he could not get employment here, and that he could find work where he went. Whatever his motive for going, his absence has caused no injury to the succession, which is here intact and ready for partition among the heirs, and the evidence shows that his absence was not intended to be permanent, but only until the approaching fall.

"There is no need for further administration. There are no debts to be paid, and nothing remains to be settled. On the partition all the claims between the heirs, of every nature, can be settled. To appoint a dative executor would require more advertising, another inventory, a new bond, and when the new executor would receive his letters he would have absolutely nothing to do. The property in Jefferson, the proceeds of any property sold now deposited in court, and whatever may remain of the estate, including claims which the heirs may have against each other for any account, can all be settled on the partition, without the necessity of a new executor. The property in Mississippi can be redeemed by any of the heirs, or by them jointly, and restored to the ownership of the heirs, and with this the heirs can also deal as they see fit.

"I think the authority of the case of Succession of Willis, 33 South. 314, 109 La. 282, is directly applicable to this case, and under that authority, and under the evidence, a judgment will be entered dismissing the demands of the petitioner, at his costs, with reservation of the rights of all the heirs to assert whatever claims they may have against each other on the partition.

"N. O., La., June 28, 1905.

"[Signed] T. C. W. Ellis, Judge."

The case has had our careful consideration, as evidently it had that of the learned judge a quo. For the reasons given by him, this judgment is affirmed.

We will add, however, that, if the absence of the executor from the state has been protracted more than one year, this is peremptory cause for removal (Civ. Code, art. 1158), and that the services of some succession representative will be needed for paying out the money deposited in court.

It is ordered, adjudged, and decreed that the judgment appealed from be affirmed, at the cost of the appellant.

(116 La.)

No. 15,674.

STOKER v. HODGE FENCE & LUMBER CO., Limited.

(Supreme Court of Louisiana. March 12, 1906. Rehearing Denied April 9, 1906.)

1. NEGLIGENCE—BILLS OF EXCEPTION—BILLS NOT WELL TAKEN.

The several bills of exceptions touching testimony on trial were reviewed. The grounds

of objections afforded no good reason to set aside the decree and remand the case for another trial.

2. SAME—CHARGES AND COUNTERCHARGES.

Complaints are directed by plaintiff against defendant for bad management in its towing work just preceding the accident, which resulted in his fall and injury. Complaints are directed by defendant against plaintiff of gross negligence of duty just before the accident. After a review of the grounds of these complaints, it appears that the work of neither was model to be followed. The incidents at the time of the casualty were taken up and reviewed. The conclusion arrived at was that there was an open space in the bridge through which, under proper management, it would have been possible for the tug and the towed schooner to have passed.

3. SAME—DELAY.

Plaintiff did not delay in opening the draw of the bridge. Defendant's towing tug came to the bridge, and would have passed it with the schooner in tow if the usual channel had been followed.

4. SAME—IMPACT WAS AVOIDABLE.

The captain of the tug and other employés thereon knew, or must be held to have known, something about the channel. They should have directed all their attention to stay in the channel.

5. SAME—HALF OPENED BRIDGE.

The weight of the testimony does not sustain defendant's charge that the bridge keepers were closing, instead of opening, the bridge at the moment of the accident.

6. SAME—EVIDENCE.

A number of witnesses testified that the drawbridge was half open and there was space to pass. Others testified to the contrary. The district judge, who saw and heard the witnesses, substantially held that it was half open. After having reviewed the testimony, the court discovered no error in this respect.

7. DAMAGES—PERSONAL INJURIES.

In answering the decree, the plaintiff asked for an increase of damages. The court declines to increase the amount, and leaves it as found by the district judge.

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by Robert W. Stoker against the Hodge Fence & Lumber Company, Limited. Judgment for plaintiff, and defendant appeals. Affirmed.

McCoy & Moss, for appellant. Gorham & Gorham, for appellee.

BREAUX, C. J. Plaintiff sues to recover damages for personal injuries. Plaintiff, with one John F. Spearing, was bridgekeeper of the Kansas City & Southern Pacific Railroad Company.

For brevity, we will refer to the Kansas City Railroad as the "K. C.," and to the Southern Pacific as the "S. P."

Each of these railroad companies own a bridge spanning the Calcasieu river near the city of Lake Charles.

To be specific as relates to the location, the bridge of the S. P. is nearer Lake Charles than is the bridge of the K. C. The distance between the two bridges is about 200 yards. They are strong railroad bridges; that of the

K. C. being the heavier, and having a double gear. The S. P. bridge had a single gear and turned more easily. They are turning bridges, moved by a lever to give passage to boats and vessels. The arms of the lever are 12 feet in length.

Defendant's boat had to pass through the draw of the S. P. first, and afterwards through the draw of the K. C.

The stretch of the river on each side of the bridges is due north and south, and the bridges span this river east and west. It appears that the river is 600 feet wide at this place.

The draw of the K. C. bridge is 254 feet in length. The width of each draw between the center pier and the end of the draw is from 90 to 100 feet clear.

Plaintiff was one of the keepers of the K. C. bridge. He and his fellow employé (Spearling) had stepped out of the store in West Lake, and had walked a short distance, when they heard the signal of the tug to open the bridge. They ran to the bridge and applied themselves to open the draw. This happened in the daytime in January, 1904.

The contention here between the plaintiff and the defendant is, on the part of defendant, that plaintiff and his helper were slow. This is denied by plaintiff. Again, defendant urges that plaintiff had been notified to be prepared to open the bridge on his return in about two hours. Plaintiff's testimony does not fully agree with that of defendant in this respect.

According to the plaintiff and his assistant, they were reasonably near the bridge and did all that was necessary as bridge keepers.

It was also in evidence that there was a strong wind blowing from the south.

The defendant is the owner of the steam tug Mernan. He had undertaken to tow the large-size schooner Perkins, a three-mast schooner, up the Calcasieu river to a point above the K. C. bridge. This schooner measures in width 23 feet, length on keel 84 feet, and length over all 92 feet. The tug Mernan has a width of 14 feet and length of 30 or 40 feet, and is of about 12 horse power.

It was pulling a rope about 50 feet in length that was fastened to the schooner, which was not loaded.

The contention is, on the part of plaintiff, sustained by some evidence, that it would have been much safer to have lashed the tug alongside the schooner and not to have pulled it by a rope.

When the Mernan reached the bridge, the plaintiff and his assistant were pushing the lever and turning the pivot. The bow of the schooner collided with the east end of the draw, striking it about 10, or perhaps 20, feet from the extreme east end.

Immediately before the collision, the Perkins was steering for the east side of the draw or open space of the bridge. The tug was pulling to the west.

It was evident, a few moments before the casualty, that there was danger ahead. The tug turned back (tugs turn easily), and sought to assist the schooner. The attempt failed. The tug struck one of the piers. The schooner struck a heavy blow against the bridge, and was slightly damaged.

In the collision a log boat was turned over, and the movements show that the schooner and the tug must have been under pretty good headway. Plaintiff was one of the bridge tenders of the K. C. bridge. The blow of the schooner against the draw caused the lever to strike back, and strike both plaintiff and his assistant. Two of plaintiff's ribs were broken in the fall. His left lung was punctured. He was bruised and shattered, and suffered. He charges that his injuries were the direct result of the gross negligence of the Hodge Fence & Lumber Company, its agents and employes, and he, for these injuries, claims over \$5,000.

The judgment of the district court allows him \$1,000.

Defendant appeals.

We will in the first place apply ourselves to decide the questions arising on objections to evidence.

The first objection of defendant is that the plaintiff, a carpenter at one time, but not of late years, should not have sought to prove how much he had earned a day some six years ago as a carpenter.

The objection of defendant, overruled by the court, was that the evidence was irrelevant and immaterial. The evidence admitted shows that the witness had been working as a bridge tender for over six years, and that during that time he had not worked as a carpenter. It may have been the impression of the court *a qua* that it would be connected with other testimony, and we infer that it was.

But the court has some discretion regarding irrelevant testimony.

The error, if there was error, was not prejudicial, and affords no ground for complaint. *Wigmore, Ev. § 15 et seq.*

We think that it was admissible testimony.

The next objection raised by defendant was to evidence relating to the extent of injury to plaintiff's arms. The objection was that there was no allegation of injury contained in his petition. Allegations of injury were in general terms and broad enough to cover all injuries. Moreover, without regard to injuries to his arms, there were other injuries suffered by plaintiff to sustain the action.

The next objection was raised against the admissibility of evidence to prove the custom in towing schooners and barges through bridges. The contention was that there was no specific allegation upon the subject.

We are of opinion that it was inseparable from the issues presented. It was part of the substance of the case. It did not mislead the defendant or give the least occasion for surprise.

The text of Jones on Evidence (volume 2, verbo "Relevancy") has some bearing.

Another objection was raised on the ground that plaintiff did not have the right to prove the safest method of towing, as between towing by the line astern the tug and towing alongside by fastening the tug to the vessel.

The allegations were sufficiently broad to admit the testimony.

A witness was called for the purpose of impeaching the testimony of one of defendant's witnesses.

Defendant's objection was that plaintiff had made its (defendant's) witness his own, and that therefore he could not impeach his testimony. We have read the testimony admitted to impeach this testimony. It is neither positive nor direct. The statement of the witness sought to be impeached was not directly contradicted. If the testimony of the defendant's witness amounted to anything, it was not affected by the attempt made to impeach it.

We therefore pass to the merits.

The plaintiff charges that the employes of the defendant on the tug in question were not sufficiently attentive to the work intrusted to them, and were absent from their post of duty at a moment of danger; that they should have been present at all times.

Plaintiff's insistence is that by better management there would have been no casualty.

There was a strong gale blowing from the south, and the current was from the same direction, owing to the tide. In consequence, after passing the first bridge, the tug and the schooner were urged on with more than ordinary speed. The fireman on the tug had taken the place of the engineer, who had gone to his dinner.

Plaintiff says it was negligence on the part of the captain of the tug to have turned to the left, as the schooner's steersman was steering to the right and to the east for the opening of the span; that no orders were given to change its course and steer in the direction the tug was going.

Defendant seeks to retaliate, in answer to plaintiff's charges, by stating in substance that it was not its agents and employes who were at fault, but plaintiff and his assistant; that the bridge tenders were at a distance of over 1,000 feet; and that in consequence, after the signal was given by the coming tug, the bridge was not turned in time. It would be hard, in view of the facts, to hold that plaintiff was at fault because of the distance at which plaintiff and his helper Spearing were from the bridge at the time that the whistle of the tug was given, or, on the other hand, to hold that the defendant was at fault on account of the absence of the engineer, if he was absent as charged.

The plaintiff and his assistant, the testimony shows, ran to the bridge as fast as they could, and were at the bridge in time to commence turning it before the bridge

keepers of the S. P. bridge had commenced to open the draw of that bridge.

Defendant, on the other hand, at the last moment did all he could to avoid the accident.

We leave this phase of the case.

This brings us to a consideration of the course followed by the tug with its tow just before entering the S. P. bridge. We shall follow the tug and its movements until it reached the K. C. bridge down to the moment of the accident.

On entering the draw of the S. P. bridge the pilot of the tug saw that the bridge of the K. C. was half opened, and as that was sufficient to enable him to pass he moved on with the schooner across the first bridge. There was a strong wind and a gentle current, we infer, as the tug was pulling north and upstream. The Calcasieu is a tidal stream, but the tide is not great, and the current of the water upstream is sluggish. With a strong wind and slow current, it does not seem to us that the rudder of the schooner was as useless as some of the witnesses will have it. She surely could steer toward the space in the bridge, and would have steered to it, as we understand, if his tug had not pulled in an opposite direction. Defendant's tug turned a few moments before entering the draw. It is difficult to determine why the tug turned suddenly when about to enter the draw. The testimony is that the schooner had not been properly towed to that point, and the result was that it could not pass. Its prow was directed to the channel, while the tug was in another direction. The tug easily obeyed the rudders, and the schooner was equally as manageable. Why did they not unite in pulling to the space in the bridge?

It does not appear that anything prevented the tug from pulling the schooner to the right and to the open space from the time it left the S. P. bridge until it reached the K. C. bridge. Had she thus pulled, we infer that the schooner would have been towed to the open space, and it would in all probability, have escaped the collision. The weight of the testimony shows that, had the schooner followed the straight line to the opening of the K. C. bridge, it would have had ample space to pass. This space between the pier of the bridge and the end of the draw of the bridge, when in position in the bridge at rest, is between 90 and 100 feet. The schooner is 26 feet in width and the tug 14 feet. If the schooner had followed the tug in Indian file, no good reason suggests itself why they could not have passed and steered clear of the obstacles, as the draw was open to an angle of about 45 degrees—45 feet. At the last moment the tug added to the danger.

The evidence shows that under similar difficulties other schooners have avoided collision. No good reason suggests itself why the

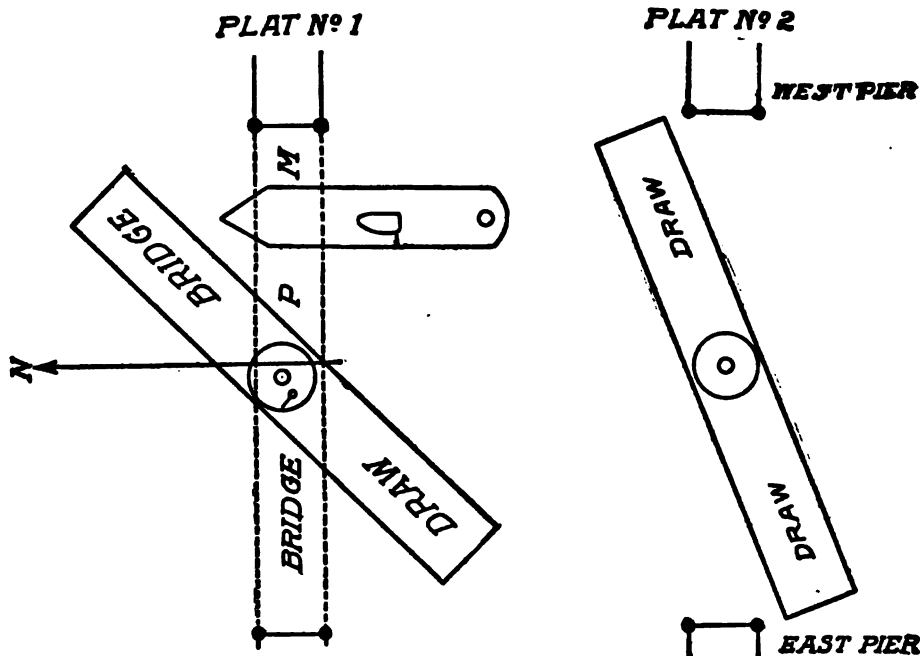
schooner could not have done likewise. The testimony does not lead us to infer that a safe passage through the bridge was impossible.

We annex hastily prepared diagrams.

P 1 represents the bridge as plaintiff claims it was at the moment of the accident. P 2 represents the bridge as defendant claims it was at the moment of the accident.

Defendant cites a number of decisions upon the subject, rendered in other jurisdictions. The decisions cited do not appear to fit the facts. Here the difference consists in that the vessels did not pass in the usual place.

Defendant further urges in this connection that the pilot of its tug, when it entered the river south of the S. P. bridge, saw that bridge draw open full width, and the K. C.,



A disinterested witness, who was near and saw the collision, says of the tug:

"If she would have kept on straight and turned east, she would have gone through."

This is corroborated by other testimony.

This witness was an officer on the boat Molineaux, which was following the schooner and the tug at a short distance.

Defendant cites the rivers and harbors act of August, 1894, especially that portion which requires tenders of drawbridges not to unreasonably delay the work in opening bridges after signal has been given.

In order that bridge tenders may be brought within the terms of the cited statute, it must be shown that there was unreasonable delay. Here we are not of opinion that there was such delay. The bridge was half open, and it afforded space sufficient to enable the watercrafts to pass. It was usual for vessels at this place to go through within the space before mentioned.

Defendant also takes the position that, the tug having given the signal required in due time to open the draw, and in view of the fact that the pilot of the tug could see the tender men at the draw, it was not negligence to continue approaching the draw, unless the bridge tenders signaled the boat to stop.

200 yards farther, had begun to swing open. This pilot knew from experience that they had time to open it before his boat could reach the bridge, and that without notice from the tender he was justified in proceeding as he did under slow bell.

True, plaintiff did not signal not to approach the bridge. Others had frequently passed. Was it negligence for him to presume that defendant's schooner would also pass? He and his assistant could not well foresee that the tug would turn to the left, instead of to the right, and that the schooner, not sufficiently controlled, would strike the draw as before stated, thrust it out of its way, and continue upstream a half a mile before stopping.

Another insistence of defendant is that the crew of defendant's boat and the crew of the schooner unite in saying that the bridge was half open and still opening just as the tug pulled out of the draw of the S. P. bridge. But defendant charges that thereafter things changed, and that the bridge tender went to work reversing the movement and closing the bridge, so that the opening did not exceed 10 feet at the time that the tug reached the bridge and the collision took place.

Of course, if the bridge had been half open, and was afterward closed, in presence of the

fact that the tug and schooner were coming, then there was nothing left for the tug's pilot to do except to look to doing all he could toward lessening the force of the impact between the schooner and the bridge. But we have considered all the evidence on the subject, and have not found unanimity of expression, even of defendant's witnesses upon the subject.

We have not found that the preponderance of the testimony sustains the serious charge. The weight of testimony is emphatic to the contrary. We have given special weight to unbiased and disinterested witnesses upon that question. We are forced to the conclusion that the draw was not closing at the time that the accident happened.

We will state, in concluding on this point, it appears to us that, in striking the bridge at an angle of about 45 degrees, and pushing or throwing it out of the way, as it is said was the effect of the impact between schooner and bridge, is already extraordinary enough; but if the bridge was nearly closed, as some of defendant's witnesses testify, it was wonderful, particularly as it continued farther on about half a mile before it was stopped.

Now, as to the defense of the uncontrollable force of the gale, another issue: The district court declined to permit the defendant to amend its answer and allege that defendant's craft was uncontrollable because of strong wind and current; in other words, that the accident was caused by a vis major. This was a new issue. The case had been at issue for a considerable time when the amendment was offered, and the court decided that it came too late. It was a plea different from the pleas which had been previously interposed.

We think that it was properly excluded.

Subsequently, evidence of the wind's force was admitted. But it appears that it could have been controlled, and the evidence shows that the accident could have been averted. It appears to us that ordinary management would have been equal to the occasion.

Defendant charges that the conduct of plaintiff was not sufficiently prudent. Defendant urges that plaintiff should have foreseen the blow, and should either have raised the lever on its pivot, or should have hastily retreated from where he was at work when he saw the schooner turning. It does not appear that the lever could have been easily removed, nor that plaintiff had timely warning of any kind to retreat.

The plaintiff received injury for which he is entitled to recover. The judge of the district court fixed the amount of the damages at \$1,000.

After having considered the facts and the circumstances of the case, we have come to the conclusion not to increase the amount. The wages he was receiving were not large.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed.

(116 La.)

No. 15,675.

SPEARING v. HODGE FENCE & LUMBER CO., Limited.

(Supreme Court of Louisiana. March 26, 1906.)
Rehearing Denied April 9, 1906.)

NEGLECT—EVIDENCE.

The facts and the law in this case are the same as those presented in the case of *Stoker v. Same Defendant* (recently decided) 41 South. 211.

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by John F. Spearing against the Hodge Fence & Lumber Company, Limited. Judgment for plaintiff, and defendant appeals. Affirmed.

McCoy & Moss, for appellant. Gorham & Gorham, for appellee.

BREAUX, C. J. The views expressed in *Stoker v. Hodge Fence & Lumber Company, Limited* (La.) 41 South. 211, having been reconsidered, the conclusion arrived at is the same as in the cited case, except as to the amount of damages, which is less by reason of the fact that plaintiff in this case did not suffer injuries to the extent found that plaintiff had suffered in the cited case.

For these reasons, the law and the evidence being in favor of the plaintiff, the judgment of the lower court is affirmed.

(116 La.)

No. 15,929.

MACMURDO v. MASON.

(Supreme Court of Louisiana. April 9, 1906.)
Rehearing Denied May 7, 1906.)

BROKERS—COMMISSION ON SALES—EVIDENCE.
Involves only question of fact.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by Guy M. Macmurdo against Charles E. Mason. Judgment for plaintiff, and defendant appeals. Reversed, and suit dismissed.

Charles Ferdinand Olaborné, for appellant. William Sommer Benedict, for appellee.

PROVOSTY, J. Plaintiff sues for a commission of 2½ per cent. on the sale of defendant's property, claiming that he (plaintiff) was the "procuring cause" of the transaction. Plaintiff was in no way instrumental in bringing about the sale. The evidence leaves no room whatever for doubt on that point. Another person found the purchaser, corresponded with defendant, who lives in England, was given defendant's procuration, and made the sale and received and remitted the price. Plaintiff had nothing, absolutely nothing, to do with the matter, except that

he was the local agent of defendant and held a power of attorney for administration, and had been advised by letter nine months before that defendant would be willing to accept an offer of \$85,000 for the property.

The sale was made for \$105,101, without plaintiff's participating in the matter in any way, shape, or form.

Judgment set aside, and suit dismissed.

(116 La.)

No. 16,126.

MURPHY et al. v. POLICE JURY OF ST. MARY.

In re MURPHY et al.

(Supreme Court of Louisiana. May 7, 1906.)
JUDGES—RECUSATION—APPOINTMENT OF MEMBER OF BAR.

The fact that the judge of the district court advised the police jury that it was authorized to build a courthouse indicates that he had formed an opinion on the subject, but it does not indicate that he has any personal interest in the matter concerning which the opinion was formed, and where, in his reasons for recusal, he states that he has none, his appointment of a lawyer having the qualifications of a judge of his court to try the case is in strict conformity to law. Act No. 40, p. 39, of 1880, § 2.

(Syllabus by the Court.)

Action by John B. Murphy and others against the police jury of St. Mary. From an appointment of a member of the bar to act as judge on the recusal of the district judge, Murphy and others apply for writs of mandamus and prohibition. Denied.

Donelson Caffery & Son, for relator.

MONROE, J. Relators having instituted a suit in the district court for the parish of St. Mary attacking, as illegal or unconstitutional, an ordinance of the police jury providing for the erection of a courthouse, and praying for an injunction to restrain the police jury from acting thereunder, the judge of the district court recused himself (on the ground that at a time when he believed there would be no opposition to the building of the courthouse, he had advised the police jury that it was authorized to undertake the work) and appointed a member of the bar of the parish, having the qualifications of a judge of a district court, to act in his stead, to which plaintiffs (relators herein) excepted, on the ground that:

"Act No. 40, p. 39, of 1880, requires the judge recusing himself for interest to appoint a judge of one of the adjoining districts to try the case, and the exception having been overruled, they now apply to this court for writs of certiorari and prohibition and pray that the order of appointment be annulled, and that the judge a quo be ordered to appoint a judge of an adjoining district to try the case."

In support of their application, relators propound the theory that the district judge, having recused himself for the reason that he had advised the police jury that it had the

right under the law to build a courthouse, "which was the essence of the litigation in the case of John Murphy et al. v. Police Jury, has disclosed such an interest in the litigation as disqualifies him," and that being disqualified and having recused himself by reason of interest, it was his duty to appoint a judge of an adjoining district, rather than a lawyer, to act in his stead. This theory is untenable. The fact that the judge advised the police jury indicates that he had formed an opinion, but it does not indicate that he had any interest in the matter concerning which the opinion was formed, and, in giving his reasons for recusing himself, he distinctly stated that he had none.

The writs prayed for are therefore denied, and these proceedings dismissed, at the cost of relators.

(116 La.)

No. 16,027.

LEPINE v. MARRERO, Sheriff et al.

(Supreme Court of Louisiana. May 7, 1906.)

DEEDS—RECORDATION—SIGNATURE BY VENDOR ALONE.

The registration of an act of sale signed by the vendor alone will effect a registry of the sale. *Hutchinson v. Rice*, 33 South. 57, 109 La. 29, overruled.

Monroe, J., dissenting.

(Syllabus by the Court.)

Case Certified from Court of Appeal, Parish of Orleans.

Action by Felicien Lepine against L. H. Marrero, sheriff, and others. Judgment for plaintiff, and defendants appeal. Case certified from the Court of Appeals by the judges applying for instructions. Question answered in the affirmative.

Philip H. Mentz, for plaintiff. Rapp & Weiss and Louis Herman Marrero, Jr., for defendants.

PROVOSTY, J. Plaintiff's home was seized as if still belonging to his vendor, although he held it by a cash deed duly recorded. The deed, however, was signed by the vendor alone; and upon that circumstance the seizing creditor relied in making his seizure. Plaintiff has enjoined the seizure; and the question presented is: Whether the recordation of a cash deed to real estate signed by the vendor alone will effect a registry of the sale as against third persons. Finding that this question had been decided in the negative by this court in the recent case of *Hutchinson v. Rice*, 109 La. 29, 33 South. 57, while the former jurisprudence (*Allen v. Whetstone*, 35 La. Ann. 846, and cases there cited), seemed to be the other way, the Court of Appeal for the parish of Orleans, where the suit is pending, has certified the question to this court.

There is certainly a conflict, and inasmuch as the former jurisprudence constituted a rule of property, we have concluded to over-

rule the Rice Case, without stopping to debate whether its doctrine is not the logical deduction from the provisions of the Code on the subject of registry. "Omnis innovatio plus novitate perturbat quam utilitate prodest." *Levy v. Hitsche*, 40 La. Ann. 508, 4 South. 472; *Douglas Co. v. Pike*, 101 U. S. 677, 25 L. Ed. 968.

We therefore answer the question in the affirmative.

MONROE, J. dissents.

(116 La.)

No. 16,085.

McCALEB v. BOARD OF COM'RS FOR THE BURAS LEVEE DIST.

(Supreme Court of Louisiana. May 7, 1906.)

COURTS—SUPREME COURT—JURISDICTION.

In a suit to recover taxes paid in error, held, that the questions are not within the jurisdiction of this court.

(Syllabus by the Court.)

Appeal from Twenty-Ninth Judicial District Court, Parish of Plaquemines; Nemours Henry Nunéz, Judge.

Action by James F. McCaleb against the board of commissioners for the buras levee district. Judgment for plaintiff, and defendant appeals. Transferred for want of jurisdiction.

John Dymond, Jr., for appellant. Edwin Howard McCaleb, for appellee.

BREAUX, C. J. Plaintiff paid in error \$132.86, with interest and cost, being the amount of levee and acreage tax for the years 1894 to 1904, inclusive.

He had bought 4 arpents of land front by 40 arpents in depth. Some time afterward a survey was made, and it was found that six-sevenths of this land belonged to the government, and a small triangular tract, consisting of about one-seventh of the whole, was all that plaintiff owned under his deed of purchase.

He had placed some improvements on the land. He was ousted from the land by the United States government, who had absolute title to it. After he had been ousted he brought suit against his vendor, and recovered the price he had paid and the value of his improvements; consisting of \$2,000, the price, and \$1,500, the value, of the improvements.

Having paid the taxes thereon in error, and having been evicted as before mentioned because he had no title except to the fractional area before mentioned, plaintiff brought suit against the board of levee commissioners for the return of the taxes which he alleges were unlawfully assessed against him, the land being exempt from taxation.

Defendant objected to the return of these

taxes on the ground that there was a natural obligation to pay them; furthermore, that the taxes were apparently legal; and, again, that the right of exemption did not include exemption from taxation on land which was not supposed to belong to the United States government, but to persons in possession.

The tax claimed had been paid. It was no longer in contestation. It had passed out of the possession of the taxpayer into the hands of the levee board. In all cases in which the tax collecting authority brings suit for the recovery of taxes, the constitutionality or legality of the tax presents issues which may be brought up before this court, but after it has passed into the hands of the tax collecting authorities it no longer gives rise to questions of unconstitutionality or legality of the tax. The sole question now is whether or not an error has been committed, and whether or not on that ground it is possible for the plaintiff to recover after payment has been made. The questions to which this gives rise are no questions of constitutionality vel non or legality vel non of the tax, as made evident by the issues which are presented to be passed upon by this court.

The exemption invoked is an incident in connection with the issue of error and nothing more; it is a fact to decide which there is no necessity of considering the questions just stated, over which this court has jurisdiction; that is, questions of legality and constitutionality. Moreover, the matter of exemption and the error committed in the assessment of the property in the name of one who is not the owner, is not within the jurisdiction of this court.

We have concluded *ex proprio motu* to transfer this appeal to the Court of Appeal, parish of Orleans for want of jurisdiction, under St. 56 of 1904, provided that before said transfer is made the appellant or his attorney of record shall make oath that his appeal was not made for the purpose of delay.

It is therefore ordered, adjudged, and decreed that this suit be transferred for want of jurisdiction, and that should the defendant fail to file the affidavit required by the statute just cited within 10 days from date of this order then the appeal shall be considered dismissed.

(116 La.)

No. 15,996.

REEMS v. DIELMAN.

(Supreme Court of Louisiana. April 9, 1906. Rehearing Denied May 7, 1906.)

APPEAL — DECISION — REMAND, AND PROCEDURE BELOW.

This court having simply condemned the defendant to declare whether she accepted or renounced the succession of her daughter,

the lower court erred in requiring her, in addition, to cause an inventory to be made; especially in a different succession, that of the father of the daughter. The lower court cannot add to the decree of this court.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Simon J. Reems against Mary M. Dielman. Judgment for plaintiff in rule, and defendant appeals. Affirmed in part and reversed in part.

James Barkley Rosser, Jr., for appellant. Joseph Clohesy Gilmore and Thomas Gilmore, for appellee.

PROVOSTY, J. Defendant, as survivor in community, has the usufruct of the property of her children. Two of the children, one of whom was the wife of plaintiff, having died, plaintiff instituted this suit for the double purpose of having it declared that defendant's usufruct of the share of her deceased daughter had terminated, and of compelling defendant to elect whether she decided to accept or renounce the succession of her said daughter. On a former appeal this court rejected the first of these demands, but maintained the second, and remanded the case in these words:

"And the case is hereby remanded to the District Court, Division A, for execution of this decree, by ordering defendant to elect whether she accepts or renounces these successions, as an heir, as before mentioned."

In the lower court plaintiff took a rule on defendant to show cause why she should not make the election required of her and why an inventory should not be made of the property of the succession of her husband, the father of the deceased daughter.

Defendant first excepted that she could not be required to make the election until after the termination of a certain suit which she had brought to set aside the will of her daughter, and to have herself declared to be the heir of her daughter, and, as such, entitled to her succession. She, then, with full reserve of her exception, filed a formal acceptance of the said succession. The acceptance, however, was not signed by her, but only by her counsel, and the court would not accept it, but ordered her to file a formal acceptance or renunciation. The court, furthermore, ordered an inventory to be made as prayed.

In this court counsel argues that the filing of the suit by defendant to annul the will of her daughter, was in itself an unconditional acceptance of the succession of her daughter, since she in said suit took unqualifiedly the quality of heir. But we think with the learned judge a quo that defendant should have obeyed the judgment of the court by filing a formal acceptance or renunciation of the succession, and by a formal acceptance we mean one signed by herself. She, therefore, will have to bear the costs of the proceedings in the lower court.

In so far, however, as the judge a quo ordered an inventory to be made, he, we think, went beyond the purpose for which the case was remanded and beyond the decree of this court. The decree was simply that defendant make the election in question.

The judgment is therefore affirmed, in so far as it orders defendant to make a formal declaration as to whether she accepts or renounces the succession of her daughter and condemns defendant to pay the costs of the lower court; and it is set aside in so far as it requires an inventory to be made, and that part of the demand of the plaintiff in rule is now dismissed. The appellee to pay costs of appeal.

(116 La.)

No. 15,958.

STATE ex rel. PEREZ v. WHITAKER, Inspector of Police, et al.

(Supreme Court of Louisiana. May 7, 1906.)

1. **MANDAMUS—WHEN GRANTED.**

Mandamus will not issue until other remedies are exhausted.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 8, 10.]

2. **MUNICIPAL CORPORATIONS—POLICE—REMOVAL OF AN OFFICER.**

The inspector of police has authority to remove an officer of police subject to an appeal de novo to the board of commissioners.

3. **SAME—OFFENSE COMMITTED DURING PRIOR TERM.**

If an offender is still in office, he may be removed, although the act charged was committed during his previous term of the same office.

4. **SAME—WARRANT OF APPOINTMENT.**

Under the terms of the last statute, under which the police force was reorganized, the appointee, under Statute No. 63, p. 64, of 1888, was retained in the same position he held under the old law. The new law substantially provided for his continuing in the office he held under the old law.

5. **SAME—CHARGES AND SPECIFICATIONS.**

The relator and appellant was sufficiently informed of the nature of the charges and of their date, although they were not drawn with the precision required in an indictment. He does not appear to have been surprised, and not to have been sufficiently informed to defend himself.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Application by the state, on the relation of Peter Perez, for writ of mandamus to E. S. Whitaker, inspector of police, and others. From an order denying the writ, relator appeals. Affirmed.

Robert John Maloney, for appellant. Henry Garland Dupré, Asst. City Atty., and Samuel Louis Gilmore, City Atty., for appellees.

BREAUX, C. J. Relator sued for a mandamus in the district court to be directed to E. S. Whitaker, inspector of police, the mayor, and the board of police commissioners, to compel them to restore him to the office of sergeant of police, and to compel them to set

aside all proceedings connected with his removal.

In his petition for a mandamus, relator, as one of his main grounds, in substance, alleged that the inspector of police and the board of police commissioners acted without authority. Their authority was questioned because relator was compelled to appear before them and defend himself against charges of improper conduct and corruption in office.

The charges were in the first place heard by the inspector of police contradictorily with the relator. He (relator) was removed by the inspector. From the order of removal he appealed to the board of police commissioners, authorized by law to hear appeals *de novo* from the decision of the inspector.

On the appeal before mentioned he appeared before the board, answered, and asked to be reinstated.

Returning to the inspector, we will state that relator's position was that he had the right to suspend a member of the police force, but had no right to remove him. This was urged before the board of commissioners also, and the relator further urged before the board of commissioners that it was organized for the purpose of trying offenses committed since the promulgation and adoption of the statute, and not to try offenses committed before the adoption of the statute. It was charged that the offense was committed before the statute was adopted.

The first question, in the order the issues suggest themselves to us, is whether the relator should have moved for a new trial after he had been dismissed by the board of commissioners.

It appears that he did not move for a new trial.

In several decisions it has been held as a rule safe to follow that the complaining party should pursue his defense to the uttermost limit of a new trial.

We believe that under the decisions in question the objections urged are fatal to defendant's application for a mandamus.

Our learned brother of the district court prepared an opinion with painstaking care, from which we excerpt the following:

"It being a fact that relator did not apply to the board of police commissioners for a new trial, there is an end of his case, and his demand must be dismissed. for the doctrine is now consecrated by jurisprudence that the acts and judgments of a quasi judicial tribunal, like the said board, will not be reviewed by means of the extraordinary writ of mandamus, unless the relator has availed himself of all the remedies before said tribunal." State *ex rel. Aucoin v. Police Board*, 113 La. 428, 37 South. 18; State *ex rel. Klotter v. Police Board*, 51 La. Ann. 747, 25 South. 637; State *ex rel. McCabe v. Police Board*, 107 La. 167, 31 South. 662.

For good reasons stated, the court *a quo* considered the other grounds upon which relator had based his demand, and for the same reasons, being in the main that the issues were of importance in local administration, we also have considered the said grounds.

The next question is whether the inspector of police has the authority, under Act No. 32, p. 43, of 1904, to dismiss a member of the police force. The question is substantially jurisdictional.

The contention of the relator on this point is that, under Act No. 32, p. 43, of 1904, the power conferred must be expressed; that it is not expressed.

In this respect relator is in error, for the statute conferred upon the inspector the power to fine, suspend, or remove any officer of the police force, "except the superintendent," on written charges, duly sustained. He is specially authorized to investigate and determine whether he should fine, suspend, and, as we understand, whether he should remove an officer. The word "determine" of the statute, taken together with the word "remove" in another section of the same act, cannot be very well construed to mean less than is positively expressed. It is not because in one section the authority of the inspector is limited to a fine or a suspension or a forfeiture of pay that it is not enlarged in another section, which relates to his authority to remove.

These sections must be construed in connection with each other, and the authority which is not given in one section may be conferred in another.

"The omission from paragraph 2, p. 52, of the statute of 1904," we quote from the opinion of the district court, with which we agree, "is not suggestive of the purpose of the Legislature to limit the inspector's authority to the powers therein enumerated, of reprimanding or punishing. That provision of the statute must be read in connection with the provision last quoted, which includes the power of removal, and is indicative of the full legislative intent on the subject."

But let us concede that the inspector did not have the authority to remove the relator, it nonetheless remains that, after the inspector had dismissed him, he (the relator) brought his suit before the board of commissioners on appeal. We have seen that this board has original jurisdiction. It considered the charges brought before the inspector of police and charges brought by another complainant directly before the board, and, after having fully heard these charges and the defense of the relator, again the relator was removed.

The removed officer had no ground of complaint, even if the inspector was without jurisdiction, for he had a second opportunity to defend himself before a board of competent jurisdiction.

But relator urges another ground, to wit, that the charge brought against him before these boards was for an offense alleged to have been committed before the date that Statute No. 32, p. 43, of 1904, went into effect.

In order to have the dates before us, we will state that in July, 1905, an affidavit was made against relator by Frank Kenner, charging the relator with improper conduct in October, 1903, and about the same time Vig-

ers brought charges against him for other asserted wrongful conduct.

It will be seen from the foregoing that both of the alleged charges preceded in date the date of the statute of 1904.

The contention of the relator is, through his able counsel, that Act No. 32, p. 43, of 1904, is original in its nature. It did not amend the act of 1888, nor 1886, but repealed all prior acts on the same subject-matter. From which, as stated by him, counsel deduced that relator had ceased to be an officer of police, had gone out of office, and that, when he was employed under a new law, it was a new tenure of office, and he was relieved from all possible charges growing out of prior conduct.

We have not found it possible to agree with learned counsel. We do not think that there was a stop between the old and the new law, during which the relator is not to be considered as having been on the police force. But there was an unbroken, continuative service by relator.

There never was an absolute repeal of the old law, as contended by relator's counsel, cutting off relator from all service on the police force. On the contrary, the statute provided for the reappointment of relator to the same position he held under the old law, and provided that the commission should show the date of his original appointment, and that he was retained on the police force as holding over under the terms of the statute.

The following is pertinent to the issue.

The able judge of the district court, from whose opinion we have quoted, supra, for the purpose of illustration, gave expression to relator's position by quoting him as saying:

"I was not continuously in office, and there was an interregnum in my case. Act No. 32, p. 43, of 1904, went into effect on July 16, 1904. On that day Act No. 63, p. 64, of 1888, ceased to exist, and my tenure of office expired. Yet it was not until September 14, 1904, that I was reappointed on the police force. So well was it understood that this was the beginning of a new tenure that I was required to give bond and qualify as though I had never been on the force. True, I continued to act as sergeant of police until my reappointment, but that was without special warrant of law, and because there was no one else to take my place."

The direction of section 3 of Act No. 32, p. 46, of 1904, afforded a complete answer to the foregoing, the learned judge, in substance, said. In thus holding we are of opinion that he did not err.

The relator complains of the charges and specifications as not sufficiently indicative of the offense, also as not being sufficiently definite as to date.

It is well settled that these charges and specifications need not be drawn with the precision of an indictment.

Nothing in the proceedings leads us to infer that the relator was in the least taken by surprise, or that he was made to answer for

an offense which had not been sufficiently set forth to let him know in what consisted the accusation.

We do not think that he is entitled to relief on this score.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment is affirmed.

(116 La.)

No. 15, 743.

BARROW v. GRANT'S ESTATE et al.
(Supreme Court of Louisiana. March 26, 1906.
Rehearing Denied May 7, 1906.)

1. EVIDENCE—PAROL EVIDENCE—TITLE TO REALTY.

Where a mortgage is sought to be annulled on the ground that the mortgagor was not the owner of the mortgaged property, the issue involves the title of the mortgagor, and parol evidence is inadmissible.

2. SAME—FRAUD.

The fraud, whereof the allegation opens the door to the admission of parol evidence to affect title to real estate, is that kind of fraud which, in the nature of things, admits of no other kind of proof, as, for instance, the fraud that is the cause of error in contracts, and the fraud by which a debtor puts his property beyond the reach of his creditors. The fraud by which a person buys real estate in his own name, instead of in that of his principal, is not provable by parol.

3. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST DECEDENT.

For proving against the estate of a dead man a claim for a large sum of money said to have been confided to him and not accounted for, specific allegations and unsuspicious proof are required.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durleve King, Judge.

Action by H. G. Barrow against the estate of William M. Grant and others. Judgment for plaintiff, and defendants appeal. Amended and affirmed.

Henriques & Duchamp, for appellant Sarah Louise Barrow. Ernest Touro Florance and Cunningham & Cunningham, for appellant administrator. William Stirling Parkerson, for appellee.

PROVOSTY, J. There are two demands in this case, one for the annulment of a mortgage, and the other for a moneyed judgment. We shall consider the former, and begin with a statement of the facts, and in doing so shall ignore entirely the parol evidence, which is inadmissible in the case; the matter involved being title to real estate.

The deceased, William M. Grant, bought a house and lot from the People's Homestead Association in May, 1890. What the price was is not proved, but by the passbook of the association the fact appears that from the date of the purchase to May, 1900, he made monthly payments of, alternately, \$40 and \$45, amounting in all to \$6,366.

On May 10, 1900, he made the last payment,

and 15 days afterwards he mortgaged the property to secure a note of \$1,200 executed by himself.

On the 23d of January, 1901, he and Miss Sarah Louise Barrow, the daughter of plaintiff, went before a notary and executed an act of sale by which he transferred the property to her at the price of \$3,650, of which \$650 cash and \$3,000 in three installments payable in one, two, and three years, with 6 per cent. interest from date, secured by mortgage and vendor's privilege on the property. The act refers to the \$1,200 mortgage as still existing on the property, and binds the vendor to hold the purchaser harmless against the same.

In April, 1902, 15 months after this sale, Grant died. This \$3,000 mortgage was inventoried as an asset of his succession.

In May, 1902, the present plaintiff filed a suit in the name of his daughter, whom he alleged to be a minor, for the cancellation of this \$3,000 mortgage, on the ground that Grant was never owner of the property; that he had been charged by Mrs. Barrow, plaintiff's wife, to buy it for her, and she had furnished him all the money that had gone in payment of it; but that he had fraudulently put it in his own name; that, when the fraud was discovered, he had agreed to rectify matters by transferring the property to Mrs. Barrow, but that instead of so doing he had fraudulently made the credit sale to Miss Barrow.

Defendant excepted that Miss Barrow was not a minor, and that, moreover, she had been of age when the transfer to her was made. Thereupon Miss Barrow filed a supplemental petition alleging that she was of age, and that the declaration of her being a minor had been through an error of counsel.

That case came to this court, and was dismissed on the ground that Miss Barrow was estopped from contesting the recitals of the authentic act freely signed by her.

Thereupon the present suit was filed, in which the same contention is made that Grant fraudulently put the property in his own name, when in reality it was bought and paid for by Mrs. Barrow. Miss Barrow, now Mrs. Wood, is made a party defendant as also the recorder of mortgages, and the administrator of the succession of Grant, and the prayer is that the house and lot be decreed to belong to the community of acquets and gains existing between plaintiff and his wife, and that the mortgage be annulled and be ordered to be erased from the records.

A good deal of parol evidence was offered, but was duly objected to, and should have been excluded. The validity of the mortgage depends solely upon whether Grant was or not the owner of the property, and the parol evidence was offered to show that he was not the owner; and hence it was offered to affect title to real estate.

The learned counsel for plaintiff argues that the allegation of fraud opens the door

to the parol evidence; and he cites in support of that contention the case of *Le Bleu v. Savole*, 109 La. 680, 33 South. 729.

That was a case where the defendant had alleged that "by an error of the notary, superinduced by the fraud and ill practices of the defendant, the notarial act was not made to embody the real agreement of the parties." The kind of fraud that causes error may always be shown, and, if the only evidence available for the purpose is parol evidence, such evidence is admissible, even though title to real estate be involved. If it were otherwise, the courts of justice could be made to lend their aid to the enforcement of so-called contracts to which the consent of the defendant had been given in error. In such cases the parol evidence is admitted *ex necessitate*. *Broussard v. Sudrique*, 4 La. 347; *Palangue v. Guesnon*, 15 La. 311; also, *Succession of Goodrich*, 6 Rob. 109; *Blanchard v. Gloyd*, 7 Rob. 548; *Robert v. Boulat*, 9 La. Ann. 30; *Wurzburger v. Meric*, 20 La. Ann. 416; *Fleming v. Scott*, 26 La. Ann. 548; *Hackenberg v. Gartskamp*, 30 La. Ann. 902; *Levy v. Ward*, 33 La. Ann. 1035; *Vignie v. Brady*, 35 La. Ann. 561; *Armstrong v. Armstrong*, 36 La. Ann. 551; *Dickson v. Ford*, 38 La. Ann. 740; *Ker v. Evershed*, 41 La. Ann. 25, 6 South. 566; *Bryan v. Wisner*, 44 La. Ann. 840, 11 South. 290; *Gladdish v. Godchaux*, 46 La. Ann. 1575, 16 South. 451; *Landry v. Laplos*, 113 La. 697, 37 South. 606. But parol evidence is not admissible to show that in a sale of real estate the vendee named in the act was not the real vendee, but that another person was. *McKenzie v. Bacon*, 40 La. Ann. 157, 4 South. 65; *Perrault v. Perrault*, 32 La. Ann. 635; *Hackenberg v. Gartskamp*, 30 La. Ann. 898; *Heirs of Dohan v. Dohan*, 42 La. Ann. 449, 7 South. 569; *Tille v. Taylor*, 42 La. Ann. 1165, 8 South. 399; *Stierle v. Kaiser*, 45 La. Ann. 580, 12 South. 839; *Whelage v. Lotz*, 44 La. Ann. 600, 10 South. 933. It cannot be done even when the suit is by a creditor seeking to uncover the property of his debtor. *Hoffman v. Ackermann*, 110 La. 1070, 35 South. 293. Here the plaintiff is not seeking to show that he has consented to something as the result of an error induced by the fraud of defendant, but he is seeking to show that the recitals of the act by which the homestead association made the sale to Grant are not true. If after a man is dead the purchases of real estate made by him may be shown by parol to have been made for some other person, what safety is there in titles?

But plaintiff contends that there is sufficient written evidence in the record to show that the property was bought for Mrs. Barrow and was hers. That evidence consists of the following:

"T. D. Office, 4th.

"My dear 'Mite':

"I have just received a communication from the 'Kid', in which she says that you and she have had a conversation as to possession of 4504, she to be nominal and you to be actual

owner of the place—on the understanding that it is to be a home for you both, and that you will jointly inhabit in the future as you have done in the past.

"I hesitate only to signify my approval of this arrangement, until I know that it is perfectly agreeable to you; for, while I do not in the least doubt the accuracy of the 'Kid's' statement that the agreement pleases you, I would like you to say so yourself, because in a recent somewhat vague letter from you I read the words: 'I do not see why you should donate your place to Louise; if forced by necessity. I would certainly prefer to live from your bounty than from Louise's.'"

"You will, my dear 'Mite,' perhaps have the goodness, under the circumstances, to let me know explicitly whether you prefer to go on occupying the place as a home, without disturbance or interference, from me, or whether you should prefer that I should deed it to the 'Kid'—to be equally a home for you. You will no doubt observe that, in either case, your comfort is the object aimed at, and you must be pleased to understand that never at any moment has the 'bounty' idea entered, or is it likely to enter my mind.

"Please, therefore, my dear 'Mite,' to indicate clearly whether you approve the contemplated arrangement to turn over the place to the 'Kid' to be your and her home, or what it is that you would like. I am, with love,

Yours [Signed] W."

"T. D. Office, 2:30 p. m., Friday, 30th.

"My dear Madam:

"Your note to hand. It will be impossible for me, as far as I see at present, to do what you want me to do in regard to the repayment of my pecuniary indebtedness to you. Not wishing, however, to stand in your way when you have a good thing in prospect, I shall immediately put myself in communication with the homestead association for the surrender of the property, 1124 Camp street. I may get the amount which I owe you, and for which you are quite entitled to dun me, by that surrender; but I do not have any hope that the transaction could be transacted inside of the two weeks that you allow me in which to repay. That is all I can say in the meantime; and, with the assurance that you may rely upon it that you will not lose a cent of your money through me, I beg to subscribe myself,

"Very truly yours, [Signed] W. M. Grant.

"A meeting of the homestead association can not be had until next week.

"[Signed] G."

"New Orleans, Monday Aftn., Sept. 5, 1892.

"I am writing here amid much noise the temporary 'good bye' which I was unable to tell you at the house. I shall go out of New Orleans in search of that few days absolute repose which is necessary to my deriving any advantage from my short holiday, and which, though I expected to find it at 1124 Camp, I failed, as you are aware, to find. I have not yet made up my mind altogether where I shall go; but one thing is certain, that, until Monday next, at least, I shall not put in an appearance at your house to be in your way.

"Until then, I am, as N. M. H. would put it. Your friend, [Signed] W. M. Grant."

There is, in addition, a visiting card of Mr. W. M. Grant, with the following upon it in manuscript:

"Mr. Laumann will look over your fences and make estimate."

But this is not shown to be in the handwriting of Grant.

It is hardly necessary to say that these writings are very far from showing that Grant

admitted this property did not belong to him—show the very opposite, and in no uncertain manner. Perhaps a different interpretation might be placed upon them, if they were read in connection with the parol evidence, and with the letters testified to by plaintiff's wife and daughter as having been written by them to Grant; but those letters amount to nothing more than parol evidence, since they emanate from the witnesses themselves and are produced by them. They and the parol evidence are not evidence in the case and cannot be considered. On a question of title to real estate, written evidence cannot be eked out by parol. *Wright v. Elms*, 106 La. 150, 30 South. 311.

We pass to the second demand. It is set forth in the petition in the following words:

"Petitioner further represents that his wife gave the said W. M. Grant money, which she had saved, with which she proposed buying property at Covington, Louisiana; and that the item inventoried as 'Cash in Bank \$428.90,' was a part of that amount."

The prayer is:

"And that he do have and recover judgment for the item on the inventory 'Cash in Bank \$428.90.'"

It is not so clear, under this allegation and prayer, that the suit is not for specific property, and that it must not fall upon the evidence which shows that the particular \$428.90 in question was Grant's own money.

But conceding that the suit is simply for the return of money placed in the hands of Grant and never returned, the suit must fail for the reason that the money which plaintiff's wife testifies she confided to Grant is not shown to have been community property, but may have been the paraphernal property of the wife.

No more in the testimony than in the allegation is there any specification of time and place, and this vagueness in the putting forward of a claim against the estate of a dead man is almost of itself fatal.

Again, the claim was brought forward only after the first suit had failed.

In support of the demand, plaintiff produces his wife, who testified as follows:

"I gave him \$800 to put in bank for me. He put it in his own name."

She further testified that when Grant was taken sick of the illness of which he died she tried to see him, but that he refused to see her. "I had written," she says, "four letters to him begging an interview with him because I wanted to see him about money I had given him to put in bank for me, and I could get no communication from him. I had tried friends, and finally I sent a boy down with a note and I got that in reply."

The reply the witness has reference to is the following note:

"I can scarcely imagine how you could be worrying me at this time while I have been ill. It certainly is a peculiar way of showing af-

fection. For God's sake let me alone until I get better. I shall be up at the place, but inquire as you may, but please save me further letters."

Plaintiff produced in addition a man who testified that he went to Mr. Grant's sick room with a note from Mrs. Barrow, and that as he was leaving the room Mr. Grant asked him to make a memorandum in his book, and that thereupon he, under the direction of Mr. Grant, made the following memorandum:

"March 26th Mr. Grant says remember that if I should die the place that Mrs. Barrow resides at belongs to her. She gave me the money to purchase the place.

"I have money in bank in my name which belongs to her. She gave it to me to buy property at Covington."

The witness further testified that he showed the memorandum to his mother the next morning, and that the memorandum book had been in his pocket ever since.

The mother of this witness testified that the son had given her the book the next morning, and that, deeming it to be a sort of testament, she had kept it precious in her armolr, except that one time she had told her son to show it to Mrs. Barrow, and that he had done so and returned it to her.

The only other evidence produced by plaintiff in support of this demand is a letter written to her by a lawyer in connection with her proposal to buy a certain piece of property for \$800. This letter is dated May 13, 1901.

The testimony of plaintiff's wife, even conceding that she could be permitted to testify at all in the matter, is entirely too vague to support a claim against the estate of a dead man. Her statement is highly improbable, for, if she gave the money before she had made the alleged discovery of Grant's dishonesty and duplicity in the matter of the house and lot, it would be strange that in the 12 months that Grant lived thereafter she should not have gotten it back; and she does not even say that she demanded it, except that she says that she wrote to Grant about the matter when he was on his deathbed. On the other hand, if she gave the money after the alleged discovery of Grant's dishonesty and duplicity, it is passing strange that she should have had recourse to him for depositing the money in bank for her, when she could so easily have deposited it herself or through her daughter or her husband.

The testimony of the memorandum man is contradicted by that of his mother, and, moreover, it appears next to incredible to us that, if Grant had had this matter on his mind, he would not have referred to it in his note to Mrs. Barrow, or would have had recourse to this stranger instead of to the friends who were at his bedside.

The fact is that, after reading what the daily associates of Mr. Grant for a long number of years have had to say of his character and sense of honor, it is simply impossible

for the court to believe the story of plaintiff. It would be hard to believe it, even if set down in black and white in Grant's own handwriting and over his signature. For such a thing to be, Grant would have had to be a Dr. Jekyll and Mr. Hyde sort of man.

The judgment appealed from is amended so as to dismiss the suit of plaintiff at plaintiff's costs as against the succession of Grant and the recorder of mortgages, and is otherwise affirmed; plaintiff to pay costs of appeal.

(116 La.)

No. 15,862.

DAY et al. v. BAILEY et al.

(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied May 7, 1906.)

APPEAL—BOND—SUSPENSIVE APPEAL.

In cases where article 575, Code Prac., fixing the amount of suspensive appeal bond at one-half over and above the amount of the judgment, is inapplicable, as, for instance, where plaintiff's suit is dismissed, the amount of the bond for suspensive appeal must be fixed by the judge, as would have to be done if the appeal were devolutive; and where it is not done, the appeal must be dismissed for want of a bond.

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas Moore Burns, Judge.

Action by William G. Day and William L. Wright against H. C. Bailey and others. Judgment for defendants, and plaintiffs appeal. Dismissed.

Gustave Lemle and Joseph Quintero Gowlan, for appellants. Benjamin Moore Miller, for appellees.

PROVOSTY, J. Plaintiffs enjoined defendant from disposing of certain notes. On rule the injunction was dissolved. Plaintiffs appealed and the court fixed the bond at \$100.

Four days later the main suit was tried on exception of no cause of action, and from a judgment sustaining the exception plaintiff obtained an order for a suspensive appeal. The order, however, did not fix the amount of the bond, but directed that the bond be furnished "in the sum provided by law."

Plaintiffs furnished one bond in the sum of \$6,000, which recites that it is given for the two appeals.

Defendant moves to dismiss the first appeal on the ground that no bond has been given. The motion is obviously untenable, and in fact has been abandoned.

Defendant moves to dismiss the second appeal on the ground that the amount of the bond was not fixed by the judge, as required by law, and that no legal bond has been given.

The motion must be sustained. There cannot be a devolutive appeal unless the amount of the bond is fixed by the judge. Pelletier v. State National Bank, 112 La. 564, 36 South

592 and there are cases where the bond for suspensive appeal must necessarily be fixed in like manner. They are the cases where, because of the peculiar nature of the judgment, article 575, Code of Practice, fixing the suspensive appeal bond at one-half over and above the amount of the judgment, is inapplicable. And such is the case where the judgment simply dismisses the suit of plaintiff. In such cases the requirement that the judge fix the amount of the bond is as imperative for the suspensive as for the devolutive appeal. The bond must "necessarily be fixed by the judge." Succession of Parker, 18 La. Ann. 644; State ex rel. v. Judge, 21 La. Ann. 741; State ex rel. Cain v. Judge, 20 La. Ann. 574; State ex rel. v. Judge, 22 La. Ann. 115. Where an injunction is dissolved without damages the suspensive appeal bond is for costs only, and must be fixed by the judge. Hart v. Lazarus, 34 La. Ann. 1210; State ex rel. Cain v. King, 40 La. Ann. 843, 6 South. 108.

The argument that the bond fixed for the first appeal can serve for the second, because it is for the costs, and the costs were increased but by a trifling amount after the first appeal, does not take into consideration the fact that the two appeals are separate, and that the requirements of the Code of Practice are imperative. The question is not as to whether the bond is or is not sufficient, but as to whether a bond has been given in an amount fixed by the judge.

The motion to dismiss is overruled in so far as the appeal of the 9th of October, 1905, is concerned, and is sustained in so far as the appeal granted on the 13th of October, 1905, is concerned, and the latter appeal is dismissed, at the cost of appellant.

(116 La.)

No. 15,995.

PATTISON v. GULF BAG CO., Limited, et al.
(Supreme Court of Louisiana. May 7, 1906.)

1. CORPORATIONS—LIABILITY FOR LIBEL—ACTS OF MANAGER.

A corporation is responsible in damages for a libel, the publication of which was sanctioned by its manager, in a matter which concerned the business of the company.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1903, 1904.]

2. SAME—WHO MAY SUE.

A father individually cannot recover damages for a libel against his daughter, a minor aged 19 years.

3. APPEAL—PARTIES ENTITLED TO APPEAL.

Where the daughter married pending the suit, and her husband was made a party, the father thereupon ceased to represent the daughter, and is without capacity to plead for her on appeal.

4. LIBEL—WHAT CONSTITUTES.

Published words to the effect that a factory girl was discharged, not for the violation of the rules, but for a reason that the manager preferred not to disclose, but, which was such that she could not be retained in the factory, con-

stitute an actionable libel under the laws of Louisiana.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Libel and Slander, § 1.]

5. EVIDENCE — PAROL EVIDENCE — CORPORATIONS.

Parol evidence is not admissible to show that a corporation has gone into liquidation, or that a foreign corporation has been licensed to do business in the state, or that one corporation has been merged into another.

6. CORPORATIONS—ESTOPPEL OF STOCKHOLDERS — CORPORATE EXISTENCE.

Where the stockholders of a corporation permit its name to be used in the conduct of the same business, in the same place, and under the same manager, they are estopped to deny its continued existence as to the public and employees not aware of any change in corporate ownership or control.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Newton H. Pattison against the Gulf Bag Company, Limited, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Carroll & Carroll, for appellants. Robert John Maloney, for appellees W. H. Pattison and Hannah L. Strenger.

LAND, J. This is a suit for damages for an alleged libel published in the New Orleans Picayune on November 6, 1902, reflecting on the character of plaintiff's minor daughter, aged 19 years.

Plaintiff sued for himself individually and as tutor for his minor daughter, who married pending the suit, and her husband, Peter Strenger, was made a party.

The suit was discontinued as to the owners of the Picayune. The bag company pleaded the general issue. The case was tried before a jury, and there was a verdict and judgment in favor of Mrs. Strenger for \$500, and against the individual demand of the plaintiff. Defendant appealed.

Plaintiff and appellee answered the appeal, praying for an increase of the judgment in his own behalf, and for the benefit of his minor child, Hannah L. Pattison, wife of P. L. Strenger. There has been no appearance made in this court by Mrs. Strenger and husband.

The plaintiff individually had no standing in court. Black v. Carrollton Railroad Company, 10 La. Ann. 33, 63 Am. Dec. 586; 8 Am. & Eng. Ency. Law (2d Ed.) p. 664.

The petition represents that the daughter had been an employé for several years of the Gulf Bag Company, Limited, of which Robert J. Wood was manager, and was discharged from service without just cause on August 28, 1902; that on November 6, 1902, the libel complained of was published in the columns of the Picayune; that the girl referred to in the publication was the daughter of the plaintiff; that the article as published was the result of a malicious and deliberate conspiracy between the defendants to injure

and defame the character of the daughter, and had the effect of blasting her reputation, good name, and future as an innocent and virtuous girl. A copy of the newspaper containing the article referred to was made a part of the petition. The offensive matter is set forth in what purports to be a statement made by Manager Wood of the bag company to one Mr. Alexander and other gentlemen representing the Central trades and labor council, in an interview relative to the striking employes of the bag company. Among the propositions of settlement presented to the manager was the following:

"The above contemplates that all of the old employes, including Miss Patterson, are to return to work within one week from date of acceptance."

The article proceeds to detail the interview between Mr. Alexander and Manager Wood, and quotes the latter as speaking as follows:

"You have been misinformed," said Wood, "as have a great many others. I did not believe that you understood just what did happen here, and what precipitated this situation. It was not a trivial offense—it was not the cause which has been generally assigned by the Union. It was a good cause, which she knows and which I know, and which I could tell you if necessary, but which I would prefer not to. Suffice it to say, however, that the cause was such that she could not be retained in this factory."

The petition charges that plaintiff's daughter was the girl referred to, and that said article as published was the result of a conspiracy between the defendants.

It was not necessary for the pleader to have gone to the extent of alleging a conspiracy. The Picayune's liability resulted from the publication of the defamatory matter, and the mere privity of the bag company was sufficient to make it also responsible. The manager was interviewed and made a statement for the purpose of publication. He spoke for the corporation and authorized the insertion of his remarks in the article that appeared in the columns of the Picayune.

Evidence as to the statements of the manager was admissible, not for the purpose of proving slander, but to show that the company, through him as its representative, authorized the publication of the alleged libel.

The defense that the defendant company was not in business during the year 1902, but that the factory belonged to and was operated by its successor, the "Bemis Bros. Bag Company," was not set up in the answer. Besides the business was conducted in the name of the Gulf Bag Company, as far as the employes and the public were advised, and the addition on letter heads of the legend "Branch Bemis Bro. Bag Company" is without significance. Parol evidence was not admissible to show that the Gulf Bag Company had been put into liquidation, or that the other company was a foreign

corporation authorized to do business in this state, or that the two had been merged.

The only evidence of the existence of the second company is the testimony of the manager, who admits that the name of the old company was used in the conduct of the business for the purpose of securing the benefits of its good will and patronage. Both had the same manager and, as to the public, the same name. The name of the Gulf Bag Company was used throughout the published article. If there was a merger of the old company, it was secret and intentionally concealed from the public. The Gulf Bag Company held itself out as still doing business, and its stockholders must take the consequences.

The language used was defamatory, and well calculated to injure the good name and reputation of plaintiff's daughter. No specific misconduct was charged, but the statement implies that the girl had done something of such a nature that she could not be retained in the factory. It is due to the manager and the reporter to state that they testified that they did not consider the language used as defamatory in the sense alleged in the petition.

The manager testified that his only objection against the girl was that she affiliated with the Union and was a disorganizer of labor in the factory. The girl was discharged for the ostensible reason that she was a few minutes late in coming to her work. In the published article, the manager said in effect that this was not the true reason, and proceeded to state that there was a reason, known to himself and the girl, which he preferred not to tell, but was such that she could not be retained in the factory.

The unavoidable inference is that the reason not disclosed was personal to the girl, and had nothing to do with her work or the strike. The insinuation contained a veiled charge of some wrongdoing, the nature of which was left to the imagination.

The manager denied that he had been correctly reported. On this point the evidence is conflicting, and we are not prepared to dissent from the conclusion of the jury.

The manager represented the corporation in this state, and sanctioned the publication of the libel in the interest of the company for which he spoke. A corporation may be held responsible for libel. *Vinas v. Insurance Co.*, 27 La. Ann. 367; *Townsend on Slander and Libel*, § 265.

Injury and malice may be inferred from the nature and falsity of the words and the surrounding circumstances. *Spotorno v. Fourichon*, 40 La. Ann. 424, 4 South. 71.

In cases of this kind there is no standard for the measurement of damages, and the amount is left largely to the discretion of the trial judge or jury. Moreover, there is no prayer by the proper party for an increase in the amount awarded.

Judgment affirmed.

(116 La.)

No. 15,897.

TUCKER et al. v. BENEDIOT et al.(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied May 7, 1906.)**MORTGAGES—REDEMPTION SALE—LIABILITIES
FOR INJURIES TO PROPERTY BY THIRD PER-
SONS—CUTTING TIMBER.**

Because the title stands in a man's name is no reason for holding him in damages for the act of some other person in taking timber off the land; especially where his apparent title was a mere contract of security.

(Syllabus by the Court.)

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; William Hutchinson McClendon, Judge ad hoc.

Action by W. W. Tucker and others against H. P. Benedict and others. Judgment for plaintiffs, and defendant bank appeals. Dismissed as to the bank, and in other respects affirmed.

See 38 South. 142.

Alfred Wood Spiller, for appellants W. W. Tucker and others. Warren Moses Wright, Obadiah Pierson Amacker, and Reid & Purser, for appellant Hammond State Bank. Stephen Dudley Ellis, Benjamin Moore Miller, Hypolit P. Mixon, and John W. Sentell, for appellees.

PROVOSTY, J. The case is appealed only in so far as the judgment against the Hammond State Bank is concerned.

One Benedict sold to one Barley the trees on a certain tract of land for \$900. For \$250 of that amount Barley gave a note payable in three months. The balance was payable as the trees would be taken, at the rate of \$1 per thousand feet. At the end of each month a report was to be made of the timber cut during the month. The purchaser was to have three years within which to remove the timber. Reports and payments were to be made to the Hammond State Bank "which is hereby authorized to receive and receipt for same." The witness to this contract was R. Lillie, cashier of the Hammond Bank. The date of the contract was July 1, 1901. Barley assigned his contract to the Hammond Lumber Company.

In the following October Benedict made a redemption sale of the land to the bank for \$950; the bank acting through the same R. Lillie, its cashier. Four months were allowed for the redemption.

In the following December Benedict sold the land to J. W. Sentell for \$2,500 cash. The deed recites as follows:

"To have and to hold the above-described premises, all and singular the rights and appurtenances thereto, in anywise belonging unto the said J. W. Sentell, his heirs, and assigns forever; and I hereby bind myself, my heirs, executors, administrators, and assigns to warrant and defend all and singular the premises unto the said J. W. Sentell, his heirs and assigns, excepting a certain redemption deed for \$950, and interest payable to Hammond State Bank and timber contract made to W. T. Barley

against any person whomsoever lawful claim or to claim the same or any part thereof."

Benedict had acquired the land in perfect good faith, and these contracts of his were made in perfect good faith. The bank was reimbursed its \$950. When and by whom the record does not show; but, presumably, by Barley's paying to it the \$250 note, and by divers other payments made to it, in pursuance of the timber contract, by Barley and his assign, the Hammond Lumber Company. If the payment was made as is here supposed, then \$500 or \$600 was paid in 1903 and 1904; that is to say, after the delay for redemption had expired.

The redemption sale was still uncanceled on the records when plaintiffs brought the present suit to recover the property. They made both the bank and J. W. Sentell defendants, and they claim from the bank the value of the timber taken from the land during the time that the title stood on the records in its name.

The bank urges that the redemption sale was a mere contract of security, and that it never was owner of the land. The evidence supports this defense, and it is a perfect defense. We fail entirely to see on what theory the bank could be held for timber, when it never took or was concerned in taking any, and all it did was to act as agent for the owner in receiving a part of the price of the timber.

The judgment is set aside, and the suit is dismissed as against Hammond State Bank; in all other respects it is affirmed.

(116 La.)

No. 15,883.

Succession of LANDRY.

(Supreme Court of Louisiana. May 7, 1906.)

**ATTORNEY AND CLIENT—CONTINGENT FEES—
VALIDITY OF CONTRACT.**

An agreement that for his services in a litigation an attorney shall have one-half of whatever he may recover is not the purchase of a litigious right, and is valid.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 351.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

In the matter of the succession of George Landry. From a judgment enforcing a contract for attorney's fees, Augustin Daniel appeals. Affirmed.

See 38 South. 575.

Simeon Belden, for appellants Augustine and Victorine Daniel. Albert Voorhies, for appellee executrix. James J. McLoughlin and John G. Robin, for plaintiffs appellees. Felix J. Dreyfous, for appellee Alfred D. Danziger. Henry G. McCall, tutor ad hoc, appellee. Hyman Mithoff, tutor or curator ad hoc, appellee.

PROVOSTY, J. This is an appeal by Augustin Daniel from a judgment recognizing and enforcing a contract alleged to have been made by him with two attorneys, by which, in compensation of services to be rendered by them in a certain litigation, he agreed to pay them one-half of whatever they might recover. The defenses are that the contract was never entered into, and, if entered into, is null because champertous. The appellant is one of several collateral heirs, all the others of whom entered into the same contract, and have not contested same. The case is submitted both on the merits and on motion to dismiss.

The conclusion we have reached on the merits dispenses us from saying more of the motion to dismiss than that it could not operate the dismissal of the appeal, in view of the fact that the clerk's certificate to the transcript is full and unqualified, and, therefore, protects the appellant.

The evidence establishes beyond controversy that the contract in question was entered into. So far as its validity is concerned we see no reason why attorneys should not be permitted to stipulate that they shall have by way of fees a certain proportion of whatever they may recover. In the case of *Buck & Beauchamp v. Blair & Buck*, 36 La. Ann. 21, on rehearing, this court had occasion to differentiate such a contract from one by which a litigious right is acquired.

Judgment affirmed.

(116 La.)

No. 16,004.

STATE v. ORFILA

In re **FITZPATRICK**, Tax Collector.

(Supreme Court of Louisiana. May 7, 1906.)

1. COURTS—APPELLATE JURISDICTION—CONSTRUCTION OF REVENUE STATUTE.

Where the amount of a license tax depends on the construction to be placed on the revenue statute, the legality of the tax is in contestation, and an appeal lies from the court of the first instance directly to the Supreme Court.

2. LICENSES—TICKET AGENTS.

An agent for several nonresident steamship companies, whose business is to sell transportation, receive the price, and give orders for tickets to be delivered in the city of New Orleans, is liable to a license tax under the provisions of section 12, Act No. 171, p. 412, of 1898, relative to persons carrying on the business of selling or dealing in railroad or steamship tickets. (Syllabus by the Court.)

Certiorari to Court of Appeal, Parish of Orleans.

Action by the state against **F. J. Orfila**. Judgment for the state for a less amount than sought, and the state appealed to the Court of Appeal. **John Fitzpatrick**, tax collector, applied for certiorari or writ of review. Modified and affirmed.

Edward Rightor, for applicant. **John Dymond, Jr.**, for respondent.

LAND, J. The state sued defendant in the First city court of the city of New Orleans for \$50 alleged to be due for license tax as steamship agent representing three or more companies.

There was judgment in favor of the state for \$25, and thereupon the state appealed to the Court of Appeal for the parish of Orleans.

The case was heard in that court, which, finding that there was no dispute about the facts and that the only question involved was the legality of the tax demanded, of which it had no jurisdiction, ordered the appeal to be transferred to the Supreme Court as provided by act No. 56, p. 135, of 1904. This ruling was correct. *State v. Rosenstream, Weiss & Co.*, 52 La. Ann. 2126, 28 South. 294.

Section 12 of Act No. 171, p. 412, of 1898, reads, in part, as follows:

"Each person carrying on the business or calling of selling or dealing in railroad or steamship tickets, whether said tickets are sold in the streets, in the office of the company he represents, or that of any other company, shall pay an annual license graded upon the number of companies he represents, to wit: One company, twenty-five dollars; two companies, forty dollars; three or more companies, fifty dollars."

Defendant made the following statement, under oath, in open court:

"I am a steamship passenger agent and represent one company, the *Campagne General Transatlantique*, for whom I solicit business, receive the money, and issue official tickets. I also solicit business for seven other companies, receive the money, and issue an order on the New York office of such company, where the passenger must call and exchange my order for his ticket. In the case of the *Campagne General Transatlantique*, I am the exclusive agent. In the case of other companies mentioned I solicit business together with the other agents on the city. I get a commission of 5 per cent. on this business; on the *Campagne General*, 7½ per cent. I tendered the sum of \$25 to the state tax collector, and he refused to accept it."

Defendant was certainly engaged in selling or dealing in steamship tickets for eight different companies. In so doing he represented each one of them. In one case he sold and delivered tickets in the city of New Orleans. In the other he sold tickets in the city of New Orleans to be delivered in the city of New York. The only difference was in the mode of transacting the business.

Counsel for the defendant argue that he did not represent the New York companies in the sense of the statute, which does not contemplate the taxing of agents engaged in selling tickets to be delivered out of the state. The license tax is on the business or calling of selling or dealing in railroad or steamship tickets, and is graded by the number of companies represented by the person pursuing such a vocation. The words of the statute are general, and there is no warrant for excepting persons selling or dealing in tickets to be delivered out of the state.

The tax is on the occupation, and not on the tickets sold.

There is no essential distinction between delivering an order for a ticket and delivering the ticket itself, as far as the nature of the business is concerned.

There is no good reason for taxing one person who sells transportation and delivers tickets, and exempting another who sells transportation and delivers orders for tickets. Both pursue the same gainful occupation, and both should contribute to the support of the government whose protection they enjoy.

Discrimination in such cases would be odious, and the presumption is against the legislative intent to sanction such a result.

It is therefore ordered, adjudged, and decreed that the judgment of the city court herein be amended by increasing the amount from \$25 to \$50, with 2 per cent. per month interest thereon from March 1, 1901, until paid, and 10 per cent. attorney fees on the aggregate amount of the license and penalties collected; defendant to pay costs in the city court and this court, but not the costs occasioned by the improper appeal to the Court of Appeal and the transfer of the same to this court.

(116 La.)

No. 15,917.

STENDELL v. LONGSHOREMEN'S PROTECTIVE UNION BENEV. ASS'N.

(Supreme Court of Louisiana. May 21, 1906.)

1. BENEFICIAL ASSOCIATIONS—APPOINTMENT OF RECEIVER—GROUNDS.

The fact that the officers of a branch labor and charitable association, acting in good faith and for the best interest of the association, used for satisfying, in part, the demands of pressing creditors, including the complainant, a per capita tax collected for transmission to the parent association, and the further fact that the officers, without authority, but in good faith and for the benefit of the association, executed a mortgage on the property of the association for raising money wherewith to pay pressing debts, including, in part, that of the complainant, will not justify the appointment of a receiver, under a statute empowering the courts to appoint a receiver when the officers of the corporation are jeopardizing the rights of stockholders or creditors by acts ultra vires or by grossly mismanaging the business of the corporation, or by wasting, misusing, or misapplying its property or funds; it appearing that the appointment of a receiver would do good to no one and might prove disastrous to all.

2. SAME—SUIT TO OUST OFFICERS.

The expenses of a suit against the officers of a corporation to oust them from office are at the charge of the corporation, and not of the officers.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durlève King, Judge.

Action by Julius G. Stendell against the Longshoremen's Protective Union Benevolent Association. Judgment for defendant, and plaintiff appeals. Affirmed.

McCaleb, McCaleb & Leopold and Mercer W. Patton, for appellant. James Madison

Vance (Edgar Mayer Cahn and Seargent Smith Prentiss, of counsel), for appellee.

PROVOSTY, J. The defendant is a colored labor and charitable association. The plaintiff was one of four druggists furnishing drugs to the members of the association by contract. He was such for 20 years, and in that time, it was stated in the oral argument, received over \$25,000, from the organization. A new set of officers inaugurated retrenchment and reform in the management of the affairs of the corporation, and, among other measures on that line, discontinued the contract with plaintiff. There was due plaintiff a debt claimed in this suit to amount to \$2,649.65, and plaintiff asks that a receiver be appointed to the defendant corporation.

The request is made under Act No. 159, p. 312, of 1898. Section 1 of the act provides that the courts are—

"empowered to take charge of the property and business of corporations in the cases and under the conditions, following, to wit:

"At the instance of any stockholder or creditor, when the directors or other officers of the corporation are jeopardizing the rights of stockholders or creditors by grossly mismanaging the business or by committing acts ultra vires, or by wasting, misusing, or misapplying the property or funds of the corporation."

We take up seriatim the several charges.

First. Diversion of per capita tax. The learned judge a quo said of this charge:

"These are all the charges made in the petition. In argument it is charged they diverted the per capita tax due the International Association. They collected the tax and paid with it pressing creditors, including the plaintiff. They then took other money of the corporation a few weeks after and paid the International Association. It was perhaps irregular, but no injury was inflicted on any one, and certainly paying pressing creditors with money intended for a friendly creditor, who was willing to wait, is no cause by a pressing creditor for the appointment of a receiver."

This, in our opinion, effectively disposes of the charge.

Second. Loan of \$250 to pay personal indebtedness of the president and other officers.

The learned judge a quo disposes of this charge, as follows:

"The plaintiff contends that the payment of the fees of the attorney for Swan, in the case of Williams v. Swan, was an illegal ultra vires act. The suit was to oust Swan from the office of president. It was really a suit against the corporation, and the corporation, by resolution, ordered the fee to be paid. They had the legal right to do so."

Third. \$S25 mortgage.

This mortgage was executed without authority, but the record leaves no doubt that it was executed in perfect good faith, and for the benefit of the corporation. It is said in argument that, since the trial of the case, the act has been duly ratified by the corporation. Be that as it may, an act of this kind, merely technically unauthorized, but done in

the exclusive interest of the corporation and for its manifest benefit, will certainly not justify the appointment of a receiver. Of the money thus obtained \$325 went to plaintiff himself.

It is not every slight departure from the strict line of authority that will justify the appointment of a receiver. The court must be satisfied that such appointment is called for by the circumstances of the case. High on Receivers, pp. 4, 12; Alderson on Receivers, 49, pp. 73, 74; State ex rel. Dauphin v. Judge, 108 La. 521, 32 South. 335; Bartlett v. Fourton (La.) 38 South. 882; Marcuse v. Gullett Gin Co., 52 La. Ann. 1383, 27 South. 846. In the instant case the court is satisfied that the appointment of a receiver can do no good, and might prove disastrous to all parties concerned.

Judgment affirmed.

NICHOLLS, J., absent.

(116 La.)

No. 15,906.

McELVEEN v. GOINGS.

(Supreme Court of Louisiana. May 21, 1906.)

EXEMPTIONS—EXECUTION—WORK HORSES.

The term "work horses" used by the constitutional exemption provision, includes mules.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, § 54.]

(Syllabus by the Court.)

Appeal from Second Justice's Court, Parish of Washington; Murray J. Schilling, Judge. Action by Willie McElveen against Henry A. Goings. Judgment for defendant, and plaintiff appeals. Reversed.

Herman Eldridge Gayer, for appellant. Albert Gallatin Breeland, for appellee.

PROVOSTY, J. Article 244 of the Constitution, exempts from seizure "the homestead consisting of lands, buildings and appurtenances, whether rural or urban; also two work horses, one wagon or cart, one yoke of oxen, two cows and calves, 25 head of hogs or 1,000 pounds of bacon or its equivalent in pork, whether these exempted objects be attached to a homestead or not, and on a farm the necessary quantity of corn and fodder for the current year, and the necessary farming implements, to the value of \$2,000."

The seizing creditor in this case seized plaintiff's mule, and contends that mules not being horses the Constitution does not exempt them from seizure. He is mistaken, the term "work horses" includes mules. Ray v. Hayes, Sheriff, 28 La. Ann. 641. The Constitution manifestly so intends. And in order so to hold it is not necessary to have recourse to what is known as a liberal construction, but simply to read the statute intelligently. Courts "will not apply the rule of strict construction with such technicality as to defeat the purpose of ascertaining the true meaning and intent of the statute." 26 A. & E. E. of

Law, p. 659. Thus in Goldsmith v. State, 1 Head 150, the Supreme Court of Tennessee held that a criminal statute against horse racing was violated by the running of a mule race.

The judgment appealed from is set aside and the injunction herein is perpetuated at the cost of defendants in both courts.

(116 La.)

No. 16,092.

STATE v. CRUMP.

(Supreme Court of Louisiana. May 21, 1906.)

1. HOMICIDE—EVIDENCE—DYING DECLARATIONS—APPEAL.

The defendant was indicted for manslaughter, found guilty and recommended to the mercy of the court. The objection of the defendant to the admissibility of evidence was general, and did not point out the inadmissible words of the declaration. Grounds not urged below will not be considered on appeal.

2. SAME—EVIDENCE—MALICE.

The fact that the testimony for the state may have gone slightly beyond the crime charged because of the issues as presented by defendant will not afford ground sufficient to set aside the verdict. If there was malice on the part of defendant, it only added to the gravity of the offense.

3. SAME—SELF-DEFENSE.

The testimony of defendant admitted to prove that plea, i. e., self-defense, justified the ruling which permitted the introduction of testimony by the state to which the defendant objected.

4. SAME—TRESPASS VEL NON.

The defendant sought to prove he had not committed a trespass, and that he was on a peaceable mission at the time of the homicide. The testimony offered by the state was properly admitted.

5. SAME — TESTIMONY AS TO CONVERSATION HEARD.

The witness heard the conversation which was pertinent to the issue. The testimony was admissible in corroboration of other testimony.

(Syllabus by the Court.)

Appeal from Third Judicial District Court, Parish of Bienville; James Edward Moore, Judge.

Charley Crump was convicted of manslaughter, and appeals. Affirmed.

Benjamin Pearce Edwards, Joseph Rush Wimberly, and William Chappelle Barnette, for appellant. Walter Guion, Atty. Gen., and John C. Theus, Dist. Atty. (Lewis Guion, of counsel), for the State.

BREAUX, C. J. The defendant was charged with manslaughter; he was indicted and found "guilty and recommended to the mercy of the court."

From a sentence of five years and a half he prosecutes this appeal.

His grounds of defense are set forth in seven bills of exceptions. In the first bill of exceptions it appears that defendant objected to the verdict on the ground that the court permitted, over defendant's objection, the witness R. P. Watson, father of the deceased, to state, in testifying regarding the

dying declaration of his son, facts that were "self-serving declarations, inadmissible and hearsay." The bill of exceptions states said objection: "The defendant through counsel objected to the first part of the statement of the witness."

The following is the first part of the dying declaration in question, as testified to by the father of the deceased, quoting:

"When I said that I was sorry that these things were as they were, he said 'Yes, but when I married this girl I promised to protect her, and I could not help it under the circumstances.'"

The following is the remainder:

"I didn't see Charlie. When I was shooting he was behind the wall shelter. On my return back into the house he shot me in the back, but when I walked out there he threw his hand on his pistol, but I had mine in my hand and I beat him to it. Lawrence Crump threw his hand on his pistol, but I had mine in my hand and I beat him to it."

Taken as a whole there is nothing in the foregoing in the nature of a self-serving testimony complained of by defendant, for the objections to self-serving declarations are confined to the defendant. Wharton on Criminal Evidence—Self-Serving Declarations.

The testimony as relates to the state could not be self-serving.

In the second place "It was hearsay" said the defendant. This in view of the facts is scarcely an objection; for at best the dying declaration was all hearsay. The defendant did not, in support of the grounds stated, point out the objection he had, nor did he specifically set forth the grounds on which it was inadmissible.

In a case we have before us the dying declaration was "that the dying man had nothing against him," the defendant, and that "he did not know that defendant had anything against him," the dying man. The court said this part of the evidence should have been excluded, if properly pointed out and objected to as illegal. But the objection, said the court, was to the declaration as a whole; although a part of the evidence was inadmissible there was no error in refusing to exclude it. Citing *Shorter v. State*, 63 Ala. 129; *Brown v. State*, 52 Ala. 345; *Reynolds v. State*, 68 Ala. 502.

We are certainly of the opinion that the declaration of the dying man should relate to the circumstances attending the killing, and that under the evidence of a dying declaration inadmissible evidence should not be admitted. But an accused should be held to specifically object to the errors and point out that portion which is inadmissible. The defendant who levels his attack at the dying declaration cannot on appeal successfully urge that the whole charge was illegal because of the illegal portion which he did not point out.

We have said before that under the circumstances here an objection that the dying declaration was hearsay is scarcely an objection which a defendant should make in

order to give notice to the court of his ground of defense. Both the irrelevant portion of the declaration and that which was pertinent to the issue were hearsay. Should not the defendant, through counsel have directed the attention to that particular portion which was considered inadmissible?

This brings us to the second bill of exceptions whereby it is shown that the defendant objected to the following question, quoting:

"What disturbance, if any, had been made prior to the killing about Bob Watson's place or Otis Watson's place or along that lane by Chester Crump, Lawrence Crump, or their crowd?"

The judge in permitting this question to be propounded as a part of the bill of exceptions states that the evidence went to sustain the contention of the state that defendant and others were engaged in trespass under aggravating circumstances, and that they had been engaged in disturbance before the house of the Watsons; and that there was reason to anticipate trouble.

The whole issue reduces itself to whether malice, shown in view of the circumstances of this case, vitiated the verdict. We do not consider that it did.

It may be well to state here, as showing the character of the case, that manslaughter sometimes comes near to murder; while the act is not attended with legal malice or depravity, yet under certain circumstances proof of malice will not afford ground for setting aside the lesser charge of manslaughter.

It is well settled, so much so that it is not necessary to cite decisions, that in order to obtain relief on appeal it must appear that the error committed was prejudicial to defendant's cause. Here it is very evident that it was not prejudicial. The defendant has no good ground upon which to stand in urging that the verdict should not have been affirmed because it appeared by the testimony that there was malice; and that he had been actuated by malice.

Now as to the self-defense which defendant sought to prove: An attacking party cannot, while attacking, very well be held to have acted in self-defense (a defense to which defendant claims to have been entitled).

There was question as to whether defendant had acted in self-defense. The state, in order to meet the defendant on this ground, introduced evidence to show that he had committed aggravated trespass on the day of the homicide and on days before the homicide. These aggravated acts of trespass went to show that he and not the deceased was the aggressor, and that he could not, in view of the facts, sustain the plea of self-defense.

But defendant next reiterates that in order to prove manslaughter it was only necessary to show that the killing was unlawful and in heat of blood. This is quite true; but there are circumstances which may render it necessary to let in certain proof although it may have a tendency to show that the accused was actuated by malice.

There had been difficulties between the parties. The accused and those with him sought to prove that they intended to pass peaceably through the Watson inclosure, in which Charles Watson was killed. This the prosecuting officer sought to meet by offering in evidence testimony which was admitted to show the bad faith and to contradict the defendant on other grounds. The testimony was properly admitted to enable the prosecuting officer to meet the defense on its own ground.

We glean from the testimony that there was no good feeling toward one another, to wit, the father and his two sons—one now deceased—on the one hand, and defendant and those who were with him at the time of the occurrence on the other.

Defendant and those with him, we infer, sought to prove that they were not trespassers; that they had received no notice not to pass within the inclosure of the Watsons; and that defendant had acted in self-defense.

While the district judge deemed it proper to permit the prosecuting officer to introduce evidence to the contrary.

Considering the issue as presented, it may be that part of the testimony showed some malice on the part of defendant, and yet it does not follow that the verdict, under the circumstances, was null and illegal. Although in the course of the trial the issue may have been somewhat enlarged it does not for that reason appear that the defendant was prejudiced in his defense. The defendant, as well as the prosecutor, is responsible for expanding the issues slightly beyond the indictment.

This brings us to another ground of defense: defendant's objection was that the prosecuting officer was permitted on cross-examination to examine the accused regarding matters that had not been testified to when he was examined in chief. The prosecuting officer, in answer, said that it was no new matter; that the accused, while testifying in his own behalf, had raised the question which the prosecuting officer sought to meet.

The trial judge in his statement (made part of the bill of exceptions) sets forth that the defendant as a witness on his direct examination testified that he was peaceably passing through the premises of the Watsons without intending thereby to commit a trespass, and fully believing that he was not committing a trespass, and that there was no objection to his passing. The judge's further statement is that if the state could prove that defendant had promised the owner (Watson, Senior) that if he (Watson) would put up a gate and posts he would not enter the premises, the testimony would then be a direct contradiction of his statement as a witness that he had had no notice to pass through the premises.

From the foregoing it is evident that the questions raised by the testimony did not

relate to facts not sworn to on the direct examination, but the reverse.

We pass from this objection to the bill of exceptions reserved to the ruling of the judge in accordance with which he permitted D. W. Adams to testify regarding a conversation between the accused and R. P. Watson, father of the deceased, a short time before the day the homicide was committed. The purpose was to corroborate the testimony of R. P. Watson regarding a certain conversation.

The objection of defendant was that Adams had not heard all the conversation. The trial judge informed us by his statement in the bill of exceptions that the witness Adams heard all that was said after coming up to where the parties were conversing and that he heard all that was said regarding the point at issue.

The facts being as stated it was manifest that the objection had no merit.

See upon the subject, *State v. Spillers*, 105 La. 165, 29 South. 480.

The last of the bills of exceptions taken shows that the court refused to permit a witness to testify that R. P. Watson had made a statement to the effect that the notice posted by him notifying persons not to pass through his premises did not apply to the accused.

The trial judge informed us that he refused to permit the defendant to prove this statement of Watson because it did not appear that it was ever communicated to the defendant or had in any way come to his knowledge; that not communicated as it was, it was irrelevant and mere hearsay. We agree with the trial judge that if the testimony had been admitted it would have enabled the defendant to impeach the witness, Watson, although no foundation had been laid to enable the defendant to impeach the testimony of this witness.

It is well settled, in order to impeach a witness, there must be a proper foundation laid.

We have taken up the different grounds of defense; our examination has resulted in the conviction that the defendant has no legal ground upon which to obtain relief before this court. We find no error.

The judgment is affirmed.

(116 La.)

No. 16,100.

STATE v. RESTER.

(Supreme Court of Louisiana. May 21, 1906.)

1. WITNESSES—IMPEACHMENT—PRELIMINARY SHOWING.

Where the defense in a criminal trial seeks to impeach the credibility of one of the state's witnesses testimony as to his general reputation in the community in which he lives for truth and veracity, it is a reasonable demand on the part of the prosecution that it should be shown before the witness testifies that he is so situated as to be properly able to give testimony on that subject. The state should not be driven to the necessity of allowing injurious testimony

to be received and confined to having it afterward stricken out and the jury instructed to disregard it.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1154, 1157.]

2. CRIMINAL LAW—EXCLUSION OF EVIDENCE.

The mere fact that the trial judge refused to allow a witness for the defense to be asked the question whether he knew the general reputation of one of the witnesses for the state in the community for truth and veracity furnishes no ground for reversal where the answer expected to be made was not made known to the trial court, nor was it made known on and through a motion for a new trial, what the witness would have answered.

3. INDICTMENT—MOTION TO QUASH.

The filing of a motion to quash an indictment after pleading to the merits even though it may not then be absolutely too late falls under the discretionary powers of the court. Where a motion is sought to be filed under such circumstances it should not be granted except upon clear and plain grounds, the accused under such circumstances being driven to some other remedy. The motion should not be allowed to prevail on a doubtful case where the insufficiency of the indictment was not such as being shown would not authorize a verdict upon it adverse to the accused. In this case a verdict of guilty could be legally returned upon the indictment under proper and sufficient evidence.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 473.]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; Thomas Moore Burns, Judge.

Lafayette Rester was convicted of assault with intent to kill, and appeals. Affirmed.

Albert Gallatin Breeland, for appellant. Walter Gulon, Atty. Gen., and John B. Lancaster, Dist. Atty. (Lewis Gulon, of counsel), for the State.

NICHOLLS, J. The defendant was indicted by the grand jury for the parish of Washington, on November 13, 1905, and on the 14th of the month he was arraigned and pleaded not guilty. His case was then assigned for trial on the first day of the next June term of the court.

The indictment charged that the defendant did on the 16th of July "willfully, feloniously, and of his malice aforethought, with a dangerous weapon, to wit, a pistol, make an assault by willfully shooting at Isaac Miley with the intent the said Isaac Miley to kill and murder."

On the first day of the June term of court defendant filed a motion to quash the indictment, on the ground that it charged no crime known to the law of the state of Louisiana; that the indictment did not charge that defendant made an assault upon any human being. The motion to quash was overruled by the court though the record does not show upon what ground, and no bill of exception was taken.

The district attorney, in his brief states that on the hearing of the motion he called

the attention of the court to the fact that the defendant's plea of not guilty to the indictment has never been withdrawn and there was no motion before the court.

On the trial, the defendant seeking to impeach the testimony which had been given by one Dido Stafford against him, placed D. E. Branch as a witness on the stand for that purpose and asked him the following question:

"Do you know the general reputation of Dido Stafford in the community wherein he resides for truth and veracity?"

To this question counsel for the state objected and the court sustained the objection. The district judge states in the per curiam to the bill of exceptions that he sustained the objection for the reason that it was not shown that the witness Branch lived in the same locality or was acquainted with the state witness and that there had been no foundation laid for the testimony.

The district attorney in his brief declares that the defendant had attempted to attack the credibility of only one of the state's witnesses when all of them were eyewitnesses and testified identically as did Stafford to the same facts as he did, "and even if there were error in the judge's ruling no injustice would be done the defendant, and the ruling was brought about by his laches."

Defendant neither at the time of the offering of the impeaching testimony, nor in the bill of exceptions taken by him, nor through an application for a new trial asserts or attempts to show that Stafford was unworthy of belief or that Branch claimed to know or did know anything of his general reputation for truth and veracity.

We are asked to set aside the verdict and to reverse the judgment in this case on the hypothesis that Branch may have been in a position to have known legally what general reputation Stafford may have had in the community in which he lived, and that he would in answer to the question asked have declared that that reputation was such as would cause his testimony to be entitled to no credit. We would not be justified in setting aside verdicts and reversing judgments upon bare possibilities. The objections taken by the district attorney and the reasons assigned by the district judge for his ruling might certainly have been presented to us in a more satisfactory shape than they have been, but defendant has failed to show us that he has legal grounds for reversal, for the matter set up in his bill of exceptions.

We are satisfied that when the witness Branch was placed upon the stand to give testimony as to Stafford's general reputation for truth and veracity that the district attorney must have insisted that he should not be permitted to give such testimony until it had been first shown by defendant that he was so situated as to be entitled to testify on that

subject, and that defendant declined to make such preliminary showing.

In the brief for the state it is said, referring to that matter, that to postpone objection to the giving of such testimony until cross-examination of the witness, after testimony possibly injurious to the prosecution would have gone to the jury would involve the necessity of having the testimony so given stricken out and the jury instructed to disregard it—a proceeding prejudicial, dangerous, and to be avoided if possible. We think there is force in that suggestion, that it is a reasonable and conservative demand by the state that a preliminary showing should be made by the defense before his witness should testify. It was an easy matter for defendant in this case to have complied with it, and the failure to elicit the testimony of the witness was to some extent attributable to himself.

In *Martin v. State*, 40 South. 275, the Supreme Court of Alabama held that the sustaining of an objection to a question to a witness will not be reviewed on appeal unless the answer expected was made known to the trial court and is shown by the record. Our own decisions are to the same effect. To justify a reversal of the judgment appellant must show injury as well as error.

The motion to quash the indictment was filed in this case after a plea of not guilty. While that fact may not be an absolute bar to the filing of such a motion it brings the propriety of its filing under the discretionary power of the court.

When such a motion is sought to be filed after pleading to the indictment it cannot be required to be granted as a matter of right unless upon clear and plain grounds; the party being under such circumstances driven to some other remedy. The motion should not be allowed to prevail in a doubtful case where the alleged insufficiency of the indictment was not such as being shown would not authorize a judgment upon a verdict upon it adverse to the accused.

We do not think the objection urged in this case to the indictment was of that character.

We understand appellant to claim that the indictment should have made the express specific averment that the defendant had "made an assault upon Isaac Miley" instead of "willfully shooting at Isaac Miley."

We think the averment of the indictment sufficient to have justified the verdict under proper and sufficient evidence, and to have authorized the judgment upon the indictment. If the accused willfully and feloniously shot at Isaac Miley, with the intent to kill and murder him, he certainly committed an assault upon that person.

We see no legal ground for reversal in this case. The judgment appealed from is affirmed.

(116 La.)

No. 15,932.

DREW et al. v. CAFFALL et al.

(Supreme Court of Louisiana. May 21, 1906.)

1. PRINCIPAL AND AGENT—EXECUTION SALE—ACTION ON BOND.

Plaintiffs seek to hold the Citizens' Bank of Jennings as the undisclosed principal upon a 12 months bond signed by John H. Hoffmann, individually, under an adjudication made to him individually at a judicial sale.

2. SAME—EVIDENCE.

The cause of action upon which the suit is brought is not sustained by the facts shown and the evidence adduced.

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by H. C. Drew and others against Caffall and Dalbey, commissioners of the Citizens' Bank. Judgment for defendants, and plaintiffs appeal. Affirmed.

Léon Sugar, for appellants. Gorham & Gorham, for appellees.

Statement of the Case.

NICHOLLS, J. This suit is brought on the petition of Henry C. Drew, the Elstner Martin Grocery Company, and Willis P. Weber; they setting out that they were judgment creditors of Thomas Lamont as recited in the pleadings. That on December 7, 1902, writs of *fi. fa.* were issued upon each of said judgments commanding the sheriff to seize and sell property, real and personal rights, and credits of the defendant Lamont to satisfy the respective judgments, interests, and costs. That, under said writs, the sheriff, among other property of Lamont, seized, on December 8, 1902, two certain dredge-boats known as the "Gamma" and "Beta," together with their barges and other appurtenances, and, after legal advertisement, offered the same for sale. That at the first offering no sale was made for want of a bidder. That on the 21st of February, 1903, they were cried off to John H. Hoffmann; he being the last and highest bidder for the sum of \$3,500. That said sale was made on credit of 12 months, and the successful bidder was required to execute his 12 months bond to cover the amount of his bid less cash to cover costs.

That there was paid at or about same time the sum of \$349.97 in cash to cover costs, leaving a net balance of \$3,153.03 to be distributed among petitioners in proportion to their respective judgments. That, although more than 12 months had elapsed, no part of said sum had been paid, nor had said judgments been in any part satisfied. That, although said boats were cried off to John H. Hoffmann at the price aforesaid, petitioners had since learned that J. H. Hoffmann was acting as agent in the premises of the Citizens' Bank of Jennings. That said bank had

recognized, affirmed, and ratified the acts of the said agent, Hoffmann. That it took possession of said property, made contracts with reference thereto, and repeatedly treated the property as its property acquired at the time and in the manner aforesaid.

That the Citizens' Bank had been placed in the hands of commissioners appointed and acting under orders of the district court. That they had recently sold the dredge Beta for \$1,000 cash. That after the sale of December 21, 1903, Hoffmann is supposed to have given a 12 months bond covering the balance of the amount bid for the boats (\$3,150.03); but that petitioners did not know that the bond was ever given to the sheriff, was ever executed. That, if it was, it was never delivered to petitioners or either of them, though petitioner had caused diligent search to be made for such bond in all the places where there was the least likelihood that it might be found and that such efforts had all proved unsuccessful. That the Citizens' Bank represented by said commissioners was indebted to them in the sum of \$3,150.03, with legal interest from February 21, 1903, until paid. That they had a vendor's lien against the dredges Beta and Gamma and their barges, and that they were entitled to have the said dredges and their barges seized and sold to satisfy the balance due on the purchase price thereof. That said commissioners, having sold the dredge boat Beta, and having in their hands the sum of \$1,000, being the price received therefor, petitioners were entitled to a special lien and privilege on the said proceeds, and were entitled to an order directing the commissioners to pay said sum of \$1,000 in preference to all other creditors of the bank. They prayed for citation upon the commissioners, and that they have judgment against them in the sum of \$3,150.03, with legal interest from February 21, 1903, until paid; that their vendor's lien and privilege be recognized and rendered executory; that the commissioners be ordered to pay them the \$1,000, being the proceeds of the sale of the dredge-boat Beta by preference over other creditors of the bank; and that they have general relief.

The commissioners excepted that plaintiffs had no cause of action and no right of action against them. In the alternative they pleaded the general issue. They admitted that plaintiffs obtained judgments against Lamont as alleged, and that the dredge-boats Beta and Gamma were sold under 12 months bond to satisfy the execution of their judgments. They admit that Hoffmann purchased same under said 12 months bond for his own special benefit. They specially denied that Hoffmann ever purchased said dredge-boats as cashier of the Citizens' Bank, or ever gave his 12 months bond as cashier for said purchase, or that he was ever authorized in any manner by said bank to make said purchase on account of said bank, or that said bank ever accepted said purchase on their behalf or ever ratified the same.

They specially averred that Hoffmann from the time he made said purchase of the dredge-boats, used and operated the same for about six months for his own special account and appropriated all the revenues therefrom for his own account.

They aver that the plaintiffs are concluded and estopped by their conduct, their declarations, their pleadings, and their judicial acknowledgments and averments, and they cannot now be permitted to assume entirely different and new position for the purpose of profiting thereby and injuring the credit of the bank, which plea of estoppel they specially urged against plaintiffs' demand.

They alleged that the Citizens' Bank acquired said dredge boats in good faith in due course of business and for valuable consideration, and that they had the right to dispose of the same for the benefit of the creditors of the bank, and plaintiffs' only recourse is against Hoffmann individually, and his individual assets.

The district court rendered judgments in favor of the defendants, and plaintiffs appealed.

The plaintiffs' statement of facts in their brief is as follows:

"This suit is a sequel to the suit of Elstner-Martin Grocery Co., Ltd., et al. v. Lamont (Hoffmann, Intervener) 113 La. 894, 37 South. 868, decided by the Supreme Court in January, 1905.

"In that case, J. H. Hoffmann, intervener, asserted that he was the owner of the dredge boats that had been seized under writs of fieri facias, issued upon judgments recovered by the respective plaintiffs against their common debtor, Thomas Lamont.

"There was no injunction; Hoffmann contenting himself with a mere third opposition, claiming the proceeds of the sale.

"The judgment of the lower court, afterwards affirmed to this honorable court, was adverse to Hoffmann's contentions.

"The property under seizure, under the said respective writs of fieri facias, failed to find a bidder upon first offering, and upon the second offering was adjudicated to J. H. Hoffmann at the price of \$3,500. He paid to the sheriff in cash \$349.97 covering the costs, leaving balance of \$3,150.03, due at 12 months after sale.

"On February 7, 1905, the respective plaintiffs caused execution to issue as upon 12 months bond, and certain property belonging to Hoffmann was seized.

"The property was advertised, but, before sale day, Hoffmann, upon his own petition, was adjudicated a bankrupt, and the seizures fell by operation of law.

"About this time the Citizens' Bank of Jennings, La., and of which institution Hoffmann had previously been an officer, went into hands of commissioners appointed under orders of the honorable Fifteenth judicial district court for the parish of Calcasieu.

"The bank was closed on January 13, 1905, and the commissioners qualified very shortly thereafter.

"The boats were inventoried as the property of the bank, and the commissioners took charge of them.

"The commissioners subsequently sold one of the boats for \$1,600, and at a later date sold the other for \$1,000.

"These matters coming to their knowledge, plaintiffs began inquiry and arrived at the conclusion that the Citizens' Bank was the real party in interest in the Lamont litigation:

that Hoffmann had no interest whatever; that the Lamont obligations, which he had alleged upon in the Lamont litigation, were the property of the Citizens' Bank; that, in the matter of the adjudication under plaintiffs' writ of *f. fa.*, the bank was the real adjudicatee; that the bank was the beneficiary, and in all respects debtor of the 12 months bond, instead of Hoffmann.

"This suit is to hold the Citizens' Bank for debt."

The following letter from plaintiffs' attorney to the sheriff is found in the transcript:

"Lake Charles, La., April 6, 1905.

"D. J. Reid, Esq., Sheriff Calcasieu Parish, La.—Dear Sir: In the matter of the sheriff's sale in re H. C. Drew vs. Thomas Lamont, Kelly, Weber & Co. vs. Thomas Lamont; Elstner Martin Grovery Co. vs. Thomas Lamont—property of J. H. Hoffmann seized under twelve months' bond and sale advertised to take place on April 18th.

"J. H. Hoffmann has been adjudicated a bankrupt. In consequence thereof we are without right to proceed with our sale and I hereby instruct you to proceed no further in so far as the sale is concerned.

"You will retain the property under seizure, however, until further orders from the plaintiffs in said writ or from the court of bankruptcy.

"Yours respectfully, Léon Sugar."

Filed in evidence November 13, 1905, in suit No. 5,923, and marked "D." Eugene J. Leveque, Dy. Clk.

Opinion.

The position taken by the plaintiffs in this suit, and on which it is grounded, that the Citizen's Bank of Jennings was in point of fact the purchaser of the dredge boats at the sheriff's sale made on the 21st of February, 1905, in execution of the writs issued in plaintiffs' favor upon the judgments in their favor, although the adjudication so made was to J. H. Hoffmann, and that that bank was the real debtor on the 12-months' bond, which was executed by J. H. Hoffmann himself under the terms of his bid; in other words, that the bank was the undisclosed principal of Hoffmann in acting in the premises cannot be maintained under the evidence.

Hoffmann testified that, although the adjudication of the dredge boats was made to him, it was in reality an adjudication to the bank; that he was acting in making the purchase for and in behalf of the bank, but he does not pretend that he was authorized by the bank or its officials to do this, or that they had any knowledge either of his intention to do this, or after the sale that he had in fact done so. We give no credit whatever to his testimony. It is absolutely broken down and disproved by counter testimony. It is true that, subsequent to the judicial sale of the boats, the bank dealt with them as if their owner, when making certain contracts, and it is also true that the commissioners of the bank, after its affairs were placed in their hands, sold them as the bank's property, and that defendants in their plead-

ings admit and claim that they belonged to it; but this is far from establishing plaintiffs' claim that the bank held them under a title acquired at the sheriff's sale, under which circumstances the bank would have been the direct personal debtor upon the bond, and the dredges would have gone into its possession and ownership, struck by a privilege.

No such condition of things is shown by this record. If the bank has come under liability to any one by reason of its acts in regard to the dredges, it is under derivative rights, and through Hoffmann acting as their owner with the rights resulting from that situation, and not under original rights flowing directly from the sheriff's adjudication which is the issue presented by the plaintiffs as their cause of action, and the theory upon which the case was tried and the district court rendered its judgment.

This is really a direct action by plaintiffs against the bank upon the 12-months' bond alleging it to be a lost instrument, though plaintiffs' petition contains some features as attempting to deal with the bank as a "third person," who had taken possession and sold as its property the property of plaintiffs' debtor, when struck in their favor by the privilege. No steps have been taken, so far as the record shows, against Hoffmann upon the bond other than a seizure of his property, as the debtor upon the same, which seizure they still maintain, though Hoffmann has gone into bankruptcy. The facts and circumstances under which the bank took possession of the dredges, and held the title under which they were sold, are not shown by the record. No one seems to know anything about them, except Hoffmann, whose testimony, as we have seen, is discredited.

Whatever those circumstances and that title were, we are satisfied that they were under some agreement or contract with Hoffmann individually after he had purchased the dredges by which he placed the legal title thereto in the bank with the right to sell the same, and under which they have been sold by the commissioners. That Hoffmann consented to the legal title being placed in the bank or its president, with the right to sell, is shown by the fact that he joined in and was party to an act by which Hall, the president of the bank, declared the dredges to be then its property and entered into a contingent promise of sale of the same. Under the circumstances as far as shown, and under the pleadings, and with the parties before the court, we do not feel justified in attempting to deal with and dispose of the rights and obligations of the parties before us otherwise than upon the cause of action, on which the plaintiffs have declared.

From that standpoint, the judgment appealed from is correct, and it is hereby affirmed.

PROVOSTY, J., dissents.

(116 La.)

No. 15,487.

LOUISIANA RY. & NAVIGATION CO. v. MORERE.

(Supreme Court of Louisiana. May 21, 1906.)

1. EXPROPRIATION—JURY OF FREEHOLDERS.

The jury of freeholders, in an expropriation case, should be taken as much as possible from the vicinage.

2. JURY—RECUSATION OF JUROR.

His being the brother of one of the counsel in the case is not good ground for recusing a juror.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 419.]

3. EXPROPRIATION—EVIDENCE OF VALUE.

So long as assessments are not made at the market value of property in this state, the offering of them, for the purpose of showing value in expropriation cases, will be a useless incumbering of the record.

4. SAME—EVIDENCE.

The statement of the notary that the price recited in the act is the true price, so far as he knows, is not sufficient proof of the true price for the purpose of making the act admissible as proof of value in an expropriation case.

5. SAME—EXPERT EVIDENCE.

In an expropriation case, in order that a witness should be admitted to testify as an expert as to value, it suffices that he shows he has some knowledge of the value of the property in question.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2357, 2361.]

6. SAME—EVIDENCE.

The verdict of the jury in a case between other parties for the expropriation of property of similar character in the neighborhood is good evidence of value.

7. SAME.

Whether an estimate of the value of the particular property, or of neighboring property of similar character, is, or not, too remote, is a question depending upon the facts of the particular case. If the only change in the property since the estimation was made has been a steady rise in its value, the remoteness of the estimate might perhaps offer to the defendant good ground of objection, but surely not to the plaintiff.

8. EVIDENCE—PAROL EVIDENCE.

Parol evidence is admissible to show an agreement of sale of neighboring property, when the purpose is not to affect title of real estate, but simply to show value.

9. EXPROPRIATION—EVIDENCE OF VALUE.

The price paid for neighboring property by a railway company for its right of way is admissible to show value, though the purchase was made after suit brought. The objection goes to the effect.

(Syllabus by the Court.)

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson, Jérôme Louis Gaudet, Judge.

Action by the Louisiana Railway & Navigation Company against Bartholomew Morere. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wickliffe & Falls, for appellant. Foster, Milling, Godchaux & Sanders and Louis Hermann Marrero, Jr., for appellee.

PROVOSTY, J. Plaintiff's projected railroad, due north and south, on the east bank

of the Mississippi river, has to cross defendant's land, which has a front of two acres on the river and runs back from the river, or due east, 40 acres, between parallel lines. The land is near the upper boundary of the city of New Orleans, and is already traversed by five railroads. The present suit is brought to expropriate a strip 300 feet in width across the land, making an area of 2.06 acres, for right of way and trackyards.

The first point to be noticed is the challenge to the array of jurors. The objection is that not one of the 48 freeholders composing the venire was taken from the east side of the river, where the property to be expropriated is situated, but all from the west side, and nearly all from the towns on the west side.

The requirement of the statute (article 2632, Civ. Code) is that the array shall consist of "a list of forty-eight freeholders residents of the parish in which the land lies, and not interested in the issue to be tried."

Defendant does not say that the freeholders selected did not answer to that description, but only that the fact of their being all from one side of the river shows design on the part of the sheriff, and that this vitiates the venire. But, evidently, not unless the design was sinister, and no suggestion of that kind is made, non constat that the freeholders of the east side were not all, directly or indirectly, interested, and hence disqualified. We will add, however, that, if any could have been found on the east side who were not interested, it would have been the duty of the sheriff to take them by preference, as they would have been from the vicinity of the land to be expropriated, and more likely to know something of its character and value.

The next point is that one of the jurors was a brother of one of the counsel of plaintiff. This is not good ground for recusation. The justices of this court could not well recuse themselves because their brothers or their sons happened to be of counsel, nor does a lawyer with a large practice have to emigrate from his parish because his brother happens to be made judge.

We pass to defendant's objections to evidence.

The first is to the offer of the assessment roll for the purpose of showing value. Until assessments shall be made in this state at the market value of property, they will not be reliable evidence of value, and the offer of them for showing value will be a useless incumbering of the record, unless accompanied by proof that the appraisement was made by the owner himself.

We will here add, for the guidance of counsel in the event this case is remanded, that the court does not consider that an admission of the notary that, so far as he knows, the price recited in the act passed before him was the true price, is sufficient proof of the true price, for the purpose of making the act admissible in evidence.

The next matter calling for consideration

is the objection to the witness Danziger as an expert. The witness is 23 years old, resides in New Orleans, has been engaged in the real estate business since he was 18, and was employed by plaintiff to inform himself as to the value of the property and make an estimate. He bases his opinion principally on his examination of the records showing the sales of property in the neighborhood, of which there have been very few. He never saw the land of defendant but once, which was the time he went to examine it in pursuance of his employment by plaintiff. He is not sure he was on the particular portion of the land sought to be expropriated. Did not notice how much timber there is on the land, and does not know the value of timber. Has negotiated a great many sales of country property, plantations, in the vicinity of New Orleans; was "interested in the biggest land deals right below" the property in question. He admits knowing nothing of the sale of the West Park tract of land, 80 acres, for \$30,000; said land being situated about ten arpents below the land in suit. Did not take that sale into consideration in making his estimate. Does not know whether the West Park land is or not higher than the land in question. Under the foregoing circumstances, the witness was qualified as an expert. As he had negotiated a great many sales of country property in the vicinity of New Orleans, and was interested in a large land deal right below the property in question, he was more or less acquainted with the value of land in the neighborhood, and could therefore have an opinion on the subject. A. & E. E. of Law, vol. 12, pp. 475, 482. But, in view of his limited knowledge of the particular land in question, and of his being in the employ of the plaintiff as an expert, his opinion can be of but very little weight. So far as his information was founded upon an examination of recorded acts of sale, it could simply mislead, since these recorded acts would themselves have been inadmissible, unless accompanied by proof that the prices recited in them were bona fide. N. O. v. Manfre, 111 La. 927, 35 South. 981.

We pass now to the objections made by plaintiff to defendant's evidence.

Plaintiff offered the record in the suit entitled N. O. & W. R. R. Co. v. B. Morere, No. 842 of the docket of the Twenty-First judicial district court, parish of Jefferson, which was the suit by which one of the five railroads already traversing defendant's land expropriated its right of way. The ground of the exclusion was that the valuation made in the suit was *res inter alios acta*, and too remote in point of time; it dating nearly nine years back.

The evidence, we think, should have been admitted. In an expropriation proceeding, whatever tends to show the value of the property in question is good evidence, even though *res inter alios acta*. It is on this principle that private sales between third per-

sons may be shown. Remoteness is good ground of objection only in so far as it gives rise to a presumption that such a change has taken place in the conditions surrounding the property as may render the remote estimate of it unreliable as a test of value. This presumption, however, may yield to evidence that conditions have continued unchanged. Thus, in the case of Benham v. Dunbar, 103 Mass. 365, the Supreme Court of Massachusetts held that sales of similar property six miles distant and eight years back were not too remote, under the peculiar circumstances of the case. In the instant case the evidence shows that the only change in the conditions has been a steady increase in value. This change might furnish a good ground of objection to defendant, since the present value is higher, and defendant is interested in showing a high value; but surely it does not furnish good ground for objection to plaintiff who is interested in showing a low value—the very thing which the evidence would tend to show.

But when we come to examine the record in question, which has been brought up as part of the bill of exception, we find it of little or no utility. The amount allowed the defendant was not alone for the value of the land taken, but also for the damage done to the rest of the property, including the land now sought to be expropriated. More than this, the estimation was based, in part, upon defendant's statement as a witness that the taking of the land would reduce to little or nothing the value of the rest of his property, including the land involved in the instant suit. How much of the estimate was for value of land, and how much for damages to the remainder of property, it is impossible to say. The verdict of the jury, which the court simply affirmed, reads as follows:

"We, the jury, assess the value of defendant's land and damages at \$800."

There was no separate valuation of the land. The value of the property taken and the damages to the remainder of the property are two distinct and separate things. Shreveport R. R. Co. v. Hinds, 50 La. Ann. 781, 24 South. 287.

The objection to the verdict of the jury in the Gaudet suit was good, or not, accordingly as defendant could, or not, have shown that the property was of similar character. And the same thing may be said of the objection to the act of sale by Gilchrist to Mrs. Aricer.

The witness Deckbar was ruled out as not an expert, although he had lived 22 years in the neighborhood, and was thoroughly acquainted with the property in the neighborhood and with the property to be expropriated, and said that in making his estimate he would take in consideration all the sales that had been made of real estate in the neighborhood in recent years. The ground of his exclusion was that he would also take into consideration the amount allowed by

the jury in the suit of N. O. & W. R. R. Co. v. B. Morere, referred to hereinabove.

We think the witness should have been permitted to testify. The objection went to the effect of his evidence.

Defendant offered to prove by the witness Mack the agreement between the witness and the Frisco Railroad for the sale by the witness to the railroad of certain lots in the neighborhood, and plaintiff objected to the evidence on the grounds: (1) That the lots were too remote from defendant's property; (2) that the agreement was *res inter alios acta*; (3) that an agreement to sell real estate must be in writing; and (4) that the agreement was after suit for expropriation had been instituted, and by way of compromise.

The lots were a mile, or a mile and a half, from defendant's land. This did not make them too remote, if the land was similar in character. The other grounds of objection are untenable: That of *res inter alios acta* we have already had occasion to pass on hereinabove, in connection with the offer of the record of the suit of Railroad Company v. Morere; that of parol not being admissible to show title to real estate, would have been good if the object of the offer had been to affect the title to real estate, but such was not its object—its object was simply to show what price a railroad company had consented to give, a fact which, until some writing had been drawn up, could not be shown otherwise than by parol; and, finally, the circumstance that the agreement had been the result of compromise, went to the effect and not to the admissibility. The same thing can be said of every purchase made by a railroad for securing a right of way. The vendor avoids a law suit by accepting the offer made to him by the railroad company. Some courts hold that such purchases are inadmissible on that ground.

The evidence as to offers of purchase was properly rejected. Offers of purchase are a class of evidence safer to reject than to receive. *A. & E. E. of Law*, vol. 10, p. 1154.

Henry Lambert was, we think, qualified to testify as to the value of the land. He lived in the neighborhood, and was well acquainted with the property. Knew of the real estate transactions in the immediate neighborhood.

Strange to say, the defendant was not permitted to testify to the value of his own property, on the ground that "he had not been qualified." The defendant had owned the land since 1891, and had lived on it for 17 years, and was well acquainted with it and knew of the sales of land in the neighborhood.

The conclusion, from the foregoing examination of the record, is that the case must be remanded for another trial, and the judgment will be rendered accordingly, with leave, however, to defendant, on application for rehearing, to have it set aside and the judgment appealed from affirmed.

It is therefore ordered, adjudged, and de-

creed that the judgment appealed from be set aside, and the case remanded for another trial, and the plaintiff pay all costs.

NICHOLLS, J., takes no part, not having been present when the case was argued.

(116 La.)

No. 15,925.

SMITH v. SMITH.

(Supreme Court of Louisiana. May 21, 1906.)

HUSBAND AND WIFE—ACTION FOR SEPARATION FROM BED AND BOARD.

Plaintiff and defendant have managed to live together as husband and wife nearly a half century. Children, issue of the marriage, are of age and married.

It is not made evident that there is cause enough to dissolve the ties of matrimony.

The cause to justify a decree as prayed for must clearly appear.

It is late in life to apply for a separation from bed and board, to be followed by a divorce.

(Syllabus by the Court.)

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Clay Elliott, Judge.

Action by Jane Holloway Smith against Robert W. Smith. Judgment for defendant, and plaintiff appeals. Affirmed.

Warren Moses Wright and Stephen Dudley Ellis, for appellant. J. W. Sentell, Horace Marshall Roberts, and Bell Marvin Harvard, for appellee.

BREAUX, C. J. Plaintiff's action is for separation from bed and board. She also sued to be decreed owner of certain property described in the petition, and for the dissolution of the community and a partition of the property. To that end she asks that all of the community property not susceptible of division be sold, and that the proceedings be referred to proper authority for the final division of the property. She also asks a judgment against defendant for alimony, at the rate of \$30 per month, from April 1, 1904. Her pleadings set forth substantially that she and her husband had always been together at their home; she, as a dutiful wife, had done all she could to render him happy, but about a year before this suit was brought she left him. She particularly charges that, for about three years before she took her leave from him, his treatment was abusive, harsh, and cruel, and rendered their living together an impossibility. He uttered epithets which she could not bear, and she avers that he went so far as to take a chair in hand in his attempt to make an assault upon her; that her health became impaired; that during the winter of 1893-94 she was seriously ill, none the less the defendant refused to call on her, and accompanied his refusal, as reported by one of his sons-in-law, with an opprobrious remark, which was, it must be said, very much out of place and inexcusable from a moral point of view.

It appears that, in search of health, she went to Florida to spend a few months with one of their daughters; that on her return defendant was heard to say that he would not permit her to return to the matrimonial domicile.

The foregoing is in the main an account of the wrongs she avers she has suffered at the hands of the stubborn old defendant.

In the answer of defendant, we find nothing showing a disposition to be unkind and harsh. Devotion as a husband, and anxiety to provide for his wife in all that was needful in the way of support and maintenance, are some of the grounds of his defense.

He avers that their matrimonial domicile and common dwelling is her home, as well as his own, and open to her whenever she wished to return; that she left it against his will, without the least reason or excuse. He expresses his willingness to support her. He has invited her to return, and still expects her to return with him. He further avers that all the property belongs to the community, and he cannot afford to pay alimony; that he is ill, his illness is serious, and he is now confined in a hospital and under the care of physicians.

The judge of the district court decided for defendant. In his opinion upon which his decree is based, he states that he was prompted to decide against the plaintiff because plaintiff resides with one of her daughters, and the enmity which has arisen between the husband of this daughter and the defendant may have its influence upon the plaintiff. He further states that the ill health and the age of both parties may render them irritable and not duly kind to each other.

Plaintiff and defendant have been married many years. Three daughters are the issue of their marriage. They are married, and live at their respective homes. By dint of industry, as we understand, plaintiff and defendant have earned property sufficient to afford them support without the necessity of great exertion on their part during their remaining years.

The case is of an unusual character. The husband is weak, old, and feeble, an inmate of an asylum for the sick; the partner of his toils in his early manhood is also ill, and in her illness and irritated condition she declines to return to the matrimonial domicile.

Should we reverse the judgment and grant a separation of property, which may in time be followed by a divorce, it would sever the ties of matrimony, which should never be severed except for manifest legal cause. Plaintiff and defendant should, as married persons usually do, bear the infirmities of age together. We do not think we should grant a divorce between persons of such ages on the showing here made by the testimony. Having managed to live together these many years, they should stay together in the evening of life, which they certainly

can do by the exercise of a little patience and forbearance. They have lived together nearly half a century.

The witnesses in the case (who cannot be suspected of being swayed by sympathy of any kind, as are sometimes swayed the near kindred of the family, who testify) do not show that there exists such a condition between the parties as to render their living together unendurable.

The evidence in referring to the property shows that these parties are the fortunate owners of a two-story dwelling in the pretty and attractive town of Hammond. There should be room enough for two to live in such a house without one being very much in the way of the other.

The testimony does not show that defendant has been guilty of all that he is charged with. He has never refused to pay her accounts, nor is it shown by the weight of the testimony that he has ever offered to commit an assault on the person of the plaintiff. True, he is gruff, a Scotchman, the testimony shows; possibly an uncanny old Scotchman who has seen much of the rough side of life. He does not weigh his words. But all of this, when the parties are nearing the end of life's course, should not be held sufficient to obtain a judgment of separation from bed and board. These things are to be borne with to some extent, at least. It may be slightly provoking, but not cause falling within the articles of the Code on the subject of separation.

It is quite true, as suggested by plaintiff's counsel, that, if she were to recover a judgment, she would have 12 months within which to think of reconciliation, and during that time there might be reconciliation. May it not be answer enough to state that the parties will be more inclined to reconciliation before the day of judgment than after a judgment has been rendered, if one were to be rendered?

It is not by any means evident that any serious attempt has yet been made at reconciliation, nor is it evident that plaintiff has been repulsed and driven away from her home as charged by her.

With reference to the property—it is community property—we will here state that the plaintiff has taken steps in this suit to prevent the sale of the property. The defendant, on the other hand, does not manifest the least wish to dispose of the property. In case the least attempt were made in that direction, plaintiff is not without remedy. Neither is she without remedy, if the acts of the defendant were to become such as to render living with him unendurable.

But just at this time, with the evidence before us, we must decline to render a judgment of separation from bed and board.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed.

(116 La.)

No. 15,776.

DAVENPORT et al. v. DAVENPORT et al.
(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied May 21, 1906.)

1. NOTARIES—OFFICERS DE FACTO.

One who has been commissioned as notary, and has taken the oath of office, and has been acting as notary for many years, and has the reputation of being such in the community in which he lives, but who has failed to file his oath of office in the offices of the Secretary of State and of the clerk of court, and has also failed to renew his bond every five years, as required by law, is a notary de facto; and acts passed before him have the same validity as acts passed before a notary de jure.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Notaries, §§ 6, 12½.]

2. WILLS—PROOF—WITNESSES—COMPETENCY.

The executor is a competent witness to the will in which he is named executor.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 280.]

3. SAME—IDENTITY OF WITNESS.

Where the witness signs by a name slightly different from that given to him in the testament, "Fresco Cutero," instead of "Francesco Cutero," parol evidence is admissible to show the two to be the same person.

4. BASTARDS—LEGITIMATION—METHODS.

It is not essential to the validity of an act of legitimation that it negative the existence of the various causes which would constitute impediments to the legitimation. The existence, vel non, of these impediments, depends upon proof dehors the act.

5. SAME—LEGALITY OF LEGITIMATION—BURDEN OF PROOF.

The burden of showing the existence of such impediments lies on the person contesting the legitimation.

6. SAME.

Marriage is not the only mode of legitimation. Legitimation may also be effected by notarial act.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, §§ 16, 17.]

7. SAME—ACT OF LEGITIMATION—CONSTRUCTION AND EFFECT.

Where, in the act of legitimation or acknowledgment, the parent declares that he acknowledges the child, and "does hereby legitimate him"; and further declares that he wishes that the child inherit "the same as if born in lawful wedlock"; the act will be held to be one of legitimation, and not of mere acknowledgment; and this although in the same act the parent further declares that he does hereby legitimate said child as is contemplated by article 203 of the Civil Code of 1900, which article is the one providing for mere acknowledgment; and although he, moreover, in a will made on the same day refers to the child as having been acknowledged.

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Action by Mrs. Sallie Davenport and others against John F. Davenport and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Foster, Milling, Godchaux & Sanders and Charles Frank Borah, for appellants. E. Howard McCaleb, Henry Mayer, and Henry D. Smith, for appellees.

PROVOSTY, J. The plaintiffs are the collateral relations of John J. Davenport, deceased. The latter, some 20 days before his death, sent for the principal notary of the parish and executed before him an act acknowledging the defendants as his natural children and legitimating them, and executed also two testaments. In the first he gave the children one-fourth of his estate; in the second he made them his universal legatees. This suit is brought to have these three acts declared to be null and of no effect.

The grounds are:

First. That the notary was not in fact a notary, for the reason that he had not taken the oath or filed the bond required by law.

Second. That the testaments are lacking the requisite number of witnesses, because one of the attesting witnesses did not sign, and another was disqualified by reason of interest, he being the executor named in the will.

Third. That the act of acknowledgment or legitimation is informal, in that it fails to show that no legal impediment existed to the marriage of the parents at the time of conception; or that the deceased had no ascendants or legitimate descendants living, or that the children named were not adulterous or incestuous; and that even the evidence does not show these essential facts.

In the brief, but not in the petition, the further grounds are taken: First, that marriage is the only means of legitimating children; and that, consequently, Act No. 54, p. 63, of 1894, prohibiting marriage between whites and persons of color, has the effect of precluding the legitimation of the issue of the illicit union of such persons; third, that the three acts, when read together, show that the intention was merely to acknowledge the children, and not to legitimate them.

1. The evidence shows that the notary had been duly commissioned, and had taken an oath, and at divers times had filed bonds, and had been acting as notary for 25 years, and was the principal notary of the parish; but that he had failed to file a copy of his oath in the offices of the Secretary of State and of the clerk of court as required by law, and also to renew his bond in time to keep his commission alive. Therefore, at the time of the execution of the acts in question he was not a notary de jure. But we think it would be an intolerable hardship to require everyone who needs the services of a notary to ascertain first, under pain of nullity, whether he has or not filed his oath or bond with the Secretary of State, etc. If the notary is a notary de facto, it is safe to have recourse to him. The adoption of the doctrine of officers de facto was forced upon the courts by just such situations as that presented in this case. Here is a man dying who sends for the principal notary of the parish to receive his last will. It would be a strange law that would in such a case an-

nul the will because the notary had not 25 years before filed his oath in the office of the Secretary of State, or had filed his bond a day or two too late. The validity of acts passed by de facto notaries was recognized by this court in the case of *Monroe v. Liebman*, 47 La. Ann. 155, 16 South. 734. The doctrine of the validity of acts of de facto officers in general is too well established to need to be supported by citation of authorities. In *Citizens' Bank v. Bry*, 3 La. Ann. 631, the validity of the acts of a deputy notary public was recognized.

We are not struck forcibly by the argument that the office which the notary fills comes into existence with and by the commission given him by the Governor, and ends with it; so that when the commission lapses the "office" also vanishes; and that, therefore, it is not properly an "office"; and, as a consequence, there can be no such thing as a notary de facto. True, there cannot be such a thing as a de facto incumbent of an office that does not exist; but there are such officers as notaries public, and if a person holds a commission as one, and acts as one, and has the reputation to be one, he is clearly one under the principle of the law of officers de facto. See 8 A. & E. E. of Law, p. 771 et seq.

In the case of *Cragg v. Westmore*, 13 La. Ann. 344, the notary himself was plaintiff.

2. In the case of *Keller v. McCalop*, 12 Rob. 639, this court said:

"The general principle in relation to the capacity of a testamentary witness is that all persons are capable, with the exception of those who are excluded by express law."

Now articles 1591, 1592, Civ. Code 1900, designate as the persons incapable of being witnesses to testaments, heirs, legatees, women, and persons deaf, dumb, or blind, or under 16 years of age, or whom the criminal laws declare incapable of exercising civil functions. No mention is made of executors.

3. As to the witness who, it is said, did not sign, he gave his name as "Francesco Cutero" and signed as "Fresco Cutero." Parol evidence to show the identity of the two was objected to, but was properly admitted. *Succession of Crouzelles*, 106 La. 442, 31 South. 64. Besides the court would have had no difficulty in reaching the same conclusion from the documents themselves and the attending circumstances.

4. Article 200, Civ. Code 1900, provides as follows:

"A natural father or mother shall have the power to legitimate his or her natural child by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children. But only those natural children can be legitimated who are the offspring of parents who, at the time of conception, could have contracted marriage. Nor can a parent legitimate his or her natural offspring in the

manner prescribed in this article, when there exists on the part of such parent legitimate ascendants or descendants."

The sole requirement here prescribed is that there shall be passed before a notary and two witnesses an act wherein the parent shall declare his intention to legitimate the child. There is no requirement that the act shall negative the existence of the facts which would preclude the legitimation. These facts are in no wise dependent upon the will of the parties, and could not be affected one way or the other by the recitals of the act; the recital of their nonexistence would prove nothing; their proof or disproof is a matter depending upon evidence dehors the act. *Stephens v. Duckett*, 111 La. 979, 36 South. 89. The object of the law in prescribing certain forms for the legitimation is, "to discourage concubinage by compelling the parent to publicly avow his shame before a notary public and witnesses." *Succession of Llula*, 41 La. Ann. 87, 6 South. 555. For the full accomplishment of that object the recital of the nonexistence of the impediments is entirely unnecessary.

5. So far as concerns the absence of the evidence on the subject of the existence vel non of these impediments, the presumption is that they did not exist; and, in the absence of contrary proof, the court will so assume. Moreover, the act itself carries with it an assertion of their nonexistence, for presumably it would otherwise not have been passed.

6. The argument that children can be legitimated only by marriage, or, in other words, that children legitimated otherwise than by marriage have no better legal status as heirs than children merely acknowledged, cannot receive our sanction. The chapter of the Code devoted to illegitimate children is divided into two sections. The first section treats of legitimation. The second treats of the acknowledgment of illegitimate children. If one meant no more than the other, why this separate treatment? All the articles of our Code on the subject of acknowledgment stood just as they stand today, when the Legislature passed the acts of 1831 (page 86, No. 37) and No. 68 of 1870 (page 96) providing for the legitimation of children. If this legislation was to have no effect, why take the trouble of it?

In the case of *Marlonneaux v. Dupuy*, 48 La. Ann. 496, 19 South. 466, the court found on the facts of the case, that the deceased had not intended to legitimate his children, but only to acknowledge them; hence all that may have been said in that decision touching the effects of legitimating must be considered as obiter. Moreover, it is not true that there is no provision of our law which confers upon legitimated children the right to take the inheritance of their parents. Section 2173 of the Revised Statutes confers it upon them in express terms, as follows:

"They who are therein mentioned as being legitimated, can inherit both the estates of their fathers and other relations."

There is nothing in these statutes that would go to show that the lawmaker did not intend to use the word legitimate in its ordinary sense, and that is to make legitimate, or, in other words, to give the status of a child born in wedlock. Article 199, Civ. Code, which provides that "Children legitimated by a subsequent marriage have the same rights as if they were born during marriage," seems to make a distinction between legitimation by marriage and by notarial act; but it was written at a time when marriage was the only mode of legitimation; and it has therefore to be read in the light of that fact. When the subsequent laws were passed providing the other mode of legitimation, there was no intention of creating a different class of legitimated children, a class possessed of no greater rights than children merely acknowledged.

7. As to whether the intention of the deceased was to legitimate or merely acknowledge his children the acts are not as explicit as they might have been. The recitals of the acts are as follows:

The act of acknowledgment and legitimation:

"The said appearers declare that they do hereby and by these presents make acknowledgment of said children and do hereby legitimate them.

"They further declared that they desire and it is their wish that they inherit from them their property the same as if said illegitimate children had been born in lawful wedlock.

"That they do legitimate said children as is contemplated by article 203 of the Civil Code of 1900, of this State."

Will written on same day:

"My name is John Junior Davenport. I have no no ascendants nor descendants. I have six children, which I have this day acknowledged by public act before Henry Mayer, notary public, and whose names are as follows: Bettie Davenport, Emma Davenport, wife of Charles Stansberry, John F. Davenport, Blanch Davenport, Henry Davenport, and James Davenport. I will and bequeath to my said children, share and share alike, one-fourth of all the property that I may die possessed of, movable and immovable, real and personal. I appoint Thomas W. Tarleton and Charles Stansberry the executors of this my last will. I revoke and set aside all other wills made by me."

Second will:

"My name is John J. Davenport. I have no living ascendants nor descendants, save and except six children, who I have legally acknowledged and legitimated whose names are as follows: Bettie Davenport, Emma Davenport, wife of Charles Stansbury, John F. Davenport, Blanch M. Davenport, Henry N. Davenport, and James W. Davenport.

"I will and bequeath to each of my said duly acknowledged & legitimated children, share and share alike, all the property movable and immovable, real and personal, I may die possessed of.

"I appoint Thomas Wyatt Tarleton and Charles Stansbury executors of this my last will and testament, and I do hereby revoke and set aside all former wills made by me."

We think that the result from these three documents is that the deceased intended to legitimate his children. Davenport certainly meant what the words "as if born in lawful wedlock" mean; and possibly did not know what article 202 of the Civil Code of 1900 meant. The parol evidence shows beyond question that such was the intention; but there is no need of going into it or of considering the question of whether or not it was admissible.

Judgment affirmed.

(116 La.)

No. 16,157.

Interdiction of WATKINS.

In re MUTERSBAUGH.

(Supreme Court of Louisiana. May 21, 1906.)
APPEAL — SUSPENSIVE APPEAL — RECUSATION OF JUDGE — INTERDICTION.

As the law provides that a judgment relating to the nomination of a curator of a person interdicted shall be executed provisionally, it follows that a judgment upon the question of the recusation vel non of the judge to whom the question of the nomination is presented must fall under the same rule, and hence that a suspensive appeal does not lie from such judgment.

(Syllabus by the Court.)

In the matter of the interdiction of Jabez Bunting Watkins. Application of Grant Mutersbaugh for writ of mandamus and certiorari.

J. W. Baker, Morris Reese Stewart, and Miller, Dufour & Dufour, for relator. McCoy & Moss and Robert L. Knox, for respondent.

MONROE, J. Relator alleges that at his instance his uncle, Jabez Bunting Watkins was interdicted, and that he (relator) was appointed administrator pro tempore of his estate; that the judge of the district court, ignoring his rights, convoked a family meeting to advise with regard to the appointment of a curator, and that the family meeting recommended the appointment of the Commercial Germania Trust & Savings Bank Company of New Orleans; that relator opposed the homologation of the proceedings and moved to recuse the judge in the matter of said opposition, on the ground that he had appeared before the family meeting and "advised them of their duties and what he believed to be the law in this case," and had stated "that the curatorship was a dative one and that they could appoint a nonresident"; that, over the objections of relator, the judge appointed A. R. Mitchell, a member of the bar and resident of the parish, judge ad hoc to hear and determine said motion, and that said Mitchell, after hearing, overruled the same; that relator thereupon moved for an appeal, suspensive and devolutive, from said judgment and that the suspensive appeal was denied. Wherefore he prays that writs of certiorari and mandamus issue, and that said

judge ad hoc be commanded to grant the suspensive appeal as prayed for. Among the exhibits attached to the petition are certain excerpts from the minutes of the court, from which it appears that the ruling of the judge ad hoc was based, in a general way, on Civ. Code, art. 395, which provides that "every judgment by which an interdiction is pronounced shall be provisionally executed notwithstanding an appeal"; the learned judge being of opinion that the rule thus established should be applied to the judgment in question. We concur in this view. Civ. Code, art. 404 et seq., regulate the time and manner in which the curator of an interdict shall be appointed, and Code Prac. art. 580, provides that "some judgments, however, are executed provisionally, although an appeal has been taken from the same within the delay prescribed, and the necessary surety given. Such judgments relate: (1) To the nomination of tutors and curators of minors, of persons absent or interdicted, and of vacant successions. (2) To the appointment of syndics of creditors, when the court orders that they shall administer provisionally." If, therefore, the final judgment, appointing the curator, or, rather, if any judgment relating to the appointment of the curator, is to be executed provisionally, it follows, we think, that a judgment upon the issue of the recusal vel non of the judge to whom the question of the appointment is presented must fall under the same rule. The case is distinguished from that of *State ex rel. Stewart v. Reid*, 115 La. 959, 40 South. 369, and from that of *State ex rel. Poche v. Judge*, 42 La. Ann. 319, 7 South. 586, in that we are here dealing with a judgment which, under the law, is to be provisionally executed notwithstanding the appeal, and from which, therefore, no suspensive appeal lies.

The writs prayed for are accordingly denied.

(116 La.)

No. 16,158.

Interdiction of WATKINS.

In re MUTERSBAUGH.

(Supreme Court of Louisiana. May 21, 1906.)

In the matter of the interdiction of Jabez Bunting Watkins. Application by Grant Mutersbaugh for prohibition and certiorari Denied.

J. W. Baker, Morris Reese Stewart, and Miller, Dufour & Dufour, for relator. McCoy & Moss and Robert L. Knox, for respondent.

PROVOSTY, J. The relator filed a petition for the interdiction of his uncle, and applied to be appointed his curator. The judgment ordered a family meeting to be held, and, same having been held, the relator opposed the homologation of the proceedings and recused the judge. The judge referred the rec-

usation to a judge ad hoc, and the latter overruled same. The relator moved for a suspensive appeal, and, same having been denied, applied to this court for a mandamus, and at the same time filed the present application for prohibition and certiorari as ancillary to the mandamus proceeding. The mandamus having been refused by a decree this day handed down, (41 South. 242), the present application must also be denied.

Application denied.

(116 La.)

No. 15,998.

O'MEALLIE et al. v. MOREAU.

(Supreme Court of Louisiana. May 7, 1906.
Rehearing Denied May 21, 1906.)

1. DAMAGES—BREACH OF CONTRACT—VEXATION—ELEMENT OF DAMAGES.

When plaintiffs and their guests, 100 in all, got off of the train at Milneburg, they found that the Lake Breeze Park, which they had engaged from defendant for their picnic, was occupied by another picnicking party. Defendant tendered them another, but less eligible, place, which they refused to take. For their disappointment, annoyance, vexation, and mortification, they are allowed \$75 damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 100.]

2. DAMAGES—BREACH OF CONTRACT.

Though a breach of contract has happened through an honest mistake, yet the actual damages caused by it must be allowed.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durlieve King, Judge.

Action by Harry O'Meallie and others against Charles Moreau. Judgment for defendant, and plaintiffs appeal. Reversed, and judgment ordered for plaintiffs.

Louis R. Hoover and Edward Alexander Parsons, for appellants. Charles Joseph Thérard, for appellee.

PROVOSTY, J. The plaintiffs, 20 in number, compose a loosely organized social club called the "Rounders," whose purpose is to give entertainments, balls, picnics, etc. For giving one of their picnics the plaintiffs engaged, three weeks in advance, the pavilion of defendant, known as "Lake Breeze Park," at Milneburg. Some days later, hearing that the place had been engaged for the same day by another similar, and to some extent rival, club, known as the "Leading Six," plaintiffs sent a committee to defendant to find out what truth there was in the report, and were assured by defendant that they need have no fear, that the place was reserved for them. Still later they discovered that the Leading Six were issuing tickets for a picnic at the same time and place as theirs, and again they sent a committee to defendant, and were again and positively assured that the place was not engaged to the Leading Six, and that the Rounders could depend upon having it.

Early on the morning of the day of the picnic two of the plaintiffs drove out to Milneburg with the eatables, in order to prepare everything in advance. They were informed by defendant that a mistake had been made, that the Lake Breeze Park had already been engaged to the Leading Six when the Rounders had applied for it, and that the Leading Six were in possession; but that the Rounders could have Kranz's Hall, which had been secured for them, and which was just as good. The two precursors went and inspected Kranz's Hall, and were not satisfied with it. They found that it was four blocks from the railroad station, and that the access to it was by a pathway grown up in weeds and somewhat muddy. Not knowing what to do, they awaited the arrival of the train on which the other members of the club and their guests, in all about 100, were to come.

When the latter arrived, their disappointment, as might be expected, was great. There was a deliberation as to what to do; and it was decided not to take Kranz's Hall. Some of the members said they had attended a picnic there on a previous occasion when it had rained, and the water had invaded the floor. This consideration, it would seem, weighed all the more because the day was threatening. Finally, after about an hour and a half of indecision, they concluded to take a place known as O'Mallon's, and there they had their picnic.

Defendant admits the breach of contract; but pleads that it was through an honest mistake, and that he minimized to nothing the consequences of his mistake, since he tendered to the plaintiffs Kranz's Hall, which was just as good a place. He deposited in court the money which plaintiffs had paid him, being \$4, one-half of the rental of the place, paid in advance, and deposited also the amount of the costs incurred up to the moment of the filing of the answer.

Five of the plaintiffs testified. They evidently sought to magnify the disappointment caused to the club and its guests at being shut out from the pleasant Lake Breeze Park and having to put up with O'Mallon's, and the annoyance and mortification of themselves and associates of the club at the contretemps. "Even now," they say, "when our friends meet us they twit us about our picnic, and ask us when we are going to give another." But, after every allowance and deduction is made, the fact remains that, despite their extraordinary precautions, they and their guests were sorely disappointed, and that they, as hosts, were subjected to some annoyance and mortification, and that their and their friends' day's pleasure was to some extent marred.

Defendant offered no evidence except his own testimony, which is to the effect that the mistake was an honest one, and that Kranz's Hall is just as good as Lake Breeze Park.

In the lower court the plaintiffs were given not even the traditional one cent damages.

They were given judgment for their \$4, and for the costs incurred up to the moment of the tender of this \$4. In other words, the court held that the defendant's breach of contract did not give rise to a cause of action.

We think that even upon the facts as stated by defendant himself the sole possible question is as to the quantum of damages. There cannot be a breach of contract without a cause of action. The theory of the judgment of the lower court must be that plaintiffs had no cause of action; had no right to vex the ear of the court with their complaint of disappointment, annoyance, vexation, and mortification. We imagine that if the bankers of New Orleans were to retain Tranchina's at West End for some function or other, and on reaching the place with their guests were blandly informed that the Bar Association, or some other body, were having a banquet in the place, and that the last comers would have to go to a neighboring place that was "just as good," or, vice versa, if the gentlemen of the bar happened to find the princes of finance in possession and were requested to be content with some second choice, but "just as good" a place, there would be considerable annoyance and vexation, which the victims would feel it would take a considerable sum of money to offset. The Rounders are an humbler set, but their complaint has to sound just as loud in the ear of the court.

It is not a question of their getting rich out of the mishap, or of ruining Mr. Moreau for his unpardonable blunder, but simply of awarding such a judgment as will serve as a recognition of the legal situation. Only actual damages can be awarded, and only the minimum which we take to be \$75.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and it is now ordered, adjudged, and decreed that there be judgment in favor of plaintiffs and against defendant, Charles Moreau, for the sum of \$75, with legal interest from this date, and in the further sum of \$4, with legal interest from judicial demand, and for costs of suit.

(116 La.)

No. 15,861.

BANK OF PATTERSON v. URBAN CO. et al.
(Supreme Court of Louisiana. April 23, 1906.
Rehearing Denied May 21, 1906.)

COSTS—PARTIES LIABLE.

In a revocatory action coupled with an attachment, the defendant in the revocatory action is liable in solido with the principal defendant for the costs of the attachment. The suit is a unity, and, moreover, has been made necessary by his acts.

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Action by the Bank of Patterson against the Urban Company and others. Judgment for plaintiff, defendants appeal. Affirmed.

Foster, Milling, Godchaux & Sanders, for appellants. Borah and Bell. O'Neill & Alpha, for appellee.

PROVOSTY, J. The Urban Company, Limited, being insolvent, its president, C. F. Borah, and one of its creditors, M. Bell, entered into an arrangement by which M. Bell should buy up the claims against the company, except that of the plaintiff, and should bring a suit which by the connivance of the Urban Company, Limited, would be brought to judgment as quickly as possible, in order that by a seizure under it there should be secured for the claims thus bought up, and that of M. Bell, a seizing creditor's privilege on the property of the Urban Company, Limited, entitling said claims to be paid by preference over the claim of the plaintiff out of the proceeds of the sale of the property. The underlying motive of this scheme was that C. F. Borah, president of the Urban Company, had made himself personally liable on the debts for which a preference was thus to be secured. The scheme was carried out up to the point of the making of a seizure. At that stage of the proceedings, the Bank of Patterson brought the present suit. The foregoing facts are alleged, and an attachment of the same property is prayed. It is denied that an actual seizure was made. It is alleged that the judgment and the proceedings under it are null and void; and the prayer is that the company and Borah and Bell be cited, and that the said judgment and pretended seizure be annulled, and the property attached be sold, and the claim of the petitioner be paid by preference out of the proceeds of the sale.

A few days thereafter the plaintiff, by supplemental petition, obtained an injunction against any further proceedings under the alleged fraudulent seizure.

The Urban Company moved to dissolve the attachment, and the motion was fixed for trial. On the day of the trial M. Bell filed a motion to dissolve both the injunction and the attachment. The case was tried on the motion to dissolve the attachment, and the attachment was dissolved. It is said that the attorneys of M. Bell did not take part in the trial. That statement is true of the attorneys whose names are signed to the pleadings of M. Bell, but these attorneys had merely lent their names, and the real attorneys were those of C. F. Borah, who was the real party in interest. On appeal to this court (38 South. 561) the judgment dissolving the attachment was set aside and the attachment was reinstated. The case was then tried at one and the same time on the merits and on the motion to dissolve the injunction, and judgment was rendered in favor of plaintiff maintaining the attachment, perpetuating the injunction, annulling the judgment

and seizure in the Bell suit in so far as creating a privilege upon the property attached, decreeing that plaintiff's claim be paid by preference out of the proceeds of the sale of the property, and condemning the defendants, the Urban Company, Limited, C. F. Borah, and Mathew Bell, in solido, to pay the costs of suit.

From that judgment the defendants, Borah and Bell, have appealed, and they contend that they have been improperly condemned to pay the costs of the attachment.

We think otherwise. The suit was a unity, and was equally against all three defendants, who by their acts had made it necessary. The judgment in the entire suit, and in every part of it, is against all three, and judgment carries costs. Moreover, it is not so clear that defendants are not liable for the costs under the doctrine that persons who assist an insolvent debtor to defraud a creditor are liable to the latter in solido for whatever loss or damage their unlawful act may have entailed upon him.

It is suggested that, since the appeal was taken, the property attached has been sold, and that the costs in question have been paid out of the proceeds of the sale, by direction of the plaintiff's counsel; and that, therefore, the judgment has been satisfied, and there is nothing now for the court to adjudicate. The only matter involved in the present suit is the correctness vel non of the judgment rendered. What may happen hereafter in the course of the execution of the judgment is not a matter of present concern.

Judgment affirmed.

(116 La.)

No. 15,928.

SEGARI v. MAZZEI et al.

(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied May 21, 1906.)

PRINCIPAL AND SURETY—CHANGE OF CONTRACT—RELEASE OF SURETY.

A mere change in the site of a dwelling house, to be constructed under a contract, from one place to another in the same square, for the accommodation of the owner, and without causing any additional expense to the contractor, is not such an alteration of the contract as will discharge the surety of the contractor.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durlevie King, Judge.

Action by Simon Segari against Frank D. Mazzei and others. Judgment for plaintiff, and to obtain a correction therein he appeals. Judgment amended and affirmed, and judgment in favor of the surety company reversed.

Charles Rosen and Benjamin Rice Forman, for appellant. Frederick Sussman Wels and Saunders & Gurley, for appellees.

LAND, J. Plaintiff made a contract with Frank D. Mazzei, a builder, for the construc-

tion of a two-story frame building "on the property belonging to said Segari situated on Park Place near City Park avenue, formerly Metairie Road," in the Second District of the city of New Orleans.

The Aetna Indemnity Company intervened in the act through its agents, who declared that they have taken cognizance of the foregoing contract and of the plans and specifications and "bind said company as surety for said builder jointly and in solido with him unto said Segari, up to the sum of \$8,600, for the prompt, faithful, and correct execution of the foregoing contract, according to its true extent and meaning, for the prompt and faithful payment of the laborers employed upon the work, and of the furnishers of materials used in the construction thereof, and also of the subcontractors, for whatever amount may be due them for work done, labor performed, and supplies and materials furnished to said building."

At the time the contract was signed, Segari owned certain lots on Park Place. He subsequently purchased lots on City Park avenue, in the immediate vicinity.

By agreement with Segari, the builder proceeded to construct the house on the last-mentioned lots, but abandoned the job before the building was finished.

After putting the contractor and the indemnity company in default, Segari finished the building according to the contract, and at a cost of \$1,911.53 over and above the balance of the price retained by him, including demurrage.

There were a number of bills of subcontractors and materialmen recorded against the building.

Segari sued Mazzei and the indemnity company to recover the said sum of \$1,911.53, and to compel them to pay and discharge the recorded bills aforesaid. Subsequently the subcontractors and materialman sued Segari, who on the advice of counsel paid their claims, with subrogation. Segari then by amended petition sought to recover judgment against the defendants in solido for the sums so paid. The defense of the indemnity company to the original demand was nonliability, on the ground that the bond covered a building to be erected on a different square of ground from that on which the building was actually constructed.

The indemnity company excepted to the amended petition, on the grounds that it changed the issues and came too late after evidence had been adduced on the original demand and answer. The exception was overruled, and evidence was adduced on the amended petition, to all which the indemnity company objected and reserved proper bills of exception.

Judgment was rendered in favor of the indemnity company, and plaintiff has appealed.

The amended petition did not change the issue.

Whether the indemnity company paid the recorded claims to the original owners or to plaintiff, as their assignee with subrogations, was immaterial to the issue of liability.

The substance of the demand was not altered. Code Prac. art. 419. The time of the allowance was a matter in the discretion of the trial court. A ruling which causes mere delay in the proceedings is not reviewable on appeal.

The crucial question in the case is whether the indemnity company was relieved from liability by the change in the contract as to the place whereon the building was to be constructed.

It is to be noted that the place is not otherwise described than "as property belonging to said Segari situated on Park Place near City Park avenue."

When the contract was signed the plaintiff owned four lots fronting City Park Row.

The house was constructed on two lots in the same square fronting on City Park Boulevard, which plaintiff acquired after the contract was executed.

We assume that the term "Park Place" was used to designate the small subdivision, although no such name appears on the plat filed in the record.

Hence, the contract on its face does not show where the property was located save by reference to "Park Place," which itself is not identified on any map or plat. It is true that by investigation and inquiry we can ascertain that the parties had in their minds the square or subdivision fronting on City Park Boulevard and the lots belonging to the plaintiff on City Park Row.

But these lots are not described with sufficient certainty to identify them. "Property" is a very vague term and is used in the contract to indicate ground of some kind belonging to the plaintiff. The record of the act conveyed to third persons no notice of the particular piece of ground in contemplation of the parties.

Under the vague description in the contract, the particular location of the building was not fixed or determined.

On the face of the instrument it does not appear that the particular site of the building was of any importance, as the parties contented themselves with indicating a subdivision without describing any particular portion thereof. As to the builder and his surety, they had no interest in the particular location of the building, provided the plaintiff owned the ground on which it was to be erected.

Plaintiff's obligation was to furnish the necessary ground in Park Place for the erection of the building. Provided plaintiff furnished the site as soon as the contractor was ready to commence work, the latter and his surety had no right to complain.

Counsel for the indemnity company rely on the case of *United States v. Boecker*, 21 Wall. 652, 22 L. Ed. 472. That case was a

sult against a surety on a distiller's bond, which recited that a certain person was about to be a distiller at the corner of two certain streets, and it was shown that he had established a distillery four squares distant from the place mentioned. A majority of the court decided that the surety was not liable for taxes assessed against the defendant in respect to his business of distilling carried on at a place different from the one nominated in the bond. In the majority opinion, it is stated that the statute required the distiller to give the assessor notice of the place where the business was to be carried on, and that "the designation of the place is made important to the distiller, to his sureties, and to the government in several respects." The court reached the conclusion that the designation of the place was of the essence of the contract, and that, no distillery having been carried on at the place named in the bond, the contract never took effect.

The view of the minority, consisting of four justices, was that the designation of the place was no part of the substance of the condition, which was that the distiller was going to engage in the business of distilling in the district, and that the sureties guaranteed his compliance with the law.

In *Miller v. Stewart*, 9 Wall. 681, 6 L. Ed. 189, a deputy collector of taxes gave a bond with surety for eight townships.

There was afterwards another township interlined, making nine in all. The court properly held that this was a change in the contract which released the surety, as it increased his liability.

In the case at bar, there has been no change in the stipulations of the contract, and the only question for solution is whether the place vaguely designated in the contract as the site of the proposed building is of the substance of the obligation. We do not think so, for the reasons already stated.

It was a matter of no importance to the contractor or surety on what particular lots in the subdivision the house was erected.

Neither the contractor nor the surety made any objections to the construction of the building on the lots purchased after the contract was made. The house was constructed under the terms of the contract and in accordance with the plans and specifications attached thereto. If the contractor had finished the building pursuant to the terms of the contract, all of its obligations would have been discharged.

The contention that plaintiff, after having consented to the erection of the building on a particular site, could have compelled the contractor to duplicate the structure on the site first contemplated, is without merit.

It might as well be argued that a purchaser, having consented to receive the property at a place other than that designated in the contract, can compel a second delivery. The

place of performance may be waived without affecting the binding force of a contract.

The consent change of location did not alter the obligation of the contractor to build or the obligation of the owner to pay for the work.

The Supreme Court of the United States, in speaking of the discharge of a surety on account of some changes by agreement in the execution of a contract, said:

"There must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract, without the surety's consent, to produce that result." *Benjamin v. Hillard*, 23 How. 149, 16 L. Ed. 518.

In the case at bar the site was of no importance to the contractor or the surety, and the change of site was merely a matter of accommodation to the owner, and did not alter or change the building contract in any material point.

The following items are established by the evidence, and we give dates from which interest, at the rate of 5 per cent. per annum, commences to run, viz.:

	Amount	Interest from
Cost of finishing house and demurrage	\$1,911 53	April 10th, 1905
Bill Jas. Demourelle & Sons.	510 75	" 15 "
" Zimmerman Bld. Co....	28 50	" 15 "
" Lormier Co.....	171 25	" 15 "
" Albert Brandin.....	297 00	" 20 "
" Chas. Stopper.....	275 00	" 20 "
" Henry Mansion.....	384 80	" 20 "
" J. J. Zeigler.....	150 00	" 20 "
" H. F. Lewis & Co.....	305 75	" 22 "
Total	\$4,032 58	

The Durand claim is established by the evidence, but we can find no transfer of the account to the plaintiff. His testimony to payments is general and refers to transfers filed in evidence.

The claim of J. V. Rocca for \$923.12 and the claim of A. Baldwin & Co., for \$115 are shown to be correct as to amounts, but there is no satisfactory evidence that any definite amount of the materials furnished were used in the construction of the building.

Plaintiff will be nonsuited on the foregoing three items. The surety under the terms of the contract is bound only for materials used in the construction of the building.

Plaintiff obtained judgment against the defendant Mazzel, and has appealed therefrom to correct and fix the dates from which interest is to run.

It is therefore ordered, adjudged, and decreed that the judgment against Frank D. Mazzel be amended so as to make interest commence to run on the sum of \$923.12 from April 20, 1905, and on the sum of \$115 from April 28, 1905, and on the sum of \$90.13 from June 8, 1905, and on all other sums as hereinbefore stated, and that as thus amended said judgment be affirmed; and it is further ordered, adjudged, and decreed that the judgment in favor of the Aetna Indemnity Company be reversed, and it is now ordered and

decreed that the plaintiff, Simon Segari, do have and recover of the said Aetna Indemnity Company, defendant herein, the full sum of \$4,032.58, with legal interest on the sums and from the dates set forth in the foregoing opinion, and costs of suit; and it further ordered and decreed that plaintiff's demand as assignee of Gilbert Durand, A. Baldwin & Co., and J. V. Rocca, be dismissed as in case of nonsuit, and that defendants pay costs of appeal.

(116 La.)

No. 15,801.

SIMMONS v. SHREVEPORT GAS, ELECTRIC LIGHT & POWER CO., Limited,
et al. **SMULLINS v. SAME.**

(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied May 21, 1906.)

**ELECTRICITY—MAINTENANCE OF WIRES—NEG-
LIGENCE.**

Due care requires of those using wires or conductors of electricity so to place and maintain them with reference to similar conducting agencies that dangerous contact be not probable; and where wires maintained concurrently by different parties are so erected or strung that they are likely to touch, possibly with destructive consequences, either or both parties must make efforts to remedy such dangerous condition, and if an injury occurs through the neglect of such duty, both are liable.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, § 9.]

Breaux, C. J., dissenting in part.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Actions by J. B. Simmons against the Shreveport Gas, Electric Light & Power Company, Limited, and the Shreveport Telephone Company, and by J. M. Smullins against the same defendants. Judgments for plaintiffs, and defendants appeal. Affirmed.

Alexander & Wilkinson, for appellant Shreveport Gas, Electric Light & Power Co. Wise, Randolph & Rendall, for appellant Shreveport Telephone Co. Hall & Jack, for appellees.

PROVOSTY, J. The wires of the two defendant companies are on the same side of the street. The telephone company's posts are taller than those of the electric light company, and its wires are strung 10 feet higher. For connecting with a house on the other side of the street two of the telephone wires were run slanting downward to a lower post on the same side of the street a distance of about 80 feet, then across the street to the house, then down the side of the house, and finally under the house, two feet from the ground. On their way downward they passed through the fleet of wires of the electric light company. This brought one of them so close to one of the heavily charged wires that the two would touch in oscillating; and the

result was that the insulation of the heavily charged wire was either worn off or burnt off, and that the otherwise harmless wire going to the house became itself dangerously charged. This situation had lasted more than nine months, and the telephone had been removed from the house for more than three months, when the accident occurred which has given rise to this suit.

The two little sons of the plaintiffs in these suits while at play near the house came in contact with the wire. Both were knocked senseless, and remained unconscious some time. Young Simmons soon revived. His only other injury was a burn in the hand which necessitated his carrying the member in a sling for two months, and which has left no trace except a large scar across the palm and a slight contraction of the web between the thumb and the forefinger, such as will affect the use of the hand but very little. Young Smullins remained unconscious for four hours. The little finger of his right hand was burnt off entirely; the next finger was so burnt as to have to be amputated just below the first joint; it, or what is left of it, and the middle finger are now bent rigidly inward, useless and deformed, crooking sideways; the end of one a stub, and the end of the other shrunk, and dwarfed, and peaked. In addition to this, his scalp was burned a space some five or six inches in diameter, and through the skin, and through the outer layer of bone, which afterwards sloughed off. Two months after the accident an operation became necessary, and a circle of four or five inches of the dead bone was cut off. At the time of the trial, which was six months after the accident, the physicians thought the wound would heal in about seven or eight weeks; but that grafting might become necessary, and that the place would remain permanently bald.

The defendants are sought to be held responsible in solido. The telephone company admits its negligence, and its liability for whatever amount of damages the nature of the case may warrant. It complains, however, of the award of the jury as excessive. That award is \$500 in the Simmons Case, and \$8,150 in the Smullins Case. If the verdict had been somewhat less the court would, perhaps, have liked it better; but it is not so manifestly excessive as to require reduction.

The negligence charged against the electric light company is that it tolerated this faulty and dangerous construction, and thereafter failed to keep its own wires sufficiently insulated to prevent the transmission of the current.

On the side of the company it is argued that it does not suffice for a plaintiff to make his case probable, that he must make it certain, and that the plaintiffs in this case have failed in making their case certain, because, for all that appears, the insulation on the

electric light wire may have been burnt off so recently that the company had not had time to discover the defect; and that this view of the case is rendered all the more probable from the fact that the company's system of construction was of the best and its mode of insulation of the most approved kind; and that the preceding day had been a wet day, when the burning of the insulation might have taken place.

It is further argued that conceding negligence on the part of the electric light company, such negligence was not the proximate cause of the injury; but that the proximate cause was the subsequent intervening and independent act of the telephone company, first, in leaving the wires in position after the removal of the phone, when they had ceased to be of any utility; and, secondly, in not properly insulating them. It is urged that the city ordinances required the telephone wires to be insulated, and that the electric light company had the right to assume that the telephone company would do its duty.

In answer to this argument we will say that, as a matter of fact, it is not true that the situation would have been without danger if the telephone wires had been properly insulated and the phone not removed; the evidence shows the contrary. The construction was originally and in itself so manifestly dangerous that the president of the electric light company says he would have protested against it if he had known of it. Such being the case, it can make no difference whether the insulation had worn off or burnt off. Indeed, if defendant's electrician is to be believed that in wet weather the insulation becomes soft and lets the current through and burns off even on slight contact with another wire, the construction was all the more dangerous, for in that case insulation would have been no protection. But, as a matter of fact, the insulation, whether by rubbing or burning, had been off for some time when the accident happened; the wires were worn bright where they touched, which shows that they must have been rubbing against each other for some time; long enough, surely, for the company to have had ample time in which to have discovered the defect, by proper inspection, and corrected it.

But we prefer to rest the case on the incontestable ground of the failure of the electric light company to have known of and remedied, this defective construction which had been a standing menace for more than nine months. The law on the subject is well stated in the following excerpt from 15 Cyc. 474, founded in part on the decision of this court in the case of *Hebert v. Lake Charles Ice Co.*, 111 La. 522, 35 South. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505, to wit:

"Due care requires of those using wires or conductors of electricity so to place and maintain them with reference to similar conducting agencies that dangerous contact is not probable; and, where wires maintained concurrently by

different parties are so erected or strung that one is likely to fall upon or come in contact with the other, thereby producing possible destructive consequences, either or both of them must make efforts to abate such dangerous condition, and if an injury occurs through a neglect of such duty, both are liable."

The legal situation of electric light and power companies sending this potent fluid along their wires may be illustrated by comparing it to that of a showman conveying a caged tiger through the streets of a crowded city. The showman must not only make sure of the cage, and not himself open the door, but be vigilant in seeing that nobody else opens the door. He could hardly expect that he would be heard to plead that some negligent person had opened the door. Of course, the situation is incomparably more complicated in the case of an electric light or power company with its system of wires pervading an entire city, and the appreciation of the facts in particular cases may be proportionally more difficult; but the principle is the same. Indeed, the prisoner of the company is more sleepless and subtle and in its stroke more quick and sure, whence the need of even greater vigilance in keeping it safe within its prison wire.

Under this view of the matter the negligence of the electric light company continued down to the moment of the accident, and hence was its proximate cause.

We have not looked into the complaints against the charge of the judge. They would be no ground for remanding the case even if well founded. Where all the evidence is in the record this court must proceed to pass on the case finally. *Hennen*, p. 92, No. 5.

Judgment affirmed.

BREAUX, C. J. I concur in the opinion and decree, and dissent only regarding the amount. I think it is excessive.

(116 La.)

No. 15,882.

BURNS v. CRESCENT GUN & ROD CLUB.

(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied May 21, 1906.)

1. NAVIGABLE WATERS — WHAT CONSTITUTE.
A stream is not navigable unless its navigability is shown by evidence; i. e., navigability is a question of fact.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 16.]

2. INJUNCTION — NAVIGABLE WATERS — OBSTRUCTING USE.

One of the streams is navigable, to that extent the injunction sued for by plaintiff is maintained.

3. SAME.

It does not appear that the other streams and waters are navigable, although it appears that occasionally pirogues and skiffs have been pulled over them. The ponds and bayous are grass-choked bodies of water.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 7, 9.]

4. SAME.

They do not form part of the lake or its shores. Their waters are not those of the lake, although they at times feel the pulsations of its tide. They are containers of fresh water, and drain prairies and bayous.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, § 8.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by P. H. Burns against the Crescent Gun & Rod Club. Judgment for defendant, and plaintiff appeals. Affirmed.

William V. Seeber and J. Zach. Spearing, for appellant. Philip Stevens Gidlère, for appellee.

BREAUX, C. J. The petition sets forth substantially the following cause of action:

The right of fishing in Irish Bayou, Little Irish Bayou, Second Branch Bayou, and Bayou Castiglione; all near Lake Pontchartrain, within the limits of the parish of Orleans, near the city of New Orleans.

Petitioner avers that he and a number of others have for many years been engaged in fishing in the waters near Lake Pontchartrain for profit and pleasure. He alleges that the defendant club, its officers, members, and agents, have prevented him and others not members of the club from fishing in these waters.

An injunction was issued at his instance, enjoining the club from interfering with his rights and that of others to fish in these waters.

The defendant claims that it is in legal possession of all the lands in which these bodies of water are situated. It claims the sole and exclusive right to fish in these waters and to prevent others from fishing therein. Defendants aver that they are unnavigable bodies of water within their lands, and that they form an integral part of their premises.

According to a chart of the United States in evidence, Irish Bayou is on the east side of a point which extends into Lake Pontchartrain and connects by water with Irish Lagoon, and through the lagoon connects with Bayou Castiglione, which connects to the west of the point or strip of land with Lake Pontchartrain.

The lagoon is a large pond or diminutive lake.

The contention of plaintiff is that these form a chain of streams that have been navigable and that are still impressed with the character of navigability; that they are a cutoff in the navigation of Lake Pontchartrain.

In the acts for the admission of the states of Louisiana and Mississippi into the Union it was declared that the river Mississippi and the navigable rivers and waters leading into same or into the Gulf of Mexico shall be common highways and forever free. Act Feb. 20, 1811; c. 21, § 3, 2 Stat. 642.

Evidently the owner, in letting out the property in question, was decidedly impressed with the idea that there were navigable waters within the limits of his land, for the act of lease contains the following:

"Lessees bind themselves not to obstruct the navigation in any navigable streams on the property."

The only streams on the land are those before mentioned.

It is not very long since the defendant began to insist upon the right to fish in the waters before named and upon the right to exclude all others.

As well state at this time that witnesses stated that perch, green trout, or black bass, distinctly fresh-water fish, are the inhabitants of the bayous and lagoons, and that there are no salt-water fish in the lagoons and bayous, different from the fish in the lake, which are commonly speckled trout, sheep-head, and other salt-water fish.

The waters in the various bayous are affected by the ebb and flow of the tide from the lake. Irish Bayou is a large bayou of about 200 feet in width and at least 15 feet in depth. Irish Lagoon is a grassy body of shallow water, about a mile in length and a half a mile in width.

Our brother of the district court, in a well-considered opinion, held that the lagoons and small bayous are not navigable, but that Irish Bayou is navigable, and rendered judgment sustaining plaintiff's injunction as to Irish Bayou, and rejected the remainder of the demand.

Plaintiff appealed. Defendant answered the appeal, and asked for an amendment of the judgment.

We meet with no difficulty in holding that Irish Bayou, by reason of its width and depth, is a navigable stream. We readily agree with the opinion of the district judge to which we have just referred.

When the owner by the term of his lease, made some time ago to the defendant, specially, as we have before mentioned, referred to the navigable streams which he desired protected, he must surely have intended Irish Bayou, which is a deep and large bayou, capable of receiving vessels of large tonnage. It is a safe harbor, and has received storm-tossed boats and afforded them ample protection. It is a large indentation on the coast of the lake and is in that light highly useful. It, as well as the lake, is an arm of the sea, not susceptible of private ownership.

It has long since been held that Pontchartrain is an arm of the sea. *Milne v. Girodeau*, 12 La. 325. Reaffirmed in *Zeller v. Yacht Club*, 34 La. Ann. 839.

Irish Bayou, being as deep as the lake, directly connected with it, as a harbor is as useful as the lake itself.

This disposes of Irish Bayou.

We are brought to the other waters, notably, Irish Lagoon, Little Irish Bayou, Second Branch Bayou, and the Bayou Castiglione.

We will, in a few words, eliminate Irish Lagoon from consideration. It is filled with sea grass nearly all the year, by which it is choked and through which the passage is possible in pirogues, and small boats only with some exertion. It has no channel, and its waters are not the same as those of the lake; for in it are found the fresh-water fish to which we have before referred. The prairies and bayous above pour their fresh waters into this pond or lake. It cannot be considered in the light of a navigable stream. No schooner or water craft of any importance ever found its way through this lagoon. It is not navigable, nor can it be considered a part of Lake Pontchartrain or any part of its shores. It is a container of fresh water and, while it may be affected by the ebb and flow from the lake, it is not a salt-water pond or lake.

Second Branch Bayou and Little Irish Bayou, the other water courses named, are by-streams, mere rivulets of no importance whatever as relates to navigation.

In the words of Chief Justice Shaw in *Rowe v. Bridge Corp.*, 21 Pick. (Mass.) 344:

"It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable; but in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture."

Bayou Castiglione, the last requiring our attention, has the appearance of having a little more importance. It has some persistence; for, although the hands of industry have placed a levee across its mouth, not far from the lake, it none the less continues to flow. Besides the members of the defendant club constructed a canal that would render it dry, as they thought; but it still flows on and has a few feet of water, sometimes sought after by the active boatmen or skiffmen. It still communicates with the lake. The same waters which flow through it are the waters of the lake. Occasionally at high tide the fishermen find it convenient to enter on its waters to fish. But despite all this it is not navigable. It does not contain sufficient water to be considered in that light.

Navigable means when a stream is large enough to float a boat of some size, engaged in carrying trade. It implies the possibility of transporting men and things.

It is because navigable rivers afford a way of communicating that the legislature has placed them in the public domain. *Laur-ent*, vol. 6, § 9.

But plaintiff's contention is in the second place that, Lake Pontchartrain being an arm of the sea, Bayou Castiglione forms a part of that arm, and if it is not navigable it is open to use as a part of the shores of the lake.

This bayou under the law cannot be considered a part of the shore, for the shore is that space of land on the borders of the sea which is at times covered by the rising, and at other times is left dry by the falling, tide.

This view is sustained by all the authorities we have consulted upon the subject.

The civil law is very plain.

It results, says *Laurent* (volume 6, § 6), that there can be no question of the shores of the ocean when the land claimed as such does not border on the ocean.

"*Lemitrophe de la mer*" are the words of the learned commentator.

We have found the same view expressed in *Baudry*, verbo "*Des Biens*," § 175.

The same is also the view expressed by *Dalloz*, vol. 38, p. 208, § 106.

All agree that the shores include only the lands along the sea or the ocean, and do not extend back from the one or the other.

For these reasons it is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

(116 La.)

No. 16,021.

POLICE JURY OF AVOYELLES v. TOWN OF MANSURA.

(Supreme Court of Louisiana. April 23, 1906.
On Rehearing, May 21, 1906.)

INJUNCTION—SECOND SUIT.

A second injunction will not be granted while the first is in force, even though at the suit of another party, if acting in the same interest.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 7.]

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Gregory Horatio Couvillon, Judge.

Action by the police jury of Avoyelles against the town of Mansura. Judgment for defendant, and plaintiff appeals. Affirmed.

Joseph W. Joffrion, Dist. Atty., for appellant. Peterman & Couvillon, for appellee.

PROVOSTY, J. The parish of Avoyelles having voted prohibition, and the town of Mansura, one of the towns of the parish, having later voted in favor of selling intoxicating liquors, certain citizens of the parish brought suit to have it decreed that the result of the parish election was binding on the town and permanent in its effects, and that, in consequence, the action of the town in holding an election was illegal, and the issuing of licenses to sell liquors would be illegal. They asked for, and obtained, an injunction forbidding the town authorities from issuing the licenses.

The defendant town excepted that the plaintiffs, in their mere quality of citizens of the parish, were without capacity to stand in judgment in the suit.

Thereupon, and pending the citizens' suit, the police jury of the parish filed the present suit, which is an exact repetition of that of the citizens, saving that the additional ground is urged that the town authorities are pro-

posing to issue the licenses without having first published a budget, as required by law.

This last ground may be dismissed at once from consideration. Plainly the police jury has no standing to litigate the question of whether or not the town authorities have published a budget.

The defendant town filed an exception of *lis pendens*, and, that exception having been overruled, filed a motion to dissolve the injunction, on the ground that, so long as the suit of the citizens was pending and the injunction obtained by them was not set aside, there could be no danger of the licenses being issued, and that therefore the alleged fears of the police jury in that regard were manifestly groundless; and on the further ground that a second injunction cannot issue in favor of persons alleging a like interest, to restrain the doing of the same act.

From a judgment sustaining this motion, and dissolving the injunction, the police jury has taken the present appeal.

The judgment is correct. So long as the first injunction continued in full force, it restrained the town authorities as effectually as a thousand injunctions from the same court might do; hence the second injunction was unnecessary and uncalled for. "The rule is that second injunction will not be granted when first is in force." *A. & E. E. of Law*, vol. 16, p. 365.

Judgment affirmed.

On Rehearing.

On application for rehearing, plaintiff alleges that, the first injunction having now been set aside by this court, it can no longer serve as ground for refusing the injunction in the instant case, and that, consequently, the injunction in the instant case should now be maintained, and that, if this is not done, the defendant will proceed to do the things sought to be enjoined.

Our answer is that, if the judgment appealed from was correctly rendered, it must be affirmed, and not reversed; in other words, that the correctness or incorrectness of the judgment is to be determined from the facts as they were then—as they were when the lower judge acted upon them, not as they are now. And so far as concerns the doing of the acts sought to be enjoined our answer is that nothing prevents the plaintiff from now renewing the demand of the instant suit.

Rehearing refused.

(115 La.)

No. 16,020.

POLICE JURY OF AVOYELLES v. TOWN OF MARKSVILLE.

(Supreme Court of Louisiana. April 23, 1906.
On Rehearing, May 21, 1906.)

INJUNCTION—SECOND SUIT.

Same as *Police Jury of Avoyelles v. Town of Mansura*, 41 South. 251.

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Gregory Horatio Couvillon, Judge.

Action by the police jury of Avoyelles against the town of Marksville. Judgment for defendant, and plaintiff appeals. Affirmed.

Joseph W. Joffrion, Dist. Atty., for appellant. Coco & Couvillon, for appellee.

PROVOSTY, J. This case involves precisely the same issues as that of *Same Plaintiff v. Town of Mansura* (No. 16,021, this day decided) 41 South. 251.

For the reasons there assigned, the judgment is affirmed.

On Rehearing.

Rehearing refused, for reasons stated in case of *Police Jury of Avoyelles v. Town of Mansura*, 41 South. 251.

(116 La.)

No. 15,970.

HENDERSON v. LOUISVILLE & N. R. CO.

In re LOUISVILLE & N. R. CO.

(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied June 4, 1906.)

1. CARRIERS—BILL OF LADING—TRANSFER—RIGHTS OF PARTIES.

A railroad company is not bound by a bill of lading given by its agent for sugar not received or delivered for transportation even when the instrument has been indorsed and transferred to a third person for value in the usual course of business.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 146, 176.]

2. SAME.

This rule of commercial law was not abrogated or modified by Act No. 150, p. 193, of 1868, making it a felony for any person to sign or issue false receipts or bills of lading for property not actually received or delivered.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 146, 176.]

3. SAME—NEGOTIABILITY.

Act No. 150, p. 193, of 1868, makes negotiable, only receipts and bills of lading issued in accordance with its provisions for property actually received for storage, transportation, or other purposes.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 168.]

(Syllabus by the Court.)

Action by T. J. Henderson against the Louisville & Nashville Railroad Company. Judgment for plaintiff was affirmed by the Court of Appeal, and defendants applied for certiorari or writ of review. Judgment reversed, and suit dismissed.

Denégre & Blair and Victor Levy, for applicant. McCloskey & Benedict, for respondents.

LAND, J. Plaintiff as the holder and owner of an "order notify" bill of lading issued by the agent of defendant company at the city of New Orleans, and acknowledging the receipt of 100 barrels of sugar from Drew &

Harvey, to be transported to the city of Chicago, sued the defendant for the value of the sugar on the ground of refusal to deliver the same on demand and offer to surrender the bill of lading.

Defendant in its answer, after pleading the general issue, admitted that the bill of lading was signed by its agent and delivered to Drews & Harvey, but specially denied that the sugar or any part thereof was delivered to or received by the defendant company and that the agent had any authority to sign and issue the alleged instrument.

For further answer, and in the alternative, the defendant company charged that plaintiff had been guilty of laches in not forwarding the bill of lading and demanding delivery of the sugar at the point of destination, and in not communicating with Sprague, Warner & Co. of Chicago, who were to be notified, and in not making any inquiry of or giving any information to defendant.

The defendant averred that on account of such laches it was prevented from protecting itself against loss by timely recourse against the firm of Drews & Harvey, which was in good standing when the bill of lading was issued, but became insolvent before plaintiff communicated knowledge of the facts to defendant.

The district court rendered judgment in favor of plaintiff, and the defendant appealed to the Court of Appeal for the parish of Orleans, which affirmed the judgment in an elaborate and well-considered opinion.

The Court of Appeal found with the district court that the plaintiff was an innocent and bona fide transferee for value of the bill of lading, and proceeded to discuss and decide the case on the assumption that Drews & Harvey made no such shipment as was recited in the bill of lading, and consequently that the sugar was not delivered to the defendant company.

The district court ruled that the defendant was estopped by the bill of lading to deny the receipt of the 100 barrels of sugar, and excluded specific evidence on the subject, but nondelivery to the carrier is inferentially shown by the evidence, and it may be said that plaintiff's suit is based on that theory.

It is admitted in the opinion of the Court of Appeal that the English rule is that, even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the recital of the bill of lading issued by its agent to show that the goods therein described were not in fact received for transportation. It is further admitted in the opinion that this is also the settled doctrine of the federal courts.

The Court of Appeal, however, cites decisions in some of the states to the effect that the carrier is estopped to deny the delivery of the goods to the prejudice of third persons, who have in good faith in the ordinary course of business acted upon the representations of the agent.

The Court of Appeal held that this controverted question was set at rest in the state of Louisiana by Act. No. 150, p. 193, of 1868; and that the case of *Hunt & Macauley v. Railroad Co.*, 29 La. Ann. 446, decided by a divided court is not an authoritative construction of the statute.

In their very able and interesting brief, counsel for defendant contend that the English rule has been followed in all the courts of the United States, federal and state, except those of New York, Kansas, and Nebraska, and that this rule was not abrogated or modified by Act No. 150, p. 193, of 1868, making bills of lading negotiable, as was decided by the Supreme Court of this state in the *Hunt & Macauley Case*, supra.

The English doctrine, as set forth in *Grant v. Norway*, 2 Eng. L. & E. 337, and in *Buckingham v. Freeman*, 18 How. (U. S.) 188, 15 L. Ed. 341, was expressly approved by our predecessors in *Fellows v. Str. Powell*, 16 La. Ann. 316, 79 Am. Dec. 581. The same doctrine had been previously recognized in *Fearn Putnam & Co. v. Richardson*, 12 La. Ann. 752.

The question to be solved is whether this rule is inconsistent with the provisions of Act. No. 150, p. 193, of 1868. In the *Hunt v. Macauley Case*, two of the justices were of opinion that this rule of commercial law was not affected by the provisions of said act. One of the justices concurred in the decree, on the ground that the plaintiff was not a third party to the bill of lading. The two dissenting justices were of opinion that it was the intent of the statute "to protect both the carriers and the public, the former by punishing any persons in their employ for issuing false bills of lading or receipts, and the latter by putting such bills or receipts upon the same footing as commercial paper and protecting the holder in good faith with all the privileges and immunities given to bills of exchange and promissory notes."

It is apparent that there was an even balance of opinion on the question before the court, and that therefore the point was not decided.

The object of the act of 1868 as stated in the title, was "to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by cotton presses, wharfingers, and others."

The first section provides that no cotton compress, wharfinger, or other person shall issue any receipt or other voucher for goods, wares, etc., to any person purporting to be the owner or holder thereof, unless such goods, wares, etc., shall have been actually received, and shall be in store or on the premises, or under his control at the time of the issuing of the receipt.

The second section provides that no cotton compress, wharfinger, or other person shall issue any receipt or other voucher upon any goods, wares, etc., to any person for money loaned or other indebtedness, unless such

goods, wares, etc., shall be at the time in store or upon the premises and under his control.

The third section prescribes that duplicate receipts shall not be issued while the originals are outstanding without writing across the face of the same the word "Duplicate."

The fourth section prohibits any cotton press, wharfinger, or other person from selling, incumbering, shipping, transferring, or removing any goods, wares, etc., for which a receipt shall be given, without the written assent of the holder of the receipt.

Section 5 of the act reads as follows:

"That no master, owner, or agent of any boat or vessel of any description, forwarder, or officer or agent of any railroad, transfer or transportation company, or other person, shall sign or give any bill of lading, receipt or other voucher or document for any merchandise or property by which it shall appear that such merchandise has been shipped on board of any boat, vessel, railroad car or other vehicle, unless the same shall have been actually shipped and put on board and shall be at the time actually on board, or delivered to such boat, vessel, car or other vehicle, to be carried or conveyed as expressed in said bill of lading, receipt, voucher or other document."

Section 7 provides that any cotton press, wharfinger, forwarder, or other person who shall violate any of the provisions of the act shall be deemed guilty of a criminal offense and on conviction shall be fined in any sum not exceeding \$5,000 or imprisoned in the State Penitentiary not exceeding five years or both. This section further provides as follows:

"And all and every person or persons aggrieved by the violation of any of the provisions of this act may have and maintain an action at law against the person or persons, corporation or corporations, violating any of the provisions of this act to recover all damages, immediate or consequential, which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not."

Before referring to the sections relative to the negotiability of receipts and bills of lading, it is to be noted that the act makes it a criminal offense for any officer or agent of a railroad to sign or give any bill of lading for property not actually delivered for shipment.

It is to be further noted that the act gives to the party aggrieved a civil remedy by action for damages against the person or persons, whether convicted or not, violating any of its provisions.

It seems manifest that the criminal act of an agent or officer of a railroad in signing or issuing a false bill of lading cannot be considered within the scope of his employment or as binding on the principal.

The only civil remedy given by the statute is against the wrongdoer.

The act so far from abrogating or modifying the general rule that the agent has no

authority in such cases, affirms and accentuates the rule by making the act of the agent a criminal offense, thus placing such act beyond the pale of legal recognition as done under an implied authority resulting from the nature of the employment.

The contention that the act makes a false bill of lading negotiable, and therefore binding on the railroad when in the hands of a third innocent holder, is contrary to the express intent of the statute, which is to prevent the issue of false receipts and bills of lading.

The lawmaker certainly did not intend to denounce such issue as a felony and at the same time to encourage the violation of the statute by making false bills of lading negotiable. A careful reading of the provisions of the statute will demonstrate that the receipts and bills of lading intended to be made negotiable are such as are issued for property actually delivered or received.

Section 9 of the Act reads as follows:

"That all receipts, bills of lading, vouchers or other documents issued by any cotton press, wharfinger, forwarder or other person, boat, vessel, railroad, transportation or transfer company, as by this act provided, shall be negotiable by indorsement in blank, or by special endorsement, in the same manner and the same extent as bills of exchange, and promissory notes now are."

Surely, the act does not provide for the issue of false receipts and bills of lading. Section 6 of the same statute provides that receipts for goods, wares, etc., "stored or deposited with any cotton press, wharfinger, or other person or any bill of lading given by any forwarder, boat, vessel, railroad, transportation or transfer company may be transferred by indorsement," etc., but that "no property shall be delivered except on surrender and cancellation of said original receipt or bill of lading."

The statute places receipts and bills of lading on the same plane; and section 8 specially provides that all the provisions of the act apply to bills of lading.

It is impossible to conclude that the lawmaker intended to make false bills of lading negotiable, and at the same time to deny negotiability to false receipts.

We concur in the conclusion reached by Justice Marr (Manning, Chief Justice, concurring) in the *Hunt & Macauley Case*, that:

"When section 9 makes bills of lading negotiable, in the same manner and to the same extent as bills of exchange, and promissory notes are, it means genuine bills of lading."

Any other construction would make the carrier bound for the consequences of a criminal act committed by a person not authorized to represent him.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal and the judgment of the district court herein rendered be annulled, avoided, and reversed; and it is now ordered and decreed

that plaintiff's demand be rejected and his suit be dismissed; and it is further ordered that plaintiff pay all costs of this litigation.

NICHOLLS, J., absent.

(116 La.)

No. 15,818.

**JENNINGS-HEYWOOD OIL SYNDICATE
v. HOUSSIERE-LATREILLE OIL CO.**

(Supreme Court of Louisiana. April 9, 1906.
Rehearing Denied June 4, 1906.)

COSTS—APPEAL—JUDGMENT—RES JUDICATA.

Where, in a possessory action coupled with an injunction, both parties claimed actual possession under titles, of 40 acres of oil bearing land, and judgment was rendered in favor of the defendant dismissing plaintiff's suit and dissolving his injunction and reserving defendant's right to sue for damages, and where, pending a suspensive appeal taken by plaintiff to the Supreme Court, oil was struck on the premises in dispute by the lessees of plaintiff, and thereupon the district court, on the motion of defendant, ordered the judicial sequestration of the oil as it was produced, and said order was executed by the sheriff, and when subsequently the judgment was affirmed by the Supreme Court, *held*, that the judgment concluded all possessory rights claimed by the plaintiff and affirmed those of the defendant to a sufficient extent to maintain the sequestration of the oil and throw the costs of the execution of the writ on the party cast in the suit.

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Philip Sidney Pugh, Judge.

Action by the Jennings-Heywood Oil Syndicate against the Houssiere-Latreille Oil Company. Judgment for defendant, and plaintiff appeals. Reversed.

See 38 South. 453.

Chappuis & Holt and Gregory Batts, for appellant. D. Caffery & Son, J. Sully Martel, Richardson & Soule, and Hampden Story, for appellee.

LAND, J. This is an ancillary proceeding to the suit of the defendant company against the plaintiff syndicate, 115 La., reported in 38 South. 932, and following.

For the sake of brevity we shall style one the "company" and the other the "syndicate."

Pending the appeal in that suit, the district judge, on the petition of the syndicate, ordered a judicial writ of sequestration to issue directing the sheriff to seize all the oil produced from the wells on the tract of land in dispute, and to sell the same in the ordinary course of business, and after deducting operating expenses to deposit the balance of the proceeds in the Bank of Acadia.

The power of the judge to order the issuance of the writ of sequestration pending the suspensive appeal was challenged by the company, but was affirmed by this court in

State ex rel. Syndicate v. Judge, 113 La. 572, 37 South. 481.

The main suit was a possessory action coupled with an injunction against further trespass on the part of the syndicate, which had taken actual possession of a portion of the tract of land by erecting a derrick and boring for oil.

The company claimed title from Latreille by act of sale. The syndicate claimed under an oil lease from the same author anterior in date and duly recorded. The action being purely possessory, the question of title was not involved, and was not considered, except incidentally to show intention and extent of possession.

The suit was decided in the district court in favor of the syndicate, and the company's action was dismissed, and its injunction was dissolved, at its costs.

The judgment also reserved the syndicate's rights to sue and recover damages sustained by reason of the injunction. This judgment was practically affirmed on appeal.

After the final decision of the cause on appeal, the company moved to set aside and dismiss the sequestration on the grounds that, the object of the writ being to hold the oil to respond to whatever final judgment might be rendered in the case, and as the judgment rendered did not affect the oil, the sequestration had become *functus officio*; and on the further ground that, pending the appeal, the syndicate had become plaintiff in a petitory action against the company, and recognized its possession of the property and oil in controversy, and that the sequestration, being merely incidental to the possessory action, now final, but without results in so far as the oil is concerned, should be dissolved. The sheriff opposed the motion to dissolve, on the ground that there was due him a large sum of money for the preservation of the oil seized under the writ of sequestration, and that the said oil should not be delivered to the company until his costs and expenses had been paid.

The motion to dissolve was sustained by the district judge, and the writ of sequestration was set aside at the costs of the syndicate, which appealed, giving bond in the sum of \$30,000, the amount fixed by the court.

The oil which was seized was the product of certain wells sunk by lessees of the company after the institution of the main suit.

After causing the sequestration to issue, the syndicate instituted an action against the company and its lessees for the recognition and enforcement of its rights under the provisions of its oil lease, coupled with an injunction restraining them from carrying on any operations whatsoever for the purpose of boring wells for the extraction of oil and gas from the 40 acres of land in dispute.

The syndicate, in its petition in that action, alleged that it had commenced operations on the leased premises and was actually boring.

a well thereon, when the company sued out a writ of injunction prohibiting the syndicate from prosecuting said work and from entering on said property.

The petition further alleged that the said company, taking advantage of said injunction by which the petitioner was virtually ousted, took possession of the property and through its assigns, agents, aiders, and abettors actively engaged in the boring of wells for the purpose of extracting oil, in violation of petitioner's rights under its lease.

The company answered this petition, setting up its title from the common author and alleging that the lease to the syndicate was never legal or binding for various reasons, and, if valid, had expired and lapsed for non-fulfillment of its conditions.

The company further alleged that the syndicate's trespass upon the premises, its injunction, and "its sequestration of the oil produced on the property in controversy," had caused damages to the company in large amounts which the respondent claimed in reconvention. The answer contained the following averment:

"Defendant further avers that all the costs of the possessory action recently decided by the Supreme Court in suit No. 15,304 [38 South. 932] of the docket thereof, ought also to be paid as damages herein by the plaintiff, incurred in the prosecution of an unjust claim, now to be considered on its merits."

Defendant prayed that the plaintiff's demands be rejected and its suit be dismissed at its cost; further, for judgment in reconvention for \$307,500; and, finally, for judgment for the costs in the possessory action as damages.

It therefore appears that, pending the appeal in the first suit, the syndicate invoked the equity powers of the court to render such orders as might be necessary to preserve the property from waste and to prevent the company from converting the oil to its own use. The district judge thereupon ordered a writ of sequestration to issue, as has already been stated.

Subsequently, and also during the pendency of the same appeal, the syndicate instituted a petitory action, so called, for the recognition and enforcement of its alleged rights under the oil lease. The company joined issue on the question of title.

In the sequestration proceeding the syndicate assumed the attitude of a plaintiff as shown by the title of action. This was an

ancillary proceeding to preserve the property for the benefit of all parties in interest, and may be likened to the appointment of a receiver.

The question whether this judicial sequestration was rightfully issued was not before the Supreme Court, and therefore was not adjudicated. Nor do we think that the dissolution of the sequestration is a necessary legal result of the judgment rendered on appeal.

We held that the action was purely possessory and involved no question of title, but, as counsel on both sides had voluntarily submitted the issue as to whether the oil lease to the syndicate was a nullity on its face, we considered that question and ruled that the lease was *prima facie* valid. On the merits we found as a matter of fact that the syndicate was in possession, under its lease of a portion, of the 40 acres in dispute prior to the institution of the original suit and prior to any actual possession of the premises by the company or its lessees.

The judgment dismissing the suit of the company and dissolving its injunction is conclusive that said company had no possessory rights and had wrongfully interfered with those of the syndicate.

The judgment left the syndicate in possession of the tract in controversy, and by necessary implication affirmed its right for the time being to exploit the premises for oil and gas.

The oil which was sequestered was produced by the lessees of the company pending the appeal.

The syndicate's right of possession attached to the oil as a product of the soil. The sequestration should therefore be maintained at the cost of the party cast. Under the terms of the order of court the operating expenses should be deducted from the proceeds of the oil. What properly constitutes costs in such a case need not now be determined.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the writ of sequestration be reinstated as having been properly sued out, and that the Houssiere-Latreille Oil Company pay all costs occasioned by the issuance and execution of said writ.

PROVOSTY, J., dissents. NICHOLLS, J., absent.

AMERICAN CENT. INS. CO. v. ANTRAM
et al.

(Supreme Court of Mississippi. June 4, 1906.)

1. TRIAL—INSTRUCTIONS—ERROR CURED BY
OTHER INSTRUCTION—ACTION ON INSURANCE
POLICY.

Any error in an instruction in an action on a builder's risk insurance policy that plaintiff could not recover if, when he applied for a policy, he made certain representations and did not mention other facts, by adding, "but purposely withheld this information in order to mislead defendant," is cured by giving the instruction that plaintiff could not recover if, when he applied for the policy, he by representations and conduct misled the company's agent and obtained the policy by untrue statements and concealments.

2. SAME—INSTRUCTIONS ASSUMING FACTS NOT
PROVED.

Instructions assuming facts contrary to the proof are properly refused.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-612.]

Appeal from Circuit Court, Yazoo County;
D. M. Miller, Judge.

"To be officially reported."

Action by L. Antram and others against
the American Central Insurance Company.
Judgment for plaintiffs. Defendant appeals.
Affirmed.

This is the second appeal in this case. A full statement of facts appear in the former decision. American Central Insurance Co. v. Antram, 38 South. 626. On this second appeal the errors assigned are the giving of instruction No. 4 for the plaintiff, which is set forth in the opinion, and the modification of instruction No. 1 in behalf of defendant, which is as follows, the modification being indicated by italics: "(1) If the jury believe from the evidence in this case that at the time the plaintiff L. Antram applied to Eggleston, the agent of the defendant company, for insurance, and obtained the policy for \$1,200, he represented to the said agent that he (Antram) was constructing a school building which when complete would be worth about \$3,000, and did not mention that he was engaged in repairing and making additions to an old schoolhouse that were to cost only \$1,245, or about that amount, under his contract, *but purposely withheld this information in order to mislead defendant*, and that he afterwards obtained the policy for \$1,800 which is in suit upon said representations, and failed and neglected in said building under said contract, and that the said agent relied upon said representations by said Antram and issued said policy for \$1,800, based upon and relying upon said representations made by Antram when he applied for insurance, they must find for the defendant." The following instruction was also given for the defendant: "(2) If the jury believe from the evidence in this case that, at the time he applied for insurance upon the schoolhouse he was under contract to repair and make additions to,

the plaintiff by representations and conduct misled the agent of the defendant, and obtained the policy for \$1,800 from defendant by untrue statements and concealments as to his real interest in the property, and that defendant's agent issued said policy relying upon representations of plaintiff which were untrue they must find for the defendant."

Williamson, Wells & Peyton, for appellant.
Harris & Powell and E. R. Holmes, for appellees.

WHITFIELD, C. J. The erroneous instruction on account of which this case was formerly reversed (38 South. 626) was left out of the record on the second trial. The leading and fundamental error of learned counsel for appellant on this trial consists in the assumption that Antram was only to receive \$1,232 in cash for his services in connection with the school building, whereas he over and over testified that he was to receive that sum in cash and the material in the old building. Antram testified that the material in the old building was worth \$1,650. If this sum be added to the \$1,232 in cash, it is obvious that the value of the interest he had would be about \$3,000, and appellant's whole contention, in the last analysis, comes simply to this: That Antram had represented that he was working on a building which, when completed, would be worth about \$3,000. Antram shows that it was worth from \$3,100 to \$3,200 when it burned. Now Eggleston, the insurance agent, himself testifies that, if the value of the building had been \$3,000, he would have issued the policy for \$1,800. Indeed, he shows that he would have issued it for more. It is impossible, on this state of the evidence, to say that there was any material misrepresentation. At all events it was left to the jury to say whether there was any fraudulent misrepresentation, and their verdict is conclusive on this proposition against appellant.

Appellant insists that there was error in modifying his first instruction by adding the words, "but purposely withheld this information in order to mislead the defendant." We do not think this was an erroneous modification; but, if it were, it was manifestly cured by the giving of the second instruction for the appellant.

Appellant's most strenuous contention is, however, that the fourth instruction was improperly refused. That instruction is as follows: "The jury are instructed for the defendant in this suit that, if they believe from the evidence in this case that Antram, the plaintiff, made contract with the trustees of the school to make additions to and repairs on an old schoolhouse for the sum of \$1,232, and that it was not stipulated in the written contract between Antram and the trustees that Antram was to insure the building for the benefit of the trustees, or that he was to rebuild the old house in case of destruction

by fire, and that Antram applied for and obtained from defendant the policy for \$1,800, stating that he had a builder's risk at Flora which would be worth about \$3,000 when completed, and failed to explain that he was adding to and repairing an old building at a price much less than \$1,800, and by such failure to explain and by such misrepresentations the agent of the company was induced to issue said policy for \$1,800, relying upon the statement and misrepresentation of Antram as to the value of said building, they must find for the defendant." This instruction was properly refused for two reasons: First, it assumes that Antram solicited the insurance, whereas Eggleston testifies himself that he solicited the insurance; second, it assumes as a fact that the \$1,232 was the whole consideration to be received by Antram, when, as stated, the testimony over and over shows the contrary.

The judgment is affirmed.

ALABAMA & V. RY. CO. v. CUMBERLAND TELEPHONE & TELEGRAPH CO. et al.

(Supreme Court of Mississippi. June 4, 1906.)

1. EMINENT DOMAIN—DELEGATION OF POWER TO TELEPHONE COMPANIES—STATUTES.

As telephone and telegraph companies are distinct companies, and as Code 1892, §§ 854-858, inclusive, and section 4291, relating to telegraph companies and authorizing them to exercise the right of eminent domain, etc., repeal Acts 1886, p. 93, c. 38, authorizing telephone or telegraph companies to exercise the power of eminent domain, a telephone company has no authority to condemn land, though Const. § 195, declares that telephone companies are common carriers.

2. SAME — PERSONS ENTITLED TO QUESTION POWER.

The right of a telegraph company to exercise the power of eminent domain conferred on telegraph companies cannot be defeated by the owner of the land sought to be taken showing that the company is but a dummy company for a telephone company, that it has no capital stock, and that it was organized for the purpose of enabling the telephone company to do indirectly what it could not do directly, and that its organization was unlawful.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 469.]

Appeal from Chancery Court, Lauderdale County; J. L. McCaskill, Chancellor.

Suit by the Alabama & Vicksburg Railway Company against the Cumberland Telephone & Telegraph Company and another. From a decree dissolving injunctions granted against defendants, plaintiff appeals. Decree as to defendant Cumberland Telephone & Telegraph Company reversed, and decree as to defendant Mississippi Telegraph Company affirmed.

The Cumberland Telephone & Telegraph Company, a Kentucky corporation, instituted eminent domain proceedings in a court of a justice of the peace in Hinds county for the purpose of condemning a right of way for said telephone company along the right of

way of the Alabama & Vicksburg Railroad Company between Jackson and Meridian. While this proceeding was pending, the said railroad company filed in the chancery court of Lauderdale County a petition for injunction enjoining that proceeding. The Cumberland Telephone & Telegraph Company answered, making their answer a demurrer and on two points a cross-bill. The railroad company filed a motion to strike out the answer and cross-bill on the ground that it was not clear. The telephone company moved the court to dissolve the injunction, and the court overruled both the motion to strike out the answer and cross-bill and the motion to dissolve the injunction, and allowed the railroad company time to answer to the cross-bill. Before this last action of the court the Mississippi Telegraph Company, a Mississippi corporation, instituted eminent domain proceedings in a court of the justice of the peace of Hinds county for the purpose of condemning a right of way along the said railroad company between Jackson and Meridian, and thereafter the said railroad company filed a supplemental bill for the purpose of enjoining the said Mississippi Telegraph Company, alleging that the said Mississippi Telegraph Company was a mere "dummy" company, a cover for the Cumberland Telephone & Telegraph Company. Thereafter the Mississippi Telegraph Company filed its demurrer to said supplemental bill. The railroad company having failed to answer the cross-bill as required by the order of the court, a decree pro confesso was entered against it. Afterwards the Cumberland Telephone & Telegraph Company moved to dissolve the injunction theretofore granted against it, and the Mississippi Telegraph Company also filed its motion to dissolve the injunction granted against it on the supplemental bill. On the hearing of the motions, the chancellor dissolved both injunctions, and the railroad company appeals. On appeal the contention of the railroad company was that the telephone company had no authority to exercise the right of eminent domain under the laws of the state, and that the Mississippi Telegraph Company was a "dummy" corporation organized for the purpose of enabling the Cumberland Telephone & Telegraph Company to do indirectly what it could not do directly. The Cumberland Telephone & Telegraph Company based its right of eminent domain on section 195 of the Constitution of the state of Mississippi, declaring telephone companies to be common carriers.

McWillie & Thompson, J. M. Boone, and Fewell, Bozeman & Fewell, for appellants. Wm. L. Granberry, for appellees.

WHITFIELD, C. J. Whatever may be the true rule of interpretation as to whether the phrase "telegraph company" necessarily embraces "telephone company," as held in many authorities cited by the learned coun-

sel for appellee, it is quite clear, in our state, that telegraph companies and telephone companies are treated, and have always been treated, as separate and distinct companies. Chapter 88, p. 93, of the Acts of 1886, was manifestly repealed by the provisions of Code 1892, §§ 854-858, inclusive, and section 4291. There is nothing in the constitutional provisions referred to which conferred upon telephone companies any authority to exercise the right of eminent domain. It results from these views that the Cumberland Telephone & Telegraph Company was without any authority under our law to exercise the right of eminent domain in this case. Irrespective, therefore, of the question of laches on the part of appellant as to answering the cross-bill, since the Cumberland Telephone Company had in no event power to exercise the right of eminent domain, the action of the court below dissolving the injunction against it was erroneous.

Turning, now, to the case made by the Mississippi Telegraph Company, it is just as clear that that company was duly and regularly incorporated under the laws of this state as a telegraph company, and under our statutes had the authority to exercise the right of eminent domain in this case. The sole objection to the exercise of that right by the Mississippi Telegraph Company set up in the pleadings is that it was but a dummy for the Cumberland Telephone Company, had no capital stock, and was organized for the mere purpose of enabling the Cumberland Telephone Company to do indirectly what it could not directly do, and that its organization and incorporation were consequently unlawful; but whether the Mississippi Telegraph Company is a properly organized company under the laws of this state is a question between it and the state, not to be inquired into in this proceeding by the appellant.

The result is that the decree as to the Cumberland Telephone & Telegraph Company is reversed, and its bill dismissed; but the decree as to the Mississippi Telegraph Company is affirmed.

MOBILE, J. & K. C. R. CO. et al. v. STATE et al.

(Supreme Court of Mississippi. June 11, 1906.)

1. RAILROADS—CONSOLIDATION—CONSENT OF RAILROAD COMMISSION — AGREEMENT OF ROADS.

Where a railroad company was authorized by the railroad commission to consolidate with an already existing narrow-gauge line, on the express condition that the existing line should be broadened and standardized and made a part of the main line of the consolidated road, the company was absolutely bound to perform its agreement.

2. SAME—CHARTER PROVISIONS—WAIVER.

Where a railroad company obtained the permission of the railroad commission to consolidate with an existing narrow-gauge line solely because of an agreement to broaden and standardize the existing line and operate it as

a part of the main line, and in proceedings to enjoin a change in the course of the narrow-gauge line made no claim that one of its charter provisions authorized such a change, it was not entitled, on a second appeal in the injunction suit, to claim the benefit of a charter provision alleged to confer authority to change the course of the line.

Appeal from Chancery Court, Pontotoc County; J. Q. Robins, Chancellor.

Suit by the state and railroad commission against the Mobile, Jackson & Kansas City Railroad Company and others. From a decree perpetuating an injunction, defendants appeal. Affirmed.

This is an appeal from a decree of the chancery court making perpetual an injunction granted restraining the Mobile, Jackson & Kansas City Railroad Company from abandoning the old depot site in the town of Pontotoc, and a certain portion of the Gulf & Chicago Railroad leased by it, and establishing a new depot at another point in said town. It appears that when the Gulf & Chicago Railroad Company was built into the town of Pontotoc, the citizens of said town, by private subscription, contributed the sum of \$5,500 in cash and furnished a right of way and depot site to said railroad company, upon the understanding that the depot would be located at one of two designated points in said town. After the consolidation of the Gulf & Chicago Railroad Company and the Gulf & Chicago Railway Company, and the subsequent lease of the consolidated company by the Mobile, Jackson & Kansas City Railroad Company, the depot at Pontotoc having been destroyed by fire, the Mobile, Jackson & Kansas City Railroad Company attempted to abandon a portion of the old line of road and relocate the depot, and injunction proceedings were instituted by the railroad commission and by the state, acting through its Attorney General. The injunction was dissolved, and the case appealed to the Supreme Court, which reversed it. See *State v. Mobile, J. & K. C. R. Co.*, 38 South. 732, where a complete statement of facts will appear. On the second trial the injunction was perpetuated and the Mobile, Jackson & Kansas City Railroad Company, and Gulf & Chicago Railroad Company appealed. The finding of the chancellor on the facts recited that a valid and binding contract was entered into between the citizens of the town and the old railroad company, that the citizens of the town have never consented to an abandonment of the old line or a relocation of the depot, that the proposed change of line and depots will be detrimental to the interests of the town, and that there are no insurmountable obstacles to prevent the extension southward of the railroad from the old depot. Pending the appeal the Legislature passed a special act, known as the "Stegall Bill" (Laws 1906, c. 143), which purported to ratify and confirm the abandonment of the old line by the railroad company

and the operation of the new line and relocation of the depot. On appeal the question urged by the appellant was the legal right of the citizens of the town of Pontotoc, and the duties owing by the railroad company to the citizens of Pontotoc, and the corresponding duties of the railroad commission to the railroad company.

McIntosh & Rich, Geo. W. May, and Mayes & Longstreet, for appellants. J. M. Thomas and R. V. Fletcher, Asst. Atty. Gen., for appellees.

WHITFIELD, C. J. The former opinion in this case expressly held that the consolidation was conditioned upon broadening and standardizing the then existing narrow-gauge railroad, and making it a part of the main line of railroad operated by the consolidated corporation. Whether the statements in the petition for consolidation "that the railroads were in no way parallel and competing," were "jurisdictional facts upon the existence of which depended the power of the corporation to consolidate," we say nothing in this opinion. If that is too broad a statement, it certainly must be true, as held in the former opinion, that compliance with the statements in that petition as to broadening and standardizing the narrow-gauge railroad and making it a part of the main line of railroad were conditions upon compliance with which alone the consolidation was consented to by the railroad commission. If, therefore, these conditions were not complied with, the consolidation was of no effect. As held in the former opinion, if there had been no consolidation, these two railroads would have been parallel and competing lines, between which no consolidation was permissible under our laws, and, as held in the former opinion, an "express grant of power by the Legislature" for the two companies to consolidate would have been void, as being in contravention of the general statutory inhibition against consolidation of purchase of competing lines of railroads, which cannot, without violating section 87 of the Constitution, be suspended "for the benefit of any individual or private corporation or association." *Y. & M. V. Ry. Co. v. So. R. R. Co.*, 88 Miss. 746, 36 South. 74.

Section 3587, Ann. Code 1892, requires the consent of the railroad commission to a consolidation, and, as held in the former opinion, chapter 80, p. 95, Acts 1898, forbids the consolidation of parallel or competing railroads, and permitted the consolidation of other railroads only with the approval of the railroad commission. The appellants recognized this law as binding, and consequently, in their petition, stated that the railroads were "in no way parallel or competing lines," and expressly pledged themselves to broaden and standardize the then existing narrow-gauge railroad, and to make it a part of the main line operated by the

consolidated corporation. It is nothing short of inequitable on the part of appellant, having gotten the consent of the railroad commission to consolidate upon these express conditions, to violate the conditions, and refuse to broaden and standardize the entire narrow-gauge road, and make it a part of the main line of said railroad corporation; and it is upon this ground, and this ground alone, that we now hold that the decree of the chancellor should be affirmed. So far as the Stegall bill is concerned, it is perfectly obvious, as already held in the former opinion, that this special act, which was in substance for the benefit of this particular corporation, was, under the general statute laws which we have just referred to with respect to consolidation, palpably and manifestly violative of section 87 of the Constitution, and plainly null and void.

We have nothing to say in this opinion about the depot or its location. On that point the court said before: "Where its new depot shall be located, in what portion of the town, is not a matter involved in this litigation, and is a question for future discussion between the appellees and the railroad commission." This declaration expressly took out of this case any consideration of the location of the depot. We have nothing to do with that matter. We deal alone with the obligation, voluntarily entered into by the appellants with the railroad commission, that, if they should be permitted to consolidate, they would broaden and standardize the then existing narrow-gauge railroad and make it a part of their main line; and that, and that only, is the core of this contention, and that, and that precisely, is what we deal with, and decide in this case, to wit, that these appellants are bound by their solemn obligation, deliberately entered into, as stated above, to broaden and standardize the narrow-gauge railroad and to make it a part of the main line. The depot is a matter with which we have no concern.

One or two other precautionary observations we make. The former opinion expressly waived any consideration as to "what are the subsisting legal rights and obligations arising under the alleged written contract as to the original location of the depot"; and we now further expressly decline to render any decision as regards the rights of those citizens of the town of Pontotoc who contributed the \$5,500 to insist upon a perpetual maintenance of the depot at the old location; nor do we intimate anything as to their right to institute damage suits; nor do we make any decision as to whether, in this suit by the state through its railroad commission, the rights of private parties could be at all properly considered. We dismiss each and all of these three propositions absolutely from our consideration. If it be true, as very ably argued by the learned counsel for appellants, that the contract for the

perpetual maintenance of a depot at a particular place in a town might be void as against public policy, since the rights of the greater, and larger public—the true public—are to be considered in such matters rather than the supposed rights of a few citizens who may own property near the depot, and who are charged with a knowledge of the law, it is yet not necessary to the decision of this case that that point should be determined. The view of the learned counsel for the appellants seems sound on the authorities cited from the United States Supreme Court, and from our own case. *State v. A. & V. R. R. Co.*, 68 Miss. 653, 9 South. 469. But it could not at all be said, in view of that, if the contract originally made might be void as against public policy, that that consideration as to perpetual maintenance of the depot has anything whatever to do with the point in this case, which does not affect the depot at all, but only the agreement on the part of the appellant, as stated, to broaden and standardize the then existing narrow-gauge railroad, and to make it a part of its main line. It was pointed out in the former opinion that there could have been no consolidation, had the appellants' line of railroad been run through, because plainly then the two roads would have been parallel and competing. If, as an absolute necessity for running its road through to Middleton, Tenn., from Decatur, Miss., passing through Pontotoc county, these roads had to be first consolidated, so as not to become parallel and competing, and if, in order to obtain the consent of the state, through its railroad commission, appellants obligated themselves, in their petition for consolidation, to broaden and standardize the said narrow-gauge railroad and make it a part of the main line of its road, it is too late now to attempt to recede from these express conditions, too late to accept the benefits of consolidation and repudiate the solemn pledges made by appellants that it would broaden and standardize the said narrow gauge and make it a part of its main line.

Nor do we desire to be understood as holding that the case of *Lusby v. Railroad*, 73 Miss. 364, 19 South. 239, 36 L. R. A. 510, prohibits a railroad company, which has once located its line, from making any slight change in its line imperatively demanded by the necessities of the situation, provided that change be accomplished without calling into exercise, for the second time, the state's power of eminent domain. *3 Elliott on Railroads*, 960. Assuredly a railroad can make such change, if it can by private agreement with landowners acquire the change in the right of way necessarily demanded by the situation. We make this as a cautionary observation only, as we do not think the *Lusby Case* has any bearing whatever upon the point upon which this case must turn. Nor do we think the contention of learned counsel for appellant that section 8 of the

original charter of the Ripley Railroad Company in Acts 1871, p. 275, c. 80, to the effect that that company might exercise the power of eminent domain just as in its original location "for the purpose of making such railroad or repairing or changing it afterwards," at all effects the duty of these appellants, under their solemn agreement above set forth, according to the conditions on which the right to consolidate was granted, to broaden and standardize the said narrow-gauge railroad in its entire length, and make it a part of their main line of railroad. They did not stand in the court below on this provision of their charter. They did not, in the inception of this matter, when they filed their petition for consolidation, invoke this section 8 as authority for "changing" the line of the narrow-gauge, deflected as shown by the evidence in this case it has been deflected. That would have presented a very different proposition; but they sought the change actually and precisely and only upon the conditions upon which the right to consolidate was granted them. It would be inequitable in the highest degree on their part to obtain the consent of the state, through its railroad commission, to consolidate upon the express agreement to broaden and standardize the narrow-gauge railroad in its entire length, and make it a part of their main line of railroad, and rest upon this alone, and here, for the first time, upon the second appeal to this court, to say, notwithstanding all this, that they had power under said section 8 to change the line of the narrow-gauge railroad as they might desire simply under said section 8. If section 8 gave them any such power, which we do not now decide, they have assuredly waived and are estopped to invoke it by their conduct in this matter.

In view of the various interests here involved, we direct the appellants to operate the spur track as soon as completed, connecting the main line on the north with the town of Pontotoc, broadening and standardizing it, the said spur track, and making it part of the appellants' main line, and that appellants shall have six months from the date of this decree within which to make it part of the main line; the supersedeas meantime to remain in force.

With these modifications the decree is affirmed.

AMERICAN EXPRESS CO. v. CRAWLEY.
(Supreme Court of Mississippi. June 18, 1906.)

1. CARRIERS—EXPRESS COMPANIES—DISCRIMINATION IN RATES—LIABILITY—MEASURE OF DAMAGES.

Under Ann. Code 1892, § 4291, authorizing the railroad commissioner to fix the charges of express, telegraph, telephone, and sleeping car companies, and making it the duty of such companies to make and fix rates for doing business, to be applicable without discrimination, and making such companies liable civilly

and criminally for extortion in the same manner as railroads, an express company is liable in actual damages to one discriminated against for the sum he has paid in excess of the rate charged others, even where the discrimination was not out of distinct purpose.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 901-905.]

2. SAME.

Under Ann. Code 1892, § 4291, making express, etc., companies liable civilly and criminally for extortion in the same manner as railroads, and section 4288, providing that the party injured may recover twice the amount of damages sustained by the discrimination, an express company, discriminating out of distinct purpose, is liable to the party discriminated against for twice the damages sustained.

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

Action by W. A. Crawley against the American Express Company. Judgment for plaintiff. Defendant appeals, and plaintiff files cross-appeal. Affirmed on appeal and cross-appeal.

Appellee filed suit against appellant for unlawful discrimination against him in freight rates. The declaration alleges that the appellant had a monopoly on the express business over all the lines of the Yazoo & Mississippi Valley Railroad Company, that it was the duty of appellant to charge a uniform rate to all shippers without discrimination, that appellee was engaged in the business of a manufacturer of and dealer in carbonated beverages, and that a discrimination had been made between him and a competitor, Stone, at Marks, Miss., and claimed both actual and double damages on account of this discrimination. Appellant's defense was that the overcharge which had been made against the appellee was the result of an error on the part of an employé. On the first trial of this case, the court instructed the jury peremptorily that they could, upon the state of facts shown, return a verdict for double damages. Appellant made a motion for a new trial, which the court granted on the failure of the appellee to enter remittitur. On the second trial the jury gave actual damages only. The express company appeals. Appellee enters a cross-appeal, contending that the court should reinstate the former verdict.

D. A. Scott, for appellant. J. W. Cutrer, for appellee.

CALHOON, J. It is clear that there was discrimination in fact against appellee, at Clarksdale, and in favor of Stone, at Marks, to the extent of from 10 to 15 cents per case of carbonated beverages shipped. On consideration of the common law, of modern authority, and section 4291 of the Annotated Code of 1892, we conclude the law to be that the company is liable to the person discriminated against, even where the discrimination is not out of distinct purpose, for the sum he has paid in excess of that charged the other. If there was such purpose, then, under Ann.

Code 1892, §§ 4287, 4288, the liability would be for twice the damages sustained.

In this case there was evidence that the overcharge was from a mistake of an agent. The jury gave actual damages only.

Affirmed on appeal and cross-appeal.

HILTON v. HILTON.

(Supreme Court of Mississippi. June 18, 1906.)

HUSBAND AND WIFE—ALIMONY.

Where a wife separated from her husband without just cause, and refused to return, except on condition that he should send away a girl adopted by them, which he refused to do, the wife is not entitled to alimony.

Appeal from Chancery Court, Simpson County; J. L. McCaskill, Chancellor.

"To be officially reported."

Suit by Mrs. Nollie Hilton against A. M. Hilton for alimony. From a decree in favor of complainant, defendant appeals. Reversed, and bill dismissed.

The bill does not seek a divorce, and the only ground for permanent alimony was that the husband, without cause or excuse, abandoned his wife and refused to allow her to return to his home or make provision for her support. The record shows a number of attempts at reconciliation, and even at the trial in the court below the husband offered to allow his wife to return home; but she insisted that a little orphan girl whom they had adopted be sent away by the husband. This the husband refused to do, and no reconciliation was ever effected. The court allowed alimony, and the husband appeals.

Longino, Willing & Wilson, for appellant. Alexander & Alexander, for appellee.

WHITFIELD, C. J. After a most critical and careful examination of the record in this case, we are constrained by the testimony to reverse the decree. We do not think that the evidence shows that the husband's offer to take back his wife was insincere, but rather that she separated from him without just cause, voluntarily, and refused to return. The testimony shows that the wife made one condition, and then another, and finally insisted, as the last and only condition, that the little girl, May, should be sent away by the husband. The evidence does not leave upon our minds a favorable impression as to the attitude of the wife in regard to returning to her husband. There is no ground for divorce averred. We do not care to go particularly and in detail into the testimony. We trust this pair may yet be reconciled and live together in happiness, and for that reason forbear any further comment on the testimony. Faults there were, doubtless, on both sides; but we find nothing in the record to warrant divorce or separation. This pair should be living together, for all that has come and gone. Each should be willing to

make proper concessions as to what has happened in the past, that both may enjoy in the future the happiness resulting where each has learned the lesson of mutual forbearance. See *Garland v. Garland*, 50 Miss. 694; 2 A. & E. Ency. Law, 96 et seq.

The decree is reversed, and bill dismissed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. ANDERSON.

(Supreme Court of Mississippi. June 18, 1906.)

1. DEATH—ACTION BY PARENT FOR DEATH OF MINOR CHILD—DAMAGES.

Acts 1898, p. 82, c. 65, providing that the party suing for a wrongful death shall recover such damages as the jury shall assess, taking into consideration all damages of every kind to any and all parties, modifying Ann. Code 1892, § 663, directing the jury in such a case to give such damages as may be fair and just with reference to the injury of the parties suing, authorizes a parent suing for the death of a minor child to recover, not only the value of the services of a minor until majority, but such damages as the jury may award for the physical and mental suffering endured by the child between the injury and death, however short that time may be, together with such gratuities as the evidence may show the parent had a reasonable expectation of receiving before or after the child's majority, and such sum as the son might have recovered as the present value of his own expectancy.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 103-119.]

2. SAME—EVIDENCE—INSTRUCTIONS.

Where, in an action by a mother for the death of a minor son, there was no proof of the age of the mother and of her life expectancy and of her habits of life, nor proof of any gratuity received by the mother from the son, and the evidence showed that the son received \$10 a month, and that there was only seven years between the date of the injury and his majority, an instruction that in fixing the amount of pecuniary damages the jury should consider the loss of prospective gratuities from the son to the mother after he became of age was erroneous; for, where gratuities are recoverable, only such gratuities as there is a reasonable expectation of receiving are recoverable, and the reasonableness of the expectation of receiving gratuities must be based on evidence that gratuities have been received in the past.

Appeal from Circuit Court, Madison County; D. M. Miller, Judge.

Action by Mrs. Fannie Anderson against the Cumberland Telephone & Telegraph Company, for damages for the death of plaintiff's son. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See 38 South. 786.

Harris & Powell, for appellant. F. B. Pratt, for appellee.

WHITFIELD, C. J. The eighth instruction given for the plaintiff was as follows: "If under the foregoing instruction the jury should find for the plaintiff, they will, in computing the amount of the damages, assess as compensatory damages such damages as the boy, Eddie, sustained up to the time of his death, taking into consideration injuries

which he received, and the mental and physical suffering which he endured. You will fix the amount of such compensatory damages at such sum as in your judgment is fair and just, and as would be reasonable compensation to said Eddie for his injuries. The amount of such damages cannot be proved by evidence, but the amount of same is largely in your discretion, governed by a sense of justice and right. In addition to the damages you may assess as having occurred to said Eddie in his lifetime, you will assess the pecuniary damages that the plaintiff may have sustained by the death of said Eddie. And in fixing upon the amount of such pecuniary damages, you will take into consideration the loss to the mother of the services of Eddie until he would have arrived at the age of 21 years of age, and the loss of prospective gratuities from Eddie to his mother after he became 21 years of age." The last clause of this instruction was, under the facts of this case, manifest error. The instruction does not even say that the plaintiff should recover prospective gratuities which she had a reasonable expectation of receiving from her son Eddie after he became 21 years of age. It is not all possible gratuities which can be recovered in a case, even where gratuities are properly recoverable, but only such gratuities as there is a reasonable expectation of receiving; and the reasonableness of the expectation of receiving gratuities in the future must be based on evidence that gratuities have been received in the past. Further than this, it is also true that in a suit of this sort by the mother the extent of recovery, before majority of the child killed, is the value of the services of the child from the time of death up to majority, plus such damages as the jury may fairly award as compensation for the physical and mental anguish endured by the child killed between the injury and death, to which must also be added any such gratuities as the evidence may show the mother had a reasonable expectation of receiving before or after majority, and also whatever sum the son might have recovered as the present value of his own expectancy. These four elements of damage are all proper.

The case of *Railroad Co. v. Watley*, 69 Miss. 145, 13 South. 145, laid down the rule that, in an action by the parent for the negligent killing of his child, the measure of his damages was "compensation limited to the actual pecuniary loss sustained, on the theory of the parent's right to the services of the child during minority." But to this we think should now be added, under chapter 65, p. 82, of the Acts of 1898, the other three elements of damage named. This act changed the rule announced in *Railroad Co. v. Pendergrass*, 69 Miss. 425, 12 South. 954, that there could be no recovery at all when death had been instantaneous, and then, in fixing the amount of damages uses this language: "The party suing shall recover such damages as

the jury shall assess, taking into consideration all damages of every kind to any and all parties." Section 663, Code 1892, read: "The jury may give such damages as may be fair and just with reference to the injury of the parties suing." The charge is very marked, and we think the Legislature intended, and by this act meant to authorize, a recovery, in a suit of this character, not only of the value of the services of the minor until majority, but such damages as the jury might reasonably award for the physical and mental suffering endured by a decedent between the injury and death, however short that time may be; and damages for the other two elements named above. And in view of this construction of the statute we are not prepared to say that the verdict in this case was excessive, without regard to the question whether punitive damages may be allowed or not in a suit of this character, under chapter 65, p. 82, of the Acts of 1898. That question need not necessarily be decided in this case. But in view of the fact that there is no proof here of the age of the mother, no proof by mortuary tables or otherwise of her life expectancy, no proof of her habits of life, or any other circumstances from which the jury might judge what her life expectancy might be, and in view of the failure of plaintiff in his instruction No. 8 to use the words "such gratuities as the plaintiff might reasonably have expected under the evidence she would receive," it is clear that that clause of the instruction is fatally erroneous. The jury were told by this instruction that they might allow any possible gratuities, not such gratuities as the mother, from evidence that she had received gratuities in the past, might reasonably have expected to receive in the future; and again, there is no proof of any gratuity received in the past; and again, whatever the mother would get from the child by way of services was what was hers by law, and not a gratuity. A minor, with a fortune of its own, who has been giving its parent from that fortune gratuities, may reasonably be expected to continue this in the future to a parent, rich or poor. In a case like this, therefore, where the proof shows nothing except that the minor received nothing but \$10 a month, and that there were only seven years between the date of the injury and his majority, and that there had never been any gratuity given by him to his mother, and in which the court below gave an instruction that no punitive damages should be allowed, the only elements of damage which the jury could legally have taken into consideration were the value of the services of the minor to majority and such damages as they might award as reasonable compensation for the physical and mental suffering endured by the minor between the injury and his death, by damages for the other elements named. These four elements, however, are enough to support this verdict so far as the amount is concerned, since it is

for the jury, and not for the court, to fix the amount of damages to be awarded as compensation for mental and physical suffering. The court in a proper case might cut down such amount, but we are not prepared to say in this case that the amount exceeds what would be proper for the four elements of damages stated.

In view of the facts that the court below charged the jury that they should not award punitive damages, we must accept the verdict as having excluded them. Aside from the errors indicated, we think this record free from errors, and but for them would inhesitatingly affirm the judgment.

Reversed and remanded.

HYLAND, Sheriff, v. SHARP.

(Supreme Court of Mississippi. June 25, 1906.)
CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PRIVILEGE TAX.

Acts 1904, p. 58, c. 76, imposing a privilege tax on those doing a money-lending business on personal securities, such as household furniture, wearing apparel, etc., is invalid as depriving one of property without due process of law, because it arbitrarily fixes the basis of the tax on the kind of securities.

Appeal from Circuit Court, Warren County; J. N. Bush, Judge.

"To be officially reported."

Action by W. C. Sharp against J. L. Hyland, sheriff and tax collector of Warren County, to recover money paid under protest as a privilege tax imposed by Acts 1904, p. 58, c. 76. From a judgment for plaintiff, defendant appeals. Affirmed.

Dabney & McCabe, for appellant. Anderson & Vollor, for appellee.

WHITFIELD, C. J. The case of Gundling v. Chicago, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725, has no application to the case at bar. It certainly needs no citation of authorities to show that an occupation tax may be imposed by the city of Vicksburg. The opinion in *Rodge v. Kelly* (Miss.) 40 South. 552, clearly pointed out that this act is objectionable as class legislation. All in the class are not dealt with alike. A careful reading of that opinion is all that is necessary to show the manifest unconstitutionality of the act. The fears expressed as to the effect of the decision on other occupations taxed are wholly groundless. We dealt with nothing but this particular act. The tax in this case is not imposed on all money lenders, graduating the tax according to the population of a town or the amount of loans, etc. It attempts, arbitrarily, to base the tax upon the kind of securities. Can it be possible that argument should be needed to show that the Legislature could not vary the occupation tax by the single consideration as to the kind of security taken for a loan? On that, and nothing but that? Making the tax one thing if the security be mules, another if

cattle, another if silverware in a store, etc.? And we clearly pointed out, before, that this act was intended to reach those who lend on the kinds of securities, as sewing machines, etc., in the actual possession of servants and other necessitous persons, and at exorbitant rates of interest; and yet, that being its purpose, it wholly failed to fix any rate of interest as exorbitant, and brought within its condemnation all money lenders, without reference to exorbitant charges, etc., and whether they loaned on pianos, etc., in the actual personal use of domestics, etc., or in a factory, or a store, or anywhere else, and without reference to any charge, exorbitant or otherwise, for the loan. In other words, the act wholly failed to accomplish the only purpose it had in view. Drawn with the not unusual legislative carelessness and lack of skill, it failed to accomplish the wholesome purpose had in view, and actually gave us a law depriving the citizen of his property without due process of law.

Affirmed.

AUSTIN et al. v. BARBER.

(Supreme Court of Mississippi. June 25, 1906.)

EQUITY—DECREE PRO CONFESSO—PARTITION—TENANTS IN COMMON—LIABILITY FOR RENT.

A pro confesso against a defendant authorizes no other decree against the defendant than the allegations of the bill show he is entitled to; so that in a suit by a tenant in common of lands against her co-tenants for partition, and for recovery of her share of the rental value thereof, the bill, alleging merely that the premises had been in the use and occupation of certain two of the co-tenants, does not authorize a personal judgment against the other co-tenants for complainant's share of the rents, or a decree giving her a lien therefor on their interests in the land.

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Suit for partition by Mrs. Effie Elmer Dullon and others against Mrs. E. T. Barber and another. From a decree for Mrs. Barber on her cross-bill, Mrs. A. E. Austin and another appeal. Reversed and remanded.

Jacob Elmer in his lifetime owned a tract of land in the city of Biloxi, which he devised in equal proportions to his six children, Effie Elmer Dullon, Clarence Elmer, Percy Lee Elmer, Coresta Bachino, Edwin Ross Elmer, and Albert Elmer. Albert, Clarence, and Percy Lee Elmer sold their several one-sixth undivided interests to Mrs. A. E. Austin, and Mrs. Austin sold an undivided one-fourth interest to C. E. Theobald, and Theobald sold his undivided one-fourth interest to Mrs. E. T. Barber. Mrs. Effie Elmer Dullon, Coresta Bachino, and Edwin Ross Elmer filed a bill in chancery, asking Mrs. E. T. Barber and Mrs. A. E. Austin for a division in kind, with an alternative prayer for a sale and division of proceeds in case the court should find the property not susceptible of a fair division without prejudice to the interest

of the owners. Mrs. Barber filed a cross-bill, seeking to recover one-fourth of the rental value of the premises from the date of the purchase of the undivided one-fourth interest by Theobald, her grantor, alleging that since that time the premises had been occupied by Coresta Bachino and Edwin Ross Elmer, and praying that the court should make the rent so due her a charge against the estate. The court found that Mrs. Barber was entitled to one-fourth of the rent and profits of the premises, and entered a decree awarding the same to her and making it a charge against all the property. Mrs. A. E. Austin and Effie Elmer Dullon appeal, on the ground that their interest in the property should not be taxed with the rents and profits, since it was not alleged nor proven that they occupied the premises or received any of the rents and profits arising therefrom.

Harper & Harper, for appellants. Barber & Mize, for appellee.

MAYES, J. There is no controversy growing out of the sale of the lands described in the original bill for partition, it having been practically agreed to by all parties; but the controversy arises on the cross-bill filed by Mrs. E. T. Barber, wherein she seeks to recover one-fourth of the rental value of the premises from the 26th day of October, 1900, the date at which her rights in the property accrued to her according to the allegations of the cross-bill. We take no notice of the original bill filed in this cause, since there is no complaint in reference to it. All the original complainants and the codefendant of Mrs. Barber, Mrs. A. E. Austin, are made parties defendant to the cross-bill. The cross-bill alleges that C. E. Theobald purchased a one-fourth interest in the property described in the original bill on the 26th day of October, 1900, and that Mrs. E. T. Barber purchased same from him on the 7th day of March, 1901, and that at the time of her purchase from Theobald she also purchased from him all his interest in the rents and profits of said property, which was one-fourth interest, accruing to him on the 26th day of October, 1900, the date of his purchase of the one-fourth interest in the property. After charging that the rental value of the premises is \$40 a month, the cross-bill then proceeds to state "that two of the complainants herein, Coresta Bachino and Edwin Ross Elmer, have occupied said property from the 26th day of October, 1900, and are now occupying said property without agreement with or permission from respondent and cross-complainant, and cross-complainant is informed and believes, and therefore charges the truth to be, that Coresta Bachino and Edwin Ross Elmer have rented a part of said property to tenants, and have collected rents therefor." Edwin Ross Elmer, Coresta Bachino, Mrs. A. E. Austin, and Effie

Elmer Dullon are all made parties defendant to the cross-bill, and the cross-bill, after praying for partition, etc., concludes with a prayer for a decree in favor of cross-complainant for one-fourth of the reasonable value of the rents and profits of the premises from the 26th day of October, 1900. All parties defendant were duly summoned by personal service. Mrs. Coresta Bachino and Edwin Ross Elmer answered the cross-bill, denying that the rental value of the premises was \$40 a month, and a pro confesso on the cross-bill was taken against Mrs. A. E. Austin and Effie Elmer Dullon.

It will be noted that the cross-bill does not charge that Mrs. A. E. Austin or Effie Elmer Dullon had been in the use and occupation of the premises, neither does it charge that they have ever received one cent from the property as rents and profits; but, on the contrary, the cross-bill charges that Coresta Bachino and Edwin Ross Elmer had been in possession of the property and receiving the rents and profits of same. There is no allegation in the bill of any indebtedness on the part of Mrs. A. E. Austin and Effie Elmer Dullon to Mrs. E. T. Barber, and the only allegation in the bill which could possibly affect them is the allegation that Mrs. E. T. Barber was entitled to a one-fourth interest in the rents and profits. Testimony was taken as to what the reasonable rental value of the place was, and as to who had been in the use and occupation of the same since the 26th day of October, 1900, and the testimony shows that Mrs. A. E. Austin and Effie Elmer Dullon had not been in the use and occupation of the premises at all, nor does it establish that either of them had received one cent as rent or profit from the property since Mrs. Barber acquired the right of Theobald, dating from the 26th day of October, 1900, to the date of the hearing. As a matter of fact, since the filing of the original bill Mrs. A. E. Austin has purchased the interest of Effie Elmer Dullon and has also become the purchaser at the sale for partition; but since these purchases were made pending the litigation, with full notice of the rights claimed by cross-complainant, we deal with the suit as though no transfers had been made, and just as the property was in reference to the various interests at the date the original bill was filed. The cross-bill was set for hearing on the answers filed by Edwin Ross Elmer and Mrs. Coresta Bachino, and testimony taken and pro confessoes taken against Mrs. A. E. Austin and Effie Elmer Dullon. After hearing the case the chancellor rendered a decree in favor of Mrs. E. T. Barber, which is as follows: "That Mrs. E. T. Barber is justly entitled to a one-fourth interest in all rents, profits, and issues of the hereinafter described land, from the 26th day of October, 1900, to the 6th day of August, 1902, a period of 22 months, and that the value of

the rents from said property for that time amounting to \$20 per month, and that Mrs. E. T. Barber is entitled to a lien on the property in question." It will be noticed just here that the decree of the chancellor does not give Mrs. E. T. Barber a lien only on the interest of Edwin Ross Elmer and Coresta Bachino, the parties shown by the proof and the parties charged in the bill with having had the use and occupation of the property; but it gives a lien on the entire property, including the interest of Mrs. A. E. Austin and Effie Elmer Dullon, to pay the debt that could only be owing by Edwin Ross Elmer and Mrs. Coresta Bachino, and which was owing as well to Mrs. A. E. Austin and Effie Elmer Dullon as to Mrs. E. T. Barber in such proportion as the interest of each bore to the entire value. By this decree the interest of Mrs. Austin and Effie Elmer Dullon are made to guaranty to Mrs. Barber the debt of Edwin Ross Elmer and Mrs. Coresta Bachino, when the whole pleadings show that they have nothing to do with it in any way, and occupy the same relation to Edwin Ross Elmer and Mrs. Coresta Bachino that Mrs. Barber does. The decree then proceeds: "It is therefore ordered, adjudged, and decreed that the said Mrs. E. T. Barber do have and recover from Mrs. Coresta Bachino, Mrs. A. E. Austin, and Mrs. Effie Elmer Dullon, or either of them, the sum of \$110, with all cost herein; and in default of the payment by either one of them of said sum within 30 days from this date, it is further ordered that F. S. Hewes, clerk of this court, who is hereby appointed a special commissioner, shall sell the before-mentioned real estate as above set out, or so much thereof as may be necessary to pay the \$110, with cost herein."

It will be seen by this part of the decree that the chancellor not only establishes a lien on the interest of Mrs. A. E. Austin and Effie Elmer Dullon in the property for the use and occupation of the premises by Edwin Ross Elmer and Coresta Bachino; but the court gave a personal judgment against them in favor of Mrs. Barber for the use and occupation shown to have been enjoyed by Edwin Ross Elmer and Mrs. Bachino only. A pro confesso, at most, is nothing but a confession by the party against whom it is taken that the allegations of the bill in so far as they affect him are true. It confesses only such case as is made by the pleadings against the party against whom the pro confesso is taken. A decree taken on a pro confesso must conform to the pleadings, and no other judgment can be taken against a defendant confessing the bill than the allegations in the bill show that the complainant is entitled to. The mere fact that a pro confesso is taken does not give the party taking it the right, *ad libitum*, to take any kind of a judgment he may see fit to take against the defendant failing to answer, and, if he transgresses the limits of the case as made out by the pleadings, the decree is, to say the least, voidable

on appeal. The cross-bill does not contain one single allegation of indebtedness for use and occupation against Mrs. Austin or Effie Elmer Dullon. On the contrary, it alleges that the premises have been in the use and occupation of "two of the complainants herein, Mrs. Coresta Bachino and Edwin Ross Elmer." The proof shows that Mrs. Austin and Effie Elmer Dullon have not received anything from the premises, and have not had the use and occupation of same; nor is there any attempt, either by the allegations of the cross-bill or in the proof, to show that they had made themselves liable in any way, either for rents received, or for use and occupation of the premises. The only possible effect that a pro confesso could have as against them was to conclude them from controverting the fact that Mrs. E. T. Barber was entitled to a one-fourth interest in the rents and profits of the property in question. There was no attempt to charge them with either rents and profits, or with use and occupation. Mrs. Austin and Effie Elmer Dullon might well let a pro confesso go against them, since the only rights of theirs which were sought to be affected were that Mrs. Barber owned a one-fourth interest in the property, and was entitled to one-fourth of the rents and profits as against them, from the 26th day of October, 1900, to the 6th of August, 1902. The pro confesso taken only confessed this, and this was the only kind of a decree that could be taken against them on the pro confesso. The decree, based upon the pro confesso taken against Mrs. Austin and Effie Elmer Dullon, shows no right to the relief given by the chancellor. *M. & C. R. R. Co. v. Neighbors*, 51 Miss. 412, on page 422; *Spears v. Cheatham*, 44 Miss. 64; *George v. Solomon*, 71 Miss. 168, 14 South. 531; *Garland v. Hull*, 13 Smedes & M. 76, 51 Am. Dec. 140.

It would have been proper for the chancellor to have given Mrs. Barber a lien on the interest of any tenant in common shown to have received rents and profits in excess of his interest in the property, or to have had the use and occupation of the property over and above his interest in same; but the chancellor could only establish this right in favor of Mrs. Barber on the interest of such party as was shown to have had the use and benefit of the property, and could not fix a lien in her favor on the entire property. Including the interest of other tenants in common not shown to have been in the use of the property in any way. There was no warrant in the record for the judgment rendered in favor of Mrs. Barber against Mrs. Austin and Effie Elmer Dullon; neither was it proper to charge their interest with the use and occupation of the premises by Edwin Ross Elmer and Mrs. Coresta Bachino. The case of *Medford et al. v. Frazier*, 58 Miss. 241, and *Morgan v. Long et al.*, 73 Miss. 406, 19 South. 98, 55 Am. St. Rep. 541, and *Walker v. Williams*, 84 Miss. 392, 36 South. 450, decide nothing applicable to this case, except to

establish the right of one co-tenant to charge another co-tenant for use and occupation beyond the extent of his individual interest in the property. They do not say, nor does any authority hold, that one co-tenant may sue a co-tenant in possession for the use and occupation of joint property, joining in the suit as defendants other tenants in common out of possession, not shown to have been in the use and occupation of the premises at any time, and not charged in the bill with having had the use and occupation, and obtain a decree as against the interest of the defendants out of possession for the use and occupation of the tenants in common in possession of the property. Each is liable for his own use and occupation, and his interest in the premises may be subjected to the payment of same; but the interest of one tenant in common can never be subjected to another tenant in common for the use and occupation of the premises by a third tenant in common, when it is not shown that the party whose interest is sought to be subjected had any connection with the matter in any way.

The judgment being an entirety, the cause is reversed and remanded.

MORRIS v. BROOKHAVEN & P. R. R. CO.
(Supreme Court of Mississippi. June 25, 1906.)

MASTER AND SERVANT—NEGLIGENCE—PLEADING.

The declaration in an action for injury to an employé working on a bridge, alleging that plaintiff stood where the chief in command told him to stand when push cars came along with materials, and that he was injured by a car improperly loaded, in that it had, nailed to the sides, projecting strips three feet longer than the materials on it, and that it was so fixed by the servants engaged in loading by direction of the same chief, charges negligence of the superintendent, and not of the fellow servants.

Appeal from Circuit Court, Lawrence County; Jno. R. Enoch, Judge.

Action by G. G. Morris against the Brookhaven & Pearl River Railroad Company. A demurrer to an amended declaration on the ground that it did not state a cause of action was sustained, and judgment rendered for defendant. Plaintiff appeals. Reversed and remanded.

G. Wood Magee and May & Flowers, for appellant. T. Brady, Jr., for appellee.

CALHOON, J. Ann. Code 1892, § 671, is this: "The declaration shall contain a statement of the facts constituting the cause of action, in ordinary and concise language, without repetition; and if it contain sufficient matter of substance for the court to proceed upon the merits of the cause, it shall be sufficient; and it shall not be an objection to maintaining any action that the form thereof should have been different." In *Gibson v. Meek*, 71 Miss. 617, 15 South. 789, this court said, through Chief Justice Camp-

bell: "The fine argument of the learned counsel for the appellant might have prevailed half a century ago, when form was often of more importance with courts than substance; but, happily that era has passed, never to return. Now substance is what the courts of this state look to. We have no forms of action. Every action is on the case, and one need only to state a case in concise and intelligible language, containing sufficient matter of substance for the court to see that he has a meritorious cause, and his declaration will be sufficient."

Applying the test of this statute and opinion to the case before us, it is sufficiently shown that Morris was at work on the bridge being repaired, at the place he was ordered to be by the chief who was in command, and who told him where to step for safety when push cars came along with materials; that this point was safe with push cars properly loaded; that that one which did the damage was, and for the first time, improperly loaded, in that it had, nailed to the sides, projecting strips three feet longer than the material on it; that it was so fixed by servants in that loading line of the work by direction of this same chief; that this was gross negligence; that Morris took all necessary precaution to save himself, but, because of the strips, was knocked off and hurt. It is hypercriticism and overstrained interpretation to confine the language to the fellow servants who manually nailed on the strips, since it specifically charges that this was done by direction of the chief in command of all. If there was contributory negligence which can avail appellee, it may be pleaded, but must be determined by a jury.

Reversed, demurrer overruled, and cause remanded.

BOYD v. FIDELITY MUT. LIFE INS. CO. (Supreme Court of Mississippi. July 2, 1906.)

INSURANCE—ACTION ON LIFE POLICY—NON-PAYMENT OF PREMIUMS—EXTENSION OF TIME—COMPLAINT—SUFFICIENCY.

A declaration in an action on a policy of life insurance, alleging that defendant's agent duly authorized by defendant so to do, solicited insured to take out a policy, offering as a special inducement the fact that defendant allowed 30 days of grace in the payment of premiums, and that insured took out the policy on the faith of such representations, and further alleging the payment of the first annual premium, and the death of insured after the expiration of 1 year, but within 13 months from the date of such payment, was not demurrable on the ground that the second annual premium had not been paid when due, in view of the averments that defendant authorized the representations to be made and that the policy was taken out on the faith thereof.

Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge.

Action by Salena Boyd against the Fidelity Mutual Life Insurance Company. From a judgment for defendant, plaintiff appeals. Reversed.

Appeal from the judgment of the circuit court sustaining a demurrer to the declaration filed in the court below by the appellant. The declaration, after setting forth the representation of the agent of the appellee that 30 days' grace would be allowed on the payment of all premiums, and the reliance of the insured on such representations, alleges the payment of the first annual premium, and the death of the insured after the expiration of 1 year, but within 13 months from the date of the payment of said premium. The demurrer was sustained, on the ground that the second annual premium had not been paid when due.

P. Z. Jones, for appellant. T. Brady, Jr., for appellee.

WHITFIELD, C. J. The declaration in this case avers as follows: "That on June 24, 1904, the date of the payment of the first annual premium, the agent of the defendant company solicited the said William H. Boyd to insure his life in the defendant company, and as an inducement to taking the insurance pressed upon the said William H. Boyd the fact that 30 days of grace were allowed by the company on the payment of all premiums due said company. That the said agent was authorized by the defendant company to make this representation, and to hold out as special inducement to persons solicited by said agent to take insurance in said company the fact that said company allowed 30 days of grace in the payment of all premiums, and furnished to said agent instruction books and other literature authorizing him to hold out this special feature as an advantage to policy holders in said company, and the agent in making the representations above mentioned was acting within the scope of his employment and authority." With this averment that the company itself authorized these representations to be made, and that the policy was taken out on the faith of them, it is too obvious for discussion that no demurrer should have been interposed, but that the case is one for evidence.

The judgment is reversed, the demurrer is overruled, and the cause remanded.

COMFORT v. CITY OF KOSCIUSKO. (Supreme Court of Mississippi. July 2, 1906.) MUNICIPAL CORPORATIONS—ORDINANCES—PROHIBITING KEEPING OF HOGS.

Under Ann. Code 1892, § 2928, empowering municipalities to make regulations to secure the general health, to prevent and abate nuisances, and to suppress hogpens, it is only when the keeping of hogs in a city is a nuisance that the city may prevent their being kept therein, so that an ordinance providing generally that hogs may not be kept in the city, without reference to whether they are or are not a nuisance, is invalid.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1335.]

Appeal from Circuit Court, Attala County; J. T. Dunn, Judge.

C. C. Comfort was convicted of violating an ordinance of the city of Kosciusko prohibiting the keeping of hogs within the city limits, and appeals. Reversed and remanded.

Lockett & Guyton, Anderson, Davis & Sawyer, and J. S. Smith, for appellant. F. M. West and J. G. Smythe, for appellee.

MAYES, J. On the 27th day of July, 1905, the city of Kosciusko passed the following ordinance: "Be it ordained by the board of mayor and aldermen of the city of Kosciusko: That in order that the said city shall be clean and put and kept in a good sanitary condition to prevent the generation and spread of disease it shall be unlawful for any person to keep or permit to be kept on or about his or her premises within the corporate limits of said city any rubbish, garbage, or filth of any kind, or to keep or permit to be kept on his said premises any stagnant or filthy water, or to drain any bath, kitchen or otherwise polluted water into any of the streets of said city, or to keep or permit to be kept within the corporate limits of said city any pig, or pigs, hog, or hogs. Any person who shall be guilty of any act or acts enumerated in this ordinance shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of not less than five dollars." On the 14th day of August an affidavit was made against Comfort in the mayor's court of Kosciusko, charging in substance that Comfort did, on and about the 11th day of August, 1905, in the corporate limits of the city of Kosciusko, willfully and unlawfully permit to be kept hogs, and did keep hogs penned and inclosed, on and about his premises in said city, against the ordinance of said city. Mr. Comfort was convicted in the mayor's court, appealed to the circuit court, demurred to the affidavit, which demurrer was overruled by the circuit judge, and he was again convicted in the circuit court, and prosecutes this appeal, claiming that the ordinance under which he is convicted is void.

Section 2928 of the Annotated Code of 1892 empowers municipalities to suppress hogpens. It also gives the power to make regulations to secure the general health of municipalities and to prevent, remove, and abate nuisances. The keeping of hogs in a municipality, or the erection of hogpens, may or may not be a nuisance, and it is only when they are such that a municipality has the power to interpose and suppress hogpens or prevent the keeping of hogs in a municipality. An ordinance which provides generally that hogs may not be kept in a municipality, without reference to whether they are or are not a nuisance is too broad and sweeping in its provisions and cannot be upheld. When the keeping of hogs within a municipality becomes a nuisance, it matters not where they may be kept, it not only has the power, but

it is its duty to abate. In the case of *Darlington v. Ward* (S. C.) 28 S. E. 906, 38 L. R. A. 826, cited by counsel, we think the court went too far. In truth this case seems to stand by itself in the extent to which it has gone in upholding municipalities in the right to prohibit the keeping of hogs within its borders. *Ex parte O'Leary*, 65 Miss. 80, 3 South. 144, 7 Am. St. Rep. 640.

Let the case be reversed, and affidavit dismissed.

COLLIER v. DASHER et al.

(Supreme Court of Florida, Division B. May 22, 1906. Headnotes filed June 27, 1906.)

INJUNCTION—ACTION BETWEEN PARTNERS—ALLEGATIONS OF BILL.

Where a bill in equity, brought to restrain alleged partners of the complainant from ousting him from participation in the alleged partnership business, fails to state any facts from which a court can adjudge whether or not a partnership in fact existed, and where a contract between the parties exhibited as part of such bill is in its terms inconsistent with the existence of a real partnership between them, a demurrer to such bill is properly sustained, and such bill should be dismissed.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 223-227; vol. 38, Cent. Dig. Partnership, §§ 181, 182.]

(Syllabus by the Court.)

Appeal from Circuit Court, Washington County; Francis B. Carter, Judge.

Bill by E. F. Collier against J. R. Dasher and E. P. Rose. Decree for defendants, and plaintiff appeals. Affirmed.

The appellant, as complainant below, filed his bill in the circuit court of Washington county in equity against J. R. Dasher and E. P. Rose, alleging and praying therein as follows:

"(1) That on or about the 1st day of November, A. D. 1904, your complainant and said respondents entered into a contract of partnership to engage in the business of operating and conducting a certain turpentine plant for the purpose of manufacturing rosin and spirits turpentine, at Hog Town, near Point Washington, county of Washington, state of Florida; that by the terms of said contract of partnership your complainant and said respondents were to conduct said business under the firm name of Dasher, Rose & Co., and that, in accordance therewith, said business has since been conducted by your complainant and by said respondents as copartners under said copartnership name of Dasher, Rose & Co., that subsequent to the formation of said partnership your complainant and said respondents on the 13th day of February, A. D. 1905, entered into further articles of agreement whereby said respondents did agree with said complainant to transfer and convey unto said complainant a one-third interest in and to certain property of the then estimated value of \$6,724.20 when the said turpentine business then being operated

and conducted by your complainant and said respondents shall have worked out and paid the sum of \$6,724.20, with interest on said amount at the rate of 8 per cent, and in consideration of said agreement and obligation on the part of said respondents your complainant agreed that he would give to the management of said business all of his time and best attention, all of which will more particularly appear by reference to a copy of said contract of the 13th day of February, A. D. 1905, attached hereto marked 'Exhibit A,' and prayed to be made a part hereof for every necessary and legitimate purpose: that in accordance with the terms of said contract your complainant has fully performed and complied with each and every obligation therein specified on his part to be performed; and has in good faith and to the best of his ability discharged said obligations, and has given to the management and control of said business his entire time and best attention.

"(2) That said copartnership business has been conducted since the formation thereof in November, A. D. 1904, with friendly relation between said respondents and your complainant until the 6th day of June, A. D. 1905, on which date the said J. R. Dasher, one of said respondents, stated to your complainant, in substance, that the said E. P. Rose and himself had decided that it would be for the best interest of the business for your complainant to sever his connection therewith, and that since said date said J. R. Dasher has declined and refused, and still continues so to do, to permit your complainant to further engage in the management, conducting, and operating said turpentine business, and thereby prevents your complainant from the proper and legitimate exercise of his duties and privileges of a copartner in connection with said turpentine business.

"(3) That your complainant is informed and believes that said turpentine business has been conducted profitably, and that the proceeds already accrued from the management thereof since the formation thereof, in November, A. D. 1904, has almost, if not fully paid the amount of \$6,724.20; that your complainant is ready, anxious, and willing to continue in the proper and legitimate discharge of his duties as a copartner in the management, control, and operation of said copartnership business, but that he is prevented from doing so by the unreasonable and unlawful acts, as hereinbefore specified, of the said respondents.

"(4) Your complainant would further represent unto your honor that he had no adequate remedy, save and except the state's most gracious writ of injunction, and that in the absence of such writ and the relief prayed for your complainant will suffer irreparable damages and injury.

"(5) Wherefore your complainant humbly prays that your honor shall be pleased to issue an order directing, enjoining, and com-

manding the said J. R. Dasher and the said E. P. Rose to refrain from any acts or conduct of whatsoever character and description that would prevent or preclude your complainant from the exercise of his right to inspect the books of said copartnership business, to be fully informed as to the state of accounts of said copartnership business, and the further and unlimited discharge of his duties as a copartner in the management, controlling, and conducting said copartnership business.

"(6) Your complainant would further humbly pray for such other and further relief in the premises as to your honor shall seem proper, and that the state's writ of subpoena shall be duly issued herein in accordance with the statutes of Florida in such cases made and provided, directed to J. R. Dasher and E. P. Rose to fully answer the premises herein. This the 16th day of June, A. D. 1905."

Attached to the bill, as part thereof, was the following contract between the parties:

"Georgia, Lowndes County.

"This agreement, made on this the 27th day of December, 1904, between Rose & Dasher, of the one part, and E. F. Collier, of the other part,

"Witnesseth that, whereas, Rose & Dasher own a certain turpentine location at Point Washington, known and called the 'Hog Town Turpentine Place,' consisting of the following property: three sacks oats, twelve sacks corn, seven sacks purina, nineteen bales hay, five mules, three horses, two wagons and harness, one buggy and harness, two saddles, one still and fixtures, twenty-three shanties, dip barrels, three crops yearling boxes, four crops virgin boxes, and a certain lease made by the West Coast Naval Stores Company to Steel & Rose, said Steel transferring his interest to said Rose, and said Rose transferring half interest in lease to said Dasher, all of said property being of the value of \$6,724.20; and

"Whereas, E. F. Collier is desirous of buying one-third undivided interest in said turpentine place, but is unable to do so for want of funds: Now, therefore, said Rose & Dasher agree that if said Collier will work said turpentine location, giving it all of his time and best attention, when the same has worked out the sum of \$6,724.20, with interest on it at 8 per cent, to make the said Collier, his heirs or assigns, proper bill of sale to a one-third interest in the property above described. It is distinctly understood by the parties hereto that if the management by Collier of said place or said conduct of said Collier or for any reason he should become unsatisfactory to said Rose & Dasher, to either or both of them, that the said Collier forfeits all of his right and interest in this contract and the same shall be null and void. It is further understood and agreed, however, that if said Collier should forfeit his interest in this contract and the same shall be null:

and void, then he shall receive as compensation for his services \$50 per month from the dating of this contract to the time of its forfeiture; said Collier expressly agreeing to the terms of this contract and further agreeing, in the event of his becoming unsatisfactory to said Rose & Dasher, to leave said turpentine location without disturbance or molestation of the hands thereon, or causing any trouble whatever.

"In witness whereof, the parties hereunto have signed these presents.

"E. P. Rose. [L. S.]

"J. R. Dasher. [L. S.]

"E. F. Collier. [L. S.]

"C. F. Clarke, N. P. L. Co., Ga.

"Signed and sealed before me this 13th day of Feb., 1905. George H. Mundy, N. P. of State of Florida at Large. [Seal.] Office expires Oct. 28, 1908."

To this bill the defendant J. R. Dasher interposed a general demurrer for want of equity in the bill. Upon argument the circuit judge sustained the demurrer, with leave to the complainant to amend his bill within 10 days. From this order this appeal was taken, and the said order is assigned as error.

W. W. Flournoy, for appellant. S. K. Gillis, for appellees.

TAYLOR, J. (after stating the facts). The complainant in his bill alleges, as a conclusion of law, that he and the defendants on or about the 1st day of November, 1904, entered into a contract of partnership to engage in the business of operating and conducting a certain turpentine plant for the purpose of manufacturing rosin and spirits turpentine at Hog Town, near Point Washington, in Washington county, Fla.; that by the terms of said contract complainant and defendants were to conduct said business under the firm name of Dasher, Rose & Co. What any of the other terms of this alleged contract of partnership were the bill fails to state. It fails to state how much, if any, of the partnership capital was or would be contributed by the complainant or by the defendants. It fails to state anything as to any obligation to share in the profits, losses, or expenses of the business. Indeed, what is stated of this alleged contract of partnership alleged to have been entered into on or about November 1, 1904, is a mere conclusion of the pleader, with no statement of any facts from which a court can determine whether the alleged contract established or created the relationship of partners between these parties or not. But, in addition to this defect

in the bill, the written contract subsequently entered into between them on February 13, 1905, and exhibited as a part of the bill, according to our interpretation thereof, is altogether inconsistent with the existence in fact of a partnership between the parties. This written contract says nothing about any partnership, but in its terms is inconsistent with the idea of partnership. It binds the defendants to make a proper bill of sale conveying a one-third interest in certain specified personal property to the complainant in consideration of the personal services of the complainant in the conduct and supervision of the turpentine business and plant of the defendants, whenever such business shall have yielded the sum of \$8,724.20, whether in gross or net, after deducting expenses, is not stated, reserving the right to the defendants, either or both of them, at any time, if the management of the business by the complainant should for any reason become unsatisfactory to either or both of the defendants, to sever their connection with the complainant, and thereupon, in lieu of conveying to him a one-third interest in the property, to pay him \$50 per month from the date of the contract until its forfeiture. It will be observed that this contract binds the defendants to convey to the complainant, not a one-third interest in the business, but a third interest only in certain specified property. The bill fails to negative the idea of a complete forfeiture of his rights by the complainant under this contract. It alleges that the complainant to the best of his ability has given to the management of said business his entire time and best attention, but fails to allege that the management by him proved to be satisfactory to the defendants, or was of such nature as that it was entitled to be reasonably satisfactory. If not so satisfactory for any reason, the defendants had the right under the contract to sever their connection with him, and to pay for his services, not as a partner, but as an employé, the sum of \$50 per month for the time of his service. In view of this construction of the contract between the parties, the court below ruled correctly in sustaining the demurrer of the defendants to the complainant's bill.

The decree appealed from is therefore hereby affirmed at the cost of the appellant, and the cause is remanded, with directions to dismiss the bill.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

DICKINSON v. TRAPHAGAN.

(Supreme Court of Alabama. April 28, 1906.)

1. CORPORATIONS — STOCKHOLDERS — LIABILITY — ACTION TO ENFORCE — NATURE AND FORM.

Under the express provisions of Code 1896, § 823, a creditor of a corporation has no right to file a bill to subject a stock subscription to the claim unless he is a judgment creditor.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 935, 936.]

2. SAME.

Acts 1903, p. 388, permitting the marshaling of assets of an insolvent corporation for the payment of creditors, has no application to a bill by a contract creditor to subject a stock subscription to his claim.

3. SAME—NECESSITY OF JUDGMENT AND EXECUTION AGAINST CORPORATION—INSOLVENCY OF CORPORATION.

The mere insolvency of a corporation does not enable a contract creditor to maintain a bill to subject a stock subscription to his claim without first obtaining a judgment and having an execution returned nulla bona.

4. SAME—PLEADING—BILL—SUFFICIENCY.

Const. 1901, § 232, prohibits a foreign corporation from doing business in the state without having one known place of business and an authorized agent therein, and Code 1896, c. 28, art. 16, provides the method of compliance. *Held*, that a bill by a contract creditor to subject a stock subscription to his claim against a foreign corporation, alleging that there was no person in the service of the corporation in the state, was insufficient for not alleging a noncompliance with the statute in order to show that the obtaining of a judgment was impracticable.

5. SAME—PERSONS LIABLE—MARRIED WOMEN.

A general statute imposing liability on shareholders includes married women.

Appeal from Chancery Court, De Kalb County; W. H. Simpson, Chancellor.

"To be officially reported."

Suit by H. L. Traphagan against Gertrude H. Dickinson. From a decree in favor of complainant, defendant appeals. Reversed.

Goodhue & Blackwood, for appellant.
Howard & Isbell, for appellee.

ANDERSON, J. This bill is filed by the complainant, a simple contract creditor of an insolvent corporation, to compel the respondent to pay what is due upon her subscription and to subject the same to payment of his debt. Section 823 of the Code of 1896 confers this right in a court of equity only upon judgment creditors.

Acts 1903, p. 388, has no application to a bill of this kind, but simply permits the marshaling of the assets of an insolvent corporation for the payment of creditors. The bill in the case at bar is in no sense such a bill as is contemplated by said act. The complainant, having no right under the statute to maintain this bill, is relegated to the common law, and, if he cannot proceed thereunder, has no standing in the chancery court. "No facts will be sufficient to excuse the creditor from obtaining a judgment at law against the corporation, except facts which are such as to make it impracticable for him

to obtain such a judgment." The mere insolvency of the corporation does not relieve the complainant from first obtaining a judgment and its being returned nulla bona. 10 Cyc. 728; *Tarbell v. Page*, 24 Ill. 46; *Van Weed v. Winston*, 115 U. S. 228, 6 Sup. Ct. 22, 29 L. Ed. 384.

An attempt is made in the bill as amended to excuse a failure to obtain a judgment against the corporation by averring that the officers are nonresidents of the state, "and that there is no white person or any person in the service or employment of said corporation in Alabama." Section 232 of the Constitution of 1901 provides that "no foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Article 16, c. 28, p. 445, of the Code of 1896, makes provision for the requirements of the Constitution in this respect and prescribes the method of a compliance therewith. It would therefore seem that the complainant could have obtained service if the law had been complied with by the corporation, and there should be an averment of a noncompliance therewith in order to show that the obtaining of a judgment was impracticable or impossible. This conclusion is not in conflict with the rulings of this court in the cases of *McDonnell v. Ala. Gold Life Ins. Co.*, 85 Ala. 401, 5 South. 120; *Spence v. Shapard*, 57 Ala. 598. In those cases the bill was filed after a dissolution of the corporation. If the corporation had been dissolved, the creditor could not get service or a judgment in a court of law, and his only remedy was by a bill in equity. "There is nothing in the bill here under consideration to indicate that the corporation has been dissolved, and, for aught we know, it is a going concern. The chancellor erred in overruling the second and third grounds of the demurrer.

The Constitution of West Virginia clearly defines the liability of a stockholder for his unpaid subscription to the capital stock and is an affirmation of the common law. 10 Cyc. p. 678, §§ 1, 2. The first ground of the demurrer was properly overruled.

"A general statute imposing an individual liability upon shareholders includes married women, and, unless they are specially mentioned by its terms, they are not exempted by reason of their coverture." 10 Cyc. p. 682, § 11; *Reciprocity Bank Case*, 22 N. Y. 9; *Dreisbach v. Price*, 133 Pa. 560, 19 Atl. 569. The fourth ground of the demurrer was properly overruled.

For the error above pointed out, the decree of the chancellor is reversed, and the cause remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

HOOKS v. HUNTSVILLE RY., LIGHT & POWER CO.

(Supreme Court of Alabama. April 28, 1906.)

1. APPEAL—HARMLESS ERROR—RULINGS ON DEMURRER.

The erroneous overruling of demurrers to pleas was harmless, where there was no evidence to support the counts of the complaint to which the pleas were addressed.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4101.]

2. STREET RAILROADS—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

One who approached the track of a street railroad without stopping to look or listen, and who would have seen an approaching car if she had looked, could not recover for injuries sustained by being struck by the car.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 208.]

Appeal from Circuit Court, Madison County; Paul Speake, Judge.

"Not officially reported."

Action by Clara E. Hooks against the Huntsville Railway, Light and Power Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Cooper & Foster, for appellant. Walker & Spraggins, for appellee.

HARALSON, J. The complaint contains two counts, the first averred simple negligence, and the second counted willfulness of defendant in the infliction of the injury on the plaintiff.

The demurrer interposed to the complaint was overruled which ruling is not assigned as error. The defendant interposed eight pleas to the complaint as a whole, the first being that of the general issue and the others, pleas of contributory negligence of plaintiff in the infliction of the injury. Demurrers were interposed to these pleas except the first.

The judgment entry recites, that the demurrers to these pleas were overruled, and immediately recites, "Thereupon issue being joined on pleas one to eight to the first count, and plea one to the second count as amended, thereupon came a jury," etc. It would seem from this latter recital, that the demurrer to the pleas of contributory negligence to the second count were sustained and not overruled. The case was tried on these pleas to the first count, and to the one of the general issue to the second count, and there was an entire absence of any evidence of willfulness or wantonness. So, if the demurrers to these pleas of contributory negligence to the second count were really overruled, it was error without injury, since, as stated, there was no evidence of the averment of willfulness or wantonness and no such insistence is made. *Espalla v. Wilson*, 86 Ala. 487, 5 South. 867; *Phoenix Insurance Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31.

There is really no conflict in the evidence for the plaintiff and that for the defendant. The evidence for defendant is full and clear

to show that the plaintiff walked in the way of the car that struck her without stopping, looking and listening for its approach; that the track was straight at that point for about 200 feet.

The motorman testified that when his car was coming down the track going westward, he discovered a woman dressed in black walking down Holmes street, on the north side of the track, about half way between the curbing and the track, with an umbrella over her left shoulder; that he slackened the speed of the car, reversed it, put on brakes and rang the bell; that the party suddenly turned, as if to cross the track and came in contact with the car at the front end. Mattie Bush, a passenger on the car, testified, corroborating the motorman.

The plaintiff testified, that as she stepped from the curbing on the north side of Holmes street, she looked in both directions, but a covered wagon going east, obstructed her view on the east and she did not see the car; that the track was straight for several hundred feet on the east at that point, and for 100 feet or more on the west; that the north rail of the track is about 25 feet from the curbing of the sidewalk; that she is deaf, but had a peculiar sense of vibration, heard no bell ring, and did not see the car until it struck her. She denied that she had an umbrella.

On the cross she testified, "that just as the wagon passed her, she stepped down off the curbing, (which she had testified was 25 feet from the track) and did not look for the car thereafter, and had no opportunity to do so until it struck her." Why she had no opportunity to look for the car, she does not explain. The driver of the wagon testified, that at the time of the accident, he had stopped his wagon on the north side of the railroad track at a private residence and was delivering meat.

It has long been held as a correct principle of law, that a person on foot approaching a railroad crossing is required to stop, look and listen before attempting to cross, and his failure to do so is contributory negligence which will defeat a recovery in an action for damages. *C. of G. R. Co. v. Foshee*, 125 Ala. 212, 27 South. 1006; *G. P. R. Co. v. Lee*, 92 Ala. 262, 9 South. 230; *L. & N. R. R. Co. v. Webb*, 90 Ala. 189, 8 South. 518, 11 L. R. A. 674; *Gothard v. A. G. S. R. Co.*, 67 Ala. 114. Of such a person, it was said in the case last cited, if a party "rushes into danger, which by ordinary care, he could have seen and avoided, no rule of law or justice can be invoked to compensate him for an injury he may receive."

Here, the evidence without conflict shows, that the plaintiff approached the track of the railroad, without stopping to look or listen; there was nothing to prevent her seeing the car, if she had used this pre-

caution, and that the accident was the result of her own heedless negligence.

The court properly gave the general charge for the defendant.

Affirmed.

DOWDELL, ANDERSON, and DENSON.
JJ., concur.

MORRIS v. STATE.

(Supreme Court of Alabama. April 28, 1906.)

1. JURY—VENIRE—STATUTES—CONSTRUCTION.

Code 1896, § 5004, providing that, when a capital case stands for trial, the court shall cause the box containing the names of jurors to be brought into the courtroom, and after the same is well shaken the presiding judge shall draw therefrom not less than 25 nor more than 50 of such names, is mandatory, and the record must affirmatively show a compliance with its terms.

2. CRIMINAL LAW — RECORD — SUFFICIENCY — JURY IN CAPITAL CASE.

The record of a trial of a capital case did not show the number of jurors drawn by the presiding judge and recited that the presiding judge publicly drew the "following names from the jury box, to wit," without setting forth the names and without showing how many names were drawn. The record showed that the court ordered that 50 special jurors should be drawn for the case. *Held* not to show a compliance with Code 1896, § 5004, requiring the judge in a capital case to draw from the jury box not less than 25 nor more than 50 names.

3. SAME—PARTIES TO OFFENSES—PRINCIPLES—STATUTES.

Under Code 1896, § 4308, abolishing the distinction between an accessory before the fact and a principal and between principals in the first and second degrees in cases of felony, and declaring that all persons concerned in the commission of a felony, whether they directly commit the act or aid or abet, must be punished as principals, each of two or more persons who by prearrangement or on the spur of the moment enter on a common enterprise, in which a felony is contemplated, is a conspirator, and if the purpose is carried out, each is guilty of the felony committed, for one present, aiding or ready to aid the active perpetrator in the commission of the offense, is a guilty participant, and equally guilty with the one who does the act.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 81.]

4. SAME—EVIDENCE—DECLARATIONS OF CO-CONSPIRATOR.

Before declarations of a co-conspirator are admissible against another, a foundation must be laid by proof sufficient in the opinion of the judge to establish prima facie the existence of the conspiracy.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1012, 1017.]

5. SAME.

Where a defendant is on trial for a murder, and not for a conspiracy to commit murder, evidence of his declarations tending to show a conspiracy is not inadmissible, though there is no other proof showing the conspiracy.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1013, 1014.]

6. SAME.

Where a defendant is on trial for a murder, and not for a conspiracy to commit murder, his declarations showing a conspiracy to commit murder are admissible, not as the

declarations of a conspirator, but as the declarations of accused.

7. HOMICIDE—EVIDENCE—ADMISSIBILITY.

On a trial for homicide committed by the son of accused, evidence that a few minutes after the killing accused declared, "We have come here to kill [decedent] and we are going to do it," is admissible as showing a common purpose between him and his son to kill decedent.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 367.]

8. SAME.

On a trial for homicide committed by the son of accused, evidence that accused, in response to the declarations of a third person that decedent had been killed, answered, "I hope we have done him up, and if we haven't I will go back and finish him," is admissible as showing the feeling of accused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 359.]

9. SAME.

On a trial for homicide committed by the son of accused, evidence that about 10 minutes after the shooting accused declared that he would kill every one bearing the name of decedent was admissible as showing malice.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 287.]

10. SAME.

On a trial for homicide, the declaration of accused that he would kill every person by the name of decedent was admissible, though it did not particularize decedent by his given name; it being for the jury to determine whether decedent was referred to.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 287.]

11. CRIMINAL LAW — EVIDENCE — DECLARATIONS — ADMISSIBILITY.

Where the facts under which declarations were made by accused on trial for homicide show that they were voluntarily made, evidence of the declarations is admissible as against the objection that a proper predicate was not laid.

12. HOMICIDE—EVIDENCE—ADMISSIBILITY.

Where, on a trial for homicide, the theory of the prosecution was that the killing was the result of a conspiracy between accused and his son; evidence that some one remarked that there was going to be a fight, and the difficulty almost immediately ensued, was inadmissible, because leading the jury to infer the existence of a conspiracy without proof that one of the alleged conspirators made the statement.

13. SAME.

Where, on a trial for homicide, the question as to whether decedent or accused provoked the difficulty was in dispute, evidence that shortly before the killing accused was dancing and saying: "Where is [decedent]? Come and dance some while you are mad"—was admissible on the status of the mind of accused with respect to decedent.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 319.]

14. SAME—EVIDENCE—RES GESTÆ.

On a trial for homicide, evidence of what was said or done by accused in reference to decedent on the day of the difficulty and leading up to the difficulty was competent.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 341-348.]

15. SAME.

On a trial for homicide, evidence that accused, about an hour before the difficulty, cursed and called decedent's name, was competent, when taken in connection with the proof of accused's declaration, made after the difficulty.

"We have come here to kill [decedent] and we are going to do it."

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide § 293.]

16. CRIMINAL LAW — EVIDENCE — TESTIMONY OF ABSENT WITNESS AT PRELIMINARY TRIAL — ADMISSIBILITY.

Where it was shown that a witness was a permanent resident of a foreign state and that he had not been subpoenaed, his evidence given on the preliminary trial of the defendant was properly admitted.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1233.]

17. SAME—CONSPIRACY—PROOF—SUFFICIENCY.

To show a conspiracy to do an unlawful act, it is not indispensable that the evidence should show the existence of the conspiracy any definite time prior to the doing of the act. It may have arisen on the spur of the moment.

18. SAME—NATURE OF PROOF.

It is not necessary to prove a conspiracy by positive evidence, but its existence may be inferred from the attendant circumstances accompanying the doing of the act and from conduct subsequent thereto.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1014.]

19. SAME—DECISION OF COURT ON PROCEEDINGS FOR BAIL—EFFECT.

A judgment of the appellate court, affirming an order of a judge allowing bail to accused charged with committing a homicide, does not preclude the state from prosecuting accused for murder in the first degree and from introducing evidence other than that contained in the record in the proceeding in which the judgment was rendered.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 304, 305.]

20. SAME—PARTIES TO OFFENSES—AIDERS AND ABETTORS—MANSLAUGHTER.

Under Code 1896, § 5306, providing that, where the indictment charges an offense of which there are different degrees, the jury may find defendant not guilty of the degree charged and guilty of any degree inferior thereto, or of an attempt to commit the offense charged, there may be aiders and abettors in manslaughter.

21. SAME—EVIDENCE—RES GESTÆ.

What occurred from the time that decedent and accused, on trial for the murder of decedent, walked to the place at which arose the difficulty resulting in the killing of decedent up to the conclusion of the difficulty, is admissible as a part of the res gestæ.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 804.]

22. WITNESSES — IMPEACHMENT — PROOF OF ANIMUS OF WITNESS.

Where, on a trial for homicide committed by the son of accused, the son was a witness, it was proper, for the purpose of affecting his credibility, to question him with respect to a conversation in which he made threats against decedent.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1194.]

23. CRIMINAL LAW — TRIAL — INSTRUCTIONS — REQUESTS — NECESSITY.

The failure of the court in a criminal case to limit evidence competent as affecting the credibility of the witness to such purpose is not a matter of which accused can complain, in the absence of a motion on his part to so limit it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1909.]

24. WITNESSES—IMPEACHMENT.

Where, on a trial for homicide committed by the son of accused, the son denied that he had made threats against decedent, it was competent to offer evidence showing that he had made threats.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1244.]

25. SAME.

Where, on a trial for homicide, accused testified that decedent knocked him down, jumped on him, caught him by the throat with his left hand, and began to beat him about the face with his right, it was competent, on his cross-examination, to ask him if he did not state after the difficulty that he was not hurt.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1228, 1229.]

26. CRIMINAL LAW—TRIAL—INSTRUCTIONS—EVIDENCE.

Where, on a trial for homicide, there was evidence supporting the plea of self-defense, an instruction that self-defense was not in the case was erroneous as a charge on the effect of the evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1758, 1763.]

27. SAME — WITHDRAWAL OF QUESTION OF FACT FROM JURY — AUTHORITY OF COURT.

The court in a criminal case has no authority to take any material question of fact from the jury, where there is any tendency in the evidence to support it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1703-1722.]

28. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

An instruction, on a trial for homicide, that the burden is not on the accused to establish self-defense by a preponderance of the evidence, but, if the evidence raises a reasonable doubt as to whether accused acted in self-defense, he must be acquitted, is erroneous.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 617.]

29. CRIMINAL LAW — INSTRUCTIONS — AIDING AND ABETTING — HOMICIDE.

An instruction that accused, on trial for homicide, cannot be guilty as an aider or abettor in the killing of decedent if he gave no "assistance or uttered no word to the person doing the killing," etc., is misleading for using the word "or," instead of "and," between the words "assistance" and "uttered."

30. HOMICIDE — INSTRUCTIONS — AIDING AND ABETTING.

Where, on a trial for homicide, it appeared that the killing was done by the son of accused, and that accused at the time of the killing stood in front of decedent with his hand near his pocket as if attempting to draw a weapon, an instruction that accused could not be found guilty as an aider or abettor if he gave no assistance or uttered no word to the person doing the killing, and if accused was not present by preconcert, nor present with the knowledge of the person doing the killing, with intent to aid him, unless he actually took part in the killing, was erroneous for failing to charge that there might be an aiding and abetting by conduct, demonstrations, or menaces.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 637; vol. 14, Cent. Dig. Criminal Law, § 81.]

31. CRIMINAL LAW—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—HOMICIDE.

Where, on a trial for homicide, there was evidence showing the existence of a conspiracy between accused and his son to murder decedent, an instruction ignoring the theory of a conspiracy was properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

32. SAME.

Where, on a trial for homicide, the theory of the state was that a conspiracy for the murder of decedent existed between accused and his son, who did the killing, and the evidence showed that accused stated, "We have come here to kill" decedent, an instruction assuming that the evidence of a conspiracy was circumstantial was erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1764.]

33. HOMICIDE—PROOF OF MOTIVE—NECESSITY.

The state, on a trial for homicide, need not prove a motive for the commission of the crime.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 481.]

34. SAME—INSTRUCTIONS—PROVINCE OF JURY.

Where, on a trial for homicide, there was evidence showing the existence of a conspiracy between accused and his son, who did the killing, an instruction that there was no evidence showing a conspiracy to kill decedent was erroneous as an invasion of the province of the jury.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 582.]

35. CRIMINAL LAW—TRIAL—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse an instruction covered by instructions given.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

36. SAME—IGNORING EVIDENCE.

An instruction in a criminal case which ignores a part of the evidence is properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

37. SAME—ASSUMPTION OF FACT.

Where, on a trial for homicide, there was evidence showing the existence of a conspiracy between accused and his son to kill decedent, and that decedent was killed by the son, an instruction that malice on the part of the son, not indulged in by the accused, would not authorize a conviction, unless accused, with knowledge of the malice, aided in the killing, was erroneous, as assuming that malice on the part of the son was not indulged in by accused.

38. HOMICIDE—MALICE—INSTRUCTIONS.

An instruction, on a trial for homicide committed by the son of accused, directing the acquittal of accused unless the son's malice was indulged in by accused, was misleading, where defendant might be convicted of manslaughter, an offense not involving malice.

39. SAME.

An instruction, on a trial for homicide committed by the son of accused, that unless the killing was done under such circumstances as to render the son guilty of murder, the jury could not find accused guilty of murder, was misleading, as he might be convicted of manslaughter.

40. SAME.

An instruction, on a trial for homicide committed by the son of accused, that no presumption was to be indulged in against accused because he was present at the place of the killing and had an altercation with decedent just prior thereto, was erroneous, as invading the province of the jury.

41. SAME—APPEAL—HARMLESS ERROR—ERRONEOUS INSTRUCTION—CURED BY VERDICT.

The error in an instruction on a trial for homicide arising from erroneously defining malice is rendered harmless on accused being found guilty of manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 720.]

42. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

The court, on a trial for crime, should charge that where the evidence convinces the jury that there is a probability of the innocence of accused the verdict should be not guilty.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1920.]

43. SAME—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THOSE GIVEN.

Where, on a trial for homicide, the court in its charge rested the conviction alone on the hypothesis that the jury should find that a conspiracy actually existed between accused and his son for the killing of decedent, the refusal to charge that, before accused could be found guilty, it must be found that there was a conspiracy to kill decedent, etc., was not error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

44. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

An instruction, on a trial for homicide committed by the son of accused, that a son has the right to slay in defense of his father whenever the father has a right to slay in his own defense, is erroneous for failing to define the elements of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 617.]

45. SAME.

An instruction, on a trial for homicide, directing the jury to acquit accused where they have a reasonable doubt as to whether or not the killing was in self-defense, was erroneous for failing to define the elements of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 617.]

46. CRIMINAL LAW—INSTRUCTIONS—ARGUMENTATIVE CHARGES.

An instruction, on a trial for homicide, that the fact that the grand jury indicted accused for the unlawful killing of decedent with malice aforethought could not be considered as tending to show either guilt or innocence, was properly refused as argumentative.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Laws, §§ 1959, 1960.]

47. HOMICIDE—APPEAL—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

Where, on a trial for homicide, accused was convicted of manslaughter, the correctness of instructions relating to murder in either degree will not be considered.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 720.]

48. CRIMINAL LAW—INSTRUCTIONS—IGNORING EVIDENCE.

On a trial for homicide committed by the son of accused, an instruction that a son has the right to act in defense of his father, who is in real or apparent imminent danger and is not at fault in bringing on the difficulty, and there is no other means of escape from the real or apparent danger which menaces him, except to kill decedent, etc., is erroneous, because ignoring evidence that the accused entered willingly into the difficulty with the decedent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

49. SAME—SELF-DEFENSE—INSTRUCTIONS.

An instruction, on a trial for homicide, that the state has the burden of proving that accused was not free from fault in bringing on the difficulty with the decedent, was misleading, because leading the jury to believe that retreat and imminent peril were not factors in the case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

50. SAME.

An instruction, on a trial for homicide committed by the son of accused, that whatever occurrences might have sprung out of the trouble between decedent and accused, if they were mere incidents happening casually without the knowledge or expectation of accused, such casual incidents did not show a conspiracy between accused and his son, was properly refused as argumentative.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1959, 1960.]

51. SAME—INSTRUCTIONS—SELF-DEFENSE.

An instruction, on a trial for homicide committed by the son of accused, that if the acts of decedent at the time he was shot were such as to reasonably impress on the son the belief, and the son honestly believed, that he was in imminent danger to his life, and there was no other means of escape, except by taking the life of decedent, then the son had the right to shoot decedent, unless the son brought on the difficulty, was erroneous, as ignoring the evidence showing the existence of a conspiracy between accused and the son to murder decedent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

52. SAME.

The instruction was also erroneous, because ignoring the son's right of self-defense as depending on the status that the accused occupied with reference to the difficulty with decedent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

53. SAME—AIDING PERPETRATOR OF CRIME—INSTRUCTIONS.

An instruction, on a trial for homicide committed by the son of accused, that there was no evidence that accused did any act or said any word at the time the son killed decedent that aided in the killing, was properly refused as invading the province of the jury, in view of the evidence showing the existence of a conspiracy between accused and the presence of accused at the time of the killing.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1764.]

54. SAME.

An instruction for homicide committed by the son of accused, that before accused could be convicted on the ground that he aided or encouraged the son by acts or words at the time he shot decedent, it must be found that the son had knowledge of such acts or words, and that the acts or words were done or said for the purpose of encouraging him in the killing, was erroneous for disregarding the evidence of a conspiracy between the accused and the son to kill decedent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

55. HOMICIDE — INSTRUCTIONS — AIDING AND ENCOURAGING.

The instruction was erroneous, because going too far in hypothesizing that the son must have had knowledge that the acts done or words said were for the purpose of aiding or encouraging him in killing decedent; for if, under the circumstances, he was led to believe that the acts done or words said were meant to encourage him, that would be sufficient.

56. SAME—SELF-DEFENSE—INSTRUCTIONS.

An instruction, on a trial for homicide committed by the son of accused, that the dangers which will excuse one for killing another need not be real, and if the jury believe that the appearance of danger surrounding the accused at the time of the homicide was such as to induce a reasonable belief, honestly entertained by the son, that accused's life was in danger, and there was no other reasonable

means open to accused to avoid the danger, but by taking the life of decedent, accused must be acquitted, though decedent had no deadly weapon, unless accused could have retreated and avoided the danger, etc., was erroneous, for failing to negative a willingness on the part of accused in entering into a difficulty with decedent.

57. CRIMINAL LAW—TRIAL—WITHDRAWAL OF INSTRUCTIONS.

Where, on a trial for homicide committed by the son of accused, the court erroneously charged the jury that there was no evidence that accused aided the son in the killing, it was the duty of the court to recall the jury and correct the error in the presence of accused and his counsel.

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

"To be officially reported."

John M. Morris, Sr., was convicted of manslaughter, and he appeals. Reversed and remanded.

The defendant was indicted for killing Doc Grisham by shooting him with a pistol. The evidence on the trial shows that the killing was done by a son of this defendant after the deceased had struck this defendant. The other facts necessary to a proper understanding of the opinion are fully set out therein.

The following charges were requested by the defendant and refused by the court:

Charge 7: "The burden of proof is not on the defendant to establish self-defense by a preponderance of the evidence; but, if all the evidence raises in the minds of the jury a reasonable doubt as to whether or not the defendant acted in self-defense, you must find him not guilty."

Charge 12 is fully set out in the opinion.

Charge 18: "I charge you, gentlemen of the jury, that before you can convict this defendant of having aided and abetted or aided or abetted his son, John Morris, Jr., in the killing of B. F. Grisham, you must believe from the evidence beyond a reasonable doubt that this defendant participated in the killing, or intentionally encouraged his son in said killing, or was present for the purpose of aiding his son in the killing, which purpose was known to said son, John Morris, Jr., at the time the latter fired the fatal shots."

Charge 20: "I charge you, gentlemen of the jury, the question as to whether or not there is a conspiracy and whether or not the defendant was a participant therein rests on circumstantial evidence and a conclusion as to whether or not there was a conspiracy and the participation therein by this defendant. The failure of the state to prove a motive or inducement therefor, if you believe it has so failed, is a circumstance that may be considered by you in connection with all the other evidence in the case."

Charge 21: "I charge you, gentlemen of the jury, that there is no evidence in this case showing a conspiracy or prearrangement on the part of this defendant and Johnnie Morris, Jr., to take the life of B. F. Grisham."

Charge 26: "I charge you, gentlemen of

the jury, that if you believe from the evidence that the defendant was knocked down by B. F. Grisham, and that Johnnie Morris, Jr., ran up and shot the deceased, without knowledge of this defendant, you cannot convict the defendant, unless you further believe beyond all reasonable doubt that there was a conspiracy or prearrangement between the defendant and his son to take the life of B. F. Grisham."

Charge 29: "I charge you, gentlemen of the jury, that if you believe from the evidence that B. F. Grisham started the difficulty with this defendant by calling him off and knocking him down, and that John Morris, Jr., ran up and fired the fatal shot, without encouragement from this defendant, your verdict should be not guilty, unless you believe beyond all reasonable doubt and to a moral certainty that there was a prearrangement or a conspiracy existing between this defendant and his son, John Morris, Jr., to take the life of B. F. Grisham."

Charge 31: "If you believe from the evidence that B. F. Grisham provoked the difficulty by calling this defendant off and knocking him down, and if you believe from the evidence that John Morris, Jr., ran up and fired the fatal shot without encouragement from this defendant and without his aid and assistance, your verdict should be not guilty."

Charge 41: "Malice upon the part of John Morris, Jr., and not indulged in by the defendant, will not authorize a conviction of the defendant of the offense charged in the indictment, unless the defendant, with knowledge of the malice, aided, abetted, or encouraged the killing."

Charge 42: "Unless the killing of deceased was done under such circumstances as to render John Morris, Jr., guilty of the murder, the jury cannot find the defendant guilty as charged in the indictment."

Charge 46: "No presumption is to be indulged against this defendant because he was present at the place of killing and had an altercation with the deceased just prior to the killing."

Charge 50: "Malice upon the part of John Morris, Jr., not indulged in by the defendant, will not authorize a conviction of the defendant, unless he had personal knowledge of the malice on the part of John Morris, Jr."

Charge 53: "If the evidence in this case convinces the jury that there is a probability of the defendant's innocence, then your verdict should be not guilty."

Charge 2A: "I charge you, gentlemen of the jury, that before you can find this defendant guilty you must find beyond all reasonable doubt and to a moral certainty, from all the evidence, that there was a conspiracy into which the defendant entered to kill B. F. Grisham or to commit some other unlawful act, and killing of B. F. Grisham followed from or was the natural or proximate result of such conspiracy to commit such unlawful

acts, or that he aided or abetted in the killing by preconcert of action with John Morris, Jr., or that he was present and aided John Morris, Jr., in the infliction of the fatal shot, or was present for the purpose to aid, encourage, or incite John Morris, Jr., to commit the deed, which purpose was known to John Morris, Jr., and did contribute to."

Charge AA: "I charge you, gentlemen of the jury, that a son has the right to slay in defense of his father whenever that father has a right to slay in his own defense."

Charge 1B: "I charge you, gentlemen of the jury, that, if you have a reasonable doubt as to whether or not the killing was in self-defense, you should acquit the defendant in this case."

Charge 3B: "I charge you, gentlemen of the jury, that the fact that the grand jury of this county indicted this defendant for the unlawful killing of B. F. Grisham with malice aforethought cannot be considered by you as tending to show either his guilt or innocence."

Charges CC, DD, and E related to murder in the first and second degrees, and the verdict was for manslaughter.

Charge EE: "I charge you, gentlemen of the jury, that a son has the right to shoot in defense of his father, provided his father is in real or apparent imminent danger of death or grievous bodily harm, and was not at fault in bringing on the difficulty, and there was no other motive of escape from the real or apparent danger which menaced him, when there was no other means of escape save by taking the life of his father's assailant."

Charge G: "I charge you, gentlemen of the jury, before you can convict this defendant under this indictment, you must believe from the evidence beyond all reasonable doubt and to a moral certainty that this defendant was not free from fault in bringing on the difficulty with B. F. Grisham and that he actually participated in the killing of B. F. Grisham, or that he and John Morris, Jr., had a preconcert or agreed to do some act from which the death of B. F. Grisham would proximately result from the doing of such act, or that there was a community of purpose between John Morris, Jr., and this defendant to kill B. F. Grisham, or to do some act from which the death of B. F. Grisham would flow as a proximate result of doing such act, or that this defendant aided and abetted or aided or abetted John Morris, Jr., in killing B. F. Grisham."

Charge K: "I charge you, gentlemen of the jury, that whatever occurrence may have sprung out of the trouble between B. F. Grisham and this defendant, if they were mere incidents happening casually, without the knowledge, design, or expectation of the defendant, then these casual incidents do not show a conspiracy." Charge KK: "I charge you, gentlemen of the jury, that you cannot find this defendant guilty, on the

theory of a conspiracy or prearrangement or preconcert, on the uncorroborated declarations or admissions or confessions of this defendant."

Charge NN: "I charge you, gentlemen of the jury, that you cannot find this defendant guilty, on the theory of a conspiracy or prearrangement or preconcert, on the uncorroborated confessions of this defendant."

Charge OO: "I charge you, gentlemen of the jury, that if you believe from the evidence in this case that the acts of B. F. Grisham, at the time he was shot, were such as to reasonably impress upon John Morris, Jr., the reasonable belief, and John Morris, Jr., honestly entertained that belief at the time, that he was in imminent danger to his life or great bodily harm, and there was no other motive of escape, except by taking the life of B. F. Grisham, then John Morris, Jr., had the right to shoot B. F. Grisham, unless you further believe that John Morris, Jr., brought on the difficulty."

Charge X: "I charge you, gentlemen of the jury, that there is no evidence in this case that this defendant did any act or said any word at the time John Morris, Jr., killed Grisham that aided in the killing."

Charge Y: "Before you can convict the defendant, on the ground that he aided or encouraged John Morris by acts or words at the time he shot Grisham, you must believe beyond a reasonable doubt and to a moral certainty that John Morris had knowledge of such acts or words, and also knowledge of the acts or words were done or said for such purpose."

Charge XYZ: "I charge you, gentlemen of the jury, that the dangers that will excuse one for killing another need not be real or actual. It may now be known that all the appearances of danger were false, and that B. F. Grisham never intended to do the defendant any further harm, and that he did not have a pistol or other deadly weapon; yet if the jury believe from all the evidence in this case, or any part of the same, after a consideration of all the evidence in the case, that the appearance of danger surrounding this defendant at the time was such as to induce a reasonable belief, honestly entertained by John Morris, Jr., that his father's life was in danger, or that his father was about to suffer great bodily harm, and that there was no other reasonable means at the time open to defendant, or to his son, Johnnie Morris, Jr., to avoid the danger, real or apparent, to the defendant, but by taking the life of B. F. Grisham, the defendant being without fault in producing or causing the situation culminating in such appearances, the law holds Johnnie Morris, Jr., harmless for the killing of B. F. Grisham, and the jury must acquit the defendant, although B. F. Grisham had no pistol or other deadly weapon, unless the jury further believe from the evidence that defendant, if you

find that apparent danger menaced him, could have retreated and avoided his apparent danger, or that there was a preconcert or conspiracy on the part of defendant and his son, John Morris, Jr., to engage in some unlawful act, from the doing of which the death of B. F. Grisham proximately resulted."

W. R. Walker, H. C. Thach, and Callahan & Harris, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The defendant was tried on an indictment which charges murder in the first degree, a capital offense. Section 5004 of the Code of 1896 provides that: "When any capital case or cases stand for trial, the court shall, at least one day before the same are set for trial, cause the box containing the names of jurors to be brought into the courtroom, and after having the same well shaken, the presiding judge shall then and there publicly draw therefrom not less than twenty-five nor more than fifty of such names for each capital case." It has been uniformly held by this court that this section of the Code is mandatory and the record must affirmatively show a compliance with its terms. *Scott's Case* (Ala.) 37 South. 366; *Bankhead's Case*, 124 Ala. 14, 26 South. 979; *Watkin's Case*, 89 Ala. 82, 8 South. 134; *Washington's Case*, 81 Ala. 35, 1 South. 18; *Jordan's Case*, 81 Ala. 20, 1 South. 577. Neither the original record nor the one sent up in response to the certiorari shows the number of jurors that were drawn by the presiding judge. The record contains these recitals on the subject: "And this being a capital case, on motion of the solicitor it is ordered by the court that Monday, October 9, 1905, be set for the trial of this cause, and that 50 special jurors be drawn and ordered summoned for the trial of this cause. Thereupon the court caused the box containing the names of the jurors for Limestone county to be brought into court, and after having the same well shaken, the defendant being present in open court, the presiding judge then and there publicly drew the following names from the jury box, to wit." The names are not set out and there is nothing in the record to show just how many names were drawn. The fact that 50 were ordered does not show that 50 were in fact drawn from the box. The judge may have drawn a number less than 50 and the box may have been exhausted. While we can in many instances presume that a court or a judge has complied with the law, this is not one of the instances, as the facts must affirmatively appear of record. Authorities supra. If for no other reason, this case will have to be reversed on account of this defect in the record. We do not mean to decide that it is essential to a compliance with section 5004 of the Code of 1896 that the names of the jurors should be set out, but that the order should affirmatively

show that the number ordered to be drawn were drawn.

The evidence adduced on the trial, as appears from the bill of exceptions, showed: That the homicide occurred on the 25th day of June, 1904, in Limestone county, at Baker's Mill, where there was a large gathering of people; the occasion being a neighborhood barbecue or picnic. That among those present were the defendant, his three sons, John Morris, Jr., Walter Morris, and Eddie Morris; also the wife of John Morris, Jr., and three small children of Walter Morris. It is not contended that the defendant killed the deceased or that he did him any injury whatever with his own hand. But he was tried and convicted on the theory that he was either a conspirator with his son, John Morris, Jr., who did the killing, or that he aided and abetted his son, or was present to aid and abet him. "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in the cases of felony, is abolished by statute; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, must be indicted, tried, and punished as principals." Code 1896, § 4308; Jolly's Case, 94 Ala. 19, 10 South. 606; Tanner's Case, 92 Ala. 1, 9 South. 613; Tally's Case, 102 Ala. 25, 15 South. 722.

When by prearrangement, or on the spur of the moment, "two or more persons enter upon a common enterprise or adventure, and a criminal offense is contemplated, then each is a conspirator, and if the purpose is carried out each is guilty of the offense committed, whether he did any overt act or not. This rests on the principle that one who is present, encouraging, aiding, abetting, or assisting, or who is ready to aid, abet, or assist, the active perpetrator in the commission of the offense, is a guilty participant, and, in the eye of the law, is equally guilty with the one who does the act. Such community of purpose, or conspiracy, need not be proved by positive testimony. It rarely is so proved. The jury are to determine whether it exists, and the extent of it, from the conduct of the parties and all the testimony in the case." Tanner's Case, 92 Ala. 1, 9 South. 613; Williams' Case, 81 Ala. 4, 1 South. 179, 60 Am. Rep. 133; Martin's Case, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91; Gibson's Case, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; Elmore's Case, 110 Ala. 63, 20 South. 323; Evans' Case, 109 Ala. 13, 19 South. 535; Ralford's Case, 59 Ala. 106.

With respect to the question of conspiracy or common purpose to kill the deceased, Doc Grisham, it has been strenuously argued in the brief of appellant's counsel that, before declarations of the defendant tending to show such conspiracy are admissible as evi-

dence, it must appear by evidence allunde that a conspiracy existed; in other words, that in this respect the conspiracy and not the homicide constitutes the corpus delicti, and notwithstanding the proof clearly, and without dispute showed that the homicide was committed, the declarations of the defendant himself tending to show the conspiracy to kill deceased are not admissible, in the absence of other proof preceding the proof of the declarations, which tended to show the conspiracy. We fully recognize the well-established rule of evidence that, before declarations of a co-conspirator are admissible against another, a foundation must be laid by proof sufficient, in the opinion of the judge presiding, to establish prima facie the existence of such conspiracy. Martin & Flinn's Case, 28 Ala. 71; Johnson's Case, 29 Ala. 62, 65 Am. Dec. 383; McAnally's Case, 74 Ala. 9; Hunter's Case, 112 Ala. 77, 21 South. 65; Johnson's Case, 87 Ala. 39, 6 South. 400; Thomas' Case, 133 Ala. 139, 32 South. 250. But it must be borne in mind that the defendant is not indicted for a conspiracy to commit murder, but for the murder itself; further, that it is not the declarations of a co-conspirator, but of the defendant, that are the subject of this discussion. Hence the insistences of the defendant in this respect are inapt, as is also the distinction with respect to accessories before and after the fact, drawn and argued by counsel and bottomed on the Tally Case, 102 Ala. 25, 15 South. 722.

Upon these considerations we think the court did not err in allowing Mrs. M. A. Price to testify that a few minutes after the difficulty she heard the defendant say, "We have come here to kill Doc Grisham and we are going to do it." Its tendency was to show a common purpose between him and his son to kill Grisham, or at least it was competent to go to the jury, and it was for that tribunal to determine its weight, in connection with all the other evidence, including the denial of the defendant that he gave utterance to the declaration. For the same reason the evidence of Mrs. A. J. Grisham that, "shortly after the shooting of B. F. Grisham (Doc) by John Morris, Jr., she heard Mrs. Ida Grisham screaming, 'They have killed Doc Grisham,' " and at this time she saw the defendant and heard him say, "I hope we've done him up, and if we haven't I will go back and finish him." It may be that the statement of Mrs. Ida Grisham, apart from the reply of the defendant, was subject to the objection made to it; but the statement of the defendant at the time was evidently in response to Mrs. Grisham's statement, at least it was for the jury to determine whether it was or not, and, if it was, then it was explanatory of the defendant's declaration, which tended to show bad feeling on the part of the defendant, and also tended to inculcate the defendant, Morris'

Case, 39 South. 608; Jones' Case, 96 Ala. 102, 11 South. 399.

The evidence of witness Malone and Mrs. M. A. Price that about 10 minutes after the shooting they heard defendant say he would kill every damned Grisham by the name was properly admitted. The tendency of the declaration was to show malice on the part of the defendant. Its weight was a question to be determined by the jury. *McManus' Case*, 36 Ala. 285; *Plant's Case*, 140 Ala. 52, 37 South. 159; *Kerr on Homicide*, p. 473, § 430. Nor did the fact that the declaration did not particularize the deceased by his given name render it inadmissible. It was for the jury to determine whether the deceased was referred to. *Harrisons' Case*, 79 Ala. 29; *Anderson's Case*, 79 Ala. 8. The facts and attendant circumstances under which the several declarations were made affirmatively show that the declarations were made voluntarily, and there could be no valid objection that a proper predicate was not laid for the admission of them. *Bush's Case*, 136 Ala. 85, 33 South. 878; *Stone's Case*, 105 Ala. 60, 17 South. 114; *Price's Case*, 117 Ala. 114, 23 South. 691.

W. H. McClellan, the first witness examined by the state, testified that the first thing that attracted his attention was that he heard some one remark, "There is going to be a fight." At the last term, on an appeal by John Morris, Jr., from a judgment of conviction for the killing of the deceased, Doc Grisham, we said of this declaration: "The undisputed evidence showed that the difficulty or 'fuss' almost immediately ensued between Morris and the deceased, and, if it should be conceded that the court erred in admitting the declaration, we are satisfied that no injury resulted therefrom to the defendant"—citing Code 1896, § 4333. *Morris' Case*, 39 South. 608. The facts in the case at bar differentiate it from that case, in that here we have evidence tending to show a conspiracy, and one theory of the prosecution was that the killing was the result of a conspiracy. From the remark objected to the jury might have been left to infer a conspiracy, without proof that one of the alleged conspirators made it. We think in this case the evidence was inadmissible, and the court erred in not sustaining the objection to it.

Witness Tucker was permitted to testify that shortly before the killing he was standing in a crowd near the dance ring and the defendant was dancing, that he heard the defendant say while dancing: "Where is Doc Grisham? Oh, Doc! Doc!! come and dance some while you are mad." It was a disputed fact on the trial as to who provoked the difficulty in which Grisham was killed, the defendant or the deceased, and any evidence that would cast light on the status of defendant's mind with respect to Grisham was competent, and we think this evidence was competent for that purpose. Its weight may be slight, but with that we are not dealing.

That is a jury question. Then the admissibility of this evidence is strengthened by the declaration made by defendant after the difficulty, as testified to by Mrs. Price: "We've come here to kill Doc Grisham and we are going to do it." *Morris' Case* (Ala.) 39 South. 609; *Armor's Case*, 63 Ala. 173.

All that was said or done by the defendant in reference to Doc Grisham on the day of the difficulty and leading up to the difficulty was competent. Upon this consideration the testimony of Mrs. B. F. Grisham, widow of the deceased, "that about a half hour before the difficulty she heard the defendant at the dinner table curse and call Doc Grisham's name, but did not understand what he said," was competent. Especially so when taken in connection with the proof of defendant's declaration, made after the difficulty, "We've come here to kill Doc Grisham and we are going to do it." *Armor's Case*, 63 Ala. 173.

Witness Colbert was permitted to testify, among other things, as follows: "I heard the defendant at the dinner table say, 'Eat, drink, and be merry, and we will shell these damned woods down directly?'" In connection with the other evidence in the case, we think there was no error in admitting this evidence.

The proof we think sufficiently showed that John Robinson's permanent residence was in the state of Tennessee. He had not been subpoenaed, and his evidence given on the preliminary trial of this defendant, with others, was properly admitted. *Lett's Case*, 124 Ala. 64, 27 South. 258, and authorities there cited; *Wilson's Case*, 140 Ala. 43, 37 South. 93; *Jacobi's Case*, 133 Ala. 1, 32 South. 158.

The motion made by the defendant to exclude the state's evidence as to the shooting of B. F. Grisham (deceased) on the grounds named is without merit. The evidence cannot be said to be free from inference that the defendant conspired to kill Grisham, or that he aided or abetted his son, who killed him. To show a conspiracy to do an unlawful act it is not indispensable that the evidence should show the existence of the conspiracy any definite time prior to the doing of the act. It may have arisen on the spur of the moment. Nor is it necessary that the conspiracy or common purpose should be shown by positive evidence, but its existence may be inferred from all the attendant circumstances accompanying the doing of the act, and from conduct of the defendant subsequent to the criminal act. *Tanner's Case*, 92 Ala. 1, 9 South. 613; *Williams' Case*, 81 Ala. 4, 1 South. 179, 60 Am. Rep. 133; *Martin's Case*, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91; *Gibson's Case*, 89 Ala. 121, 8 South. 98, 18 Am. St. Rep. 96; *Elmore's Case*, 110 Ala. 63, 20 South. 323; *Evans' Case*, 109 Ala. 13, 19 South. 535; *Johnson's Case*, 29 Ala. 62, 65 Am. Dec. 383; *Scott's Case*, 30 Ala. 503; *Buford's Case*, 132 Ala. 6, 31 South. 714.

It has been suggested and seriously argued by counsel for appellant that the evidence for the state should have been excluded upon the ground stated in the motion, "that no conspiracy is shown." We have adverted to the tendencies of the evidence in this respect, and are satisfied that this was a jury question. But the defendant's counsel urged that, when this case was before this court on an appeal by the state from an order granting defendant bail on an application for habeas corpus, this court must of necessity have held that the evidence before it would not authorize or sustain a conviction for a capital offense, and that therefore there was no evidence of a conspiracy. It may be true that the evidence contained in the record in that case did not warrant a conviction for the capital offense, but it does not follow that, because the court affirmed the order of the judge allowing bail, the state was thereby precluded from prosecuting the defendant for murder in the first degree and from introducing other evidence. Nor does it follow that the evidence contained in the record now before us is the same as was the evidence in the record on the appeal referred to. Counsel in their brief expressly disclaim any contention that the guilt or innocence of the defendant became *res adjudicata* by the decision made in the habeas corpus case by this court. But they contend that, in that case the court having determined that there was no evidence upon which a trial court could permit a conviction for murder in the first degree to stand, therefore there was no authority for the jury to find for a lesser offense than murder in the first degree, and the court should have excluded the evidence. It seems to us that this argument, logically followed, would lead to the position that the ruling of the court on the application for bail became *res adjudicata*. The position, however, of the defendant seems to be that, if two or more conspire to commit a murder, there can be no conviction for a less offense than murder; in other words, that there cannot be aiders and abettors in manslaughter. It is a sufficient reply to this position or contention that this court has expressly held to the contrary, and we see no reason for departing from the holding. *Coleman's Case*, 5 Port. 32; *Martin's Case*, 89 Ala. 115, 8 South. 23, 18 Am. St. Rep. 91; Code 1896, § 5306.

What occurred from the time that Grisham and the defendant walked to the place at which the difficulty occurred to the conclusion of the affray was a continuous transaction, and all that was said and done by the parties to it while the affray was in progress was of the *res gestæ*. *Wood's Case*, 128 Ala. 27, 29 South. 557, 86 Am. St. Rep. 71; *Dixon's Case*, 128 Ala. 54, 29 South. 623; *Armor's Case*, 63 Ala. 173; *Stitt's Case*, 91 Ala. 10, 8 South. 669, 24 Am. St. Rep. 853; *Smith's Case*, 88 Ala. 73, 7 South. 52; *Seam's Case*, 84 Ala. 411, 4 South. 521; *Amos' Case*, 83 Ala. 1, 3 South. 749, 3 Am. St. Rep. 682; *Plant's*

Case, 140 Ala. 52, 37 South. 159. In this view, the shooting of McClellan by defendant, the drawing of a second pistol by John, Jr., and, to repeat, everything done and said by the parties while engaged in the difficulty was competent to be shown in evidence.

The evidence elicited by questions propounded by the solicitor to the witness, John Morris, Jr., with respect to a conversation he had with Tom McLemore in November, 1903, was not competent as substantive evidence against the defendant, and we do not apprehend that it was introduced in that light, but only to show the animus of the witness towards the deceased, and thus to affect the credibility of the witness' evidence. It went to witness' credibility. We think the evidence was competent for this purpose, and was properly admitted against the specific objections made by the defendant. That the court did not limit it to this is not a matter of which the defendant can complain, in the absence of a motion on his part to the court to so limit it. It may be that the state should have been confined to the proof of the simple fact that there was a threat made by the witness against deceased, or previous ill will. If an objection had been made to giving the details of the occurrence referred to, it should have been sustained. *Jordan's Case*, 79 Ala. 9. The witness having denied making the statement, it was competent to offer evidence that he did make it.

On cross-examination of the defendant as a witness, the state was permitted to ask him if he did not, "that day after the difficulty, in response to a question asked him by Earl McGlocklin, while he was still on the barbecue grounds, as to whether or not witness was hurt much, he replied, 'Not a damned bit; but, by G—d, I am going to hurt somebody before I leave.'" The witness had testified that, when the deceased knocked him down, he jumped on him, caught him in the throat with his left hand, and began to beat him in the face with his right hand. Whether or not the defendant was hurt and the extent of his injuries was a material question in the case. The contention of the state was that deceased struck him only one blow, while the defense contended that he was struck several times by the deceased and badly hurt. If defendant said that he was not hurt, then it was proper to go to the jury as contradictory of his evidence that deceased knocked him down, caught him in the throat, and struck him several blows. If the question coupled matter that was illegal with that which was legal, the objections made did not properly raise the question.

This brings us to the exceptions reserved by the defendant to parts of the oral charge of the court and to charges refused to the defendant. The court in its oral charge instructed the jury, among other things, as follows: "I charge you, gentlemen of the jury, that the doctrine of law of self-defense has no field of operation in this case. There

is no room for a plea of self-defense in this cause. There is no field of operation for such defense." This was a charge on the effect of the evidence, and the court erred in giving it. In his own evidence and that of his son, John Morris, Jr., we think may be found sufficient tendencies to require a submission of the question of self-defense to the jury under proper instructions by the court. We will not speak of the tendencies in detail, lest we might unduly magnify or minimize some of them. Then it must be remembered that there was evidence rebutting the theory of a conspiracy. In the report of the case of *Morris v. State* (Ala.) 39 South., on page 610, the authorities applicable to the case with respect of the doctrine of self-defense are collated. The court is not clothed with authority to take any material question of fact from the jury, when there is any tendency in the evidence to support it.

Quite a number of written charges were given at the request of the defendant, and quite a number were refused to him. Charges similar to refused charge 7 have been so often condemned by this court that it is hardly necessary to do more than cite an authority. *Mann's Case*, 134 Ala. 1, 32 South. 704.

Charge 12, refused to defendant, is in this language: "I charge you, gentlemen of the jury, that you cannot find this defendant guilty as an aider or abettor of the killing of B. F. Grisham, if he gave no assistance or uttered no word to the person doing the killing. If the defendant was not present by preconcert, special or general, nor present with the knowledge of the person doing the killing with intent to aid him, unless he actually took part in the killing himself." In the case of *Raiford v. State*, 59 Ala. 106, this court, defining the words "aid and abet," said: "The words 'aid and abet,' in legal phrase, are pretty much the synonyms of each other. They comprehended all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary. No particular acts are necessary. If encouragement be given to commit the felony, or if, giving due weight to all the testimony, the jury are convinced beyond a reasonable doubt that the defendant was present with a view to render aid, should it become necessary, then that ingredient of the offense is made out." In the case of *State ex rel. Attorney General v. Tally*, 102 Ala., on page 66, 15 South. 722, there the responsibility of Tally for a homicide committed by another, upon the theory that Tally was a principal in the second degree at common law, was considered. The homicide was committed at Stevenson by Skelton, while Tally was at Scottsboro, several miles away; but it was held that the evidence showed Tally was constructively present, and the question under discussion was whether or not the evidence showed that Tally aided and abetted Skelton in the commission of the homicide. The court

there reviewed the definition of the words "aid and abet," as given in the *Raiford Case*, and said: "The definition was sufficient for the case then in hand, and it is in the form not infrequently found in the books. But it is incomplete. Mere presence for the purpose of rendering aid obviously is not aid in the substantive sense of assistance by an act supplementary to the act of the principal. Nor is it aid in the original sense of abetting, nor abetting in any sense, unless presence with the purpose of giving aid, if necessary, was preconcerted or in accordance with the general plan conceived by the principal and the person charged as an aider or abettor, or, at the very least, unless the principal knew of the presence, with intent to aid, of such person. * * * And in the nature of things the fact of presence and purpose to aid could not incite or encourage or embolden the principal unless he knew of the existence of that fact. * * * The definition we have quoted is, as an abstract proposition, clearly at fault. As applied in the concrete to cases of confederacy as it is, we undertake to say, whenever it is stated in this form, it is free from objection. But in the absence of confederacy, or at least of knowledge on the part of the actual perpetrator of a crime, one cannot be a principal in the second degree who is present intending to aid and does not aid by word or deed. The definition must go further. *It should appear by it that, to be an aider or abettor when no assistance is given or word uttered, the person so charged must have been present by preconcert, special or general, or at least to the knowledge of the principal, with the intent to aid him.*" So it appears that the charge now under discussion is based upon that portion of the opinion of the court as italicized above. "Whenever a father engages in a fight, the tendency of that act is to incite a son, who may be standing by, to acts of violence towards the antagonist of the father. This tendency may be affirmed in respect to many other ties of kindred, or in many instances of merely close companionship. What rash or violent act the bystanding son, kinsman, or comrade may be moved to do depends in a great measure upon the quality of his tempter, the strength of his affection, and the notion, often mistaken, that he may hastily gather under the excitement of the moment, as to who is in fault and to be held responsible for bringing on the conflict. And if the bystanding son, other kinsman, or comrade should of his own volition, by an independent act of violence, slay the antagonist, the party engaged in the fight should not be charged with this act merely because he was engaged in a conflict with the deceased, and in that way, but in that way only, incited the fatal act. This is not enough to show a criminal intention. Something more must appear. He must have purposely incited or encouraged the party in that course of violence that led to the homicide, or done some overt act

himself, with a view to that result, and that in some degree contributed thereto." *Woolweaver v. State* (Ohio) 34 N. E. 352, 40 Am. St. Rep. 667; *Goin v. State*, 46 Ohio St. 457, 21 N. E. 476; *Tanner's Case*, 92 Ala. 1, 9 South. 613; *Jordan's Case*, 79 Ala. 9. It is well settled that a party may aid or abet another by menace, gesture, or act. This is clearly recognized by all the authorities. We think on the facts in the Tally Case the law is correctly enunciated there. The defendant's counsel, in framing charge 12, attempted to follow the Tally Case; but as the charge is framed it is misleading, if not inherently bad, in that it uses the word "or" where "and" should have been used between the words "assisted" and "uttered." Furthermore, there is evidence tending to show that defendant, at the time John Morris, Jr., killed deceased, was standing in front of deceased with his hand near his pocket as if attempting to draw a weapon. If this evidence was believed, its tendency was to show a demonstration by defendant, a menace, which the jury had a right to consider in reference to the question of aiding and abetting. The charge does not hypothesize aiding and abetting by conduct, demonstrations, or menaces, and for this reason was well refused.

The Tally Case recognizes the principle that, if the killing was done in pursuance of a common purpose to do the act, that would be sufficient. And the definition given in *Ralford's Case* of the terms "aid" and "abet" would be free from objection in a case where the tendency of the evidence is to show a conspiracy. The charge under consideration seems to negative the presence of the defendant as a conspirator. But charge 18, refused to the defendant, entirely ignores the theory of a conspiracy, and for this reason, if for no other, must be held bad. Whether or not defendant conspired to kill deceased was a question for the jury. Where there is any evidence, however slight, tending to support a given contention, it cannot be ignored; the contention being a material one. Besides it would seem that in given charge 35 the defendant had full benefit of all that is contained in charge 18. *Frank's Case*, 27 Ala. 37; *Elmore's case*, 110 Ala. 63, 20 South. 323; *Alston's Case*, 109 Ala. 51, 20 South. 81; *McLeroy's Case*, 120 Ala. 274, 25 South. 247; *Amos' Case*, 83 Ala. 1, 3 South. 749, 3 Am. St. Rep. 682; *Pierson's Case*, 99 Ala. 148, 13 South. 550.

Charge 20 assumed that all the evidence of conspiracy was circumstantial evidence. The declaration, if made by the defendant, "We've come here to kill Doc Grisham," is a confession, or in the nature of a confession, and therefore not circumstantial evidence. Furthermore, it is not indispensable that the state should prove a motive for the commission of the crime, and the charge was argumentative. *Jackson's Case*, 136 Ala. 23, 34 South. 188; *Hornsby's Case*, 94 Ala. 55, 10 South. 522.

Charge 21 is an invasion of the province of the jury. Besides, it does not contain a true statement in point of fact.

Charge 26 seems to state a correct proposition, but it was practically covered by given charges 24, 39, 45, and 47, and its refusal was, therefore, not error.

Charge 29 is practically covered by given charges 32, 33, and 24.

Charge 31 ignores the evidence of conspiracy. Besides it seems to be covered by given charges 47 and 00.

Charge 41 may be condemned on two or more grounds. In the first place it assumes that malice on the part of John Morris, Jr., was not indulged in by the defendant. It is misleading, as the defendant may have been convicted of manslaughter (and he was), an offense not involving malice. *Littleton's Case*, 128 Ala. 31, 29 South. 390; *Thompson's Case*, 131 Ala. 18, 31 South. 725; *Jarvis' Case*, 138 Ala. 17, 34 South. 1025.

Charge 42 is subject to the criticism made with respect of charge 41, that it is misleading. But the theory of the defendant, as shown by refused charge MM is, that there cannot be aiders and abettors in manslaughter. This theory is contrary to the decisions of this court as before noted. *Coleman's Case*, 5 Port. on page 41, *Martin's Case*, 89 Ala. on page 119, 8 South. 23, 18 Am. St. Rep. 91; *Ferguson's Case*, 141 Ala. 20, 37 South. 448; Code 1896, § 5306. The charge was properly refused, as also were charges MM and ZZ.

Charge 46 invades the province of the jury.

Charge 50. Malice is not the ingredient of manslaughter, and, if charge 50 is a good charge, the refusal of it was rendered innocuous by the verdict finding the defendant guilty of manslaughter. Besides it may be said of the charge that it is misleading.

Charge 53 is a copy of charge 6, which was held to be a good charge in *Whitaker's Case*, 106 Ala. 30, 17 South. 456. The charge should have been given.

In given charges 25, 28, 35, 38, and J, it seems that the defendant had the benefit of the propositions contained in refused charge 2A, and some of the charges were even more favorable to the defendant than charge 2A, and by given charge 36 the court rested the conviction alone upon the hypothesis that the jury should find beyond a reasonable doubt that a conspiracy actually existed between the defendant and John Morris. So the court was under no duty to give charge 2A.

Charge AA was properly refused. It relates to self-defense, and does not set forth or define the constituent elements of self-defense. The same criticism is applicable to charge 1B. *Mann's Case*, 134 Ala. 1, 32 South. 704.

Charge 3B is a mere argument and was properly refused.

Charges CC, DD, and E need not be considered, as the verdict was for no higher

offense than manslaughter. *Jarvis' Case*, 188 Ala. 17, 34 South. 1025.

Charge EE is incomplete, in that it ignores the tendency in the evidence that the father (defendant) entered willingly into the difficulty or that he encouraged it. Such charges should negative willingness in entering into the difficulty. *Gillmore's Case*, 128 Ala. 21, 28 South. 595; *Mitchell's Case*, 129 Ala. 23, 30 South. 348; *Wilson's Case*, 128 Ala. 17, 29 South. 569; *Wood's Case*, 128 Ala. 27, 29 South. 557, 86 Am. St. Rep. 71; *Sherrill's Case*, 138 Ala. 3, 35 South. 129.

Charge G was properly refused. The postulate that the burden of proof was on the state to prove that defendant was not free from fault in bringing on the difficulty, without more, was calculated to mislead the jury to believe that retreat and imminent peril were not important factors in the case.

Charge K is argumentative and misleading. Charges KK and NN are patently bad for reasons given in a former part of this opinion pertaining to the motion to exclude evidence offered by the state.

Refused charge OO ignores the evidence tending to show a conspiracy. Moreover, *John Morris, Jr.'s*, right of self-defense depended somewhat upon the status that the defendant occupied with reference to the difficulty and this the charge entirely ignores. *Wood's Case*, 128 Ala. 27, 29 South. 557, 86 Am. St. Rep. 71; *Morris' Case* (Ala.) 39 South. 608.

Charge X, refused to the defendant, invades the province of the jury.

Charge Y pretermits the theory of a conspiracy formed to kill the deceased, and deals alone with the doctrine of aiding and abetting. We think the charge properly hypothesizes that *John Morris, Jr.*, must have had knowledge of the acts or words; but we think the charge goes too far in hypothesizing that he must have had knowledge that the acts or words were done or said for the purpose of aiding or encouraging. If under the attendant circumstances he was led to believe that the acts or words were done or said to encourage him, then that would be sufficient. Having reason to believe that a purpose exists is not the same thing as knowing that it does exist. The charge was properly refused.

The charge designated XYZ, refused to the defendant, was properly refused on the authority of *Sullivan's Case*, 102 Ala. 135, 15 South. 264, 48 Am. St. Rep. 22. In addition to the reasons assigned for holding the charge bad, we think the charge should have negatived willingness on the part of the defendant in entering into the difficulty and encouragement of it by him. *Gillmore's Case*, 128 Ala. 20, 28 South. 595.

We think it was not in the province of the court to instruct the jury that there was no evidence in the case that defendant aided or abetted *John Morris, Jr.*, in killing *Grisham*. Having so instructed the jury, it was the du-

ty of the court to recall the jury and in proper manner correct the error. Of course this could only be properly done in the presence of the defendant and his counsel. The presiding judge should sedulously avoid any communication with the jury with reference to the case in the absence of the defendant and his counsel. As the cause must be reversed on other points, and the matter complained of will not properly occur again, we deem it unnecessary to say more with respect to this matter.

For the errors pointed out the judgment of conviction must be reversed, and the cause remanded.

Reversed and remanded.

HARALSON, DOWDELL, and ANDERSON, JJ. concur.

UNTREINER v. STATE.

(Supreme Court of Alabama. May 17, 1906.)

1. INDICTMENT—MOTION TO QUASH—GROUNDS—GRAND JURY—ORGANIZATION.

Where a grand jury as organized from a list of 24 names drawn by the jury commissioners, while containing the names of the last 3 jurors drawn by the commissioners, did not exceed the number provided by statute to constitute a grand jury, because of nonattendance and excuses, the fact that more jurors were drawn than were required did not invalidate indictments returned by such grand jury.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 481.]

2. JURY—SELECTION.

In selecting a jury from a special venire to try a criminal case, it was proper for the judge to call six persons as their names were drawn from the hat, and, after swearing them, ask each the qualifying questions and permit them to all to answer at one and at the same time.

3. CRIMINAL LAW—TRIAL—LIST OF TALESMEN—DELIVERY TO DEFENDANT.

Where a special venire was exhausted before the completion of the jury, accused was not entitled to a list of the talesmen summoned to complete the jury as provided by Cr. Code, 1896, § 5009.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1443.]

4. JURY—NAMES—VARIANCE—EFFECT.

A variance in the middle initial of the names of certain jurors constituted no ground for discarding them.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 309.]

5. SAME.

It was not error to refuse to discard the name of a juror called to try a criminal case because of the variance between the name on the list served on accused and that drawn from the hat.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 309.]

6. SAME—QUALIFICATIONS—CAPITAL PUNISHMENT—PREJUDICE.

Where a juror on his voir dire, in a prosecution for homicide, stated that he was opposed to capital punishment, the court properly sustained a challenge for cause on such ground, as provided by Cr. Code 1896, § 5018, though he also stated that he "would hang some men."

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 491.]

7. HOMICIDE—EVIDENCE.

Defendant, on returning from his place of business, found that his brother was absent. The brother was then engaged in an altercation with deceased, and defendant, hearing his brother's response that deceased had a gun on him, immediately went to where his brother and deceased were, and, taking up the cause of his brother, the fatal encounter resulted. *Held*, that the difficulty between deceased and defendant's brother and deceased and defendant were not separate and distinct difficulties, and hence it was competent to show all that transpired from the beginning of the difficulty between deceased and the brother, including the age of defendant's brother, and whether or not he was free from fault in bringing on the difficulty.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 341-350.]

8. CRIMINAL LAW—TRIAL—CURING ERROR.

The subsequent admission of evidence cured any error in the former exclusion thereof.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3146, 3147.]

9. WITNESSES—CROSS-EXAMINATION OF ACCUSED—FLIGHT.

It was not error to permit the state's solicitor to cross-examine defendant as to his movements after the alleged crime was committed for the purpose of showing flight.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 979-983.]

10. HOMICIDE—EVIDENCE—MATERIALITY.

In a prosecution for homicide, evidence as to who gave the gun to the witness after the difficulty was over and deceased had been killed was irrelevant and immaterial.

11. CRIMINAL LAW—EXCEPTIONS TO INSTRUCTIONS—FORM.

At the conclusion of the charge, accused "severally and separately excepted to each distinct part of the court's general oral charge, and especially to the charge on the weight of the evidence, and especially to the charge of setting forth the punishment of manslaughter in the first degree." *Held*, that such exception was a mere general exception to the charge as a whole, and was unavailing unless the charge was entirely erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2025.]

12. SAME—INSTRUCTIONS.

Instructions that, if the jury do not believe the evidence, they should find for the accused and could not find for the state were properly refused.

13. HOMICIDE—SELF-DEFENSE.

Where defendant, in response to his brother's call that deceased had a gun on him, immediately went to where deceased and the brother were, and, taking up his brother's cause, engaged in a fatal encounter with deceased, defendant was not entitled to invoke the doctrine of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 153, 154.]

14. SAME—INSTRUCTIONS.

In a prosecution for homicide, defendant requested the court to charge that manslaughter in the first degree was the unlawful and intentional killing of a human being without malice, expressed or implied, and manslaughter committed under any other circumstances was manslaughter in the second degree. *Held*, that the last clause defining manslaughter in the second degree was erroneous, and hence it was proper for the court to refuse the entire charge.

15. SAME—APPEAL—INSTRUCTIONS—HARMLESS ERROR.

Where accused was acquitted of murder in the first degree by his conviction of murder in the second degree, the erroneous refusal of an

instruction defining murder in the first degree was harmless.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3166; vol. 26, Cent. Dig. Homicide, § 721.]

16. CRIMINAL LAW—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction in a criminal case that it is the sole right of the jury to believe or not to believe, and that the court cannot tell them what to believe or what weight they must give to any testimony, was erroneous, and properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1889-1894.]

17. HOMICIDE—INSTRUCTIONS—MALICE.

Accused requested the court to charge that, if the killing was without malice, he could not be guilty of a higher grade of offense than manslaughter in the first degree, and that in the absence of malice defendant could not be guilty of murder in either degree. *Held* proper, and erroneously refused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 638-656.]

18. SAME—PUNISHMENT.

A request to charge that, if defendant was guilty of manslaughter in the first degree, his punishment as fixed by law, in the discretion of the jury, was imprisonment in the penitentiary for not less than one nor more than ten years, or by hard labor for the county for not more than two years nor less than a year and a day, was properly refused; the jury being authorized, in its discretion to impose hard labor for the county for "twelve months" for manslaughter in the first degree.

19. CRIMINAL LAW—ABSTRACT INSTRUCTIONS.

Where, in a prosecution for homicide, there was nothing in the case to authorize a conviction of manslaughter in the second degree, a charge on such defense was properly refused as abstract.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1979-1984.]

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

"Not officially reported."

George Untrelner was convicted of murder, and he appeals. Reversed.

The defendant was indicted and tried for murder in the first degree. In selecting the jury to try the case from the special venire, the judge had the names of six persons drawn from the hat, and had the six come around and be sworn, and then asked each the qualifying questions, permitting all six to answer the same at one and the same time. To this the defendant excepted. Before the jury was completed the venire was exhausted. The jury as selected was composed of eleven men. One more was needed to complete it. The court ordered the sheriff to summon two qualified citizens, write their names on slips of paper, and place the same in a hat. The defendant demanded to know the two so selected before they were drawn from the hat. The court declined to inform him as to the names until they were drawn, and as to this action of the court the defendant excepted. The other facts sufficiently appear in the opinion.

At the conclusion of the testimony, the defendant requested the following charges in writing: (1) The court charges the jury

that, if they do not believe the evidence, they should find for the defendant. (2) The court charges the jury that, if they do not believe the evidence, they cannot find for the state.

* * * (4) The court charges the jury that in cases like this it is the province of the defendant to set up self-defense, and in doing so he may show that at the time he fired the fatal shot there was a necessity to take life, or that the circumstances were such as to create in his mind a reasonable belief that it was necessary to save life or to prevent great bodily harm and there was no reasonable mode of escape. If the evidence tends to establish the foregoing ingredients, the burden then is on the state to show that the defendant was not free from fault in bringing on the difficulty. * * * (7) The court charges the jury that manslaughter in the first degree is the unlawful and intentional killing of a human being without malice, expressed or implied, and manslaughter committed under any other circumstances is manslaughter in the second degree. * * *

(10) The court charges the jury that it is their sole right to believe or not to believe, and the court cannot tell them what to believe, or what weight they must give to any testimony. (11) The court charges the jury that, if the killing in this case was without malice the defendant would not be guilty of a higher grade of offense than manslaughter in the first degree. (12) The court charges the jury, if the killing was not malicious, then the defendant would not be guilty of murder in either degree. * * * (14) The court charges the jury that, if they find the defendant guilty of manslaughter in the first degree, the punishment fixed by law in the discretion of the jury is imprisonment in the penitentiary for not less than one, nor more than 10 years, or by hard labor for the county for not more than two years nor less than a year and a day. * * * (16) The court charges the jury that, if they find the defendant guilty of manslaughter in the second degree, the punishment fixed by law in the discretion of the jury is imprisonment in the county jail for one year or sentence to hard labor for the county for not more than one year, and may also be fined not more than \$500—any amount under \$500."

The defendant was convicted of murder in the second degree and sentenced to ten years in the penitentiary.

J. N. Miller and Barnett & Bugg, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The defendant was indicted at the spring term, 1904, of the circuit court of Monroe county for murder in the first degree. On this indictment he was tried at the Spring Term, 1906. He was tried and convicted of murder in the second degree and sentenced to imprisonment in the penitentiary for a term of ten years. Before entering upon the trial the defendant made a

motion to quash the indictment, upon the ground that the grand jury which preferred the indictment had not been drawn according to law, in that the jury commissioners in drawing the grand jury drew 24 jurors, which was in excess of the number provided by law to be drawn. The grand jury as organized by the court from the list of names so drawn by the jury commissioners, while it contains the names of the last three jurors drawn by the commissioners, yet by reason of nonattendance and excuses did not exceed the number required by the statute to constitute a grand jury. The court overruled the motion to quash, and in so doing committed no error. *Rogers v. State* (Ala.) 40 South. 572; sections 4997, 5269 of the Cr. Code, 1896.

In the selection of the jury from the special venire for the trial of the case, in the course adopted by the trial court no error was committed. *Brown v. State*, 141 Ala. 80, 37 South. 408.

After the special venire had been exhausted, before the completion of the jury, the defendant was not entitled to a list of the talesmen summoned to complete the jury. Cr. Code 1896, § 5009.

There was a variance in the middle initial of the names of the jurors, Schneider, Smith, and Brantley; but this constituted no ground for discarding their names. *Kimbrell v. State*, 130 Ala. 40, 30 South. 454. There was no error in refusing to discard the name of the juror Johnson, because of a variance in the name on the list served and that drawn from the hat. It was decided in *Teague v. State* (Ala.) 40 South. 312, that the annexing of "Jr." to a name constituted no part of the name.

The juror Marshall, when examined on his voir dire, answered that he was opposed to capital punishment, but also stated that he would hang some men. The court permitted him to be challenged for cause by the state, to which action of the court the defendant excepted. Being opposed to capital punishment is a statutory ground of challenge for cause. On the statement of this juror, the court committed no error in its action. Cr. Code 1896, § 5018.

On the trial there were a number of exceptions reserved to the rulings of the court on the introduction of evidence. The rulings by the court were based on the theory of two separate and distinct difficulties, and that it was not, therefore, competent to give in evidence the details of a previous difficulty. On the theory of two difficulties, the rulings of the court as to giving in evidence and details of the former difficulty would unquestionably be in accordance with the law. This was the tendency of the state's witness, Mosely. The evidence of the defendant showed that the difficulty, which resulted in the fatal shooting of the deceased by the defendant, was not a distinct and separate difficulty, but a continuation of the difficulty between

the deceased and the defendant's younger brother. The evidence showed that when the defendant returned to his place of business, and found his brother, Robert Untreiner, absent, and called for him, Robert was at this time engaged in an altercation or difficulty with the deceased, and the defendant, upon the response by his brother to the defendant's call for him, that the deceased had a gun on him, immediately went to where the deceased and his brother were, and taking up the cause of his brother, the fatal encounter resulted. On this view of the evidence, it was competent to show all that transpired from the beginning of the difficulty between the deceased and Robert Untreiner, the defendant's younger brother, to its end. In this connection it was competent to show the age of Robert Untreiner, and whether or not he was free from fault in bringing on the difficulty, since the question of freedom from fault on the part of Robert might become a very material question as bearing upon the action and conduct of the defendant.

The court refused to permit the witness Eddins to testify that the deceased purchased a gun and shells from him, etc., but later in the trial this witness was recalled and testified at length, answering at length all the questions originally propounded to him. If the evidence was erroneously excluded when first offered, its subsequent admission cured the error. *Walker v. State*, 91 Ala. 76, 9 South. 87.

There was no error in allowing the solicitor to question the defendant, when examined as a witness in his own behalf, as to his movements after the alleged crime was committed, for the purpose of showing flight. *Elmore v. State*, 98 Ala. 12, 13 South. 427.

As to who gave the gun to the witness Eddins, after the difficulty was over, and the deceased had been killed, was irrelevant and immaterial matter.

The bill of exceptions recites that, "when the court concluded its general charge to the jury as set forth above, the defendant's attorney, before the jury retired, severally and separately excepted to each distinct part of the court's general oral charge, and especially to the charge to the jury upon the weight of the evidence, and especially to the charge setting forth the punishment of manslaughter in the first degree." This mode of excepting to the oral charge of the court was, in reality, nothing more than a general exception to the charge as a whole, with possibly the exception of the part particularly pointed out as setting forth the punishment of manslaughter in the first degree. When an exception is taken to the charge of the court as a whole, such exception is unavailing, unless the charge is as a whole bad.

A charge similar to written charges 1, 2, and 9, requested by the defendant, was condemned in *Koch v. State*, 115 Ala. 99, 22 South. 471. See, also, *Crane v. State*, 111 Ala. 45, 50, 20 South. 590.

In the present state of the record, under the rulings of the court in the exclusion of evidence, the case as presented to the jury did not involve the question of self-defense. Written charges, therefore, requested by the defendant based on the theory of self-defense, were properly refused.

Charge 7, requested by the defendant, was a correct definition of manslaughter in the first degree; but the last clause in the charge, which embraced the definition of manslaughter in the second degree, rendered the charge bad, and it was, therefore, properly refused.

Charge 8, requested by the defendant, contained the statutory definition of murder in the first degree, and should have been given. But, since the defendant was acquitted of murder in the first degree, no injury resulted from its refusal.

Charge 10 was bad, and the court properly refused the same.

Charges 11 and 12 correctly stated the law, and should have been given as requested.

Charge 14 was faulty. Hard labor for the county may, in the discretion of the jury, be for 12 months for manslaughter in the first degree, which is less than "a year and a day."

Charge 16, requested by the defendant, was abstract. There was nothing in the case to authorize a charge upon manslaughter in the second degree.

We need not consider the question as to the regularity in the calling and holding of the adjourned term of the court at which the defendant was tried, since this question is one which is not likely again to arise.

For the errors pointed out, the judgment of the circuit court will be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

RICHARDS v. SLOSS-SHEFFIELD STEEL & IRON CO.

(Supreme Court of Alabama. May 17, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE.

Any negligence of the master in furnishing an employé a balky mule with which to haul an ore car up a hill was not the proximate cause of injury; the employé having got off the car when the mule let it go back, and having been injured by slipping while attempting to get on again, when the car had again been drawn nearly to the top of the hill, at which time the mule did not balk.

2. SAME—DUTY TO INSTRUCT.

The master is under no duty to instruct an employé, 19 years old, engaged to drive an ore car drawn by a mule, how to board the car, so as to avoid slipping because of mud which was on it, the nature of which he knew. [Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 297, 308-310.]

Appeal from Circuit Court, Franklin County; H. B. Almon, Judge.

"To be officially reported."

Action by Joe Richards, by next friend, against the Sloss-Sheffield Steel & Iron Company. Judgment for defendant. Plaintiff appeals. Affirmed.

G. O. Chenault, for appellant. Weatherly & Stokely, for appellee.

SIMPSON, J. This was an action by the appellant for damages on account of injuries received by complainant while in the employ of defendant. According to the plaintiff's testimony he was 19 years of age at the time of the accident, had been in the employment of defendant near the place of the accident for 30 days, but had been put at the work of tramping cars on the day of the accident, about 9 a. m., and the accident occurred about 1:30 p. m. His duties were to drive the mule, which was hitched to the car from the pit, after the ore had been placed in the car, up to the top of the grade or hill ("knuckle," they called it), and there to detach the mule, and the car was there run into the switch, where the dinkey (small engine) would take the car into the washer. He explains that he had noticed others at this work, and knew how they managed the cars, etc., but states in another part of his testimony that he had no experience in the tram car business. Plaintiff had started up the grade once, when the mule either "backed" or "stalled," or stopped because the load was too heavy, and the car rolled back into the pit. Plaintiff was riding on the car at the time, but the boss told him to get off and walk up the hill, which he did, and about the time the car reached the knuckle, or within 30 feet of the knuckle, plaintiff, for the purpose of loosening the singletree, so as to release the mule, tried to get up on the bumper of the car, and as he did so his foot slipped from the bumper and went to the ground, where it became fastened between the guard rail and the outer rail of the track, and before he could extract it the car ran over his leg and caused the injury. No one else attempts to give an explanation of the accident, so that we must take this statement as the correct one that the car, with more than two tons of ore, ran over his leg, about five inches above the knee, and yet he still has his leg, and it is only a little stiff and somewhat shorter than the other. But whether it ran over his leg, or against it, matters not. The car was in motion when he fell, being drawn by the mule, and continued in motion until the accident occurred.

The first, fifth, and sixth counts are under subdivision 1 of section 1749 of the Code of 1896, alleging that the defendant had failed to remedy, etc.; the first specifying the car was defective, the fifth the tram track, and the sixth the mule. There is not a

particle of testimony tending to show any defect in either. There were some questions seeking to show that the mule was "balky," but no affirmative answer. It matters not whether the mule balked or stalled, or simply signified his preference to have the load lightened. He simply allowed the car to roll back into the pit, and no damage was done there. When the young man got off, the mule drew the car up the hill, and his equanimity does not seem to have been disturbed when the young man tried to board the car again. The character of the mule seems to be unimpeached, and the fact that it refused to pull before certainly could not furnish any reason for charging it with the responsibility of this accident, because it continued to pull, in accordance with orders, when the young man, without his knowledge or consent, attempted to get on the bumper and let his foot slip. So there could be no recovery on these counts.

The other counts are under subdivision 2 of said section, naming Holbrook as the party who was negligent in putting the defendant, young and inexperienced as he was, to work in a dangerous business without instructing him in regard to the dangers. The mere fact of minority of a young man 19 years of age does "not impose upon the master any other or greater degree of care in respect to the minor than would be upon him had the servant attained full age." Ala. Min. R. R. Co. v. Marcus, 115 Ala. 389, 396, 22 South. 135, 137. The general doctrine is that, when a person of apparently sufficient age, ability, etc., seeks employment, the presumption is that he is competent to perform the duties, "to apprehend and avoid all dangers that may be discovered by the exercise of ordinary care and prudence, and there is no reason or rule "that will compel the master to pass him through a critical examination to discover his competency." 2 Bailey on Personal Injuries Relating to Master and Servant, p. 955, §§ 28-30 et seq.; Id., § 958, § 2838 et seq. If there are dangers which are not obvious, or if the servant is put to work upon a machine with which he is not familiar, and which is so complicated and dangerous as to suggest that he is not probably aware of the danger, the duty would rest on the master to instruct him; but we do not find anything in the authorities which would authorize the court to hold a master guilty of negligence for failing to instruct a young man, 19 years of age, and who shows the knowledge which this young man does, as to how to board a car which is being drawn by a mule. There is no reason suggested why his foot slipped, but only the fact that it did slip. If his foot slipped by reason of the fact that the "grey horse" was over it, which made it slippery, the evidence shows that the plaintiff's previous occupation was picking "grey horse," so he knows all about the slippery nature of that mud. Ala. Steel

& Wire Co. v. Wrenn, 136 Ala. 477, 34 South. 970 (8th h. n.) 439; Worthington v. Go-forth, 124 Ala. 656, 660, 26 South. 531; Rob-inson Mining Co. v. Tolbert, 182 Ala. 463, 466, 31 South. 519.

This court has held that the general charge was authorized in a case wherein the plain-tiff swore that he did look and listen, but the facts were clear that he must have been mistaken. *Peters v. Sou. Ry. Co.*, 135 Ala. 533, 537, 541, 33 South. 332. Also in a case where plaintiff was held to have assumed the risks "notwithstanding the plaintiff's statement of his ignorance of the danger." *Sloss Iron & Steel Co. v. Knowles*, 129 Ala. 410, 416, 30 South. 584, 585.

It is unnecessary to discuss the points raised on pleading. The general charge was properly given in favor of the defendant.

The judgment of the court is affirmed.

TYSON, ANDERSON, and DENSON, JJ.,
concur.

ELROD et al. v. ELROD.

(Supreme Court of Alabama. May 17, 1906.)

CONTRACTS — CONSTRUCTION — SUBJECT-MAT-TER—EXTENT OF OBLIGATION.

An agreement that a certain person should not be liable for the cost of the appointment of an administrator of a certain estate will not sustain a claim against the estate of the maker, by attorneys employed by the person named, for their fees in resisting proceedings to annul the previous appointment of an administrator of the estate named.

Appeal from Chancery Court, Marshall County; W. H. Simpson, Chancellor.

"Not officially reported."

Proceedings for the allowance of claims by Nena N. Elrod and others against W. A. Elrod, executor of S. M. Elrod, deceased. Appeal from a decree disallowing a claim. Affirmed.

Street & Isbell, for appellants. John A. Lusk, for appellee.

SIMPSON, J. Without entering into an examination of technical points raised by the appellee, the gravamen of this case is a contention on the part of the appellants that the chancellor should have sustained exceptions to the report of the register disal-lowing the claim of Street & Isbell against the estate of S. M. Elrod, deceased. The claim was for an attorney's fee for resisting an attack upon the validity of the appoint-ment of one as administrator of one Fennell in the probate court of Marshall county; the case being *McDonnell v. Farrow*, 132 Ala. 227, 31 South. 475. The testimony is with-out conflict that said Street & Isbell were employed to perform said service by one Llewellyn Jordan, and the contention of ap-pellants is that the said estate of S. M. El-rod was liable for said services by reason of certain transactions between said decedent and said Llewellyn Jordan.

We see no reason for reversing the deci-sion of the chancellor in confirming the reg-ister's report. The agreement between said Jordan and said Elrod is in the form of a receipt for the payment of Elrod's claim against the estate of Miss Fennell, at the close of which it is stated: "A part of the consideration of the payment above recited is that said Llewellyn Jordan and the estate of Mattie Lee Fennell are not to be in any manner held liable or sought to be charged for any costs or expenses of proceedings in the probate court of Marshall county, Ala., for the appointment of a personal representa-tive of the estate of Mattie Lee Fennell, deceased." We cannot see anything in this agreement, or in the testimony referred to by appellant, to sustain a claim against the estate of Elrod for the fee of an attorney employed by Llewellyn Jordan to resist a direct proceeding to annul the previous appointment of Farrow as administrator of Mattie Lee Fennell.

The decree of the court is affirmed.

TYSON, ANDERSON, and DENSON, JJ.,
concur.

MAYHALL v. STATE.

(Supreme Court of Alabama. May 17, 1906.)

1. TRESPASS—CRIMINAL RESPONSIBILITY—AF-FIDAVIT—SUFFICIENCY.

An affidavit for trespass which alleges that accused entered on the lands of a person named as trustee, described as "N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, in section 13, township 9, range 3 W.," and cut down timber growing thereon with the intent to appropriate the same to his own use, is in conformity to the form prescribed by Code 1896, § 4600, as amended by Acts 1903, p. 283, and sufficiently describes the land.

2. SAME—EVIDENCE—ADMISSIBILITY.

Where, on a trial for trespass, the state showed the ownership of the land trespassed on as laid in the affidavit and that defendant re-moved timber which had been cut therefrom, evidence that stumps of trees had been seen around where defendant's wagon had been seen standing, and that within a few feet of his wagon a tree had been cut into three stocks, was admissible.

3. CRIMINAL LAW — APPEAL — FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

Acts 1900-01, p. 1342, conferring addition-al jurisdiction on the county court of a county, does not authorize the Supreme Court to review the findings of the county court trying a criminal case without the intervention of a jury.

4. SAME.

Where the facts are not agreed on, and the trial court, trying a criminal case without the intervention of a jury, made no special findings, and there were no requests therefor, the con-clusion of the court stands as a verdict of a jury under the express provisions of Code, 1896, § 3319, and cannot be reversed by the Supreme Court.

Appeal from Cullman County Court; R. L. Burke, Judge.

"To be officially reported."

George Mayhall was convicted of trespass, and he appeals. Affirmed.

The affidavit in this case is in the following language: "State of Alabama, Cullman County. County Court. Before me, R. I. Burke, judge of the county court of said county, personally appeared D. A. Fuller, who, being duly sworn, doth depose and say that he hath probable cause for believing and doth believe that George Mayhall did knowingly enter upon the lands of S. Roman as trustee, described as follows, to wit: N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, and N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, all in section 13, township 9, range 3 W., in Cullman county, Ala., and cut down wood or timber growing thereon, with the intent to remove and appropriate the same to his own use in said county, within the past twelve months, against the peace and dignity of the state of Alabama." The defendant interposed as grounds of demurrer to the affidavit: "(1) It is too indefinite and uncertain, and states no cause of action. (2) Said affidavit does not allege the owner of said land or timber on which the timber was cut. (3) Because D. A. Fuller is not shown to have any interest or authority to prosecute or institute said cause, or that it was done at the instance of the owner of said land. (4) It does not allege on which subdivision of the land therein described the defendant cut timber to carry away. (5) The affidavit describes four 40-acre tracts and alleges the said trespass therein was on said land, but does not allege on which part of tracts thereof the said trespass was made." The demurrers were overruled, and the defendant was convicted and fined \$5.

M. F. Parker, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. The affidavit for the warrant of arrest was in conformity to section 4600 of the Code of 1896, as amended (Acts 1903, p. 283), and described the property trespassed upon with sufficient certainty. *Withers v. State*, 117 Ala. 89, 23 South. 147; *Holland v. State*, 139 Ala. 120, 35 South. 1009.

The state introduced evidence tending to show the ownership of the land as laid in the affidavit for the warrant of arrest, and tending to show that defendant removed timber which had been cut therefrom, to the sawmill of his brother, Will Mayhall, who paid defendant for the timber he hauled.

The state offered and introduced evidence against defendant's objection and exception, that stumps of trees were seen around where defendant's wagon and team were seen standing; and, within a few feet of the wagon, there was a tree cut into three stocks. Under all the facts the evidence called for was proper for the consideration of the jury, in determining the guilt or innocence of the defendant.

The case was tried by the court without the intervention of a jury. The defendant expressly waived his right of trial by jury. There is nothing in the act of March 1, 1901, "to confer additional jurisdiction upon the

county court of Cullman county, etc." (Acts. 1900-01, p. 1342), to authorize the Supreme Court to review the findings of the trial court. The facts were not agreed upon, nor was there any special finding of facts made, nor was there a request for such finding. In such case the conclusion of the judge stands as a verdict of a jury, and cannot be reversed by this court. *Norille v. State*, 131 Ala. 35, 31 South. 19; *Witherspoon v. State* (Ala.) 39 South. 356; Code 1896, § 3319.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

SELLERS v. FARMER.

(Supreme Court of Alabama. May 17, 1906.)

1. EQUITY—PLEAS—JOINDER OF ISSUE.

Issue will be treated as taken on pleas in the answer, in the absence of further pleading, and without mention of them in the note of submission; chancery rule 76 excluding the idea that it is necessary to make any note of the pleadings.

2. APPEAL—PRESUMPTION IN FAVOR OF DECREE.

Though the decree does not mention pleas, yet, they being proved, it will be presumed in favor of the decree that it was based on the pleas and proof addressed to them.

3. SAME—RULINGS ON EVIDENCE.

That assignments of error relating to objections to testimony may be considered, it must appear from the decree that the objections were ruled on. It is not enough that the opinion states that objections to testimony are well made and must be sustained.

Appeal from Chancery Court, Henry County; W. L. Parks, Chancellor.

"To be officially reported."

Suit by C. E. Sellers against B. G. Farmer From an adverse decree, complainant appeals. Affirmed.

William C. Oates and W. L. Martin, for appellant. T. M. Espy, for appellee.

DENSON, J. Bill to enforce the specific performance of a contract to convey lands. From a decree of the chancellor denying the relief prayed for the complainant prosecutes this appeal. In his answer to the bill as it was last amended the respondent as a defense to the bill incorporated independent special pleas. This he might well do under the statute and reap the benefits that might flow from proof of the pleas, the same as if they had been pleaded separate and apart from the answer. Code 1896, § 699; *Stein v. McGrath*, 123 Ala. 175, 30 South. 792; *Mylin v. King*, 139 Ala. 319, 35 South. 968; *Tyson v. Decatur Land Co.*, 121 Ala. 414, 26 South. 507.

But it is insisted by the appellant that issue was not joined on the pleas, and therefore that the principle established in the cases above cited cannot avail the defendant anything, although the proof may establish the averments made in the pleas. The in-

sistence that issue was not joined on the pleas is based solely on the proposition that the pleas are not mentioned in the note of submission. Rule 76 of the chancery court provides that: "On the hearing of a cause, the court can dispense with the reading of the pleadings and proofs; and in that case, the complainant's counsel must state the case made by the bill, and the defendant's counsel the case made by the answer. The complainant's counsel must then offer his testimony in chief, naming the witnesses and other testimony, of which the register must take a note; and then that of the defendant must be offered, and noted by the register; to which the complainant in like manner, must offer his rebutting testimony. Any testimony not offered in this way, and noted by the register on the minutes, must not be considered as any part of the record, nor considered by the chancellor. Counsel on either side in the course of their arguments can read any portion of the pleadings or proofs. A hearing on bill and answer, motion, demurrer, exceptions, or appeal shall conform as far as applicable to this rule." It is obvious that the rule excludes the idea that it is necessary to make a note of the pleadings at all. The pleadings are a part of the record, and the court may refer to the record, and any part of it, without any note being made of it. But the evidence, to become a part of the record, must be, not only noted in the note of submission, but noted by the register on the minutes. By the pleas being incorporated in the answer, as they were, the complainant's attention was called to them, and if he deemed them insufficient he should have had their sufficiency tested in the appropriate way. Not having done so, the complainant must be held to have silently taken issue on the pleas. *Tyson v. Decatur Land Co.*, 121 Ala. 414, 28 South. 507; *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 178, 18 South. 292, 56 Am. St. Rep. 38. It is true that in the decree no mention is made of the pleas or that the decree is particularly rested upon the issue presented by the pleas. Nevertheless, as the decree was in favor of the respondent, if the pleas are proved, to sustain the decree of the court we would presume that the decree was based on the pleas and proof addressed to them. We concur with the chancellor, as expressed in his opinion, that the testimony establishes the pleas; and the decree dismissing the bill is correct, whether the pleas are in the abstract good or bad. See authorities supra.

The grounds in the assignment of errors which relate to the objections to testimony cannot be considered, as it does not appear from the decree that any ruling was made with respect of objections to evidence. It is true in the chancellor's opinion he states that objections made by the respondent to complainant's testimony are well made and

must be sustained; but this is merely the expression of an opinion, and, not being embodied in the decree, cannot be reviewed.

We find no error prejudicial to the appellant in the record, and the decree appealed from is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

ROMAN v. LONG DISTANCE TELEPHONE & TELEGRAPH CO.

(Supreme Court of Alabama. May 17, 1906.)

1. INJUNCTION—TEMPORARY INJUNCTION—MOTION TO DISSOLVE—EVIDENCE.

On a motion to dissolve a temporary injunction on the denials in a verified answer, it was not competent for complainant on the hearing of the motion to support the averments of his bill as to title and ownership of the property sought to be protected by ex parte affidavits and a copy of a deed.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 386.]

2. SAME—NOTICE.

Where it is intended to introduce extrinsic evidence to sustain the allegations of the bill on a motion to dissolve a temporary injunction, made on defendant's sworn denials, the offer so to do must be seasonably made and on timely notice.

3. TRUSTS—SUIT BY TRUSTEE—NATURE OF TITLE—BILL.

Where a bill by a trustee to restrain a telegraph company from constructing its lines over certain property merely alleged that plaintiff was trustee for certain persons who owned the property, but failed to allege any facts showing that the trust was an active and not a mere naked one, and that plaintiff had the legal title to the property, it was fatally defective.

Appeal from Chancery Court, Cullman County; W. H. Simpson, Chancellor.

"To be officially reported."

Suit by S. Roman, as trustee, etc., against the Long Distance Telephone & Telegraph Company. From a decree sustaining a motion to dismiss the bill and dissolving a temporary injunction, complainant appeals. Affirmed.

The allegations made by the bill in this case were as follows: (1) Residences and ages of the parties; (2) that the complainant, a trustee for Lehman Bros. and Ignatius Pollak, is the owner of and in possession of the following described land situated in Cullman county, Ala. (here follows a description of the land), and that said lands are very valuable; (3) defendant is engaged in the construction of a telephone line on and across the lands of complainant above described without offering to pay complainant any just compensation therefor, and without having instituted any judicial proceedings for the purpose of condemning said lands, and that its servants and agents were digging holes, erecting poles, etc., on said land. And it prays for an injunction restraining the construction. The defendant filed a sworn answer, denying the ownership or pos-

session of the land in said Roman as trustee, and setting up ownership in other various parties. It sets up the requirement by defendant of the right to construct and maintain the telephone line where it is being constructed and maintained by virtue of permission from the owners of the land. The defendant further moved for a dismissal of the bill and a dissolution of the injunction for want of equity in bill, and because the sworn denials to the answer go to and convert all the material averments of the bill. Defendant also demurred to the bill because it does not sufficiently appear whether said Roman filed the bill in his individual capacity or as a trustee for Lehman Bros. and Ignatius Pollak, and because the bill is filed by Roman in his individual right and all the rights shown in the complainant to the lands involved is in his capacity as trustee, and because said bill does not show the nature of the trust held by said Roman over said lands, whether it be a naked trust or an active trust, and because of a non-joinder of parties plaintiff, in that Lehman Bros. and Ignatius Pollak are shown to be the beneficial owners of said land and are not made parties to the suit, and because the bill does not show that the land has been damaged or will be damaged by the construction of the telephone line mentioned in said bill. The defendant demurred to the verification of the bill because said verification does not show that the affiant had any knowledge of the facts stated in the bill, and it does not show any sufficient reason why it was not verified by the complainant. The verification of the bill was made by D. A. Fuller, who says that he is a duly authorized agent of the complainant and has authority to make the affidavit; that the complainant resides at Montgomery and is not present to make the affidavit, and will not have time to make the same in time to prevent the wrongs complained of in said bill, and that the matters and allegations contained in the bill of complaint are true. On a hearing on demurrers and motions to dismiss the bill and to dissolve the temporary injunction, the chancellor granted the motion, sustained the demurrers, and dissolved the injunction.

John C. Eyster and F. E. St. John, for appellant. Brown & Kyle, for appellee.

DOWDELL, J. The appeal in this case is taken from the decree of the chancellor sustaining the demurrer to the bill and dissolving the temporary injunction. It appears from the record that the cause was submitted in term time for decree in vacation on the demurrer to the bill and on motion of respondent to dissolve the temporary injunction, and by agreement of parties the 7th day of

October, 1905, at Decatur, Ala., was set as the time and place for the argument of the cause by counsel. The respondent by its sworn answer denied the title and ownership of the complainant of the lands described in the bill. At the hearing on October 7th the complainant, in support of the averments of the bill, offered certain affidavits and a copy of the deed made by the register in chancery to the complainant. The respondent objected to the introduction on the hearing of said affidavits and said copy of deed. The chancellor sustained the objection of the respondent and refused to consider the affidavits and copy of deed, and, on the denials in the sworn answer, dissolved the injunction. As stated above, the respondent, in its sworn answer, denied the title and ownership of the complainant. Under the rule laid down in *Barnard v. Davis*, 54 Ala. 565, which is but a reaffirmance of the rule of practice in injunction cases, it was not competent for the complainant, on the hearing of the motion to dissolve the temporary injunction on the denials and the sworn answer, to support the averments of his bill as to title and ownership by ex parte affidavits. Moreover, if it had been competent to do so, the offer to do so here was not seasonably made and on timely notice.

While the ruling on the demurrer is assigned as error, this assignment is not insisted on in argument, and for that reason we might decline to notice it; but, as the question might be again raised on an appeal from a final decree, we deem it proper for that reason to consider it. The bill is not sufficient in its statement as to the trusteeship of the complainant. For aught that appears, the trust may be a naked trust, without any duties for the trustee to perform. In such case the legal title of the property conveyed in trust would vest in the cestui que trust, and the alleged trustee would not be the proper party to maintain the bill. On the other hand, if it should appear that the trust created was not a naked trust, but an active one, the cestui que trust would not be a necessary party to the bill, as no question in the character of the bill here filed would arise between the trustee and the cestui que trust. The trustee, being clothed with a legal title and with active duties to perform, would be authorized, as it would be his duty, in his own name as trustee to protect the property of the trust by legal proceedings as well as otherwise.

We find no error in the record, and the decree appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

**BOWDON v. ATLANTIC COAST LINE
RY. CO.**

(Supreme Court of Alabama. May 17, 1906.)

1. CARRIERS—TERMINATION OF RELATION—ARRIVAL OF GOODS.

The liability of a common carrier is not necessarily terminated by the arrival of the goods at destination, but such liability ceases and that of a warehouseman begins only after the owner or consignee has had a reasonable time after the arrival at destination to remove the goods.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 609.]

2. SAME—REFUSAL TO DELIVER—ABSENCE OF WAYBILL—EXCUSE.

Failure of a delivering carrier to have a waybill for the freight shipped furnished no ground for such carrier's refusal to deliver the goods to the owner and consignee after arrival, on demand.

3. SAME—LOSS OF GOODS—ACTION—EVIDENCE.

Where, in an action against a carrier for loss of goods destroyed in the delivering carrier's depot, defendant claimed that the goods had been destroyed by fire after the expiration of a reasonable time within which the consignee should have removed them, and after defendant had refused to deliver when delivery was first demanded because no waybill had been received from the initial carrier, it was competent for plaintiff to show that the delivering station was a prepay station, and that it was the custom of defendant's agent to deliver freight at such station to the owner or consignee without requiring the production of a bill of lading.

Appeal from Circuit Court, Houston County; William C. Oates, Special Judge.

"To be officially reported."

Action by C. P. Bowdon against the Atlantic Coast Line Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

This was an action to recover damages for failure to deliver 144 pairs of shoes alleged to have been shipped over plaintiff's line as a common carrier and the failure to deliver the same at the point of shipment. The defendant set up by its pleas that the goods were consigned to Gordon, Ala., a town of less than 1,000 inhabitants; that the shipment reached Gordon and was stored in defendant's warehouse, and remained there 72 hours; that the plaintiff knew of the arrival of said goods and that the same had been stored in defendant's warehouse; that said goods remained in said warehouse until February 26, 1901, when said warehouse or depot was destroyed by fire, and everything therein consumed, including the goods mentioned in the complaint; and asserting that its liability as a common carrier ceased and determined upon the safe delivery of said goods in the town of Gordon, after a reasonable time had elapsed for plaintiff to remove said goods from said warehouse or depot. For further plea the defendant alleges that the goods in controversy were shipped during the month of February, 1901, from St. Louis, Mo., by the receiving carrier, the Louisville & Nashville Railroad Company, to Montgomery, Ala., where they were delivered

to defendant; that the shipment was made upon a bill of lading, a copy of which is attached to the plea; that the goods so shipped were consigned to plaintiff at Gordon, a station on defendant's line of railway; that said goods arrived there on the morning of February 24, 1901, and were stored in the warehouse of the defendant for safe-keeping; that the Louisville & Nashville Railroad Company had failed at that time to send to defendant's agent any waybill to show whether the freight charges on the goods had been prepaid, or whether the same had been shipped with bill of lading and draft attached for the value thereof; that on the afternoon of the second day after the arrival of said goods at Gordon the drayman came to the warehouse of defendant and asked for the goods, but had no bill of lading; that defendant's agent informed the drayman that he had not yet received the waybills showing how the goods were shipped, or whether the freight charges had been prepaid, and demanded a production of the bill of lading; that the drayman never produced any bill of lading and did not return to the warehouse for said goods; that after midnight on the morning of February 26th, after the arrival of said goods at Gordon, Ala., the warehouse of defendant company and its depot was destroyed by fire, and all of the goods contained therein consumed, without any fault or blame or negligence on part of the defendant, its agents or employes, and after said draymen had made demands for said goods. Defendant avers that the fire which consumed said goods occurred more than 40 hours after the arrival of said goods, and more than 10 hours after the drayman had demanded the goods of the railway agent, and after the demand for the production of the bill of lading by said agent. Defendant further avers that the plaintiff's then place of business was within half a mile of the station known as Gordon, where the goods were stored. Defendants further aver that, although it was the duty of the plaintiff to have produced the bill of lading, which was the sole and exclusive contract between the parties to said shipment, and which showed on its face that the freight charges on said goods had been prepaid, he failed to produce or present the bill of lading; and defendant avers that under the circumstances plaintiff was not entitled to demand the delivery of the goods, nor was it the duty of the discharging carrier to deliver the same. Plaintiff interposed several grounds of demurrer to each of these pleas. To the first one, that the plea fails to allege when the goods reached the town of Gordon, or to state any facts which show that the relation of common carrier had terminated, and the plea fails to state that 72 hours after the arrival of the goods at Gordon was a reasonable time in which plaintiff might have removed the goods from the depot at Gordon; and said plea fails to state any facts show-

ing that the relation of common carrier had terminated and that of warehouseman had begun. The plaintiff further demurred to last plea, after filing same grounds of demurrer assigned to first plea to last plea, because said plea is prolix, and because said plea prevents no answer to the complaint, and because the defendant by said plea seeks to justify the failure of its agent at Gordon to deliver the goods when called for by the reason of plaintiff, and because said plea fails to set up facts showing that a reasonable time had elapsed, after the railroad company was ready and prepared to deliver said goods and before the destruction of said goods by fire, within which plaintiff might remove said goods. The court overruled all these demurrers. Thereupon the plaintiff filed the following replication to first plea as follows: "Plaintiff denies that the shipment remained in the defendant's depot for a period of 72 hours or longer before said depot was destroyed by fire; and as a further answer to said plea that after the arrival of said goods plaintiff sent one McEachern to defendant's depot for said goods, and that the agent of defendant refused to deliver said goods to said McEachern, stating to him that no waybill had been received by him for said goods, and that he could not deliver said goods to said McEachern until he received said waybill. And plaintiff avers that at the time of the arrival of said goods the depot at Gordon, Ala., the station of the defendant railway, was a prepay station and that the freight on said goods was prepaid from St. Louis, Mo., to Gordon, Ala." Demurrers were sustained to this replication. The admitted facts were as follows: That the goods in controversy, worth \$175, were shipped by the Dittman Boot & Shoe Company, at St. Louis, Mo., to C. P. Bowdon, at Gordon, Ala., as per bill of lading; that they were shipped over the Louisville & Nashville Railroad Company, to Montgomery, Ala., and from there over defendant's line of railway to Gordon, and that they reached Gordon on the morning of — day of February, 1901, and that they were stored in the warehouse or depot of the defendant; that the warehouse was destroyed by fire on the morning of February 26, 1901, and the goods were destroyed along with it.

A. E. Pace and W. L. Lee, for appellant.
A. A. Wiley and Espy & Farmer, for appellee.

DOWDELL, J. The plaintiff, appellant here, sued the defendant for failure as a common carrier to deliver certain goods described in the complaint. The defendant sought to avoid liability by setting up as a defense that at the time of the destruction of the goods by fire its duty as a common carrier had terminated and that of a warehouseman had begun and that the fire which destroyed the goods was without fault or negligence on the part of the defendant. The

rule of law is well settled in this state that the liability of a common carrier is not necessarily terminated by the arrival of the goods at the point of destination, but that such liability ceases and that of warehouseman begins only after the owner or consignee of the goods shipped has had a reasonable time after arrival at the point of destination to remove the same. *C. & W. Ry. Co. v. Ludden & Bates*, 89 Ala. 612, 7 South. 471; *Kennedy Bros. v. M. & G. R. Co.*, 74 Ala. 430; *Ala. & Tenn. River Ry. Co. v. Kidd*, 35 Ala. 209; *M. & G. R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586; *L. & N. R. Co. v. Oden*, 80 Ala. 38; *L. & N. R. Co. v. McGuire & Co.*, 79 Ala. 395; *Hutchinson on Carriers*, pp. 356, 358, 359, 378, 379.

Neither of the defendant's pleas Nos. 2 and 3 averred that the plaintiff had had a reasonable time for the removal of the goods in question after their arrival at the point of destination of their shipment. These pleas, therefore, were subject to the grounds of plaintiff's demurrer directed to this defect in the pleas, and the demurrers should have been sustained.

The failure of the defendant railroad company to have a waybill for the freight shipped could furnish no excuse for the failure of the defendant to deliver to the owner and consignee the goods when he called for the same. That the receiving carrier failed to furnish the delivering carrier with a waybill of the goods shipped was no sufficient reason for a refusal by the delivering carrier to deliver the goods to the owner and consignee when he demanded the same.

Under the issues on which the case was tried, it was competent for the plaintiff to show that the railroad station at Gordon was a prepay station, and it was likewise competent for the plaintiff to show that the freight on the goods in question had been prepaid. It was also competent for the plaintiff to show existence of a custom for the railroad agent to deliver freight to the owner or consignee without requiring the production of the bill of lading.

For the errors pointed out, the judgment appealed from will be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

NORMAN v. STATE.

(Supreme Court of Alabama. May 17, 1906.)
TIME—BILL OF EXCEPTIONS—FILING.

Where the court on December 8, 1905, allowed defendant 30 days within which to file his bill of exceptions, an extension of time not granted until January 8, 1906, was not granted until after the expiration of the time originally allowed, and was therefore ineffective, though January 7th, on which the original time expired, was Sunday.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Time, § 26.]

Appeal from Circuit Court, Chilton County; A. H. Alston, Judge.

"Not officially reported."

James Norman was convicted of assault with intent to forcibly ravish, and he appeals. Affirmed.

Thomas A. Curry, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The defendant was convicted of the offense of assault with intent to forcibly ravish. On the 8th day of December, 1905, the court allowed 30 days within which to file his bill of exceptions. The extension of time was not granted until January 8, 1906. The fact that the 7th, on which the time expired, was Sunday, did not keep the previous order alive until the 8th. Consequently the bill of exceptions cannot be considered in this case. *Anniston Elec. & Gas Co. v. Cooper*, 136 Ala. 418, 34 South. 931.

There being no error apparent on the record, the judgment of the court is affirmed.

WEAKLEY, C. J., and DOWDELL and ANDERSON, JJ., concur.

CITY OF ENSLEY v. McWILLIAMS.

(Supreme Court of Alabama. May 17, 1906.)

1. QUIETING TITLE—PLEADING—COMPLAINT WITHIN STATUTE.

A bill alleged that, owing to the unconstitutionality of acts extending the corporate limits of a city, such limits did not embrace complainant's land; that the institution of proceedings by the city to sell such land for delinquent taxes worked an injury irremedial by court of law; that, extrinsic facts being necessary to show the invalidity of such proceedings, a tax deed issued by the city would be prima facie evidence of title and a cloud on plaintiff's title—and asked an injunction restraining such proceedings. *Held* not to show equity as a bill filed with respect to Code 1896, c. 16, art. 13, providing for a suit to quiet title whenever the title of one in possession is disputed or any one claims any interest or lien thereon and no suit is pending to test such claim, and specifying that the bill must allege that defendant claims or is reputed to claim some right as to the property, and must call upon him to set forth such claim and its derivation.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, § 73.]

2. INJUNCTIONS—PROCEEDINGS RESTRAINABLE—COLLECTION OF TAXES.

Injunction will not lie to restrain the collection of taxes, unless there are special circumstances bringing the case within some recognized head of equity jurisprudence.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1231-1241.]

3. SAME.

Proceedings by a city to enforce a tax and sell property thereunder, based on an unconstitutional statute extending the city's boundaries to include such property, do not constitute a cloud on title, so as to authorize restraint thereof by injunction.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"To be officially reported."

Bill by F. W. McWilliams against the city of Ensley. From a decree in favor of complainant, defendant appeals. Reversed, and bill dismissed.

Romaine Boyd, for appellant. Joel F. Webb and Sharpe & Miller, for appellee.

DENSON, J. The city of Ensley was incorporated as a municipal corporation by an act of the General Assembly approved December 10, 1900, and the act amendatory thereto approved March 2, 1901. Acts 1900-01, pp. 247, 1940. By these acts the territory of the city was defined and marked out. The Legislature at the session of 1903 enacted two acts, approved, respectively, on the 28th day of February, 1903, and the 30th day of September, 1903. The first of these acts is entitled: "An act to amend section one of an act approved March 2, 1901, entitled 'An act to amend section one of an act entitled 'An act to establish a new charter for the city of Ensley in Jefferson county, Alabama.''" Loc. Acts, p. 107. The title of the other is: "An act to alter or rearrange the boundaries of the city of Ensley, Jefferson county, Alabama." Loc. Acts, p. 692. Each of these acts extended the territory of the city, and as extended brought some of the lands of the complainant in the bill in this case within the taxing jurisdiction of the city, thereby making his property subject to taxation by the city. The bill describes the complainant's land that was brought by said acts within the city's jurisdiction and alleges that "the city of Ensley levied a tax on said land for the year 1904, but complainant has never paid said taxes. On July 1, 1905, defendant, through its city tax collector, F. G. Fonville, gave notice in the Ensley Herald that the city clerk of Ensley had issued to him an execution and he had levied on complainant's property as described (in the third paragraph of the bill) for delinquent taxes and costs due the city of Ensley, Ala., for the year 1904, and in the Ensley Herald advertised defendant's said property for sale on the 1st day of August, 1905. It is averred in the bill that the two acts of 1903 were not constitutionally enacted; the defects in this particular being particularly pointed out. In consequence of the averred unconstitutionality of the acts, it is averred in the eighth paragraph of the bill "that the corporate limits of the city of Ensley do not embrace complainant's land; that the exercise of the authority by the city of Ensley which the said acts purport to confer is vexatious to complainant, and if not restrained will deprive him of his just rights and subject him to unjust vexation and injury which is wholly irremedial by a court of law. Complainant further avers that the proceedings instituted by the said city of Ensley to sell complainant's property for the payment of said alleged delinquent taxes

are void upon their face, and extrinsic facts are necessary to be proved to show their invalidity and illegality, and a tax deed, if issued by said city of Ensley, would be prima facie evidence of title, resulting in a cloud on complainant's title. Said instruments purporting to extend the corporate limits of the said city of Ensley are not efficacious for this purpose, are null and void, and do not confer on said city of Ensley jurisdiction to make said assessment or sell said lands for the payment of said taxes. If said sale is made of said property as aforesaid, there will be a cloud on complainant's title and he will suffer irreparable injury and will be without redress at law." The prayer of the bill is for an injunction "restraining the city of Ensley, its officers, agents, and employes, any and all of them, from selling or attempting to sell said property of complainant so advertised as aforesaid for taxes so assessed against complainant as aforesaid. Complainant further prays that upon a final hearing of this cause the temporary injunction shall be made perpetual, that the court will set aside and forever annul said assessment as illegal and void, and perpetually enjoin and restrain the said city of Ensley from exercising or attempting to exercise any jurisdiction or authority over the said property of complainant, or dealing with said property as if it were in the corporate limits of the city of Ensley."

A motion to dismiss the bill for want of equity was overruled, and this constitutes one ground in the assignment of errors. "It is certainly the general rule that the collection of taxes will not be arrested by injunction. It has its reason in public policy, which cannot lend its sanction to any remedial proceeding which might clog the machinery of civil administration. In addition to illegality or irregularity in the imposition of the taxes or in the process of the collection, to borrow the language of Mr. High, 'there must be some special circumstances attending the threatened injury to distinguish it from a mere trespass, and thus to bring the case within some recognized head of equity jurisprudence; otherwise the person aggrieved will be left to his remedy at law.'" Town of New Decatur v. Nelson, 102 Ala. 556, 15 South. 275; Ala. Gold Life Insu. Co. v. Lott, 54 Ala. 499; Elyton Land Co. v. Ayres, 62 Ala. 413; Nat. Com. Bank v. Mayor, 62 Ala. 284, 34 Am. Rep. 15; Mayor v. Baldwin, 57 Ala. 61, 29 Am. Rep. 712; Cooley on Taxation, p. 760. The attempt is made in this case to show that the tax proceedings, if permitted to culminate in a sale and conveyance, would operate as a cloud on the complainant's title; and this is the recognized head of equity jurisprudence that it is sought to rest the bill on and withdraw it from the influence of the principle stated in the preceding paragraph. It is manifest from the averments of the bill

that it does not contain equity as a bill filed with respect of the sections embraced in article 13 of chapter 16 of the Code, though an intimation might be gathered from some of its averments that the draftsman had those sections in mind when framing the bill. Meyer v. Calera Land Co., 133 Ala. 554, 31 South. 938; Parker v. Boutwell, 119 Ala. 297, 24 South. 860; Weaver v. Eaton, 139 Ala. 247, 35 South. 647.

The question then arises, can the bill be maintained as an ordinary bill to remove a cloud from title? The whole theory of the bill is that the acts of the Legislature extending the territory of the city, and under which the city claims the right to tax complainant's land, are invalid as having been enacted in violation of the Constitution; that they are unconstitutional. "A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows prima facie some right of a third party, either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality, if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, so that any person impeaching the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance nor an apparent defect of title, and therefore in law could constitute no cloud." Cooley on Taxation, 552. Under the facts in this case, if, as the bill alleges, the acts of the Legislature are unconstitutional, a sale and conveyance under the tax proceedings could not constitute a cloud upon complainant's title, because from an inspection of the conveyance, which would recite the proceedings, and of the record, it would appear that the assessment was wholly unwarranted by law and totally void. The complainant and every other person is presumed to know the law. The courts take judicial knowledge of the acts prescribing the limits of towns.

It has been frequently held that a sale of land for taxes laid under an unconstitutional law does not constitute a cloud upon the title. Detroit v. Martin, 34 Mich. 170. 22 Am. Rep. 512; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Newell v. Wheeler, 48 N. Y. 486; Marsh v. City of Brooklyn, 59 N. Y. 280; Ewing v. St. Louis, 5 Wall. (U. S.) 413, 18 L. Ed. 657; Wells v. Buffalo, 80 N. Y. 253; Mayor of Birmingham v. McCormack (Ala.) 40 South. 111. If the tax proceedings should finally culminate in a sale and conveyance, and an action of ejectment should be brought by the grantee in the conveyance against complainant in possession, it cannot be doubted that to authorize a recovery valid tax proceedings would have to be shown by the plaintiff in ejectment to support the conveyance. As has been stated, the court takes judicial knowledge of

the acts chartering towns and cities, and of the territorial limits of towns and cities as fixed by such charters. *Lord v. Mobile*, 113 Ala. 360, 21 South 366; *Ross v. Reddick*, 2 Ill. 73; *State v. Jackson*, 39 Me. 291. So upon a comparison by the court of the description of the property in the conveyance with the territorial limits as given in the charter as granted by the original act, it would be seen that the property as described in the deed, if described as the land is in the bill, would fall outside the city limits as defined in that charter, but would come within the limits as fixed by the acts of 1903 that are alleged to be unconstitutional. Therefore, in the action of ejectment the plaintiff, if the amendatory acts are void, would fail, and that, too, without the defendant offering any evidence. And in such state of the case, under the test fixed by this court, the conveyance would not be a cloud on defendant's title. *Rea v. Longstreet*, 54 Ala. 291; *Parker v. Boutwell*, 119 Ala. 297, 24 South. 860; *Mayor v. McCormack* (Ala.) 40 South. 111. If the acts of 1903 are valid enactments, confessedly the bill in this case cannot be maintained. The tax proceeding would be valid, and would not be a cloud on complainant's title. *Shults v. Shults* (Ill.) 43 N. E. 800, 50 Am. St. Rep. 188.

Our conclusion is that the bill is without equity, and the city court erred in overruling the motion to dismiss it for want of equity. A decree will be here rendered dismissing the bill.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

DAVIS et al. v. STATE.

(Supreme Court of Alabama. May 17, 1906.)

CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS.

A bill of exceptions, signed after the 60 days permitted by Act Jan. 23, 1891 (Acts 1890-91, p. 227), for the filing of bills of exceptions in the Supreme Court, and after the commencement of a new term of the trial court, though within the time of an extension by agreement, cannot be considered.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2847-2861.]

Appeal from Criminal Court, Jefferson County; D. A. Greene, Judge.

"To be officially reported."

Dan Davis was convicted of crime, and he appeals. Affirmed.

This cause was tried and judgment entered on the 16th day of November, 1905. The judgment entry recites: "The execution of the judgment in this cause be and the same is hereby suspended until the decision in this case by the Supreme Court; the defendant having been granted 60 days within which to file their appeal bond to said Supreme Court." Under the act approved January 23, 1891 (Acts 1890-91, p. 227), all bills of

exceptions must be filed in said court within 60 days after conviction. An agreement was made between the solicitor and defendant's attorney on the 15th day of January, 1906, extending the time 30 days for the signing the bill of exceptions, and the bill was signed within that time. At the time of the signing of the bill, however, the last term of the court for the year 1905 had terminated, and the new January term for 1906 had begun.

E. D. and J. P. Smith, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. On the authority of the case of *Adams v. State* (Ala.) 40 South. 85, the paper in the record purporting to be a bill of exceptions must be stricken. With the bill of exceptions stricken no question remains for our consideration. There being no error apparent in the record, the judgment appealed from is affirmed.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

ECHOLS v. STATE.

(Supreme Court of Alabama. May 17, 1906.)

1. CRIMINAL LAW — EVIDENCE — OTHER OFFENSES.

On a trial for larceny, evidence that the chattels of a third person were stolen at the time the property of the prosecutor was stolen was admissible as a part of the *res gestæ*.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 807.]

2. SAME—OPINION EVIDENCE—PROOF OF VALUE — WITNESSES—COMPETENCY.

A person who has been a merchant for a number of years and who has some knowledge of the value of goods is competent on a trial for larceny to give his opinion of the value of the goods stolen.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1053.]

3. LARCENY—POSSESSION OF STOLEN PROPERTY — EXPLANATIONS BY ACCUSED—ADMISSIBILITY.

Where, on a trial for larceny, the state showed that accused had possession of some of the stolen property, it was competent for him to explain his possession and show that a third person brought the same to him.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 145.]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

"Not officially reported."

Dock Echols was convicted of larceny, and he appeals. Reversed and remanded.

Massey Wilson, Atty. Gen., for the State.

HARALSON, J. Cox, a witness for the state, testified, that he boarded at the home of Mr. Sam Teague, and the house, about six or seven weeks previous to the time he was testifying, was broken open, and he missed certain articles of personal property belonging to him, taken therefrom, and this was done at the time the property described in the indictment (as the property of Samuel

F. Teague) was stolen. The defendant moved to exclude that part of the testimony as to the articles the witness missed, but the motion was overruled. There was no error here, as the evidence was a part of the *res gestæ* of the larceny. These articles, as before stated, the witness testified, were his property, and were stolen at the time the property described in the indictment was missed.

Teague testified as to the value of the goods stolen. It was not necessary as contended by defendant, for the witness to have been an expert as to values of the goods stolen. He showed he had some knowledge of such values, had been a merchant for a number of years, and showed he was competent to express his judgment or opinion on the subject. As stated in *E. T. V. & G. R. R. Co. v. Watson*, 90 Ala. 44, 7 South 813: "To render such testimony admissible, it was unnecessary that he should be shown to possess any particular skill to qualify him as an expert on this subject." *Pollock v. Gantt*, 69 Ala. 378, 44 Am. Rep. 519.

The state having offered evidence that the defendant had possession of some of the stolen property, as an incriminating circumstance, it was competent for the defendant to explain that fact, if he could, so as to break its force or weaken its effect. If the property was at his home, because Ed Williams brought it there, this would have had a material bearing upon the inquiry, and he should have been allowed to ask the question seeking to elicit that fact. The same reasoning applies to the question to the witness Bolling,—what he hauled to defendant's house for Ed Williams.

The court in its oral charge instructed the jury to eliminate all the testimony that was given and what was said about the property on the first night of the search of defendant's house, "because (as stated) that has nothing to do with the property taken on the second night by the officers." This was favorable to defendant, for the court thereby confined the evidence to the second night of the search, as to what was said and done at the time the stolen goods were found.

For the errors indicated the judgment of the lower court is reversed and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

JONES v. STATE.

(Supreme Court of Alabama. May 17, 1906.)

1. CRIMINAL LAW—PRELIMINARY AFFIDAVIT—AMENDMENT—AUTHORITY OF COURT.

A justice having authority to hold one accused of crime for the offense it appears he has committed has authority to permit the filing of an amendment to the affidavit to correct defects therein on sustaining a demurrer thereto.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 433½.]

2. JURY—RIGHT TO TRIAL BY JURY IN MISDEMEANOR CASES—TIME TO DEMAND JURY.

Acts 1901, p. 112, § 8, provides that in misdemeanor cases the court shall try the facts, except where trial by jury is demanded by accused in writing within 10 days after the court assumes jurisdiction. The court acquired jurisdiction of a misdemeanor case on November 23d, on the transfer thereof to the court from a justice's court. On that day accused made a written demand in justice's court for a trial by jury, but he made no demand for a jury in the trial court until January 1st following. *Held*, that the demand for a jury came too late; the demand made in the justice's court not dispensing with the demand in the trial court.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 159-165.]

3. WITNESSES—REFRESHING MEMORY—USE OF MEMORANDUM.

A witness having no personal knowledge of the truth of facts set forth in a memorandum not made by him, and having no recollection of the facts independent of the memorandum, the memorandum is inadmissible in evidence.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 868-892.]

Appeal from Law and Equity Court, Walker County; Thomas L. Sowell, Judge.

"Not officially reported."

Charley Jones was convicted of obtaining property by means of false pretenses, and he appeals. Reversed and remanded.

The affidavit in this cause was in the following words, after stating the state and county: "Before me, L. C. Kelley, a justice of the peace in and for said county, personally appeared W. C. Allen, who, being duly sworn, deposes and says that he has probable cause for believing, and does believe, that within 60 days before making this affidavit, and in said county, Charley Jones did attempt to falsely pretend to the Calloway Coal Company, a corporation, with the intent to defraud, that he had mined three cars of coal and had them ready for delivery, and by means of such false pretense and token would have obtained from the said Calloway Coal Company, a corporation, \$1.80." Demurrer was sustained to this affidavit, and the court permitted the affidavit to be amended so as to properly charge false pretenses. The other facts sufficiently appear in the opinion.

Ray & Leith, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. The affidavit for arrest was questioned by demurrer for being insufficient to charge any offense against defendant. The demurrer was sustained, and the court, after sustaining the demurrer to the affidavit, allowed the same to be amended to cover the alleged defects. It is contended, that the court erred in allowing this to be done, and that the defendant was entitled to his discharge when said demurrer was sustained.

"In prosecutions begun by affidavit (as was said in *Wright v. State*, 136 Ala. 145, 34 South. 235), it is not error for the court to allow the affidavit to be amended, so as to perfect it or meet any supposed defects."

The court had the discretion and authority to hold the defendant for the offense it appeared he had really committed, and there was no violation of constitutional or statutory restrictions for him to do so, and to allow the amendment to the affidavit, which was held to be insufficient for a reason, not touching the question of defendant's guilt or innocence. By sustaining the demurrer to the affidavit, it could not be said that defendant was indicted. *Ex parte Graves*, 61 Ala. 381; *State v. McFarland*, 121 Ala. 49, 25 South. 625.

The defendant moved to strike and to quash the amended affidavit, on the same grounds for allowing the amendment. The motions were properly overruled.

The defendant objected to being put on trial because a jury had been demanded by the defendant, and the court had no right to try the case without a jury. The defendant when the case was brought up in the justice's court, on the 23d of November, 1905, made a written demand for a trial by jury. He was, therefore bound over to the law and equity court of Walker county, to answer the charge against him, and the transcript of the proceedings was, on that day, certified by the justice to that court. On January 1, 1906, the defendant filed in the law and equity court a demand for trial by jury, which defendant contends entitled him to have a grand jury pass on his case, and there had been a term of said court and the grand jury had taken no action in his case, whereby said cause was discontinued.

The court overruled said motions, and proceeded to try the defendant on said charge.

It is provided by section 8 of the act establishing said law and equity court (Acts 1901, p. 112) that in civil and criminal cases, on complaint or indictment, of which the court has jurisdiction, each and every person or party to the cause, shall be entitled to a trial by jury, "provided that in misdemeanor cases, said court shall try both law and facts, except when trial by jury is demanded by the defendant in writing, and filed with the clerk of said court *within ten days* after he is arrested or taken into custody, or *after the court herein established assumes jurisdiction of said cause.*" (Italics ours.) The law and equity court acquired jurisdiction of the case, as we have seen, on the transfer of the same to that court from the justice's court, on the 23d of November, 1905, and no demand for a jury was filed in the said court, until January 1, 1906, or the day the same was called for trial in that court, which was more than 10 days after the said court acquired jurisdiction of the same. The demand for a jury made in the justice's court, related to a trial in that court alone, and did not dispense with such a demand in the law and equity court according to the terms of the statute, in ten days after that court assumed jurisdiction of the cause. There was no error, therefore, in the action of the court

in proceeding to trial with the case. *Frost v. State*, 124 Ala. 71, 27 South. 550.

The witness, Allen, testified that he put his check on one of the cars of coal, and that five of his cars had been pulled out. As to these five, except the one he loaded, he testified to his checks being on them, from what the other men working with him told him. Defendant moved to exclude the evidence of this witness as to all five of the cars checked with his checks. The evidence was admissible, at least, so far as relates to the one car that the witness checked with his own check, and this was the extent to which the court overruled the motion to exclude.

The witness, Henry, for the state, was asked if he had a memorandum by which he could refresh his recollection as to the amount of time the defendant had put in, in November, and the amount of coal he had mined; and, producing the memorandum he stated that he had. When asked if the paper was correct, and, in answer to questions defendant was permitted to ask, he said the memorandum was copied from the books of the company; that it was a true copy of the books, and the amount shown on this memorandum was the correct amount of coal defendant mined and the price per ton paid for it, and the amount of time put in, but independent of the books he could not have so told. This was a statement of what was shown on the books, of which the memorandum was a copy. The witness distinctly stated, as has been shown, that independent of the books he could not have told what they contained.

"The defendant moved to exclude the answer of the witness, as to proving what was shown on the memorandum by him on the ground stated in the objection to the question." The court overruled the defendant's motion.

It was not shown that the witness kept the books and had personal knowledge of the truth of what they contained. "In order for a witness to refresh his recollection, or prove the contents of a memorandum, where they were once known to be true, and are forgotten, it is indispensable that the witness himself should, at some time previous, have had a personal knowledge of the truth of the facts." *Miller v. Boykin*, 70 Ala. 478; *Acklen's Ex'r v. Hickman*, 63 Ala. 494, 35 Am. Rep. 54. This, the witness in this case could not, or did not state. He did say that he had recollection, independent of the books; that the defendant did not have any coal turned in for him to the office on the 13th and 14th of November; but, this did not make the memorandum copied from the books admissible in evidence. For this error the judgment must be reversed.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

STEPHENSON v. ATLAS COAL CO.

(Supreme Court of Alabama. May 17, 1906.)

1. CONTRACTS—CANCELLATION—GROUNDS.

Neither inadequacy of consideration, mistake in law, nor partial failure of consideration is sufficient in the absence of fraud to authorize the cancellation of a contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1152, 1156, 1158, 1170, 1173.]

2. EQUITY—PLEADING—MOTION TO DISMISS.

Though, on motion to dismiss a bill for want of equity, it is to be considered as amended in all amendable defects, it cannot be considered as amended, so as to give it equity, by the averment of new, additional, or independent facts.

3. SAME—AMENDMENT—TIME.

Time for the amendment of a bill will not be allowed after a decree on a motion to dismiss for want of equity.

Appeal from Chancery Court, Walker County; Alfred H. Benners, Chancellor.

"To be officially reported."

Bill by H. W. Stephenson against the Atlas Coal Company. From a decree sustaining a motion to dismiss for want of equity, complainant appeals. Affirmed.

Smith & Smith and D. A. McGregor, for appellant. London & London, for appellee.

DOWDELL, J. The purpose of the bill filed in this case is the cancellation of an executed contract on the ground of a partial failure of consideration. No fraud is alleged. The cause was submitted on motion to dismiss the bill for want of equity, and was held for decree in vacation. A decree was rendered in vacation sustaining the motion and dismissing the bill for want of equity. From this decree the present appeal is prosecuted.

Mere inadequacy of consideration is not sufficient to authorize the cancellation of a contract. 3 Pom. Eq. Ju. 826-828. Nor will mistake in law or partial failure of consideration, in the absence of fraud, authorize the cancellation of a contract. *Bell v. Lawrence's Adm'r*, 51 Ala. 160; *Ex parte Hayes*, 92 Ala. 120, 9 South. 156; *Stacy v. Walker*, 125 Ala. 291, 28 South. 89, 82 Am. St. Rep. 235. The rule is well established in this court that, on a motion to dismiss a bill for want of equity, the bill must be taken and considered as amended in all amendable defects. This, however, is not to be understood that the bill is to be considered as amended so as to give it equity by the averment or averments of new, additional, or independent facts, but only as to amendable defects apparent on the face of the bill from the averments therein contained. *Blackburn v. Fitzgerald*, 130 Ala. 584, 30 South. 568. The plain sense of the rule in taking the bill as amended in all amendable defects on a motion to dismiss for want of equity leaves no room for argument or reason for granting time for amendment of the bill after decree on motion to dismiss for want of equity.

The decree dismissing the bill for want of equity is free from error.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

HOWARD v. STATE.

(Supreme Court of Alabama. May 17, 1906.)

CRIMINAL LAW—RIGHT TO COPY OF INDICTMENT—WAIVER.

Where defendant was arraigned and pleaded not guilty, and during the 10 days intervening between the arraignment and trial did not demand a copy of the indictment, the right to a copy, given by Bill of Rights, § 6, was waived.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1400.]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

"To be officially reported."

Lige Howard was convicted of grand larceny, and appeals. Affirmed.

Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted on an indictment for grand larceny. It appears from the record that the defendant was arraigned on said indictment on the 25th day of November, 1905, at which time he interposed his plea of not guilty. On the 6th day of December, 1905, the cause was called for trial, at which time the defendant demanded a copy of the indictment on which he was to be tried. The court refused to require that the defendant be furnished with a copy of the indictment before proceeding with the trial, but offered to furnish, and did in fact furnish, the original indictment, which the bill of exceptions recites the defendant was permitted to inspect and use, and did so inspect and use the same. The bill of exceptions further recites that no formal demand was made to the clerk of the court for a copy before trial. The defendant excepted to the refusal of the court to require a copy to be furnished him.

By Section 6 of the Bill of Rights in the Constitution of 1901 it is provided that the accused in a criminal prosecution shall have the right "to demand the nature and cause of the accusation and to have a copy thereof." This right, however, is one that may be waived by the accused. On the facts stated this court committed no error in its ruling. The defendant had been informed of the accusation against him on his arraignment, and pleaded not guilty. He then delayed until his case was called for trial, more than 10 days after his arraignment, before demanding a copy of the indictment. By this conduct he waived his right to a copy, and under the circumstances the court was under no duty to require that a copy of the indictment be furnished him.

This is the only question presented by the record, and we fail to see that any reversible error has been committed. The judgment appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

LOUISVILLE & N. R. CO. v. MUSCAT & LOTT.

(Supreme Court of Alabama. May 17, 1906.)

1. RAILROADS—CROSSING ACCIDENT—WILLFUL AND WANTON MISCONDUCT.

The act of persons in charge of a railroad train in intentionally running it over a public street crossing in a city at a speed more rapid than that allowed by ordinance is not wanton or willful misconduct, unless the persons in charge had knowledge and were conscious that injury would probably result.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1009, 1010.]

2. TRIAL—INSTRUCTIONS—CURING ERROR.

In an action against a railroad company for damages from a crossing accident, error in instructing that the servants in charge of the train were guilty of wanton and willful misconduct if they intentionally ran it over the crossing at a speed greater than that allowed by ordinance was not cured by a subsequent paragraph correctly stating that they were only chargeable with such misconduct if they were conscious that their act was likely to result in injury.

Appeal from Circuit Court, Mobile County; Samuel B. Brown, Judge.

"Not to be officially reported."

Action by Muscat & Lott against the Louisville & Nashville Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Gregory L. Smith, for appellant. Francis J. Inge, for appellees.

DENSON, J. The complaint contains four counts, two of which, the second and fourth, count for recovery on wanton or willful misconduct on the part of the defendant's agents or servants in the management of its train or engine, while the others are counts for negligence. The injury to plaintiffs' property occurred at a public street crossing in the city of Mobile, where people and vehicles were wont to pass frequently. An ordinance of the city, which is a part of the evidence, prohibits railroad trains from running at a greater rate of speed than eight miles per hour within the limits of the city. There is evidence tending to support the case as made by the second and fourth counts. The court, ex mero motu, instructed the jury with respect of the second and fourth counts of the complaint in the following language:

"On the other two counts of the complaint, the second and fourth counts set up that this injury happened at a crossing, a public road crossing, in the city of Mobile, a populous city, where people were frequently pass-

ing and repassing, vehicles and pedestrians. Well, the court will tell you that it is the duty of the railroad company not to run its trains, by the ordinance of the city, over eight miles per hour. Now if you are reasonably satisfied from the evidence, and the burden is upon the plaintiff to satisfy you that these cars were run more than eight miles an hour, and that those in charge of the defendant's engine, the servants and agents, 'intentionally' run at a greater rate of speed, and it was likely to run over somebody, persons, pedestrians, or wagons crossing there, and that they 'intentionally' ran it at a greater rate of speed than eight miles an hour, and in so doing that this driver was run over, this wagon or mule was run against and killed, and the property destroyed, why the plaintiff would be entitled to recover.

"Or if you believe, if you are reasonably satisfied from the evidence, that the railroad employes in charge of this locomotive and train were conscious of the surrounding conditions, and they were conscious that they were likely to run over somebody running at that rate of speed, more than eight miles an hour, being conscious of the surroundings and that fact, they recklessly and in disregard of the consequences ran this train or locomotive at that rate of speed, and it did result in the killing of the mule and destroying of the wagon and harness, or if you are reasonably satisfied from all the evidence those are the facts, as charged in this complaint, why the plaintiff would be entitled to a verdict, and it would be your duty to so find."

The defendant excepted to so much of the charge as instructed the jury that, "if the railroad employes intentionally ran the train at more than eight miles an hour, and that it was likely that it would run over some one, the plaintiff would be entitled to recover." The part of the charge excepted to is contained in the third sentence of the first paragraph of the charge. It is bad, in that it fails to hypothesize that the act of running the train should have been done with a knowledge and a present consciousness that injury would probably result. Without this it cannot be said that the employe was guilty of willful or wanton misconduct of the sort that would fix liability on the defendant. *L. & N. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609, and authorities there cited; *Orr's Case*, 121 Ala. 489, 26 South. 35; *L. & N. R. Co. v. Mitchell*, 134 Ala. 261, 32 South. 735; *M. & C. R. Co. v. Martin*, 117 Ala. 383, 23 South. 231. But it is insisted that the part of the charge excepted to must be construed in connection with its context, the part which preceded and followed it and in connection with which it was given, and that when so construed the court cannot be put in error for giving it, as the last paragraph of the charge correctly states the law. This is the correct rule for construing the oral

charge of the court. *Winter's Case*, 132 Ala. 35, 31 South. 717. But there is nothing which precedes which qualifies the portion excepted to, and when we come to that which follows we find that it constitutes a separate and distinct paragraph of the charge. In other words, the portion excepted to is contained in the first paragraph, which is complete within itself, and if the jury should find the facts to be as hypothesized in that paragraph they were told that they should return a verdict for the plaintiffs. So with respect of the second paragraph. We cannot construe the second paragraph as being explanatory of the first. In short, they are not correlatives. The conclusion is that the giving of that portion of the charge excepted to is error for which the judgment of the court must be reversed.

Reversed and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

BURNS v. GIBBS.

(Supreme Court of Alabama. May 10, 1906.)

1. APPEAL—RECORD—MATTERS TO BE SHOWN—BILL OF EXCEPTIONS—TIME OF SIGNING.

A bill of exceptions will not be considered on appeal, unless it appears by the record that it was signed within the time allowed or agreed upon.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2313.]

2. SAME—EXTENSION.

An order or agreement extending the time for signing a bill of exceptions must affirmatively appear from the record to have been made within the time previously allowed or agreed on, or the bill will not be considered on appeal.

Appeal from Circuit Court, Lauderdale County; Ed B. Almon, Judge.

"Not officially reported."

Action between H. J. Burns and W. A. Gibbs, and from the judgment the former appeals. Affirmed.

John T. Ashcraft, for appellant. John L. Hughston and W. H. Mitchell, for appellee.

SIMPSON, J. It appears from the record in this case that on October 31, 1904, the time for signing the bill of exceptions was extended, by agreement, to November 15, 1904. The next agreement to extend the time to December 15, 1904, is not dated, and there is nothing in the record to show when it was signed, and then on the 13th of December, 1904, by order of the judge presiding, the time was extended 30 days, "in addition to time heretofore allowed."

It has been the uniform ruling of this court that the record must affirmatively show that the bill was signed within the time allowed, or agreed on, and each order or agreement must be shown to have been made before the expiration of the previous one. As indicated, it does not affirmatively appear that the second agreement was made

within the life of the first. Consequently the bill of exceptions cannot be considered. *Morris v. Brannen*, 103 Ala. 602, 15 South. 865; *Ala. Mineral R. R. Co. v. Marcus*, 128 Ala. 355, 30 South. 679; *Mayor & Aldermen of Florence v. Irvine*, 137 Ala. 277, 33 South. 888; *Anniston Elec. & Gas Co. v. Cooper*, 136 Ala. 419, 34 South. 931.

There being no assignment of error in the record, the judgment of the court is affirmed. Affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

COKER v. STATE.

(Supreme Court of Alabama. May 19, 1906.)

1. CRIMINAL LAW—APPEAL—EXCEPTIONS TO EVIDENCE—NECESSITY.

The court on appeal in a criminal case will not consider the question of the illegality of testimony, where no exception was taken thereto.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2662.]

2. SAME—CONFLICTING EVIDENCE—REFUSAL OF GENERAL CHARGE DIRECTING ACQUITTAL—PROPRIETY.

Where, in a criminal case, there was a conflict in the evidence, the court properly refused a general charge in favor of accused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1714, 1727, 1734.]

3. SAME—INSTRUCTIONS—APPLICABILITY TO FACTS.

Where, on a trial for rape, the prosecutrix testified that her name was "Ida Parker," and then stated that she did not know what her name was, and a witness with whom the prosecutor lived testified that she was known as "Ida Parker," and there was no evidence of her having had any other name, an instruction directing an acquittal unless the name of the prosecutrix was "Ida Parker" was properly refused.

4. SAME—ABSTRACT INSTRUCTIONS.

Where, on a trial for rape, the only witness to the occurrence was the prosecutrix, who testified that the rape was committed by force, an instruction that, if the conduct of the prosecutrix was such as to create in the mind of accused the belief that she consented, he must be acquitted, was abstract and properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1979.]

5. SAME—DATE OF ALLEGED OFFENSE—RIGHT TO REQUIRE STATE TO FIX DATE.

Where, on a trial for rape, accused had full opportunity by cross-examination to question the witnesses as to the date of the occurrence, it was not error to refuse to require the state to fix the date.

6. SAME—NEW TRIAL—DISCRETION OF TRIAL COURT.

An application for a new trial in a criminal case is addressed to the discretion of the court, and is not revisable on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3067-3071.]

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

"Not officially reported."

Sonnie Coker was convicted of rape, and he appeals. Affirmed.

At the regular term of the court at which the indictment was preferred, the record and minutes of the court failed to show that a foreman was appointed for the grand jury, and the minutes also failed to show the filling of that body. At the adjourned term of the court, at which this trial was had, the solicitor moved to correct the record nunc pro tunc, so as to show the facts as they really were—that a foreman was appointed and that the grand jury was properly filled by the court. This motion was granted. The defendant moved the court to quash the indictment on account of these alleged defects, and the court overruled his motion. The defendant requested the following charges, which the court refused: Charge 2: "The court charges the jury that, unless they believe the name of the prosecutrix is Ida Parker, they will acquit the defendant." Charge 6: "The court charges the jury that, if the conduct of the prosecutrix towards the defendant at the time of the alleged rape was such as to create in the mind of the defendant the honest belief reasonably entertained that she had consented, they must acquit the defendant." The defendant moved the court to require the state to fix the date upon which the alleged crime was committed, and the court refused. There was a motion for a new trial, which the court overruled.

Barnett & Bugg and J. N. Miller, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The appellant was tried and convicted of the offense of rape, and his punishment fixed at death. The exceptions with regard to the organization of the grand jury are without merit. This matter was fully examined and determined by this court in the case of Shirley v. State, 40 South. 269.

This court cannot consider the matter of the illegality of the testimony in regard to complaint of prosecutrix giving the particulars of the offense, as no exception was taken to the same.

There being conflict in the evidence, the court properly refused to give the general charge in favor of the defendant.

There was no error in the refusal of the court to give the second charge requested by the defendant. The prosecutrix herself testified that her name was Ida Parker, though she did in the next breath say that "as a matter of fact she did not know what her name was." The witness Ida Lewis, with whom she lived, testified that she knew her as Ida Parker. There was no evidence of her ever having had any other name. It sufficiently appears that that was the name she was known by.

There was no error in the refusal of the court to give charge 6, requested by the defendant, as it was abstract. The only wit-

ness to the occurrence was the prosecutrix herself, and she testified that it was by force.

There was no error in the refusal of the court to require the state to fix the day when the offense was committed. The defendant had full opportunity by cross-examination to question the witnesses as to the day, and, if they had fixed a different time, in their previous examination it could have been brought out and gone to their credibility.

Applications for a new trial in criminal cases are addressed to the sound discretion of the court, and are not revisable in this court. *Thomas v. State*, 139 Ala. 80, 85, 86 South. 734.

The judgment of the court is affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

MARKHAM et al. v. WALLACE.

(Supreme Court of Alabama. May 19, 1906.)
MORTGAGES—EQUITABLE LIEN—SALE ON EXECUTION—PRIORITIES.

A debtor executed to his creditor an instrument, in form a mortgage, to secure the debt. It was not attested by a witness nor acknowledged. *Held*, that the instrument created an equitable lien on the land described in favor of the creditor, which equity would enforce as against a subsequent purchaser under execution against the debtor with notice.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 43-59.]

Appeal from Chancery Court, Lawrence County; W. H. Simpson, Chancellor.

"To be officially reported."

Suit by W. K. Wallace against Elizabeth M. Markham and others. From a decree for the complainant, defendants appeal. Affirmed.

Kirk, Carmichael & Rather, for appellants. W. W. Callahan, for appellee.

HARALSON, J. It appears that the bill was filed on February 19, 1902, by complainant, William K. Wallace, against Elizabeth M. Markham and others, defendants, the heirs at law of J. T. Pettit, deceased.

It is alleged, that on May 15, 1873, E. T. Simms was indebted to James H. McDonald in the sum of \$550.00, evidenced by his promissory note of that date, payable twelve months after date, and that on May 23, 1873, the said E. T. Simms, for the purpose of securing the payment of said note, executed to said McDonald, "a written instrument or mortgage on the lands" described in the bill, which was filed for record, on the 18th of June, 1875, and was duly recorded in the probate office, on the 13th of March, 1876. Said instrument, in form a mortgage, was not attested by a witness, nor acknowledged by said Simms.

It is further shown, that on the 3d of

March, 1881, said note and mortgage were unsatisfied, and that Thomas D. Simms was the owner and in possession of said note and mortgage, and on said date, said Thomas D. Simms delivered said note and mortgage, and transferred the same without recourse, to complainant, for a consideration of about \$800.00.

It is further shown, that E. T. Simms was, at the time of the execution of said note and mortgage an unmarried man; and on April 4, 1876, he entered into a marriage contract with Mollie De Graffenried, whereby he settled by deed upon her, for the term of her natural life, the lands described; that said marriage contract was in writing and provided, that the conveyance to said Mollie De Graffenried, was made subject to the mortgage of \$550.00 executed by said E. T. Simms to said McDonald on said lands described in section 10 of the bill; that upon the death of said Mollie, the lands were to revert to the said E. T. Simms, his heirs and assigns forever. This marriage contract and conveyance were duly acknowledged on the 20th of the same month.

It is further shown, that on the 7th of December, 1881, said E. T. Simms and his wife, Mollie, for and in consideration of \$1,600.00, paid to them by William K. Wallace (the complainant), sold and conveyed to him the lands described in their deed to him, consisting of 400 acres, (or one-half of the 800 acres) of the lands described in said instrument or mortgage by said E. T. Simms to said McDonald, and in section 2 of the bill, which said lands are the subject of litigation in this suit. This deed was filed for record, on the 5th of January, 1882, and was recorded on the 7th of that month.

It is alleged, that the note and mortgage referred to in the bill, were owned by complainant, W. K. Wallace, on the 7th of December, 1881, the date of the deed from said E. T. Simms and wife to him; that said mortgage only conveyed an equitable interest in the lands to said McDonald, and the transfer to complainant did not contain any apt words of conveyance; that in order to procure said mortgage, it would have required a bill in equity, which would have entailed a great expense, annoyance and delay, and to prevent this, complainant agreed to satisfy the mortgage and pay Mrs. Mollie F. Simms, in cash, the difference between the mortgage debt, and sixteen hundred dollars, the expressed consideration of the deed,—to procure her signature thereto, and that Mrs. Simms was claiming rights in said property under said marriage contract between herself and said E. T. Simms. It was also shown, that the true value of the lands conveyed to complainant by said Simms and wife, did not exceed the amount due on the mortgage; that the satisfaction of the mortgage indebtedness was all the consideration moving between complainant and E. T.

Simms, and that all that was paid by complainant to said Mrs. Simms, was paid to acquire her signature to the deed, and a release of her alleged interest in said lands by virtue of her marriage contract, and thus by such arrangement and transaction avoid the litigation that would have necessarily followed her refusal to sign said deed.

It is again averred in the bill, that on October 24, 1881, Pettit & Simpson, a partnership composed of J. T. Pettit and William Simpson, recovered a judgment in the circuit court of Lawrence county against E. T. Simms in the sum of \$1,092.30, and on November 19, 1881, execution was issued, and on March 17, 1882, the sheriff of the county, claiming to act by virtue of process issued on said judgment, executed to J. T. Pettit, as a purchaser at sheriff's sale, a deed to the lands in question.

The defendants, on the 9th of December, 1901, commenced in the circuit court of Lawrence county, their action to recover the possession of the lands in controversy, and this bill was to enjoin that action.

The chancellor rendered a decree granting relief to complainant, and decreed that the injunction theretofore granted in the cause be made perpetual; that the deed of Simms and wife of December 7, 1881, was effectual to pass and did pass to complainant the estate and interest of the grantors therein, both legal and equitable, against the claim of title asserted by respondents in their answer and cross-bill, and their cross-bill was dismissed; that the sheriff's levy and sale of the lands involved in this suit, conferred no right or title in said respondents, paramount to that of the complainant, Wallace, and the deed executed by the sheriff on the 17th of March, 1882, to J. T. Pettit was a cloud on complainant's title, and as such was cancelled and annulled. It should be added, that defendants filed a cross-bill on the theory that their right to the lands was superior to that of complainant.

The controlling question in this case is, whether the complainant has an equitable lien, right or claim to the lands described in the bill, superior to the lien claimed by defendant, which a court of equity will enforce. Upon that question, resort must be had to the instrument executed by E. T. Simms to J. H. McDonald, of date the 23d of May, 1873, and the deed by said Simms and his wife Mollie, of date the 7th of December, 1881, read in the light of the circumstances surrounding the parties at the time they were made. What purports to be a mortgage of the 23d of May, 1873, as has appeared, was not witnessed or acknowledged. It had operative words of conveyance, and purported to be given to secure a note for \$550.00 executed to McDonald by said Simms, on the 15th of May, 1873, eight days previous to said instrument, intended as a mortgage. As was said in *Newlin v. McAfee*, 64 Ala.

364, "The form of the agreement is not material: operative words of conveyance are not essential to the creation of a charge, or trust, which a court of equity will enforce as a mortgage. It is the intention of the parties to charge particular property, rights of property, or credits, with the payment of debts, which the court will regard. When that intention is deducible from their agreement, the court will give effect to it, and the equity created will prevail against all others than innocent purchasers for value."

"Every written contract which shows an intention to charge some particular property, therein described and identified, with a debt or other obligation, creates an equitable lien on such property." 19 Am. & Eng. Ency. Law (2d Ed.) 13.

"The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose rather than at the form; and if the intent appear to give, or to charge, or to pledge the property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows. * * * The intent to give a security being clear, equity will treat the instrument as an executory agreement for such security." 3 Pom. Eq. Ju. § 1237.

"A parol agreement by a debtor that certain personal property belonging to him should stand good for his indebtedness, not accompanied by a delivery or change of possession, does not convey the legal title, but creates an equitable lien merely," which may be enforced by resort to a court of equity. *Jackson v. Rutherford*, 73 Ala. 156; *Bush v. Garner*, 73 Ala. 166.

Upon the foregoing principles, it would seem there is no difficulty in declaring that the instrument of Simms to McDonald, of the 23d of May, 1873, created an equitable lien on the lands therein described in favor of said McDonald, which, under the facts stated, in the bill, accrued to the complainant, such as a court of equity will enforce, and of which, the defendants having notice, is superior to their claim arising from the purchase of their ancestor J. T. Pettit, under his execution against E. T. Simms, on the 17th day of March, 1882. Pettit purchased with notice of complainant's superior lien, derived and maintained under transfers and conveyances from said McDonald. If complainant's equitable lien was superior to defendants', there was no room for their cross-bill, which was properly dismissed by the court below.

We discover no error in the decree of the chancery court and it is affirmed.

Affirmed.

WEAKLEY, C. J., and DOWDELL and SIMPSON, JJ., concur.

HENDRICKS v. CLEMMONS.

(Supreme Court of Alabama. May 19, 1906.)

1. LANDLORD AND TENANT—CROPPING CONTRACT—TENANCY IN COMMON.

Under Code 1896, § 2712, declaring that when one party furnishes the land and a team to cultivate it and another party furnishes the labor, with stipulations to divide the crop, a contract of hire shall be held to exist, a contract which contains all the elements named in the statute, but in addition provides that each party shall furnish one-half of the fertilizers to be used in making the crop, is not a contract of hire, but, under section 2760, providing that persons raising crops by joint contributions in such manner as to make them tenants in common shall have a lien for their shares, creates a tenancy in common between the parties as to the crops grown.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 1349-1356.]

2. TENANCY IN COMMON—SERVICES OF CO-TENANT—RECOVERY FOR SERVICES.

Where a minor performed services in raising a crop, to one-half of which he was entitled under his contract with the owner of the land on which it was raised, neither he nor his parent could recover from the owner of the land the value of the minor's services.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, § 93.]

Appeal from Geneva County Court; P. N. Hickman, Judge.

"To be officially reported."

Action by Lydia Clemmons against George H. Hendricks. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. O. Mulkey, for appellant. C. D. Carmichael, for appellee.

DOWDELL, J. This is a suit on the common counts, brought by the appellee, who was plaintiff in the court below, to recover of the defendant reasonable value for the services of her minor son, rendered by the latter to the defendant. The evidence discloses that the plaintiff's son, who was a minor about 17 years of age, contracted with the defendant for the rent of a farm to be worked by him on a plan known and called "on halves"; that is to say, on a plan for an equal division of the crops raised on the land. The defendant was to furnish the land and team to cultivate the same, and plaintiff's son to furnish the labor. The contract further provided that each was to furnish one-half of the fertilizers to be used on the land in the cultivation of the crops.

It is insisted by counsel for appellee that under the law (section 2712, Code of 1896) this was a contract of hire, and that, the defendant having so contracted with plaintiff's minor son without her consent or authority, and having received the benefit of his services, he is liable to her for the value of the same. The law is well settled that the parent is entitled to the services of his minor child, and that one who receives the benefit of such services is liable therefor to the parent. Such is the general rule of the law.

There must, however, exist a contract of hire, express or implied, and under which service is rendered and received. But for the statute it is clear that the contract would not be one of hire, and it could not be said under such contract that the defendant had received the benefit of services rendered by the other contracting party, and for which at law he would be liable. Does the contract shown by the evidence in the case fall within the terms of the statute? We think not. The statute provides as follows: "When one party furnishes the land and the team to cultivate it and another party furnishes the labor, with stipulations express or implied, to divide the crop between them in certain proportions, the contract of hire shall be held to exist," etc. So much the contract in question contained. It, however, did not stop with this, but went a step further and provided that each party should furnish one-half of the fertilizers to be used in making the crop. This additional provision to the contract took it without the influence of section 2712, and, being without the statute, it cannot be said to be a contract of hire. The contract was such a one as, under section 2760, created a tenancy in common between the defendant and the plaintiff's minor son of the crops grown.

The services rendered by the minor son in his performance of his part of the contract were for his own benefit in raising the crops, in which he was to have an equal share, and were not services rendered as such for the defendant, and for which he could make the defendant liable in an action at law for the value of his services. If the minor son could not by next friend maintain an action against the defendant for the value of his services performed under the contract, we are unable to see how the parent could maintain such an action. Under the foregoing view, our opinion is that the trial court erred in the judgment rendered. The judgment, therefore, will be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

SOUTH & N. A. R. CO. v. ALABAMA GREAT SOUTHERN R. CO.

(Supreme Court of Alabama. May 19, 1906.)

INJUNCTION—ENJOINING ACTION OF EJECTMENT.

Suit to enjoin an action of ejectment may be maintained to let in the equitable defense that complainant, having possession of the land, put valuable improvements on it for the operation and maintenance of its railroad; the landowner knowing of and acquiescing therein.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 107-114; vol. 27, Cent. Dig. Injunction, §§ 35, 36.]

Appeal from Chancery Court, Jefferson County; John C. Carmichael, Chancellor.

"Not officially reported."

Suit by the Alabama Great Southern Railroad Company against the South & North Alabama Railroad Company. Decree for complainant. Respondent appeals. Affirmed.

Tillman, Grub, Bradley & Morrow, for appellant. A. T. London and A. G. Smith, for appellee.

DOWDELL, J. The appeal in this case is taken from the final decree of the chancellor, rendered upon a submission of the case upon the pleadings and evidence. When this case was here on a former appeal (S. & N. Ala. R. R. Co. v. A. G. S. R. R. Co., 102 Ala. 236, 14 South. 747) the law of the case was then settled, and we need only refer to what was then said for a final determination of the cause on the facts disclosed by the evidence in the present appeal. It sufficiently appears from the evidence that, in the interim between the decree of the chancery court in the case of Elyton Land Co. v. S. & N. Ala. R. R. Co. et al., in the year 1881, and the commencement of the ejectment suit by the South & North Alabama Railroad Company against the Alabama Great Southern Railroad Company in the circuit court of Jefferson county in the year 1884, the Alabama Great Southern Railroad Company, the complainant here, had possession of the strip of land in question, and while in such possession put valuable improvements upon said land for the operation and maintenance of its railroad, and that this was acquiesced in by and with knowledge on the part of the respondent, the South & North Alabama Railroad Company. Applying the law laid down on the former appeal to this state of facts, the chancellor rendered the decree appealed from, granting the complainant relief, and his decree will be here affirmed.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

SMITH v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama. May 19, 1906.)

1. CARRIERS—WRONGFUL DEATH OF PASSENGER—PLEADING.

In an action for the death of a person in attempting to board an electric car, the count not averring that the decedent was attempting to board the train at a station provided for passengers, or at a place where it was usual or customary to receive passengers, or that he was invited or knowingly permitted to board the car by an authorized servant of the company, or that he was in any manner accepted as a passenger, is demurrable as failing to show the relation of carrier and passenger.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1275.]

2. APPEAL—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action for death of a person attempting to board a street car at the intersection of the street car line with a railroad track, the exclusion by the court of a question whether a

certain track of the railroad company had been built since decedent was killed was without injury, where the witness was afterwards permitted to testify that no track had been built since that time.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4161-4170.]

3. DEATH — ACTION — ADMISSIBILITY OF EVIDENCE.

Under Code 1896, § 27, authorizing the recovery for death caused by wrongful act of such damages as a jury may assess, evidence of the age of decedent is inadmissible; the only damages recoverable being punitive damages.

4. TRIAL — RECEPTION OF EVIDENCE — OBJECTIONS—MOTIONS.

Where a question to a witness was not objected to, a motion to exclude the answer was properly denied.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 242-244.]

5. CARRIERS — DEATH OF PASSENGER — RELEVANCY OF EVIDENCE.

In an action for the death of a person attempting to board a street car, evidence that the place where he attempted to board the car was one where people were passing and repassing generally was not relevant to the issue whether it was one of the stopping places of the company's cars.

6. EVIDENCE—OPINIONS.

In an action for the death of a person attempting to board a street car, where a witness testified that the car did not slow up as deceased attempted to get on it, his further statement that deceased was not thrown from the car by any jerking in its movement was not objectionable as a conclusion of the witness.

7. APPEAL — REVIEW — DISCRETION OF TRIAL COURT—RECEPTION OF EVIDENCE.

In an action for the death of a person attempting to board a street car, the refusal of the court to permit a witness for the plaintiff, when introduced in rebuttal, to repeat his testimony as to where the car stopped, will not be reviewed on appeal.

8. CARRIERS—DEATH OF PASSENGER—LIABILITY OF CARRIER.

Where the death of a person attempting to board a street car was caused by the jerking of the car, the street car company is liable only if the attempt was made at a regular stopping place, or a place where it was the habit of the company to take on or discharge passengers.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1159.]

9. TRIAL—INSTRUCTIONS—SUFFICIENCY.

Where the only error urged in the giving of charges is that they are misleading and tend to confuse the jury, they do not present ground for reversal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 689.]

10. CARRIERS —INJURY TO PASSENGER — CONTRIBUTORY NEGLIGENCE.

Where a person attempts to board a car in the nighttime, when the train is running from four to six miles an hour, and when he is incumbered by a bundle, he is guilty of negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1369.]

11. SAME—INSTRUCTIONS.

In an action for death of a person attempting to board a west-bound street car at the intersection of the car line with a railroad, an instruction that if, after the motor car had crossed the west railroad track, the decedent was standing at a place near a pole between the west railroad track and the main-line track, then the conductor did not have to look out for him when the car stopped, if it did not stop west of the transfer track, was not error.

12. SAME.

In an action for death of a person attempting to board a street car, an instruction basing the street car company's liability on the negligence of the conductor and motorman was not erroneous because it ignored the presence of the street flagman and the train dispatcher on the car at the time of the accident, where the evidence did not show that these persons had any duties with reference to the discharge of passengers or that they saw the decedent in time to save him.

13. SAME.

In an action for the death of a person attempting to board a street car, where there was no evidence to show wanton or intentional misconduct of the street car employes, or to show that they knew decedent was in peril, an instruction that, if decedent attempted to board defendant's car at a place where they did not usually or frequently stop to take on or let off passengers, the jury must find for the defendant, was not error.

14. NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE.

Where newly discovered evidence is merely cumulative, and it is not satisfactorily shown that due diligence was unavailingly used to discover it prior to the trial, it does not present a ground for a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 210-214, 218-220.]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

"Not officially reported."

Action by Electa C. Smith against the Birmingham Railway, Light & Power Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The first count was in the following words: "The plaintiff, who brings this suit in her capacity as administratrix of the estate of Robert Hall, deceased, claims of the defendant the sum of \$25,000 as damages, for that heretofore, on the 3d day of May, 1902, defendant was the common carrier of passengers for hire and reward by means of a car or cars operated or propelled by electricity upon a street railway running in and from the city of Birmingham, along First avenue, to the town of East Lake, in Jefferson county; that on said day defendant was operating one of said cars as aforesaid, attached to which was a trailer car, both of which were going from said city of Birmingham towards said East Lake, and plaintiff says intestate was engaged in the act of boarding said front car, to be carried by defendant as its passenger on same, and while plaintiff's said intestate was so engaged as aforesaid, and said car or cars were at a point on said street railway on First avenue at or near where said avenue is intersected by the tracks of the Louisville & Nashville Railroad Company, near Sloss Furnace, in said county, said car or cars were jerked or started forward, and as a proximate consequence thereof plaintiff's intestate was jerked, thrown, or caused to fall from the front car, or from the rear step or steps thereof, to the ground, whereby he was run over by said trailer car, and thereby so maimed, wounded, and injured that he died

shortly thereafter as a proximate result of said wounds and injuries. Plaintiff alleges that said car was jerked or started forward as aforesaid while plaintiff's intestate was engaged in or about boarding same as aforesaid, and plaintiff's said intestate's death was caused by reason of and as a proximate consequence of the negligence of said defendant in or about jerking or starting said car forward while plaintiff's intestate was engaged in or about boarding the same as its passenger."

The following demurrers were filed to this count: "For that it does not appear from the complaint that there was any duty on the defendant to hold its car at the time and place plaintiff's intestate was attempting to board the same until he should have gotten upon the car. (2) For that it does not appear that the car was at the regular stopping place or that it had stopped for the purpose of allowing the passengers to embark or disembark. (3) For that it does not appear from the complaint that the defendant violated any duty which it owed the said intestate." These demurrers were sustained. The count was afterwards amended.

The sixth count differed from the other counts only in that it counted on wanton negligence. The evidence is sufficiently set out in the opinion.

The plaintiff requested the following charges, which the court refused: "(1) I charge you, gentlemen of the jury, that if you believe from the evidence that the car was negligently jerked while the deceased was in the act of boarding it, and that the jerking of the car was the sole cause of the injury, then you must find for the plaintiff. * * * (7) If the jury believe from the evidence that the sole cause of the plaintiff's injury was a sudden jerk of the car, and that he acted only as an ordinarily prudent person would have acted in getting upon the steps of the car, then your verdict must be for the plaintiff, if the jury believe the evidence."

The following charges were requested by the defendant, and given: "(5) If the jury believe from the evidence that the deceased, Robert Hall, did not attempt to board the car at a place where the car stops to take on or let off passengers, or at a place where he was invited to board the car, then there was no duty on defendant's conductor to see or know that he was attempting to board the car. (6) If the jury believe from the evidence that the defendant's motorman or conductor or agent in charge of the car did not know that Robert Hall desired or intended to board the car referred to in the evidence in this case, and that no one of said agents had notice or knew that he was attempting to board it, and that he did attempt to board the car at a place where he was not expressly or impliedly invited to board the car, and while it was in motion, then, although the jury may believe from the evidence that a sudden

jerk or movement of the car caused said Hall to fall and be injured as complained of, yet the defendant was not under the duty to protect said Hall, and the jury must find for the defendant. (7) Before the jury can conclude that deceased, Robert Hall, was entitled to the protection which the law accords to a passenger, they must be reasonably satisfied from the evidence that he attempted to board defendant's car at a time when or a place where defendant expressly or impliedly invited him to board its car, and if the jury are reasonably satisfied from the evidence that said Robert Hall did not attempt to board the car at a place where or a time when he was expressly or impliedly invited by defendant or its agents or servants to do so, they must find for the defendant. (8) If the jury believe from the evidence that deceased was caused to fall or was thrown from defendant's car by a jerk of the car, and if they further believe from the evidence that he was attempting to board the car at a place where he was not expressly or impliedly invited to board it, and that neither of defendant's servants in charge of the car knew that he was attempting to board it, the verdict of the jury must be for the defendant. (9) If you believe from all of the evidence that the deceased undertook or attempted to get on the car in the nighttime when it was running four or five or six miles an hour, and further believe that the deceased was incumbered by a bundle when he made such attempt to get on the car, I charge you that the deceased was guilty of negligence in making such an attempt. * * * (15) If the jury believe from the evidence that, after the motor car had crossed the transfer track, the plaintiff's intestate was standing at a place near a pole between the transfer track and the main-line track, then the conductor did not have to look out for him where the car stopped, if it did not stop west of the transfer track. (16) Unless you believe from the evidence that the motorman or conductor were guilty of negligence, you must render your verdict in favor of the defendant. (17) If the jury believe from the evidence that deceased attempted to board a car that was running from four to six miles an hour, and that there was obvious risk or danger to make the attempt, and that he was injured in consequence of said attempt, and that defendant's conductor or motorman did not know that he was making an attempt to board a moving car, if he did make the attempt, they must find for the defendant. (18) If the jury believe from the evidence that the deceased was caused to fall from defendant's car by a jerk or sudden movement of the car, and that his position on the car was not known to either the motorman or conductor on the car, and that he attempted to board the car while it was in motion and at a place where he was not expressly or impliedly invited to board the car, they must

find for the defendant. (19) If the jury believe from the evidence that the deceased attempted to board defendant's car at a place where defendant's car did not usually or frequently stop to take on or let off passengers, they must find for the defendant."

There was motion for new trial, based upon errors in the ruling of the court in giving charges for the defendant above set out and upon newly discovered testimony, which was overruled.

Stallings & Nesmith, for appellant. Walker, Tillman, Campbell & Walker, for appellee.

HARALSON, J. 1. The demurrer to the first count was properly sustained. As was said of the complaint in the case of *N. B. R. Co. v. Liddicoat*, 99 Ala. 551, 13 South. 20. "It is not averred that appellee was attempting to board the train at a station provided for passengers, or at a place where it was usual or customary to receive passengers on its cars, or that appellee was invited or knowingly permitted to attempt to board the car by any authorized servant or employé of the company, or that he was, in any manner, accepted as a passenger. In the absence of averments showing an express contract of carriage, or of facts from which such contract is implied in law, no relation is shown to have subsisted between the parties at the time of the accident," such as devolved on the defendant the duty of caring for plaintiff's intestate, as a passenger. The count was lacking in averments sufficient to raise the relation of carrier and passenger between the parties.

2. The record does not show that the demurrer to the sixth count was passed upon.

3. The pleas of contributory negligence were good as to all the counts except the sixth, and the ruling of the court in so holding was free from error.

4. The witness, Black, for plaintiff, testified to the location of the different tracks of the Louisville & Nashville Railroad Company, in respect to the street car line, and the plaintiff in order to show if there had not been some change in these tracks since the injury to plaintiff's intestate, on the 3d of May, 1902, asked him, "Mr. Black, I will ask you if that Frisco transfer track this side of the L. & N. main line has not been built there since Hall was killed?" The defendant objected to the question on the ground that it called for immaterial testimony. If the question did call for immaterial evidence, the ruling was error without injury since the witness was immediately afterwards allowed to testify, that the "L. & N. has not got a track, (and the Frisco track was one of them,) that has been built across the street car line on First avenue, since May 3, 1902."

5. The plaintiff asked his witness, Smith, "How old was Mr. Hall at the time of his death?" The court stated to counsel for plaintiff, "I take it you started to prove the

value of the life?" counsel replied, "No." The court replied, "I took it for that. I will let you state your purpose. If it is for any other purpose that is relevant, I will hear you." After other colloquy between the court and the attorney, the latter said, "We realize they are punitive damages entirely, but we think that it is a proper question, if we can prove under these conditions,—not any further than that,—just the age of the deceased." The court said, "All right, that is all you have to say about it." Counsel replied, "Yes, sir." The objection was properly sustained.

In *Buckalew v. T. C. I. & R. Co.*, 112 Ala. 148, 20 South. 606, it was held that in an action brought by the personal representative under section 27 of the Code of 1896 (2539 of the Code of 1886) to recover damages for a wrongful act or omission resulting in the death of his decedent, the damages recoverable are entirely punitive, and evidence tending to show actual, pecuniary loss by reason of the death of intestate, is irrelevant and inadmissible. *L. & N. R. Co. v. Robinson*, 141 Ala. 329, 37 South. 431.

6. The witness, Harris, for plaintiff, testified, that a flagman was placed at the crossing of the railroad, when deceased was hurt, and before that, there was an ordinance of the city that the conductor or some one should go ahead of the train, which order was carried out, and there had not been any change in the place of stopping since the ordinance was passed. The counsel for defendant asked, "And prior to that city ordinance?" Plaintiff's counsel then moved to exclude any evidence as to the ordinance, on the ground, that it was immaterial and irrelevant. The court overruled the motion, saying, "You did not object to the question," and plaintiff excepted. What the court said was correct, so far as is shown by the transcript. The question was never objected to, and the objection that was made, related to the motion to exclude an answer, after it was made without objection to an unchallenged question calling for it. The motion came too late, even if the question asked was irrelevant and immaterial, which we do not hold. It wears the appearance of speculation on what the witness' answer would be.

7. The plaintiff on the cross-examination of said witness, Harris, asked him, "Is that a place where people are passing and re-passing generally?" The objection to this question by defendant was, that it called for immaterial testimony.

If deceased had been run over and killed under circumstances tending to show wantonness or willfulness in the employees of the company in causing his death, the question of the passing and re-passing of people in great numbers at that particular place might have been admissible on that issue. That was not the purpose, however, of the evidence sought, as appears from brief of counsel for plaintiff. Its purpose was, as stated,

that this was a place where the defendant was accustomed to let passengers on and off, and the issue was, whether that was one of defendant's stopping places to take on and discharge passengers. The fact that people passed and re-passed at that point, without more, could throw no light on that question.

8. The witness for defendant, V. B. Jones, —an absent witness, whose showing was admitted,—testified that he was a passenger on the car at the time of the accident; that the train had stopped within a short distance of the Louisville & Nashville main line crossing, and then started across the network of tracks at that place; that just as the motor car was starting over the first of these tracks, plaintiff's intestate tried to board the rear end of the motor car, but failed to get on, and fell under the trailer car; that at the time deceased attempted to board the train, it was running about four or five miles an hour, and had been running from the time it stopped for the tracks west of where deceased attempted to board it; that there was no station at the place where deceased tried to get on the car, and plaintiff's intestate did not signal the motorman to stop, as the car passed him; that the car did not slow up as deceased attempted to get on it, nor was he thrown from the car by any jerking in its movement, and the car was running smoothly when plaintiff's intestate tried to get on it.

The plaintiff objected to the statement of the witness in the showing,—"nor was he thrown from the car by any jerk in its movements," on the grounds, that it was illegal, and that it was a conclusion of the witness. It is difficult to see that the evidence was not competent and legal; and as to the objection that the statement was a conclusion, it is wanting in merit. The witness was stating a fact that he saw and knew, and if he was telling the truth, as to the rate of speed of the car at the time, and of its running smoothly, we all know there could have been no jerk at the time he stated intestate attempted to board it.

9. The witness, Coburn, when introduced by plaintiff in rebuttal, was asked, "Now on that night, where did the car stop?" This witness had testified in chief for plaintiff that, "There was a motor car and trailer. The cars stopped at a switch just above the L. & N. crossing, and when they pulled up to the crossing, they just slowed down nearly to a stop and moved on. There is a switch on the car track of the B. R. L. & P. Company, and the cars stopped there, and when they got to the railroad crossing, they came nearly to a stop; just slowed down and moved off, came nearly to a stop, and moved off with a jerk." Other witnesses for the plaintiff testified as to the locality at which the car came to a stop. It was discretionary with the court to permit or refuse a repetition of this matter in rebuttal, and we will

not review the exercise of this discretion, when it seems to have been fairly exercised.

10. Charges 1 and 7, requested by plaintiff, and refused, in which ruling it is insisted there was error, predicate liability of defendant without reference to whether the intestate was attempting to board the car at a regular stopping place, or at a place where it was the habit of defendant to take on and discharge passengers, authorizing the inference that persons were thus invited to get on and off, and without reference to whether intestate had been received as a passenger. For the liability of defendant for the injury sustained, caused, as alleged, by a jerk of the car, defendant must have owed a duty to deceased, not to jerk its car so as to cause him to be injured. This duty, it must be conceded, would have been on defendant as to one standing at a regular stopping place with the view of getting on the train as a passenger, or at a place where it was in the habit of receiving or discharging passengers, thus inviting them to get on and off at such a place, or as to one who had been accepted as a passenger. The charges ignore these considerations, so important to be considered, and were properly refused on that account. The principle has been so fully treated in *N. B. R. Co. v. Liddicoat*, supra, as to require no further consideration at this time. The case of *Watkins v. B. R. & E. Co.*, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297, relied on by the learned counsel for plaintiff, is without application here, since that was a suit of a passenger against the company.

11. The only insistence of error in giving charges 1, 2, 3 and 4 for defendant, is that the court erred in giving them, which is no more of an insistence, than the assignments of error themselves.

12. Charges 5 and 11 for defendant, for reasons already given, it will appear were properly given.

13. The only reason assigned for error in giving charges 6, 7 and 8 for defendant, is that they are misleading, and tended to confuse the jury. If this were true, as has often been held, we should not reverse on that account.

14. It is not contributory negligence under all conditions and circumstances for one to attempt to board a train when moving; but, when he attempts to do so in the night time, when the train is running, as hypothesized in charge 9 for defendant, four, five or six miles an hour, and when he is incumbered by a bundle, he is guilty of negligence in making the attempt. *Ricketts v. B. S. R. Co.*, 85 Ala. 600, 5 South. 353; *B. E. R. Co. v. Clay*, 108 Ala. 233, 19 South. 309. The conditions constitute exceptional circumstances referred to in *Watkins' Case*, 120 Ala. 152, 24 South. 392, 43 L. R. A. 297, and which differentiates that case in some of its features from this one.

15. It is very clear, that if intestate was not standing on the west of the transfer track, when the car stopped, but was stand-

ing near a post between the transfer track and the main line, the conductor did not have to look out for him at the transfer track, after the car had passed over it, since looking could have availed nothing. The deceased was not there. We discover no error in the 15th charge for defendant.

16. Plaintiff's counsel criticize charges 16, 17 and 18, in that they ignore the presence of the street flagmen and the train dispatcher on the car at the time of the accident. The evidence does not disclose that the dispatcher had any duties to perform on the car with reference to the reception or discharge of passengers, nor does it show that the flagman had any such duties. His duties were to flag the cars over the L. & N. Railroad crossing and prevent collisions between cars on the two systems. There is, again, no evidence that any employé of defendant on the car saw intestate in peril in time to use preventive effort to save him. This is practically conceded by plaintiff's counsel since he fails to assign error in the action of the court, giving for defendant, the affirmative charge on the 6th, the only wanton or intentional count. Under these conditions the failure of these charges to refer to these employés did not make them erroneous.

17. There was no error in giving charge 19 for defendant. There is no contention that recovery could be had for the wanton, willful or intentional misconduct of defendant's employés. If the defendant attempted to board the car at a place, as hypothesized, when defendant's cars did not usually or frequently stop to take on or let off passengers, as the evidence tended to show, the employés in charge of the train were not bound to anticipate that he would attempt to get aboard, and no negligence would be imputed to them, if they did not know or discover that defendant was in peril, which the evidence fails to show. Liddicoat's Case, *supra*.

18. We have thus considered the assignments of error which were insisted on in the argument of counsel. Many of the grounds for a new trial, embrace rulings which have already been duly considered. As to those which have reference to newly discovered evidence, it may be said that the new discovery relates to evidence that is merely cumulative, and it is not satisfactorily shown that due diligence was unavailingly used by the movant to discover it prior to the trial. *McLeod v. Shelly Mfg. & Improvement Co.*, 108 Ala. 81, 19 South. 326.

"The affidavit (for a new trial) must show not only that the new evidence was discovered too late to have been used at the trial, but that it was of such a nature, so concealed, that it could not have been by the use of legal diligence, produced at the trial. It is indispensable that it should contain facts showing diligence. In other words, it should disclose what particular effort the mover made to ascertain and produce the testimony.

Allegations that the party was unable to produce the desired testimony, etc., or that he had used reasonable diligence to produce the same, or that he could not by reasonable diligence obtain it,—are fatally defective, being mere conclusions. His ability or inability to obtain it is a question of fact for the court to determine from the proof submitted in support of the motion. *Thomp. on Trials*, § 2762.

The court, on the evidence submitted, overruled the motion, and we have failed to see that the ruling was erroneous.

Affirmed.

WEAKLEY, O. J., and DOWDELL and SIMPSON, JJ., concur.

FORBES & CARLOSS v. DAVIDSON.

(Supreme Court of Alabama. May 19, 1906.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PLEADING.

In an action for personal injuries, pleas which merely allege that the plaintiff failed to take proper precautions, but do not state facts constituting contributory negligence, are insufficient.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 195-197.]

2. APPEAL—HARMLESS ERROR—RULINGS ON PLEADINGS.

Any error in sustaining a demurrer to a plea was without injury, where another plea was substantially the same and was not demurred to.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4094.]

3. SAME—RECORD—BILL OF EXCEPTIONS.

Rulings on demurrers to replications, which appear only in the bill of exceptions and not in the record proper, will not be reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2346.]

4. EVIDENCE—OPINION EVIDENCE—KNOWLEDGE OF WITNESS—MASTER AND SERVANT—INJURIES TO SERVANT.

In an action for an injury to an employé at a sawmill, there was no error in permitting a witness to be asked whether the person running the saw had control over the assistant, where the witness had been shown to be sufficiently acquainted with the business to know the fact, and there was evidence that the plaintiff was an assistant to the person running the saw.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2196.]

5. SAME.

In an action for injuries to a servant, a question to a witness as to how, in his opinion, the plaintiff got hurt in oiling the machinery, was properly excluded.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2186, 2195.]

6. SAME.

A question to a witness whether, if plaintiff had used ordinary care in oiling the machinery, he could have been injured, was properly sustained, though the witness might testify as an expert to the proper manner of oiling the machinery and as to what was a safe way and what an unsafe way.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2186, 2195.]

7. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in overruling objections to questions to witnesses was without injury, where the questions were not answered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4159.]

Appeal from Circuit Court, Pickens County; S. H. Sprott, Judge.

"Not officially reported."

Action by S. E. Davidson against Forbes & Carloss. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The plaintiff, appellee here, brought suit under the employers' liability act (subdivisions 1, 2, and 3) for damages for personal injury, alleging that his clothing was caught by a projecting set screw in the arbor of an edger saw operated by defendants at their sawmill. Defendants filed a number of pleas, among them the following: "(6) Plaintiff was guilty of negligence, which contributed proximately to the alleged injuries complained of, in that he negligently failed to take proper precaution in the performance of the work in which he was engaged at the time he received said alleged injuries. (7) The plaintiff was guilty of negligence, which proximately contributed to his alleged injury in that he negligently failed to take proper precaution to avoid being caught in said machinery as alleged. (8) Plaintiff contributed proximately to the injury alleged, in this: Plaintiff was employed by defendants to bear off plank, and as a favor to and for defendants' engineer he undertook to oil a certain part of defendants' machinery, and, negligently going too near said revolving screw, was caught by the same and sustained the injury received by him, and for which defendants were in no way to blame." The other matters necessary to an understanding of the opinion sufficiently appear therein.

E. D. Willett, for appellants. Foster, Oliver, Cox & Cox, for appellee.

SIMPSON, J. This was an action by appellee (plaintiff), by next friend, for damages on account of personal injuries received by plaintiff while in the employ of defendants (appellants) at a sawmill. Appellants seem to be under the impression that the court sustained the demurrer to plea No. 4, but the judgment entry shows that the demurrer to that plea was overruled.

The demurrers to pleas 6 and 7 were properly sustained, as those pleas do not aver the facts constituting contributory negligence, but merely allege generally that the plaintiff failed to take proper precautions. 4 Mayfield's Dig. p. 311, § 278; 5 Mayfield's Dig. p. 718, § 103.

Plea 10, to which there was no demurrer, was, in substance, the same as plea 8, so that the error of sustaining the demurrer to

plea 8 was without injury; the defendant having gotten the benefit of the same defense under plea 10.

The record does not show any demurrers filed or ruled out to replications 9, 10, and 11, or to replications 1 and 2. These matters appear only in the bill of exceptions. They should appear in the record proper, in order to be reviewable. 2 Mayfield's Dig. p. 183, § 980.

Referring to the twelfth assignment of error, the grounds of the objection to the question to the witness Messmore were not stated, nor any explanation given showing its relevancy, and it does not appear to be relevant. If it was desired to show what the duties were for which the plaintiff was employed, the attention of the witness should have been directed to that subject. There was no error in sustaining the objection.

There was no error in permitting the witness Kyle to be asked the question, "Does the person running the saw have control over the assistant?" as the witness had been shown to be sufficiently acquainted with the business to know that fact, and there was evidence from which the jury might have concluded that the plaintiff was an assistant to the person running the saw.

The objection to the question to the witness Carloss, to wit, "Being acquainted with this machinery, how, in your opinion, did this boy get hurt in oiling said machinery?" was properly sustained, as it was a question for the jury to determine, from the facts as detailed by the witness, how the plaintiff received the injury.

The objection of plaintiff to the question by defendants, "If plaintiff had used ordinary care in oiling said machinery could he have been caught and injured by said set screws?" was properly sustained. The witness could testify, as an expert, as to the proper manner of oiling the machinery and as to what was a safe way and what an unsafe way; but it was a matter for the jury to determine, from all the facts in the case, whether the injury could have been avoided by the exercise of ordinary care.

As to the action of the court in overruling defendants' objection to the question to the witness Forbes, as to whether an off-bearer would be fired for refusing to return boards, when directed by Edgar, the question does not appear to have been answered; hence it was error without injury.

The same is true as to the question to the witness Pate as to his authority; also as to the question to the witness Parker as to the danger of going near a set screw.

There is nothing in the record to show any request for the general charge.

The judgment of the court is affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

(116 La.)

No. 15,960.

W. W. BIERCE, Limited, v. DAVIES.

(Supreme Court of Louisiana. May 7, 1906.
Rehearing Denied June 4, 1906.)**1. SALES—SALE OR AGENCY—DETERMINATION.**

The plaintiff agreed to sell materials to the defendant. Through a period of about a year the defendant sold the materials from time to time, and as he sold them they would be delivered by plaintiffs at the agreed price. The materials were all specified at the date of the sale.

The delay feature of the negotiation between the parties, and the time that defendant took to place the orders did not have the effect of changing the negotiation from a sale to an agreement whereby defendant undertook to sell for plaintiff.

The sale was absolute of all the property mentioned in the agreement between the parties.

2. SAME.

Whether the materials were of the standard grade, or nonstandard, is something which does not seem to have been considered when the contract was agreed upon.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by W. W. Bierce, Limited, against Frank Davies. Judgment for defendant. Plaintiff appeals. Reversed and rendered.

Fenner, Henderson & Fenner, for appellant. Saunders & Gurley, for appellee.

BREAUX, C. J. Plaintiff, in its petition, claims that defendant owes it the sum of \$2,950.66, with legal interest thereon from judicial demand, balance due by defendant.

Plaintiff bases its claim on an alleged sale of personal property made by it to defendant. It avers that it delivered portions of the property as called for by defendant; that another portion remained on hand, the delivery of which was never sought by defendant.

It is for the latter that plaintiff sues.

The defendant, on the other hand, avers, in substance, that he never consented to buy this merchandise outright; that it was only agreed that he should use his best endeavors to dispose of all of plaintiff's stock which had been in his charge whilst he had charge of one of the departments of plaintiff's business, in New Orleans. Defendant says that he did use his best endeavors, and that he did sell a portion of the goods; that he made several trips to Yucatan and as far south as South America, in connection with his business as vendor of railroad construction materials and other similar materials.

He particularly denies that he bought the merchandise which plaintiff claims to have sold to him.

We will here state that plaintiff was a commercial firm dealing in iron and other merchandise of steel. They wished to quit business, and to that end to liquidate and close up its business affairs.

The defendant had been one of its clerks in charge of one of its departments for a number of years; but on April 1, 1902, de-

fendant severed his connection with plaintiff and thereafter engaged in the supply business in his own name and on his own account. It was then that plaintiff and defendant entered into an agreement with the view of disposing of plaintiff's stock.

Portions of this stock, the defendant testified, was not of the standard size, and, in consequence, it was not an easy matter to dispose of.

Correspondence took place between the plaintiff and defendant, which we will freely refer to, as it is construed by plaintiff as evidence of a sale, while, on the other hand, the defendant insists that he never made an absolute agreement to buy the property in question; that he only agreed to buy to the extent needful to fill orders which he might place.

The first of the correspondence is dated May 20, 1903, addressed by defendant to plaintiff, in which he states that plaintiff had agreed to "reserve for orders closed by me all of the material shown on page 89 of the plaintiff's stock book, consisting of 8,176 ties, weighing 12 pounds each; also material on page 95, representing 4,800 ties of same weight, as well as all ties of sundry length, at the Morden Frog & Crossing Works; also material entered on page 159, consisting of 1,789 ties, weighing approximately 10 pounds each; 54 kegs of bolts, entered on page 161, containing 1,500 bolts in each keg; the switch material entered on page 167 of the same book; 1,920 ties on page 171; 1,600 bolts, 16 kegs, page 200; approximately 5,476 ties on page 257, weighing 6¼ pounds; 3,200 bolts in 32 kegs, page 283; 8,163 ties, weighing 7 pounds each, page 291; 3,200 steel tie plates in 32 kegs, page 338; and all the switches shown on page 340."

All of this property was listed in one stock book, with which we infer defendant was quite familiar, as he had had charge of that department.

From the foregoing it is evident that the property was all fully specified. In this letter of May 20th the defendant also states, quoting:

"The balance of the material you are going to use your best endeavors to dispose of, and, should I need any of this material from time to time, I will, before purchasing elsewhere, ascertain if you have it and will give you the preference thereon."

And further the defendant goes on to state that:

"As per our conversation, you are going to endeavor to sell the balance of the stock on hand. And I take it for granted that I have fully complied with the last paragraph of our agreement of April, 1902; that I shall endeavor to sell your material, as per our agreement, and in all respects comply in my part thereto."

The issues before us are confined to the specified articles in a letter of May 20, 1903, from which we before quoted.

We are of the opinion that there is no

vinculum juris between plaintiff and defendant as relates to other items of property than those mentioned in the letter of May 20, 1903. This disposes of all questions relating to the property not specified in that letter.

To return to the items of property specified in the letter of May 20th, and in regard to which there seems to have been a positive agreement between plaintiff and defendant, we find that the defendant wrote to plaintiff as follows:

"Unless you are willing that the material as included in my letter of May 20th shall stand for orders booked by me, to be paid for by me at as much more than thirty four dollars per ton at *Progreso* as I can afford to pay for it as the returns are received from my drafts, I will dismiss the material entirely and let you dispose of it to suit yourself."

We understand that plaintiff agreed that this merchandise "should stand for orders" placed by defendant, and held the goods subject to defendant's order, but that defendant did not call for them.

The statement of the facts of the case would not be complete unless the following, touching the balance claimed by plaintiff and the asserted price, be here included:

"W. W. Bierce, Ltd., v. Frank Davies, No. 74,417, Civil District Court, Div. A. In accordance with the understanding and agreement had on the trial of this case, it is stipulated by and between the undersigned counsel, representing plaintiff and defendant, that of the materials set forth in defendant's letter of May 20, 1903, heretofore offered in evidence, and marked for identification P. L., there remains in the hands of plaintiff 16, 141 ties, weighing 169,402 pounds, or $751402/2240$ gross tons, for which defendant is liable if he is liable at all; at the rate of \$27.34 per ton, this being \$34.06 per ton, less the freight per ton to *Progreso*; in accordance with defendant's letter of May 21, 1903, marked for identification 'P, 3.'

"[Signed] Fenner, Henderson & Fenner,
"Attorneys for Plaintiff.
"Saunders & Gurley,
"Attorneys for Defendant."

In one of the letters, defendant specially refers to an agreement "to reserve for orders closed by me." This is followed by other expressions, such as: "I cannot agree to let you sell the material which I am obliged to sell." "I have sold various materials detailed to you and will need this to fill orders"—thereby clearly indicating that it was his intention to have this merchandise reserved.

We understand from the evidence that it was reserved in accordance with this request.

The property had been specified, the price had been agreed upon, and under the terms of the contract there was sufficient delivery to complete the sale.

We will again go over the business negotiations between the parties. In the letter of May 20, 1903, to which we have already specially referred, defendant wrote to plaintiff that:

"You agreed to reserve for orders closed by me all the material shown on page 89 of the stock book," etc.

It will be observed that defendant, according to his statement, had already "closed orders." The matter of orders in so far as he was concerned was a fait accompli.

The testimony of Columbus Bierce is (and it is not contradicted):

"Q. That of this material referred to above, which was enumerated in Mr. Davies' letter of May 20, 1903, you have never sold or disposed of any of that material except to Mr. Davies? A. No one except Mr. Davies. By Mr. Saunders: Did you make any effort to do so? A. No. By Mr. Fenner: Q. Why? A. Because the matter was left in Mr. Davies' hands, according to agreement."

That agreement, we understand, was to hold it for Mr. Davies.

The following agreement between counsel was copied in the record:

"The parties agree to examine the books and invoices out of court and to determine from them how much of the material, mentioned in the letter of May 20, 1903, has been taken and paid for; and the defendant is to be liable, if at all, only for the balance remaining at the rate of \$27.34 per gross ton, which is admitted to be the correct price for which the defendant is to be charged, if he is to be charged at all."

We return to the letter of May 20th and therein find it stated that plaintiffs had closed their negotiations touching the enumerated articles.

Further on in the record, quoting:

"It is admitted that the defendant is liable, if at all, for the quantities stated in the letter of May 20, 1903, and it is a matter of compilation to determine from these invoices how much remains unsold."

Defendant as a witness does not specially deny the negotiations alleged. He admits that he had used all the materials enumerated in the letter of May 20, 1903, with the exception of some 18,000 steel cross-ties, which, as we understand, are covered by the letter of May 20th.

True, he stated that he could not sell the remainder; that is, the 18,000 steel cross-ties. Nonetheless, he had ordered them, they were kept for him, the price was fixed, and the articles enumerated.

He further states that all that had already been shipped out was of a standard character, and that that which is still on hand is nonstandard. But the difficulty which confronts him is that he did not agree, as far as the record discloses, to take only the standard material; for all we know, the nonstandard was included as well. As to the latter he says he may not find a customer within six months or he may find one to-morrow.

He also testified about stock unsalable, which he would not carry in stock, which he exerted himself to sell and could not sell.

All of these things are not provided for in the agreement which was entered into. The defendant made an absolute purchase, which excludes all idea of nullity because of the asserted nonstandard material.

It is therefore ordered, adjudged, and de-

creed that the judgment appealed from is avoided, annulled, and reversed; and it is now ordered, adjudged, and decreed that the plaintiffs recover of defendant the sum of \$2,063.90, with 5 per cent. interest from judicial demand, and that defendant pay cost of both courts.

NICHOLLS, J., absent.

(116 La.)

No. 15,803.

WELLS et al. v. WELLS.

(Supreme Court of Louisiana. April 23, 1906.)
Rehearing Denied June 4, 1906.)

**1. TRUSTS—ACTION TO ENFORCE—DISCOVERY
—ANSWER TO INTERROGATORIES—CONCLUSIVENESS.**

Where, in a petitory action instituted by five heirs against a coheir holding title to lands derived from another coheir, the ostensible owner on the records, plaintiffs propounded interrogatories on facts and articles to the defendant, for the purpose of proving that the defendant and his author held the title in trust under parol agreements for the benefit of the common father and mother and their heirs, and the defendant answered under oath denying the alleged trust agreement, *held*, that the answers stand as part of the pleadings, and that an exception of no cause of action was properly sustained.

2. SAME—PAROL EVIDENCE—PROOF OF TITLE.

While forced heirs may, under certain circumstances, show by parol testimony, fraud, or simulation in sales of immovables made by their ancestor, such evidence is never admissible for the purpose of proving title in the ancestor, either directly or indirectly.

(Syllabus by the Court.)

Appeal from Thirteenth Judicial District Court, Parish of Rapides; Horace Henry White, Judge at hoc.

Action by Ennemon M. Wells and others against Charles M. Wells. Judgment for defendant, and plaintiffs appeal. Affirmed.

Robert Persifer Hunter and Francis Rivers Richardson, for appellants. Andrews & Hakenyos and Blackman & Overton, for appellee.

LAND, J. Plaintiffs' original and amended petitions were dismissed on an exception of no cause of action, and they have appealed.

The allegations of the petition may be stated substantially as follows:

Petitioners are five of the eight heirs and living representatives of their father, Gen. Montfort Wells, and of their mother, Mrs. Jeanette Wells, late of the parish of Rapides, both of whom died about the year 1882. Petitioners inherited the undivided five-eighths of the property owned by said decedents at the time of their deaths.

The other three heirs are T. Jeff Wells, Charles M. Wells, and the heirs of Mrs. Ella Blackman.

At the time of their deaths, the father and mother of petitioners owned certain tracts of land situated in the parish of Rapides, ag-

gregating about 2,060 acres, which are well worth \$20,000.

Gen. and Mrs. Wells many years ago, for their own purposes and convenience, placed these lands in the name of T. Jefferson Wells by paper titles duly recorded, for which no value was given.

T. Jefferson Wells agreed at the time to hold said lands for his father under a promise and obligation to reconvey them to him at any time he so desired.

T. Jefferson Wells for many years held said lands under said paper title and agreement but, becoming financially embarrassed he placed the mere paper title in the name of Mrs. Ida F. Wells, his wife, who as a mere party interposed, held them in her name as the property of petitioner's father and mother, pursuant to the original agreement and understanding with her husband.

Gen. Montfort Wells, shortly before his death, fearing that said lands might become involved in tutorship proceedings and thereby be lost to him and his heirs, requested T. Jefferson Wells to transfer the same to Charles M. Wells, who agreed and bound himself verbally to hold said lands for Gen. and Mrs. Wells and their heirs and legal representatives and to transfer the same at any time, when so requested to do by the parties in interest.

The transfer from T. Jefferson Wells to his wife to Charles M. Wells was not made until the day of the death of Gen. Wells or the day before he was buried, when, pursuant to the agreement and understanding above recited, which was then and there expressly consented to by Charles M. Wells, a paper deed of conveyance to said lands was executed by T. Jefferson Wells and wife and accepted by Charles M. Wells, without any consideration whatever except said agreement and understanding.

The said paper title or conveyance was delivered to said Charles M. Wells, but was never recorded.

In January, 1888, because of some defect in the description of a portion of said lands, and for no other purpose, the said T. Jefferson Wells and wife made another paper title and conveyance to said Charles M. Wells for an alleged consideration of \$2,000, no part of which was or has ever been paid, but said transfer was made in accordance with and in continuation of the previous agreement and understanding had when the paper title was first transferred to Charles M. Wells.

Portions of the land sued for were not included in the transfers from Mrs. Ida F. Wells to Charles M. Wells, but were in 1890 and 1892 transferred, by mere paper title, by T. Jefferson Wells to Charles M. Wells, pursuant to the agreement and understanding already recited.

In March, 1905, Charles M. Wells sold 600 acres of said lands for the price of \$7,500, paid in cash.

Thereupon the present suit was instituted to recover five-eighths of said price and the same proportion of the lands remaining unsold.

The original petition alleged that, if any counter letter or letters ever existed, they had been lost or destroyed, and that their only recourse in law was to have the defendant answer under oath and in open court certain questions on facts and articles which were propounded by plaintiffs. It was so ordered by the court. In his answers the defendant denied all knowledge of the agreements, understandings, and transfers alleged to have been made prior to the year 1888, and specially denied that he had ever held said lands for account of the heirs of Montfort Wells and wife.

Defendant objected to answering the interrogatories relative to the sales made to him in 1888, 1890, and 1892 by Mrs. Ida F. Wells and husband, and his objections were sustained.

Previous to answering the interrogatories, defendant sued out a rule to vacate the order directing him to answer on the ground that plaintiff's petition disclosed no sueable interest, and on the further ground that T. Jefferson Wells derived his title directly from the United States, and not from Montfort Wells.

This rule was dismissed on exception, and need not be further noticed.

Several documents purporting to be copies of title referred to in the rule are found in the transcript, but do not appear to have been offered or filed in evidence. Such documents cannot be considered.

The only question before us is whether the petition as amended discloses a cause of action.

The obscurity of the allegations as to the original connection of Montfort Wells with the title to these lands makes it difficult to state the case as disclosed by the pleadings.

It is not specifically alleged that Montfort Wells had a title which he transferred to his son, T. Jefferson Wells, nor can such an inference be deduced from the vague allegation that Montfort Wells and wife "placed these lands in the name of T. Jefferson Wells" on the records of the parish.

The situation as alleged is that, while T. Jefferson Wells was the ostensible owner of these lands, they really belonged to his father and mother, and were held for their account and benefit.

In other words, these lands were held in trust by T. Jefferson Wells, and were by him transferred to his wife, and by her to Charles M. Wells, subject to the same trust resulting from a common, continued, and well-recognized parol agreement and understanding between all the parties in interest.

In order to prove this trust as against Charles M. Wells, plaintiffs propounded to him interrogatories on facts and articles.

Defendant answered that he had no knowl-

edge of the trust agreement set forth in the petition and never had at any time held said lands for account of the heirs of Montfort Wells and wife.

In *Godwin v. Neustadt*, 42 La. Ann. 735, 7 South. 744, this court, in a well-considered opinion, held that when the plaintiff, having no counter letter, proceeds in limine to probe the conscience of the defendant by evoking his answers to interrogatories, such answers stand as part of the pleadings, and if they are destructive of plaintiff's action an exception of no cause of action will lie.

In the same case, the court further held that, when answers to interrogatories on facts and articles are resorted to for the purpose of supplying the place of a counter letter, and to make proof which nothing else but a counter letter could make, they cannot be contradicted otherwise than by written evidence.

In their original petition, plaintiffs alleged that no counter letter or letters existed to their knowledge, and that "their only recourse at law" was to probe the conscience of the defendant.

In *Heirs of Dohan v. Dohan*, 42 La. Ann. 449, 7 South. 569, this court held that parol testimony, to show fraud or simulation in a sale of immovable property to the prejudice of forced heirs, may in a certain class of cases be introduced, but such evidence never can be introduced by the heirs, without the consent of the adverse party, to show title in the ancestor to such property; and in the same case it was further held that testimonial proof is not admissible for the purpose of proving that a third person was interposed to receive or to be invested with the title to real estate, for the use of, and instead of, the intended vendee. Civ. Code, arts. 2275, 2440.

The doctrine thus enunciated was reaffirmed by this court in *Westmore v. Harz*, 111 La. 306, 35 South. 578, and in *Ackerman v. Peters*, 118 La. 156, 36 South. 923.

Plaintiffs have not alleged title in Gen. Wells otherwise than by virtue of a parol agreement with T. Jefferson Wells, who held the legal title duly recorded.

A similar parol agreement is alleged to have accompanied the subsequent transfers of the same title.

Plaintiff's action is to establish an equitable title in Montfort Wells resulting from the alleged trust agreements, and is not an action to annul as simulated or fraudulent any contract made by their father to their prejudice as forced heirs.

Hence article 2239 of the Civil Code, as amended by Act No. 5, p. 12, of 1884, has no application, as the petition discloses no simulated or fraudulent contract to be annulled by parol evidence.

Judgment affirmed.

NICHOLLS, J., absent.

(116 La.)

No. 15,802.

**DAVIS v. QUEEN CITY FURNITURE
MFG. CO., Limited.**(Supreme Court of Louisiana. April 23, 1906.
Rehearing Denied June 4, 1906.)**1. MASTER AND SERVANT—INJURY TO SERVANT
—ACTION FOR DAMAGES—PLEADING.**

There was a cause of action and in consequence an exception on the ground was properly overruled.

On the Merits.**2. SAME—DEFECTIVE APPLIANCE—EVIDENCE.**

Whilst it is true that corporations following dangerous occupations assume certain primary obligations to secure the safety of their employes, on the other hand, a plaintiff to recover must prove that needful appliances were wanting and due to that fact an accident was the result.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 895, 900.]

3. SAME—"INEXPERIENCE."

The weight of the testimony does not sustain that plaintiff was green and inexperienced.

4. SAME—INSTRUCTION.

The preponderance of the testimony shows that plaintiff was warned against dangers incident to the occupation.

5. SAME—EVIDENCE—ADJUSTABLE SPRINGS.

There were no adjustable springs on the machine fed by plaintiff. A number of witnesses testified that there is no necessity for such "springs." Some of the witnesses were employes of other factories than that of defendant. Plaintiff must make out his case with reasonable certainty.

The court holds that plaintiff has not made out his case with required certainty.

6. SAME—PIECE OF WOOD.

The plaintiff was feeding the machine with small pieces of wood. One of these pieces was brought up with the record. The court holds that the preponderance of evidence sustains the defense.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by W. L. Davis against the Queen City Furniture Manufacturing Company, Limited. Judgment for defendant, and plaintiff appeals. Affirmed.

Murff & Webb, for appellant. Thatcher & Welsh, for appellee.

BREAUX, C. J. Plaintiff sues defendant to recover a judgment in the sum of \$10,000 damages.

He was one of defendant's workmen to do such work as the foreman might point out. He was put to work on a machine commonly called the groove saw, to groove or saw "case posts," to be used in making the furniture of which defendant was a manufacturer.

The pieces of wood with which plaintiff was feeding the machine at the time, were about two inches square; in length, about three feet. On the table of the machine there were two saws about an inch apart. One of the outer rims of these saws was about an inch above the surface of the table, and the other about five eighths of an inch.

On the outer edge of the machine, known

sometimes as a "combination machine," as well as by the name of "groove machine," there was a stationary iron brace to enable the workman feeding the machine to work the pieces through at uniform distance from the saws.

Plaintiff avers that on the side opposite to the stationary brace there was another adjustable brace which served as a brace to hold the piece worked through against the stationary brace of the saws. That the adjustable brace would gently yield under pressure; but it none the less held fast to the piece and prevented it from kicking back or shooting backward.

At this point there is material difference between the testimony of plaintiff's witnesses and those of the defendant. The former have testified, in substance, as just stated, while the latter all said as witnesses that the adjustable brace was not a safety device. That this brace was not part of the machine; that it was attached to the machine to enable the workman to obtain the desired uniformity in sawing or grooving the pieces. That was all.

We will consider this point of difference later in the discussion of the issues.

Returning to a description of the machine, it had a sawboard which was fitted in, flush with the table, which formed part of the machine, and through this board there were slits through which the saws protruded.

The table itself, on which the machine rested, was 4½ feet in length, and three feet wide.

One of the contentions of plaintiff is that the sawboard was worn out and unfit for use.

While the plaintiff was at work, the piece of wood he was running through the machine was hurled back over the saws, struck his hand, he says, and caused it to fall on the saws which dragged it through the board in question, and cut his entire hand off.

Plaintiff, in his petition, sets forth his complaints at some length. His complaints may be briefly stated: defendant was negligent in not warning him of the danger; the sawboard was defective; the adjustable brace was not on the machine; he had not been directed to put it on.

Defendant interposed an exception of no cause of action which was overruled by the judge of the district court. Defendant presses this exception upon our consideration.

Defendant's answer to plaintiff's complaints was a general denial, contributory negligence, experience of plaintiff, the machine was simple, no warning was needed, the sawboard was in good condition, the adjustable springs were not part of the machine, these springs were not necessary for the convenience or safety of workmen, and, lastly, defendant urges that plaintiff lost his hand by dropping the timber on the saw and in attempting to catch it his hand was caught.

We take up for decision the exception of no cause of action before referred to. While it is true, as contended by defendant, that special allegations in the petition will control allegations that are general, it does not seem to us here that the special allegation should be controlling for the following reasons: the contention of defendant is that the defects complained of, if defects they were, were open and apparent; that the plaintiff saw that there was no adjustable brace on the machine; whether he knew there should be one or not he knew that none was there.

Furthermore, if it were true, as alleged by plaintiff, that the sawboard was split and worn he (plaintiff) saw that it was so, and that he, thereby, is precluded from claiming any damages for injury.

Now the petition alleges just the contrary.

In considering the exception of no cause of action, we take the facts as alleged.

Plaintiff alleges that he did not know that the adjustable brace which was not on the machine belonged thereon, and that he did not know that the sawboard was split and worn.

We will not infer that plaintiff had knowledge of the defect which defendant says he had when he alleges that it was not known to him.

Furthermore, we will not assume that an ordinary workman who was receiving one and a half dollars a day, whilst others more skilled were receiving two and a half and three dollars a day, had superior knowledge of defects to the employer.

We pass to the merits.

The machine was dangerous, is the first proposition which plaintiff presents for discussion.

Several of the witnesses testified that all machines are dangerous. They said, however, that a combination machine when used, as was done in this case, as a "grooving machine" was not as dangerous as others in woodwork factory, such as the shaper, jointer, tenant machine and rip saw.

Young men leave their quiet home on the farm on which they have been reared in order to follow the more active work of the factory.

The dangers on the quiet farm are infinitesimal in comparison to those of some factories. It emphasizes the necessity of being careful and attentive; but the necessity should be felt both by the employer as well as by all men employed.

In the next place plaintiff's averment is that he did not have sufficient experience in factory work to justify defendant in placing him at work on the grooving machine.

We must say that plaintiff was not as inexperienced as he thought he was. He had worked in different wood working plants. First, in a small sawmill, afterwards in a box factory. While working for the defendant before he met with the accident of which he complains he had worked on other ma-

chines considered dangerous, as well as at the grooving machine which grooved pieces of timber for locks. True, while he was not to be considered a regular machine man he certainly had sufficient experience not to be considered an entirely green and inexperienced man.

There was nothing unreasonable or improper in giving him work for which he applied.

We pass to the insufficiency of the instruction of which plaintiff complains.

He avers that he was not instructed in all the details needful in operating the grooving machine. He was certainly given some instructions, and if defendant's foreman is to be believed at all these instructions were as complete as it was reasonable for him to expect.

There is contradiction here as there is upon several other points. The foreman testifies at some length and says that he was particularly careful; while plaintiff testifies that the foreman was not near as particular as he states.

We think that everything touching needful instruction or warning narrows itself down to whether the foreman should have instructed the plaintiff about the adjustable brace or spring.

This brings us to one of the important issues of the case, and to which we have given earnest thought; that is, whether the adjustable brace or spring afforded protection from accident.

If it was a protection, a safety device, as plaintiff claims, it was then a decided omission on the part of the foreman not to rig up the machine with this safety device. In view of the fact that plaintiff was not at all skillful, it would have been prudent, if there was the least necessity for it, to put on the device. On the other hand, if it was not a protection and a safety device, as contended by defendant, then there was not the least negligence on the part of defendant in omitting all mention of it during the time that plaintiff was being instructed by the foreman and in not attaching it to the machine.

Before taking up that issue for decision, we will pass upon other points of perhaps less importance.

The alleged defectiveness of the sawboard requires attention. It will be recalled that the metal table on which the saws rested has a recess in which the sawboard was placed. The sawboard itself is made of wood.

The complaint is upon that point that the sawboard was considerably worn, and that in consequence there was too much open space between the saws and between the saws and the metal table.

Plaintiff avers that his attention was not called to this by the foreman, and although these boards did not fit around the saws, he was not aware of the fact.

Because of the defectiveness of this sawboard, and the total want of the adjustable brace the contention is urged that the piece of timber kicked back with force and was the cause of the accident.

We take up in the first place plaintiff's complaint touching the sawboard. Here again the testimony is conflicting. The plaintiff and his witnesses testify most positively that the sawboard was out of order and unfit for use, and that it was negligent not to have changed it. A large number of witnesses for defendant are equally as positive that the sawboard was all that was required. Two of the witnesses testify that in succession after the accident, on the day that it occurred, they took up the work that plaintiff had on hand at the machine and worked off the pieces, and that the machine worked very well for a number of hours, until they were entirely through with the work.

Whether in all these contradictions it is plaintiff's witnesses who have violated the ninth commandment or if it be the defendant's witnesses, only the Supreme Judge can decide with absolute certainty.

We are not certain that the sawboard was all that it should have been. At the same time in order to hold for plaintiff on this point it would be necessary to make it appear in what respect it was the cause of the accident.

We recur to the subject before referred to, the adjustable brace.

There was no adjustable brace on the machine. It was not part of the machine as originally made up. It was a device provided at the factory mostly by the workmen themselves. As to the extent of the protection it afforded, the testimony of the witnesses does not agree. The witnesses for plaintiff testify that it was a safety device, while the witnesses for defendant express a decided contrary view. According to the latter there was very little safety about it.

That it was not a part of the machine originally makes no great difference, it seems to us; as to that matter the push stick which plaintiff was instructed to use in pushing the pieces through the machine was not a part of the machine, and yet its use was deemed necessary.

While it is true that the preponderance of the oral testimony is the other way, we are inclined to the view that it had some usefulness. It certainly enabled the workmen to accomplish better work.

When operated by a thoroughly experienced machinist it is quite probable that even the push stick could have been laid aside, and the adjustable brace also; and for all we know, perhaps the sawboard itself, although a very important part of the machine. But in the hands of a man not thoroughly trained in the work there was some danger even with all the appliances on hand and in place.

We may as well state here that defendant lays great stress upon the fact that plaintiff,

as testified to by three witnesses, said immediately after the accident, in substance, that the accident was all due to his own negligence. We do not attach the very greatest importance to this statement. Plaintiff had several times requested the foreman to place him in charge of a higher class machine, where, though more dangerous, he would receive higher wages. It is probable that his mind had been bent upon this change. While suffering excruciating pain, it is highly creditable to him that he said that he, not his employer, was at fault. We infer that he himself did not know precisely how it happened. The shock and the torture were enough to cause him to forget some of the incidents of the accident.

But there is a subsequent feature in this matter; the reverse of creditable to plaintiff; that is, provided defendant's witnesses have testified truthfully in that regard. They said positively that plaintiff stated that he had been negligent.

We leave the subject and take up the last cause of contention; that is, whether the stick of wood which was brought up with the record was the piece on which plaintiff was working at the time that he was hurt.

If it was then we are of opinion that he cannot possibly recover damages.

The preponderance of testimony shows that it was handed to the foreman while he was near the grooving machine and where there were other similar pieces. The other pieces had been shaped and grooved as this was, with the only difference that the one before us has marks of the saw on which it apparently fell. It has blood stains on it or marks.

After this stick had been handed to the foreman it was handed to the superintendent who put it away and on the trial it was produced and offered in evidence. "It was admitted," the court held, "for the purpose of proving the size of case post and for that alone."

Touching the stick, we insert the following here: When the general manager was asked where was the piece of timber, his reply was that it was handed to him by the foreman about 15 feet from the machine, about five or ten minutes after Davis was hurt; and the foreman testified in turn that a boy picked it up and handed it over to him, and that he took it and turned it over to Yeager, the superintendent.

Defendant's theory is that the stick fell out of plaintiff's hands as he was taking it back in order to place it at the left of the machine where the other sticks were. That it slipped from his hand, and that it was then that the accident happened; that plaintiff must have placed his hand upon the saws.

It devolved upon plaintiff to make out his demand. If the testimony for defendant is not false and inspired by deep laid deceit and downright fraud, subtly conceived and executed, plaintiff has not, by any means

succeeded in making his demand reasonably certain.

We have not found it possible to satisfy ourselves, in view of the evidence, that plaintiff did not drop the stick on the saws as the marks thereon show.

It is reasonable to infer, we think, that this stick was in the hands of plaintiff at the time.

For reasons assigned, the judgment is affirmed.

NICHOLLS, J., absent.

(116 La.)

No. 16,101.

HANSON et al. v. POLICE JURY OF ST. MARY PARISH.

(Supreme Court of Louisiana. May 7, 1906.
Rehearing Denied June 4, 1906.)

1. MANDAMUS—RIGHT TO APPEAL.

Generally mandamus will not lie, if there is a right of appeal.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 9.]

2. SAME—ISSUANCE OF INJUNCTION—DISCRETION OF TRIAL JUDGE.

Where the trial judge is vested with discretion as to whether he should issue an injunction, the appellate court will not assume jurisdiction in mandamus proceedings and direct him to set aside his order declining to issue the writ, nor compel him to issue an injunction.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 64, 81, 82.]

(Syllabus by the Court.)

Application of Edward A. Hanson and others for writs of certiorari, prohibition, and mandamus. Writs denied.

D. Caffery & Son, Harry D. Smith, Charles Austin O'Neill, Martel & Martel, J. Clifford Brown, and Percy Saint, for relator. Respondent Judge ad hoc, pro se. William K. Wilson, Dist. Atty., and Foster, Milling, Godchaux & Sanders, for respondent police jury.

BREAUX, C. J. Plaintiffs, taxpayers and citizens of the parish of St. Mary, in these proceedings seek to obtain an order to compel the judge ad hoc of the district court to issue a writ of injunction on their petition, which they presented to the district judge and which he refused to grant, after having issued a rule nisi on the police jury to show cause why the writ should not be granted, and after the police jury had answered and showed cause to his satisfaction.

The purpose of the injunction, which relators sought to obtain, was to prevent the police jury from demolishing the present courthouse, and from erecting a new courthouse in its stead, at the proposed cost of \$115,000, and from issuing "certificates" for the work.

The present courthouse was built many years ago, but relators' contention is that it is to this day a good and substantial build-

ing and would answer every purpose if repaired; that there is no necessity for building another courthouse; that the parish of St. Mary can ill afford to meet the payment which would be required during each year; that funds are very much needed to pay the expenses of her schools and to maintain her public roads.

Relators aver, in substance, that the police jury proposes to pay \$10,000 cash of the \$115,000 in question to build this courthouse, and the balance it proposes to distribute in annual installments over a period of 10 years with 5 per cent. interest.

This is to be the consideration of the "certificates" before mentioned.

The complaint of plaintiffs is that the parish has not the cash in its treasury to pay the first installment of \$10,000, and the police jury has no right to take that sum out of the revenue of 1906. The relators aver that the parish of St. Mary is not in a financial condition to build a courthouse at a cost of \$115,000, because there was a deficit of \$14,000 at the beginning of the year, paid by the police jury borrowing the amount.

Relators specially complained that the police jury has not provided for the building of a courthouse under a contract; and also aver that the taxes by which the fund is to be acquired for the ensuing 10 years are not equal and uniform, in that they are to be collected from the parish only whilst the town of Franklin, in which the courthouse is to be built, will not pay anything; that the proposed issue of "certificates" to represent the amount before mentioned would be illegal on a number of grounds stated, and particularly because Act No. 32, p. 39, of 1902, under which the police jury has acted, is violative of articles 31 and 32 of the Constitution. It embraces in its title more than one object and is practically a new act under color of an amendment; that it contains provisions not germane to nor connected with the object of the act sought to be amended; that Act No. 30, p. 47, of Extra Session 1877 is the act which Act No. 32, p. 39, of 1902 seeks to amend.

Relators charge that the police jury has not advertised for bids to do the work at the lowest price; that the police jury has not entered into any contract at all, but has placed the matter in the hands of a "builder" (a word of relators' petition), who is to be the superintendent or overseer of the work; that the present courthouse has been purposely neglected in order to create an opportunity to build another courthouse.

The relators aver that their injury will be irreparable.

There were additional averments made by relators in a supplemental petition which was offered to be filed after the rule nisi had issued and the respondent in the case had answered, but which the court did not permit to be filed.

The judge ad hoc of the district court, ap-

pointed in the place of the judge who recused himself, reviewed the different issues presented and held that he had not found sufficient cause to issue the injunction, and declined to issue the writ.

Whether or not the police jury is authorized to make provision to construct a courthouse is the question pressed upon our attention at this time, which will only be considered hereafter on the merits, provided the case is brought up hereafter on the merits, and provided relators show that they have such interest as entitles them to stand in judgment. At this time and on this application for a mandamus and other writs, we are particularly concerned with relators' demand addressed to the court asking that it direct the judge ad hoc to recall the judgment which he has heretofore rendered and direct him to enter, instead of that judgment, a judgment granting to relators a writ of injunction, restraining the police jury from proceeding further in carrying out the project to build a courthouse.

We are decidedly of the opinion that, in order to sustain such a judgment as relator asks for, it should appear beyond all question that those favorable to the public work in question will gain an advantage and, in some way, cause irreparable injury to relators.

We have not found anything of the kind here. The issues presented do not suggest that anything permanent will be accomplished in the building of a courthouse before the pending case will have been disposed of.

But be that as it may, there are other considerations that, in our view, are controlling.

A writ of mandamus will issue when, in the opinion of the court, it is of importance to fix the right of parties; the issues being before the court, and the court being able to act with some degree of certainty.

That is not the case here.

It has been settled by a number of well-considered decisions that mandamus will not be issued when there is other adequate remedy. It has also been frequently decided that mandamus will not issue to control a court of original jurisdiction.

We have already stated substantially that there is no appearance of irreparable loss. The relators have a right of appeal. "The decree of the lower court, granting or refusing to grant an injunction, may be suspensively appealed from." *Beebe v. Guinault*, 29 La. Ann. 795.

Moreover, there is discretion. Not only the district court is vested with some discretion in the premises, but the police jury, also, in matter of the erection of a courthouse.

Now, it is elementary that mandamus will not issue to control an inferior court in matter of an injunction, when it is within the exercise of the discretion with which it is vested. It was within the power of the

judge a quo to grant or to refuse the injunction.

Upon this point we have this to say: No one will seriously contend that this is an injunction to which the parties are entitled *ex debito justitiae*, and that all that was necessary was to offer papers drawn in required form and a bond in order to obtain it.

The application for an injunction here does not fall within that class of cases, but in the case before us it can only issue after the judge of original jurisdiction has exercised judgment as to whether he should issue it. In this instance, in the exercise of the judge's discretion, a rule nisi issued, and after hearing the court decided that no injunction should issue. In thus doing he was clearly within the plainest exercise of the discretion with which he is vested, guided by the facts and circumstances as he appreciated them.

It may be stated here that courts of justice, in the exercise of their discretion, are slow to grant injunctions, unless it is manifest that, if not granted, irreparable loss will be the result.

In mandamus proceedings in cases similar to the one here, the subject was extensively discussed in the following cases, and it was decided that mandamus should not issue when there was other remedy. *State ex rel. Beebe v. Judge*, 28 La. Ann. 905, 26 Am. Rep. 115; *State v. Railroad Co.*, 37 La. Ann. 589; *State ex rel. New Orleans v. Judge*, 32 La. Ann. 549.

Our view also finds support in a well-considered decision of the United States Supreme Court, to wit, *Ex parte Schwab*, 98 U. S. 240, 25 L. Ed. 105.

In the first decision *supra* it was decided that the party complaining had a right of appeal. In view of the fact that mandamus will not issue when parties have other remedy at hand, the court gave that as one of the reasons why mandamus should not issue.

But, recurring to the question of discretion, this court said, in *New Orleans v. Telephone Company*, 37 La. Ann. 571, quoting:

"We have held that, in cases arising under article 303 of the Code of Practice, the judge is vested with a legal discretion to grant or to refuse an injunction, which will not be interfered with unless his action be manifestly arbitrary."

And we insert the following here because it is illustrative of the cases in which the court of original jurisdiction has discretion, quoting:

"But, in the cases provided for by article 298 and others similar, the jurisprudence is perfectly settled that the judge has no such discretion, but is bound to grant the application when made in conformity with the requirements of the law." *State ex rel. Behan v. Judge*, 32 La. Ann. 1276; *Slaughter House Company v. Larrieux*, 30 La. Ann. 799; *State ex rel. Gaynor v. Judge*, 38 La. Ann. 924; *State ex rel. Jacobs v. Judge*, 40 La. Ann. 206, 3 South. 561.

It scarcely need be said that the pending case is within the terms of the first case cited, and not within the terms of the last cited case.

The rule nisi is recalled and set aside. Relators' petition is dismissed, at their cost.

NICHOLLS, J., absent.

(116 La.)

No. 16,070.

BIRMINGHAM v. O'NEIL

(Supreme Court of Louisiana. May 7, 1906.)

HUSBAND AND WIFE—SELECTION OF DOMICILE.

The husband has the exclusive right to select the matrimonial domicile, and the wife is bound to follow him wherever he chooses to reside.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 7.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

Action by Alice Birmingham, wife of John O'Neil, against John O'Neil. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert John Maloney and Paul Walter Maloney, for appellant. Henriques & Dunn, for appellee.

LAND, J. This is a suit for separation of bed and board on the ground of abandonment.

Defendant denies that he has ever abandoned his wife, and avers his readiness to receive and support her, if she will return to the matrimonial domicile.

Plaintiff is and has been for a long time living with her mother, and defendant is and has been for the same length of time living with his mother, and has had the custody of the two children of the marriage.

The charge of abandonment is based on the theory that the matrimonial domicile was fixed at the home of defendant's mother-in-law, and that the refusal of the husband to abide there with his wife constituted abandonment. As a matter of fact defendant has never lived in the house of his mother-in-law, and therefore her home cannot be considered as the matrimonial domicile.

The husband has the exclusive right to select the matrimonial domicile, and the duties of both parties are prescribed by law as follows:

"The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is bound to receive her, and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition." Civ. Code, art. 120.

Judgment Affirmed.

NICHOLLS, J., absent.

(116 La.)

No. 15,990.

SPERIER v. OTT.

(Supreme Court of Louisiana. May 7, 1906.
Rehearing Denied June 4, 1906.)

1. DAMAGES—MENTAL ANGUISH—ARREST OF CHILD.

A parent cannot recover damages for mental shock and distress on account of the unlawful arrest and prosecution of minor children on a charge of malicious mischief.

2. SAME.

Not being liable for such shock, the defendant is not responsible for its alleged consequences on the health of the mother.

3. MALICIOUS PROSECUTION—EXEMPLARY DAMAGES.

The action is maintained as to the demand of the two minors for exemplary damages for unlawful arrest, and for malicious prosecution. (Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by Arthur A. Sperier, individually and as tutor of his minor children, against Luther D. Ott. Judgment for defendant, and plaintiff appeals. Reversed in part and remanded, and judgment as amended affirmed.

Nicholas Eugène Humphrey, and B. Howard McCaleb, for appellant. Robert O'Connor, for appellee.

LAND, J. This is a suit for damages grounded on the alleged unlawful and malicious arrest and incarceration of two minor sons of the plaintiff, without a warrant, at the instant of the defendant.

The petition alleges that the only pretext for such arrest was that said children with a number of others had carried away a few pieces of old and decayed boards from an abandoned shanty, which was being demolished by the defendant. The petition further alleges that the plaintiff offered to restore said boards, besides paying any value that defendant might place on them, at the same time protesting that the children were innocent of the violation of any law or ordinance, and had acted under the belief that they were at liberty to take the boards, since the men, women, and children of the neighborhood were doing the same thing. The petition further alleges that on the next day the defendant made an affidavit charging said two children and others with malicious mischief, and subsequently threatened to charge them with larceny if a monied settlement was not made, and that finally his children were tried and acquitted.

It is alleged that the boys, aged 13 and 11 years respectively, were arrested by a police officer and placed in a patrol wagon in the presence of their mother, "who was so shocked and affected thereby that she became ill as the result and suffered both bodily and mental pain and anguish from the time of said arrest until the 7th of March, following, when petitioner was compelled to remove

her to the Louisiana Retreat, where she continued to suffer, and where on the 18th day of March she died of a hemorrhage of the brain after seven weeks of the most excruciating bodily pain and mental anguish."

The petition further alleges that, at the time of the arrest, the wife and mother was in perfect health, and that the shock then received by her and her subsequent suffering and death were the direct result of the unlawful and malicious acts of the defendant.

The petition alleges damages to the husband in the sum of \$10,000 and to his nine children in the sum of \$10,000, occasioned by the death of the wife and mother.

The petition further alleges damages to the children as heirs of the mother, in the sum of \$5,000 for bodily pain and mental anguish by her suffered.

The petition further alleges damages to the husband in the sum of \$500 for medical and funeral expenses. The petition finally alleges that petitioner was entitled to recover the sum of \$2,500 as exemplary damages for the wanton and malicious acts of the defendant.

Plaintiff's petition was dismissed on an exception of no cause of action, and he has appealed.

On the face of the petition the two minor sons of the plaintiff were the parties injured. The mother was a third person, and if she had lived could not have recovered for mental distress and shock. This very question was decided in *Black v. Carrollton Railroad Company*, 10 La. Ann. 33, 63 Am. Dec. 586, in well-considered opinions, in which all the justices agreed that a father could not recover damages for mental shock and anguish caused by the mutilation of his minor son in a railroad accident. *Slidell, C. J.*, dissenting on another point, concurred in the opinion of the court that the father could not recover damages for mental suffering, and, after stating the general rule that actions for injury to the person are personal, said:

"Moreover, let us bear in mind the difficulty which would result from recognizing the mental suffering of the third party as an element of damages. Where is any but arbitrary limit to be found in extending its benefit? Could an action for damages on that ground, if allowed to the father, be refused to the mother, the brother, the sister?"

The general jurisprudence on the same subject is thus stated:

"As a general rule, the right of recovery for mental suffering resulting from bodily injuries is restricted to the person who has suffered the bodily hurt. Mental distress caused by sympathy for another's suffering is not a recoverable element of damages. A parent cannot recover for mental distress and anxiety on account of physical injuries to a child, nor can a parent recover damages for anxiety for the safety of his or her child placed in peril by the negligence of another.

"Similarly it has been held that a husband's mental suffering caused by his wife's condition cannot be shown to increase the amount of damages." 8 Am. & Eng. Ency. Law (2d Ed.) p. 664.

Hence, we are of opinion that the petition discloses no cause of action, in so far as damages are claimed for the consequences of the mental shock suffered by the mother.

The petition, however, discloses a cause of action for exemplary damages in favor of the two minor children, who were arrested and prosecuted for malicious mischief. Under the allegations the arrest was unlawful and the prosecution was malicious.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed as to the minors, Lawrence and Alexander Sperler, and it is now ordered that, as to the demand of said minors for exemplary damages, the exception of no cause of action be overruled, and this cause be remanded for further proceedings according to law, and it is further ordered that as thus amended the judgment appealed from be affirmed; costs of appeal to be paid by the defendant and appellee.

NICHOLLS, J., absent.

(116 La.)

No. 15,973.

Succession of DUPRE.

(Supreme Court of Louisiana. May 7, 1906.
On Rehearing, June 4, 1906.)

1. ADOPTION—PROCEDURE—TUTOR AD HOC—NECESSITY—STATUTES—IMPLIED REPEAL.

Where two statutes prescribe a different manner of doing the same thing; e. g., the manner of adopting children, the later act supersedes the earlier, though not having a repealing clause. If the earlier required a tutor ad hoc to be appointed, and the later is silent on the subject, a tutor ad hoc need not be appointed.

2. SAME—NOTARIAL ACT—EXECUTION.

Where a minor has neither parent nor tutor, the notarial act by which he is adopted need not be signed by any one for him.

3. SAME—EFFECT—RIGHTS OF PARENTS.

The parents no longer have any authority over the foundling; for all purposes of the adoption of the foundling the situation is as if the parents were dead.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

In the matter of the succession of Eugene Dupre, the tutor of Helen Coleman, filed in opposition, and from the judgment, she appeals. Reversed and remanded.

Philip Joseph Patorno and Emile Joseph Méral, for appellant. E. Howard McCaleb, E. Howard McCaleb, Jr., and Clegg & Quintero, for appellees. Francis Charles Zacharie and Harry Prentiss Sneed, amici curiæ.

PROVOSTY, J. The administrator of the succession of Eugene Dupre having filed the account of his administration, the tutor of the minor Helen Coleman, filed an opposition, claiming that his ward should be placed on the account as heir to one-fourth of the succession, in her quality of adopted child of the decedent.

Wishing to adopt the child, Helen Coleman, the decedent, Eugene Dupre, and his wife went before a notary, and passed an act which they and the notary thought conformed with all legal requirements. The act contains the declaration of the adopters that they adopt the child, and recites that the child is a foundling four years old, that it was given to Sister Veronica, that it has been cared for by the St. Vincent's Infant Asylum, and that Sister Veronica consents to the adoption. It is signed by the adoptants and by Sister Veronica, who is the Mother Superior of the Asylum.

The contention of the administrator is that the act should have been signed by the child's parents, who were presumably living; or by a tutor ad hoc, if the parents were dead.

We will first dispose of the contention that the parents of the child should have signed the act. The child was a foundling, received and cared for by Sister Veronica from charity. Article 213, Civ. Code, provides that "the foundling, whom persons from charity have received and brought up, cannot be claimed by its father and mother." From this the only possible deduction is that the parental authority is at an end; a deduction confirmed by the fact that article 272, Civ. Code, authorizes the appointment of a tutor to a foundling. If the father and mother have lost the right to claim the child for themselves, a fortiori have they lost the right to represent the child in the matter of its adoption by a stranger. A foundling, then, in so far as adoption is concerned, must be considered as a child without parents; as standing on the same footing as a child whose parents are dead.

Moreover, the opponent offered to prove that the parents of the child were dead at the time of the adoption; and we think he should have been allowed to do so. The evidence was objected to on the ground that "the act itself must contain all the essentials required by law for the adoption of a minor child." So far as this objection involves the proposition that an act of adoption, like every other act, must, in order to be valid, contain every thing essential to its validity, it is a mere truism. But so far as it involves the proposition that the death of the parents cannot be proved de hors the act of adoption, we are far from agreeing with it. We believe to the contrary that the death of the parents is not susceptible of proof by the notarial act; unless, perhaps, of mere prima facie proof. Notarial acts are evidence of those things the parties to them have consented to, and of nothing more. The parties can draw up an act to evidence those things they have agreed to, but cannot draw up an act to evidence a thing which stands as an independent fact upon which their consent can have no influence. The death or continued existence of the parents of this minor is an independent fact, to be proved like any other independent fact, and not neces-

sarily by the notarial act of the parties, which could be at most but prima facie evidence of it.

The next contention of the administrator to which we now pass, that a tutor ad hoc should have been appointed to sign the act of adoption for the minor, depends upon the proper construction of Act No. 31, p. 79, of 1872, which reads as follows:

"An act providing for the manner of adopting children.

"Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened: That any person above the age of twenty one years shall have the right by act to be passed before any parish recorder or notary public, to adopt any child under the age of twenty one years, provided, that if such child shall have a parent, or parents, or tutor, that the concurrence of such parent or parents or tutor shall be obtained and as evidence thereof shall be required to sign said act."

Adoption was authorized by the Code of 1808, but was abolished by the Code of 1825. It was re-established by Act No. 48, p. 130, of 1865, which act was amended by Act No. 64 of 1868, p. 77. These acts are incorporated in Rev. St. §§ 2323 to 2328. They provide for adoption by means of judicial proceedings, and require that a tutor ad hoc be appointed to represent the proposed adoptee in the judicial proceedings, in case he is a minor and has no tutor.

It will be noticed that the amendatory act of 1872 transcribed above requires that the concurrence of the parent or tutor of the child shall be obtained if the child has a parent or a tutor; but that it contains no requirement that a tutor ad hoc shall be appointed in case the child has neither parent nor tutor. It will be noticed also that the act does not contain a repealing clause. And it will be noticed, finally, that the purpose of the act was to change the manner of adopting children from judicial proceeding to notarial act.

It seems to us perfectly plain that the act supersedes, and repeals by implication all former legislation on the same subject-matter. The rule is that where a statute purports to cover the whole subject-matter, it supersedes former laws on the same subject-matter. As expressed by the Supreme Court of the United States in the case of *Tracy v. Tuffy*, 134 U. S. 207, 10 Sup. Ct. 527, 33 L. Ed. 879:

"A previous statute will be held to be modified by a subsequent one if the latter was plainly intended to cover the whole subject embraced by both and to prescribe the only rules in respect to that subject which are to govern."

See, also, *Stewart v. Kahn*, 11 Wall. (U. S.) 502, 20 L. Ed. 176; *United States v. Clafin*, 97 U. S. 546, 24 L. Ed. 1082; *Eudlick on Construction of Statutes*, p. 320, § 241; *Black Interpretation of Laws*, p. 361, § 133; *Stafford v. His Creditors*, 11 La. Ann. 470; *State v. Brewer*, 22 La. Ann. 275; *Board v. Girardey*, 36 La. Ann. 605.

That this act No. 31 was intended to cover the whole subject-matter there can be no room for doubt. It says so expressly in its title: "An act providing for the manner of adopting children." "The" manner; not a manner, or one of the manners, or part of the manner; but "the" manner; i. e., the exclusive manner.

Moreover, the terms of the act are sweeping, so much so that the Legislature found it necessary to add a proviso in order that the concurrence of even the parents of the child might not be held to have been dispensed with. There can be no doubt that the Legislature understood that such would be the effect of the terms of the act, unless such a proviso was added, there could have been no other reason for adding the proviso.

The effect of the contention of the administrator would be to relegate back to the courts this matter of adoption, and thus defeat and nullify the statute, whose sole object was to take the matter of adoption out of the courts and make it a matter of private transaction by notarial act. And, what is worse, would do this in the case of foundlings—the very case in which adoption should be facilitated; in which the adoptants would most likely be turned from their purpose by the bother of having to go into court about the matter.

The fears of the learned counsel for the administrator that if the supervision of the courts is removed undesirable persons might adopt helpless children, are, we apprehend, groundless. The child receives a right of inheritance and is required to give nothing in return. As well might we fear that undesirable persons might make helpless children their universal legatees. It is more likely that desirable persons might be deterred from adopting foundlings by the trouble of judicial proceedings than that undesirable persons might be induced to adopt them by the facility of the notarial proceeding. At any rate, the Legislature seems to have thought so; for it is not apparent what other reason could have led to the change in legislation.

The argument of counsel that Act No. 31, p. 79, of 1872, if interpreted as dispensing with the concurrence of a tutor ad hoc, would be unconstitutional, because, then, the adoption would be without consent, and the minor would be deprived of property or liberty without due process of law—can hardly be serious. As a matter of fact, the minor is not deprived of property or liberty, and he is, in law and in fact, incapable of consent. Nor any more serious can be the argument that consent is of the essence of adoption. Adoption has no particular essence, it is a purely legislative fiction; and, hence, it is what the Legislature chooses to make it.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that there now be judgment

recognizing the minor, Helen Coleman, as the adopted daughter of the decedent, Eugene Dupre; and, as such, heir to one-fourth of his estate, and ordering the administrator of the succession of the said decedent to place her on his tableau accordingly. The succession to pay all costs.

On Rehearing.

MONROE, J. The trial in the district court, in so far as the introduction of evidence was concerned, having practically terminated with the ruling of the judge a quo excluding the act of adoption offered on behalf of the opponent (the minor, Helen Coleman), we are of opinion that the decree handed down, in deciding the whole case upon the merits goes too far, and should have been confined to correcting the error in that ruling.

It is therefore adjudged that the decree heretofore handed down be amended and recast so as to read as follows, to wit: It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, and that this case be remanded to the district court to be there proceeded with according to law, and to the views expressed in the foregoing opinion; the costs of the appeal to be paid by the succession and those of the district court to await the final judgment.

NICHOLLS, J., absent.

(116 La.)

No. 15,902.

GASPARD et al. v. COCO.

(Supreme Court of Louisiana. May 21, 1906.)

1. GUARDIAN AND WARD—ACCOUNTING—MATTERS INVOLVED IN APPELLANT'S COMPLAINT.

In the matter of the settlement of the succession, the court of first instance, considered dealings between the tutrix administering while in office, and excluded the personal accounts between the parties after their majority as not connected with the settlement of the succession, nor with the settlement of the account of the tutrix. Tutorship of Crane, et al., 17 South. 431, 47 La. Ann. 896. As the settlement is sufficiently complicated without considering those items they will not be considered in the appeal. If anything be due to the tutrix she can deduct it in settling balances with her wards.

2. SAME—TAXES PAID BY TUTRIX.

In settling accounts between the tutrix and one of her wards, taxes, though due her, were not added to the indebtedness of the ward. It was considered that she was paid these taxes in the settlement as made. The tutrix was allowed for maintenance of the minors which was fixed by keeping account of taxes and deducting them.

3. SAME—EVIDENCE.

The weight of the testimony did not sustain the claim for note donated by the late husband and not paid by the tutrix as averred.

4. SAME—RIGHTS OF USUFRUCTUARY.

The usufructuary is entitled to fruits and revenues from day to day. As much of the rental as had been earned at the date that the succession was opened was due to the succession.

5. SAME—SUPPORT OF CHILDREN.

Appellee's claims, set forth in answer to appeal. The mother did not waive her claim for maintenance. The succession was small as to assets. The mother had by her own personal exertions provided for the children. The court considered that she was entitled to a limited amount for their support after she had lost the usufruct of the property.

6. SAME—CHARGES AGAINST USUFRUCTUARIES.

Usufructuaries must bear the expense of repairs, but not of new building necessary, which enhanced the value of the property, and which because of this enhancement enabled the tutrix to collect rents for which she accounted to her wards.

7. SAME—EVIDENCE.

The tutrix supported her charges by proof to the extent allowed.

8. SAME.

The court holds that as amended the judgment was substantially correct.

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Gregory Horatio Couvillon, Judge.

Final accounting of Mrs. Rebecca Coco as natural tutrix of her children, in which Joseph B. Gaspard and others filed an opposition. From the judgment rendered, the tutrix appeals. Affirmed.

Coco & Couvillon, for appellant. Tucker Horatio Couvillon, for appellees.

BREAUX, C. J. Mrs. Rebecca Gaspard, widow of Gerand J. Gaspard, now the wife of S. L. Coco, natural tutrix of the children of her first marriage, rendered the final account to the children of her first marriage. The children oppose the account.

The undisputed facts are that the father of opponents, husband of the accountant, died on the 4th of June, 1882. An inventory was taken of his estate, and his widow as natural tutrix of the children assumed the administration of his succession. About two years afterward she became the wife of S. L. Coco.

The children are Corinne, the eldest daughter who reached her majority on March 4, 1894; Joseph, who reached his majority on December 4, 1900; and Irene, on September 4, 1902.

The last two were emancipated, and thereby relieved from the disability of minority.

On the final account as homologated Joseph B. Gaspard is the creditor of his mother and tutrix in the sum of \$344.12, and Corinne and Irene, respectively, in the sum of \$294.12.

From this judgment the tutrix appeals. On appeal the heirs and opponents filed an answer and asked for an amendment of the judgment rendered by the district court to the extent that it allows certain items consisting of a claim of E. B. Coco for \$300; another, Payne, Kennedy & Co. for \$200; and another of A. B. Coco for \$23.70.

The opponents also oppose an amount of \$300, which their mother claims to have paid for building a house on one of the tracts of land belonging to the community. The opponents admit that the assets as fixed

by the judgment of the district court, homologating the account, are correct. They also admit that the annual revenues were absorbed by their expenses while minors during the years that they were at school.

We will in the first place take up appellant's complaints for decision; that is, the disputed claims of appellant. Substantially, they are that the judge a quo erred in refusing the claim she made for the maintenance of her children after they had reached their majority; and that he also erred in not allowing for improvements and repairs on their property after they had reached their majority; and that he also erred in not allowing the amount for taxes paid. She also complains because a claim of \$200, which she asserts she paid to the mother of her late husband has not been allowed.

With reference to the amount which the tutrix claims after the heirs had become of age, the judge of the district court thought that it would facilitate the settlement not to consider them and limited his judgment to items of a date prior to the expiration of the mother's trust as tutrix.

It follows that the judgment before us for review relates only to claims arising before the majority of the heirs. Those arising after the majority, not having been considered by the district judge, we think may as well remain for future settlement. The issues are already sufficiently complicated and involved. They should not be brought into a settlement of claims exclusively between tutrix and heirs.

There is authority to maintain this ruling. Tutorship of Crane, 47 La. Ann. 906, 17 South. 431.

There are balances coming to the minors according to the present account. It will be easy enough when the tutrix settles with them to deduct the sums for which they became indebted to her subsequent to their majority, if they became indebted for any amount, after attaining their majority.

The next objection of the tutrix to the judgment amending her account is that the sum of \$650, which she collected as rental on land in the year 1882, should not have been reduced by seven-twelfths; she claimed as usufructuary she was entitled to the whole of the \$650. Her husband died in the year 1882 on the 4th of June. Five months of the year had elapsed, and the succession was entitled to five-twelfths, as that proportion of the rent had accrued, although it was not collectible at that date. Her contention is, as before stated, that she was entitled to the whole amount; the rental of the whole year, by reason of the fact that the lease was for one year and the rental was not due and not collectible at the beginning of the usufruct in June; it was due at the end of the year; that the obligation cannot be divided.

We cannot agree with that view. The usufructuary was entitled to the rent from the

day the usufruct begins. The rent was due day by day. Civ. Code, art. 547.

We are brought to the charges for board and lodging, education and incidental expenses of the heirs after the second marriage, and after the mother lost her usufruct on account of her second marriage.

This claim has given us some concern. In Succession of Boyer, 38 La. Ann. 509, an apparently different view is expressed. There is this difference, that Dr. Boyer could easily afford, as he did to expend a considerable sum for the happiness and comfort of his daughter. He derived a large revenue from his practice as a physician, and everything went to prove that he always waived and abandoned any claim for maintenance.

In our case we have seen that the situation is entirely different. We think it is just that the mother should receive some compensation under the circumstances.

The mother continued in her tutorship and collected about \$100 rental a year for each of the three opponents. They claim the whole of this rental, except the amount expended by the mother for their schooling during a comparatively short time. Under the circumstances the mother and tutrix was entitled to something by way of remuneration for providing her children of the first bed, after she had lost the usufruct of the property, with sustenance and raiment. True, the amount so allowed, the interest of the heirs not being large, should be small. Nonetheless, the mother should not be entirely cut off from all compensation. Surely the small rental before mentioned was scant enough for her trouble and work.

We are informed by brief and by the testimony that the mother has a large family; children of two marriages.

She is economical, and by her industry—even herself cooking part of the time—she has managed to support her children, to rear them carefully, and obtain for them an education above the ordinary. They were sent off to school. Two of the daughters are teachers. A son is a traveling clerk.

In *Hebert v. Hebert*, Man. Unrep. Cas., 214, a claim very similar to the one here was maintained.

The opponents seek to reduce, if not entirely defeat, this claim by testimony of services rendered to the mother and tutrix.

We cannot allow that claim. The children are not entitled to anything for the limited services they may have rendered to the mother.

The mother may not be entitled to as much as she claims for the sustenance of the children. She does not recover as much as she claimed because the revenues are less by quite an amount.

In order to minimize to some extent the claim of the tutrix for sustenance, the judge of the district court did not allow the small amount paid by her for taxes due by the

minors. It was just and proper to deduct the amount in order to bring the mother's claim within an entirely reasonable limit.

To bring this branch of the case into a concrete shape we rule: the mother owes rents. She is allowed for maintenance and taxes. Maintenance and taxes together are a set-off for rental. The annual rentals are, say \$120 for each heir. Taxes are \$202, divided in 3, equals \$67.33⅓. Maintenance \$100 a year each which is fair enough taken as a whole.

We have considered all the complaints of appellant, and without dwelling upon them any further, we leave the subject of her complaints, confident that she obtained about all to which she was entitled.

We pass to the grounds urged by the opponents in their answer to the appeal (the disputed points as to the opponents); the first of which is that an amount of \$300, which had been due to E. B. Coco at the time of the death of the first husband of the tutrix, but which was paid by her after his death, should not have been allowed. We are informed by the testimony that it was an amount which her late husband had borrowed from her brother.

Properly enough opponents disclaim all intention of questioning the good faith of their mother. Their contention is that after these many years have elapsed her memory is not entirely accurate.

We will not reduce this amount. The mother testified that she held a voucher for it, which she lost.

The claim is somewhat persistent; it was mentioned in another account for a smaller sum, but in this account it is put down for the amount before stated. If the mother is entitled to any amount at all, she is entitled to the whole of it. She always claimed the amount as due. Her statement in regard to it leads us to believe that it is true that she is a creditor for a sum which she paid after the death of her first husband. She is corroborated in some respects.

There is another amount which is identified by reference to the firm of Payne, Kennedy & Co. We think that this sum also should be paid to the tutrix. She had a receipt for the sum which she has lost and the loss of which she could prove. The judge of the district court who knew the parties was impressed by the testimony of the tutrix sufficiently at any rate to sustain these claims. There is nothing suggestive of the least insincerity or bad faith on her part.

Now, as relates to another objection to which we have referred in our statement of facts urged by opponents to the mother's claim for a house constructed on the property of the community while they were minors, on the ground that the tutrix and joint owner with them had no authority or right to add an improvement to the property. We are informed by the testimony that part of the lumber had been procured by the late hus-

band of the tatrix to build the house; she bought other lumber needed and had the house built. We take it that it was a needful improvement; that it improved the property. For years rental was collected from this property for the account of the owners. It is quite true that a usufructuary and part owner of the property cannot as a matter of fancy, or to please his own tastes or inclinations, add valuable improvements to property and claim to be reimbursed at the expiration of the usufruct. In that case the person by whom the buildings are constructed loses them. Here, this is not the case, the building was needed, the late husband of the tatrix had commenced preparations for building it, part of the lumber was on the ground, and nothing suggests that it was not a useful improvement on the place. Under the circumstances, the amount of the claim should be paid.

There is no question of added value to the property. Only a question of costs is presented. We judge that they are a criterion of value. We find no error.

Judgment affirmed.

(116 La.)

No. 15,881.

BRODTMAN et al. v. FINERTY.

(Supreme Court of Louisiana, April 9, 1906.
Rehearing Denied June 4, 1906.)

1. LANDLORD AND TENANT—REPAIRS.

The articles 2693 and 2694 Civ. Code, are pertinent and govern, and not article 2695, touching guaranties of lessor against vices and defects.

2. SAME.

The repairs were ordinary and were within the terms of the former articles.

3. SAME—PERSONAL INJURIES.

There was in consequence no cause of action for asserted personal injury caused by a falling shutter owing to a defective window hinge.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 630, 631.]

4. SAME.

The head of the family represents the family. If he, a tenant, is without a right of action because of his failure to make the repairs, although he had the right to make them, the members of the family occupying the dwelling are equally as concluded.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Mary Agnes Brodtman and another against Mrs. Barbara Finerty. Judgment for defendant and plaintiffs appeal. Affirmed.

Miller, Dufour & Dufour, Robert John Maloney, and Paul Walter Maloney, for appellants. Carroll & Carroll, for appellee.

BREAUX, C. J. Plaintiff sued the defendant for personal injuries suffered by his wife and by himself.

He was defendant's tenant. There was, it seems, a defect in a shutter hinge of the

house occupied by plaintiff, as tenant, and by his wife.

The latter was endeavoring to close the blinds of one of the rooms when the blind broke loose from its hinges, the shutter fell, and in consequence her right hand was severely cut and badly mashed.

Plaintiff charges that was all due to the broken shutter hinge. They charge that the defendant was negligent, as the hinge had been broken for a number of months. He had been requested to make the repair and had promised to make it.

Plaintiff claims damages in the sum of \$5,000 for the injury which his wife has suffered, and for an additional sum of \$2,500 for his own mental distress growing out of the injury to his wife, who greatly suffered for a number of months.

An exception of no cause of action was maintained, from which plaintiffs appeal.

We leave out of all consideration the claim of plaintiff's husband, and take up for decision the claim of Mrs. Brodtman, the wife.

If no recovery can be had in her behalf, it is very evident that the husband cannot recover anything. A decision adverse to her claim will dispose of the husband's, for if she does not obtain a judgment he certainly cannot obtain one.

Plaintiff invokes both the statute which binds the lessor, the defendant here, to keep premises leased in proper repair, and in the second place they invoke the promise before mentioned, which defendant had made to them some time previous, to have the proper repairs made.

It is true that the lessor should see to the repairs due by him to his tenant.

Whether the lessor can be held for damages presents the question for decision.

The jurisprudence of this state has spoken upon the subject, and invariably it has been held that the tenant after notice has the right to have the repairs made.

This being the jurisprudence, the tenant is without right to complain of an injury which he could have avoided, for his indebtedness as tenant was over ample to have the repairs made. They would have amounted to an insignificant amount—the price of a shutter hinge and the very little work of putting it on.

This court has recently construed the article of the law touching repairs by tenants, and declined to condemn the lessor to pay damages when the amount of the rent is sufficient to pay for repairs.

The following decisions are cited in support of that position in the case to which we refer: Scudder v. Paulding, 4 Rob. 423; Westermeyer v. Street, 21 La. Ann. 714; Pesant v. Heartt, 22 La. Ann. 292; Diggs v. Maury, 23 La. Ann. 59; Winn v. Spearing, 26 La. Ann. 384; Welham v. Lingham, 28 La. Ann. 903; and Lawrence v. Lelievre, Op. Bk. No. 50, p. 57.

The principles announced in these decisions

are applicable. The case to which we first referred above is *Lewis v. Pepin*, 33 La. Ann. 1417.

Plaintiff places special reliance upon the promise which had been made by defendant to make repairs to which we have before referred.

Plaintiff should have followed up his complaint to his lessor and should have insisted upon the right which the law gave him, and, if in that event the lessor had not complied, then he had the right to have the repairs made.

In the absence of these steps he has no right to damages.

This was the view taken and expressed in another decision upon the subject in which the question relating to the lessor's special obligation to repair was very similar to the question here. *Campbell v. Miltenberger*, 26 La. Ann. 73.

We have seen that from *Westermeler v. Street*, 4 Rob. 428, to date, the line of decisions is unbroken. The jurisprudence, so consistent, and harmonious upon a point touching property or touching the lease of property, should not be changed save for the most cogent and urgent reasons.

The repairs required were the most ordinary repairs and did not grow out of the vices and serious defects which are mentioned in article 2695 of the Civil Code.

If the defect had grown out of the vice in construction of the building or other defects of that nature, other questions would have arisen. Then defendant's guaranty might have been invoked. But, as it is, article 2695 has no application.

"La garantie est due uniquement pour les vices qui empêchent entièrement l'usage." Baudry, vol. 1, *Contrat de Louage*, p. 212.

"Le locateur est obligé de garantir les vices qui empêchent entièrement l'usage." Id.; Laurent, vol. 25, p. 123, No. 114.

Touching his wife's claim plaintiff takes the special ground that she was a third person, that the duty of making repairs is not imposed on third persons, that she is not under obligation of a lessee, that the injuries inflicted on her are actionable as the claim is part of a personal property under the law.

Conceding that it is as plaintiffs contend on this point, if the wife must be considered as a third person and a guest, she would have to look to the lessee and not to the lessor for damages. This was considered and decided in a case of somewhat recent date. *McConnell v. Lemley*, 48 La. Ann. 1433, 20 South. 887, 34 L. R. A. 609, 55 Am. St. Rep. 319.

The husband was the head of the family and the wife under the circumstances really had no claim separate and apart which she could recover as the guest of the lessor. She was part of the family represented by the husband, and his failure to have the repairs

made bound her as well. 18 Am. & Eng. Enc. of Law, 217.

For reasons assigned, the judgment is affirmed.

NICHOLLS, J., absent.

(116 La.)

No. 15,938.

MASSETT v. KEFF.

(Supreme Court of Louisiana. June 4, 1906.)
ASSAULT AND BATTERY—CIVIL ACTION—JUSTIFICATION.

He who is in fault, and sues for damages resulting therefrom, cannot recover for the injuries inflicted on him, although the perpetrator was not justified in law in his conduct.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, §§ 10, 48, 51.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Martin F. Massett against Frederick Keff. Judgment for defendant, and plaintiff appeals. Affirmed.

St. Clair Adams and John Joseph Reilley, for appellant. Clegg & Quintero, for appellee.

Statement.

MONROE, J. Plaintiff alleges that defendant, by whom he was employed (in the business of making cisterns), reproved him for wasting time; that he and a companion told defendant that, if he was not satisfied, they would quit, and, after some further conversation, demanded the wages due them; that defendant tendered petitioner \$6.80, docking him 20 cents, "without any cause"; that petitioner said to him, "If you don't pay me \$7, I'll think you rob me"; and that defendant thereupon struck him with a jack plane and knocked him senseless, in which condition he was taken to his house, covered with blood, so frightening his wife that, some nine days later, she suffered a miscarriage. He further alleges that the blow inflicted a painful wound, that he was under treatment for 10 days, or more, and that his eye was still red, and would be so for some weeks; that he charged defendant with assault and battery and that defendant was convicted and sentenced; and that, as a result of said blow, and by reason of the effect on his wife, he has suffered great bodily and mental pain and agony, which entitle him to actual damages in the sum of \$4,000; and that defendant should be further condemned to pay exemplary damages in the sum of \$3,000.

Defendant answers that plaintiff and others had been sent to do certain work, and, having idled and wasted their time, were reprovved on their return; that plaintiff retorted by the use of vile and abusive epithets, and that he and others, having conspired to injure defendant by causing a strike in his shop, as-

sumed a menacing attitude; that, being unable to provoke a difficulty, they quit work and demanded their pay; and that, after they had been paid, plaintiff again sought to bring on a quarrel and called respondent a robber, and assumed "a menacing and threatening attitude," and in the belief of respondent was about to assault, and was in the act of assaulting him, when respondent, in self-defense, struck him a blow. The case was tried by a jury, who found for the defendant, and plaintiff has appealed.

The facts, as established by the evidence, are that on Thursday, June 1, 1905, defendant sent three of his workmen, Massett, Russell, and Keller (with Massett as foreman) to put up a cistern, a job which they finished about, or a little after, 11 o'clock. Instead of then returning to the shop, where there was work waiting for them, they went to Massett's residence, some six or eight squares out of the way, the reason given being that Massett wished to change his shoes (a function which might well have been postponed to the dinner hour), and they there sent for and drank some beer, after which, at about 20 minutes to 12, they reported at the shop. The defendant, in the meanwhile, had been to the place where they had been at work and had found that, having finished the job, they had left there, and he expected to find them at the shop on his return, and, not so finding them, naturally and correctly concluded that they were "loafing." When, therefore, some time later, they came in, he inquired where they had been, to which one of them replied that they had been "putting up that cistern." Defendant remarked that he had been at the place about 11 o'clock and had not found them, and to this plaintiff said (in substance, and using some profane language) either that defendant was a liar, and that the person who told him that they had left there at 11 o'clock was a liar, or that the person who had told him that they had left there at 11 o'clock was a liar, there being some difference between them as to exactly what was said; but it is sufficiently apparent that both the language and the manner of the plaintiff were insulting.

The parties then went to dinner, and, shortly after the dinner hour, when work had been resumed in the shop, plaintiff and his two companions again put in an appearance, and plaintiff (by prearrangement, speaking for the others, who had agreed to stand by him) asked defendant whether he should go to work, to which defendant replied, "Certainly; go to work." Plaintiff, instead of going to work, said it looked as if the work did not suit the defendant, to which the latter replied that the work was all right, but that they stayed out too long. Plaintiff then said that he and his companions would quit, and that they wanted their money, to which defendant replied that they could quit, but that they could not get their money until pay day, which was Sat-

urday. Plaintiff, however, insisted, and defendant testifies that he said:

"I want my money, right now, or there will be hell right now."

Defendant went out and obtained the money, and, returning, placed it before the three men, less 20 cents which he retained from, or "docked," each of them for lost time. The other two men accepted the amounts thus tendered them, but the plaintiff said it was not his money, and that defendant, in deducting the 20 cents, was a robber, or words to that effect. Defendant says that he told plaintiff not to repeat that remark, but that plaintiff reiterated:

"You are nothing but a highway robber."

And he further says:

"From his position, the way he stood there, when he called me a highway robber, the second time, and he shut his fist, I thought he would strike me, and I couldn't see any other of the men around me. They seemed all to desert the shop. These three stood there to make trouble with me, and, of course, I had to do something to defend myself."

The defendant, accordingly, struck the plaintiff and knocked him down. He says he struck with his fist, plaintiff and his witnesses say with a jack plane which was lying near, and there is some doubt about that, as the evidence is conclusive to the effect that, though plaintiff was struck over the eye, the skin was not broken, and it seems improbable that a blow with a jack plane should not have broken the skin. However that may be, plaintiff was assisted to his feet and walked out of the shop; he and his companions going to a barroom, where they drank more beer, and, after stopping once or twice en route, to defendant's residence, where he laid himself down on the floor and was there found by his wife when she returned later in the afternoon. His eye, by that time, was swollen, but the evidence does not justify the belief that there was any blood on his person. He was up as usual the next morning, and, within a few days, went to defendant's shop and bought a piece of board, which, with defendant's permission, he dressed with a plane. Plaintiff's wife sustained a miscarriage some days after the affair thus narrated; but it is by no means proved that the shock resulting from her finding him as stated was the cause of it, and, if that was the cause, the plaintiff was at fault, as we can discover no reason why he should have been found lying on the floor, or why he should not have had his eye attended to at once, instead of waiting, as he did, until 7 or 8 o'clock in the evening to call on a physician.

Opinion.

It is evident from the foregoing statement, that the plaintiff began by wasting not only the time for which he was paid, but the time for which the two men who were placed under him were paid, and that, when he was

called to account for it, in a manner to which there was no reasonable ground for objection, he answered by insulting his employer, in the presence of his workmen, and that thereafter, when, in reply to his inquiry as to whether he should go to work, he was told, without further comment, to do so, he persisted in his attitude of unreason, and (having prearranged with the other men that they should follow his lead) announced that they would quit, and demanded that the wages, to which he was not then entitled should be paid, at once; and, finally, that point being conceded, that he charged his employer, in the presence of the other workmen, with being a robber because, forsooth, he (the employer) declined to pay him for time that had been consumed by him in drinking beer at his own house. He was therefore the offender and aggressor, from beginning to end, and his case falls within the doctrine that he who is in fault, and sues for damages resulting therefrom, cannot recover for the injuries inflicted on him, although the perpetrator was not justified in law in his conduct *Bankston et al. v. Folks*, 38 La. Ann. 267; *Vernon v. Bankston*, 28 La. Ann. 710; *Miller v. Meche*, 111 La. 143, 35 South. 491; *Johns v. Brinker*, 30 La. Ann. 241.

Judgment affirmed.

(117 La.)

No. 15,385.

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**DES ALLEMANDS LUMBER CO., Limited,
v. MORGAN CITY TIMBER CO.,
Limited.**

(Supreme Court of Louisiana. June 30, 1905.
On Rehearing, May 7, 1906.)

1. APPEAL AND ERROR — REASSIGNMENT OF CAUSE—EFFECT.

An agreement of counsel, afterwards sanctioned by the court, for the reassignment of a case, has the effect of setting aside the assignment and placing matters in the situation in which they would have been if no assignment had been made, with the consequence that the timeliness of the filing of an answer to the appeal has to be determined with reference to the assignment thereafter made, and not with reference to the assignment that has been set aside.

2. CONTRACTS — REMEDY FOR BREACH — ELECTION.

When one of the parties breaks the contract, the other party must elect between demanding a dissolution of the contract and exacting a continued performance of it. He cannot have both, and the choice is made once for all.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1174; vol. 44, Cent. Dig. Specific Performance, § 4.]

3. EVIDENCE — VERBAL ADMISSIONS — WEIGHT AND EFFECT.

Verbal admissions are the weakest kind of evidence, especially when the exact language cannot be given, and when the purpose is to eke out a written contract or to put a particular interpretation upon such contract.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1029, 1050.]

4. CONTRACTS—FORM.

To confirm a conversation by letter is a good business precaution. The letter should be written as soon as possible after the close of the conversation, and surely not later than the night of the same day if circumstances permit.

5. ESTOPPEL—REQUISITES.

Estoppel en pais arises only where the other party has been led to change his position. The mere bringing of the suit in support of which the estoppel is invoked cannot be said to constitute a change of position within the meaning of the law of estoppel.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 142.]

6. DAMAGES — CONTRACTS — BREACH — PROSPECTIVE PROFITS.

The very profits the making of which constituted the sole inducement for entering into the contract cannot be said to be too speculative or remote to be claimed as damages on a breach of the contract. Hence a contractor for getting out timber may recover as damages on a breach of the contract the margin between the contract price and the cost of getting out the timber.

7. SAME.

But he can recover nothing more. He cannot recover also and in addition any part of the expenses incurred by him in making preparations or providing a working plant for executing the contract.

8. SAME—CALCULATION OF FUTURE PROFITS.

Where large expenses have had to be incurred in preparations for the executing of a contract having five years to run, and after the contract has run two years its further execution is wrongfully stopped, and a suit in damages is instituted for the recovery of the profits that would have been realized if it had been permitted to go on to the end of the five years, the net profits of the first two years cannot serve as a criterion for determining what the ultimate profits would probably have been if the five years had been accomplished.

9. SAME—EXPENSES OF EXECUTION.

The salaries of officers and the interest on money invested in the operating plant constitute part of the cost of executing the contract, and must be deducted for arriving at the net profits.

On Rehearing.

10. SAME—BURDEN OF PROOF.

Where a logging contract having five years to run is wrongfully terminated by the contractee at the end of two years, the contractor, who has made no money during the time that the contract was in force, in order to recover prospective profits for the unexpired term of the contract, ought to make it clear that by reason of some change in the conditions he would be able in the future to do that which by actual experience he had been unable to do in the past.

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Action by the Des Allemands Lumber Company, Limited, against the Morgan City Timber Company, Limited. From a judgment for defendant, plaintiff appeals. Amended and affirmed.

Howell & Martin, D. Caffrey & Son, and Robert James Perkins, for appellant. Foster, Milling, Godchaux & Sanders and Philip H. Mentz, for appellee.

PROVOSTY, J. Plaintiff is a limited corporation, owner of a sawmill and of swamp lands for supplying its mill with timber. Its officers are R. H. Downman, president, and W. G. Westmoreland, vice president and manager. Defendant also is a limited corporation, and, we may add, was organized for the purpose of entering into the contract out of the alleged violation of which this suit has grown. Its officers are Manuel Coguenhem, president, and G. W. Walker, vice president and swamp manager. Plaintiff, when it entered into this contract was, like defendant, a new concern that had not theretofore operated.

If this opinion is not to rival the proportions of the record of 11 large volumes, containing 4,620 pages, plus one large volume of maps and photographs, and two minor supplemental transcripts, one of them of no mean proportions of itself, nonessentials will have to be passed over in silence. The contract, however, must be given in full, as the case largely turns on its interpretation. It is as follows:

"Witnesseth, that for and in consideration of the covenants and agreements hereinafter made and expressed, to be kept and performed by the party of the second part, the Morgan City Timber Company, Limited, party of the first part, have agreed and covenanted, and by these presents do hereby covenant and agree and contract, to deaden, cut, pull or float, boom, and tow the cypress timber, located and situated in the swamp lands owned, leased, or otherwise held by the party of the second part, located and situated on Bayou Des Allemands, and Grand Lake Des Allemands, in the parishes of St. Charles, St. James, St. John the Baptist, and Lafourche, as shown by the maps of the said lands in possession of the party of the second part, and to which reference is here made, and upon the following terms and conditions: The said party of the first part hereby covenant and agree to pull or float all cypress timber accessible from Bayou Des Allemands and Grand Lake Des Allemands, situated upon said lands, within reach of their pull boat or boats.

"The party of the first part further covenants and agrees to keep one pull boat at work continuously, pulling timber on the said lands hereinbefore described, under the terms and provisions of this contract, except for any and all such unavoidable delays caused by accidents, breakdowns, or other unforeseen causes; and in the event that one pull boat shall not be sufficient to supply the mill of the Des Allemands Lumber Company, Limited, situated on Bayou Des Allemands, in the parish of Lafourche, this state, owned by the party of the second part, with sufficient logs, then and in that event the party of the first part hereby covenants and agrees to increase the number of pull boats to such an extent as may be required to supply said mill with sufficient logs, such additional pull boat or boats to be furnished by said party of the first part upon due notice in writing being given them to that effect by the party of the second part not less than ninety (90) days prior to the time set when such additional boat or boats shall be supplied.

"The Des Allemands Lumber Company, Limited, party of the second part, for and in consideration of the agreements and covenants to be kept and performed by the party of the first part, hereby covenants and agrees to pay unto the party of the first part, or its duly accredited representative or agent, the price

and sum of five dollars and fifty cents (\$5.50) per thousand feet for all cypress logs measuring eight inches in diameter to fifteen inches in diameter, both measurements inclusive, and the price and sum of five dollars (\$5.00) per thousand feet for all cypress logs measuring sixteen inches and above in diameter, delivered at the mill of said Des Allemands Lumber Company, situated on Bayou Des Allemands, in Lafourche parish. All measurements of said cypress logs to be made according to what is known as 'Scribner's Log Rule,' and shall be made at the mill aforesaid upon the delivery of each tow by the party of the first part. Payments to be made for said cypress logs, upon the delivery and measurement of each tow, in cash.

"The party of the second part further covenants and agrees to dredge and construct sufficient canals and pockets for the purpose of pulling said timber, said canals to be constructed in accordance with instructions which shall be furnished by the party of the first part. All such dredging and the construction of such canals and packets shall be done by the party of the second part at its own exclusive cost and charges. Said party of the second part further covenants and agrees to do all such dredging and make such canals and pockets sufficiently in advance of the time that they are needed by the party of the first part for the use of its pull boat or boats, so as not to delay the continuous working of said pull boat or boats.

"The party of the second part further covenants and agrees to furnish the party of the first part with the use of such chain dogs as may be necessary to deliver said cypress logs, and to permit and allow the party of the first part to take and use such firewood from the lands of the party of the second part, hereinbefore described, as may be necessary for them to run said pull boat or boats free of cost.

"The party of the second part further covenants and agrees to take all the cypress timber that the pull boat or pull boats of the party of the first part can pull, or that shall be floated, for a period of five years or more.

"The party of the second part further covenants and agrees to put the party of the first part on the lands hereinbefore described and to designate to it or its representatives the boundaries thereof, and should any surveying be necessary to be done, or lines run or established, all such work is to be done by the party of the second part at its own expenses.

"It is mutually covenanted and agreed by and between the parties hereto that this contract shall become effective in ten days from the date of the signing hereof.

"In witness whereof," etc.

The foregoing contract was drafted in the absence of Mr. Downman. It was left open for suggestions from him. He requested that some changes should be made, and accordingly eight days thereafter, on June 14th, the parties met at Bowle, and, after conference executed the following instrument:

"That for and in consideration of the covenants and agreements contained in the contract hereinbefore entered into between the parties hereto on the sixth day of June, 1901, the party of the first part hereby covenant and contract to deaden, cut, pull or float, boom, and tow all the cypress timber located and situated on the swamp lands owned, leased, or otherwise held, or which may be hereafter acquired, by the party of the second part, located and situated on Lake Des Allemands, Bayou Des Allemands, and Lake Salvador, and such bayou or bayous tributary thereto as may be designated by the party of the second part.

"The parties hereto further mutually covenant and agree that all canals to be dug and

constructed under the contract heretofore referred to shall be dug and constructed according to the plans as suggested by the party of the second part, provided that such canals and pockets shall be dug and constructed so as to assist and aid the party of the first part to carry out the provisions of the contract referred to herein.

"It is further mutually covenanted and agreed that the measurements of timber are to be made on the full length of the log, and that the diameter is to be taken at the small end.

"The parties hereto further mutually agree that the covenants and agreements herein contained shall be made and constitute a part of the contract heretofore entered into by them on the 6th of June, 1901, and to which this agreement is attached; it being the mutual intent of the parties hereto that, so far as said contract may be amended and changed by the stipulations and covenants herein, this agreement shall govern, but that otherwise the said contract shall remain in full force and effect.

"And R. H. Downman, president and representative herein, of the party of the second part, herein joins and makes himself a party hereto, in person, for the purpose of affirming and ratifying the said contract as the president of the Des Allemands Lumber Company, Limited, and for himself in person.

"In witness whereof," etc.

It may be well to explain the meaning of the terms to "deadend" and to "pull." To "deadend" timber means to circle the tree with a cut deep enough to interrupt the flow of the sap and thereby kill the tree. To "pull" timber means to drag it from where it has been felled to the water on which it is to be floated to the sawmill. This is done by means of a wire rope capable of reaching out as far as 5,000 feet, operated from a boat called a "pull boat." For the floating of this boat and of the timber it "pulls" a canal is dug, with an enlargement at every 120 feet, called a "pocket," for the accommodation of the boat.

The defendant company proceeded at once to provide itself with an outfit and to organize labor for carrying out the contract. This outfit consisted at the time of the institution of this suit, of the following:

Pull boat No. 1 cost, including machinery and wire.....	\$7,625 51
Pull boat No. 2 cost, including machinery and wire.....	4,026 85
Pull boat No. 3 cost, including machinery and wire.....	3,785 92
	<hr/>
	\$15,438 28
The two-story camp boat cost.....	\$1,661 71
A barge cost.....	400 00
Another barge cost.....	303 00
A pile driver cost.....	250 00
	<hr/>
	\$2,614 71
Three camps on land cost.....	\$ 400 00
Two small wooden barges cost.....	150 00
Large camp boat on land.....	200 00
Camp boat on barge.....	160 00
Steamer Richmond cost.....	1,450 00
Dugouts, tools, etc.....	500 00
	<hr/>
	\$2,860 00
Total foregoing.....	\$20,912 99
Add 110 cords wood on hand April 25th at \$2.50.....	275 00
	<hr/>
	\$21,187 99

Also one pile boom, cost not stated. The above estimates of cost are by defendant's witnesses.

The first tract of land designated to defendant for it to operate upon was Pointe Cypre, alias Island No. 1; the next was Pointe Foise, alias Island No. 2, lying just back of Pointe Cypre, or Island No. 1; and the next was a small island known as "Island No. 3." Next was a swamp known as "Paradis Swamp," lying on the other side of Lake Des Allemands.

Whether for "pulling" or for "floating" the timber has to be deadened a few months beforehand. This part of the work occupied defendant until August, so that defendant began pulling only in the latter part of August, and the first tow or raft was not delivered until September. It and the succeeding deliveries were duly measured. They were not, however, settled for; the parties not agreeing as to the mode of settlement. Walker, vice president and swamp manager of defendant, testifies that plaintiff wanted the contents of the logs computed by the Doyle rule, whereas he insisted upon Scribner's rule as being the rule stipulated in the contract; that under the one rule a log 24 feet long and 8 inches in diameter would give 24 feet of timber, whereas under the other rule it would give 37 feet.

On January 8, 1902, for the settlement of this dispute, an addendum was made to the contract. The price was increased and the Doyle rule of measurement adopted. Difficulty next arose over the manner of the measurement. Westmoreland, for plaintiff, sought to make the computation by establishing certain averages. But in this its own attorney ruled against it, and it yielded.

Thereafter the contract continued to be executed, but with more or less friction and mutual complaints.

Plaintiff's main heads of complaint were that defendant would not bring out the trees their full length, but would cut them up into several pieces, thereby largely increasing the measurements; that the mill was not supplied regularly, but had to shut down occasionally for want of logs; finally, that defendant did not take good care of the rafting materials, which under the contract plaintiff was bound to furnish. Defendant's main heads of complaint were that plaintiff did not furnish a sufficiency of rafting materials; that the first canal was not deep enough, and had a sharp bend, so that the pull boats could not be operated advantageously, and the trees had to be brought out one at a time, instead of by rafts; that the second canal, the one in the Paradis swamp, was not ready in time, and was not deep enough, so that the pull boats were idle for a considerable time, and could not operate advantageously when they did operate.

In the latter part of 1902 plaintiff sought to control defendant in the matter of the location of the pull boats, and sought to require

defendant to operate by the so-called "fan-tail" method; and all this gave rise to further friction.

The situation becoming somewhat strained, a conference was called for by plaintiff. It was held in the office of Mr. Downman, president of plaintiff company, in New Orleans. What took place at this conference will be referred to later. It resulted in nothing, and the parties continued under the existing contract.

This was the situation when in April, 1903, a break occurring in the levee along the Mississippi river, at Hymelia in the parish of St. Charles, the swamp was flooded, and it became possible for defendant to execute the contract by "floating," instead of by "pulling"; that is to say, to float the timber from the stump to the mill, instead of having to first "pull" it to water, as had been done theretofore.

At the time of entering into the contract the extreme probability had been that all the timber would have to be brought out by the pulling process. Still the contingency of a break in the public levees, and of a consequent high stage of water in the swamp, such as would make it possible to float the timber from the stump to the mill, dispensing with pulling, had been contemplated by the parties, and the alternative "or float" had been inserted in the contract in view of that contingency. All the same, the "float" came somewhat as a surprise, and plaintiff thought a conference should be had for considering how defendant should operate under the new conditions. Accordingly, on March 31, 1903, the parties met in the office of the plaintiff company at Des Allemands. There were present Westmoreland, vice president and business manager of plaintiff; Dallas, vice president and manager of Iberia Lumber Company, of which Downman, president of plaintiff company, is president; Elfer, swamp agent of plaintiff; Leonard, another swamp agent of plaintiff; Coguenhem, president of defendant; and Mayer, defendant's agent at plaintiff's mill. Hubert, book keeper of plaintiff, heard a part of the conversation. As to what was the exact understanding arrived at, the parties differ widely. Plaintiff contends that it was that during the float defendant should cut the trees at the deadening circle and should take the timber on the back part of the Paradis swamp and abstain from taking that on the front part, the part rendered accessible to the pull boats by the canal, and called in this case the "pull-boat territory." Defendant contends that the understanding went no further than that defendant engaged that it would proceed in the usual and customary manner. Whatever was the understanding at this conference, defendant went on with the execution of the contract, and plaintiff continued to send its agent in the swamp and keep a sharp eye on defendant's operations. On the 9th of April the water had reached a stage for floating.

On the 15th, the first floated timber was delivered. It gave occasion to a telegram and a letter from plaintiff to defendant.

"We have just wired you the following: 'Will not accept any more timber from small islands floated by Como. Trees cut in direct violation of contract. Work must stop immediately there. We will not have our timber butchered'—which we now beg to confirm. We have just finished measuring a lot of trees, 295, which have just been brought from the small islands and have been floated by Como; and we find that they have been butchered and cut up, and in hardly one case has the tree been delivered in accordance with the contract; and we will not receive any more timber as per our telegram; and we must request that you instantly instruct your foreman, Mr. Mayer, at this point, to issue instructions to have work cease there immediately; otherwise, we will hold you for all damages occasioned by same. As it is, any loss that we have incurred, after examination, we will expect you to stand. We remain," etc.

On the same day, the 15th of April, plaintiff wrote to defendant, complaining of the scarcity of logs at the mill and demanding a more active delivery.

Three days thereafter, on the 18th, plaintiff again wrote defendant. The letter is long and deals with details. In it any further grounds of complaint plaintiff might have had on the score of the cutting up of the timber would presumably have found place, but no complaint is made. However, defendant had not, it seems, as yet answered satisfactorily the complaint theretofore made in connection with the delivery of the 15th, and its attention was called to the matter in the following words:

"We must request you to send us an immediate answer to our letter of the 15th inst. While we received one saying that you would investigate the complaint, we consider you have had ample time to do so. We do not propose to let this matter run for any length of time, and therefore must insist upon an immediate answer before we take any action in the matter."

During this time the execution of the contract went on. Deliveries of timber were received and measured by plaintiff, without complaint, on the 17th, 20th, 22d, 24th, and 25th of April; that is to say, down to the day itself of the filing of the suit, which was on April 25th. It is furthermore noteworthy that the delivery of the 24th came from the same part of the swamp, Islands Nos. 2 and 3, from which had come the delivery of the 15th that had occasioned the letter of complaint of that date; and all the while the swamp agents of the plaintiff, Elfer and Leonard, had kept watch over the work of defendant in the swamp, and presumably had kept plaintiff fully advised of what was going on.

On the 19th of April, which was a Sunday, the same two swamp agents spent the day in the Paradis swamp, where defendant was operating. The next day, Monday, they made their report to the plaintiff in New Orleans. On their report this suit was decided on. It was filed on the 25th of April, without any

putting in default or other warning to defendant.

The petition, after reciting the contract, proceeds as follows:

"Now your petitioner avers that the object and purpose of entering into the contract was to furnish a continuous and unfailing supply of sawlogs for its mill and to insure for the use of the mill all logs of a size profitable to saw into lumber, the purpose and intent being to clear the land of all such timber; it being agreed and stipulated that all trees which would furnish a log eight inches in diameter at the small end—such diameter being by subsequent oral agreement reduced to six inches at small end of log—were to be removed from the land controlled by your petitioner and delivered to its sawmill, as the whole will more fully appear by the triplicate original copy of the said contract and amendments hereto annexed and made part hereof.

"Petitioner avers that the price covenanted to be paid by your petitioner to the said Morgan City Timber Company, Limited, is under the circumstances a high price; but your petitioner was induced to pay the same because he believed, and was induced by the Morgan City Timber Company, Limited, to believe, that it was contracting with a thoroughly responsible party, and would be insured a strict and faithful compliance with the terms of the contract, and guaranteed a full and constant supply of sawlogs for its mill and a perfect clearing of its lands of all timber.

"Petitioner avers that, in spite of the fact that it faithfully and honestly complied with all of its obligations and undertakings as stipulated in the said contract, the said Morgan City Timber Company, Limited, has almost from the very beginning of the contract flagrantly and actively violated the said contract both in letter and spirit, and has caused and is still causing serious loss and damage to your petitioner.

"That within the past three weeks, in spite of the positive instructions of your petitioner given in accord with the terms of the said contract, and in spite of the positive promise of the said Morgan City Timber Company, Limited, to carry out the instructions of your petitioner, and over and contrary to the earnest protest of your petitioners, the said Morgan City Timber Company, Limited, has cut and floated timber from places on petitioner's lands not designated by it, and refused to cut and float from places designated by it in accordance with the terms of the said contract, and as agreed and promised by the Morgan City Timber Company, Limited.

"That it has cut down, and is continuing to do so, trees about the circle of dead line mark in spite of its positive promise not to do so, and in direct violation of that contract, thereby causing a very large loss of timber to your petitioner.

"That it has cut, and is continuing to cut, the timber so low down from the top of the tree as to cause a very large loss of timber to your petitioner, and in direct, positive, and active violation of the said contract, construed both according to its letter and spirit, and according to the customs of cutting timber in the swamps and as heretofore done by defendant anterior to the high water. That it has delivered, and is continuing to do so, pieces of logs, instead of the whole logs, according to contract, and is blocking with branches and debris the canal and pockets cut by your petitioner to pull, raft, and tow in accord with said contract during the time when the swamps are not overflowed by high water from crevasses on the Mississippi river as now, thus choking up and rendering such canals and pockets practically useless for the purpose for which they were intended, and

inflicting serious loss and damage upon your petitioner.

"That by the methods of cutting, trailing, and floating timber from the lands of your petitioner now being pursued by the said Morgan City Timber Company, Limited, and in direct violation of its obligations under the contract, and of its repeated promises, your petitioner's swamps and timber lands are being ruined, as they are being merely culled of best and most available timber by the Morgan City Timber Company, Limited, and not cleared of all marketable logs of dimensions stipulated and as intended by the terms of the contract; and in addition thereto the canals and pockets cut by your petitioner as aforesaid for the purpose of pulling, rafting, and floating timber when the swamps are free from high water are being choked up and practically ruined, and will be rendered perfectly useless, unless the said Morgan City Timber Company, Limited, is prevented from continuing its illegal and wasteful acts, and your petitioner will be forced, when the high water leaves the swamps, to dig new canals and pockets to pull, raft, and float its timber, at a very heavy expense.

"Petitioner avers that the said Morgan City Timber Company, Limited, has already inflicted damages upon your petitioner to an amount exceeding five thousand dollars (\$5,000.00), and, if permitted to continue its present illegal, wanton, and wasteful methods, will in a very short time ruin the swamps of your petitioner and render them utterly useless for the purpose intended.

"That the amount of timber as left on the lands now being cut and floated by the Morgan City Timber Company, Limited, will be very large and of such lengths and sizes as to render it perfectly useless for the purpose for which it was intended, and if said company is permitted to continue will utterly ruin petitioner's swamps and inflict irreparable injury upon your petitioner.

"That by the aforesaid wanton and illegal acts the defendant has lost all rights under the contract and becomes a mere spoliator of petitioner's property.

"Petitioner avers that by the continued and persistent violation of the Morgan City Timber Company, Limited, of the said contract it has forfeited all its rights thereunder, and your petitioner is entitled to have the same canceled, annulled, and set aside."

The prayer is for the annulment of the contract, and for an injunction against further operations under same, and for \$5,000 damages.

The answer, after a general denial and an admission of the contract, proceeds in substance as follows:

"That defendant made preparations to carry out the contract, investing large sums in the said preparations; that from about January 1, 1902, plaintiff put obstacles in the way of the performance of the contract, and acted in such a manner as to try to force defendant to violate said contract, or to default thereon.

"That in order to settle these differences, and prevent the plaintiff from harassing defendant further with reference to said contract, defendant entered into the supplementary contract of January 8th, 1902.

"That plaintiff was still dissatisfied, and continued to worry the defendant by seeking further changes in the contract.

"That failing to secure further alterations of the contract, and failing to make defendant default thereon, and failing to force defendant into a lawsuit to protect its rights, plaintiff resorted to the injunction herein; that it did so, not for the purpose of protecting a right or preventing an injury, but for the purpose of preventing defendant from making and of

itself making the profits that were to be made on the float that was then on.

"That immediately upon the issuance of the injunction plaintiff took charge of the swamps, and even of the camps of the defendant, demoralized its entire force of labor, hired them for its own account, and put the defendant in a position where the further carrying out of the contract became absolutely impossible. * * *

"That therefore said injunction was wanton and malicious; finally that it had damaged defendant in the sum of \$193,826.68."

The answer further alleged that R. H. Downman was responsible personally on the contract, and should be cited on the reconventional demand. The items going to make up the \$193,826.68 are given in detail.

The prayer was for the annulment of the contract, in so far as it bound defendant, and for the dissolution of the injunction, and for judgment against the plaintiff company and R. H. Downman, in solido, for \$193,826.68, with interest, and with recognition of privilege upon certain timber, and for judgment against the sureties on the injunction bond to the extent of their liability.

Over the objection of plaintiff, an amended answer was filed.

Plaintiff urges that the amendment changes the issues, and should not have been allowed. We do not find that it changes the issues. The only issues between the parties are as to whether the contract as written, or as amended by the verbal agreement alleged by plaintiff, has, or not, been violated; whether plaintiff, in bringing this suit, has, or not, acted in bad faith; lastly, whether either party owes the damages mutually claimed. The supplemental answer adds nothing to these issues. It only makes more specific the allegations of wrongful conduct on the part of plaintiff; hence it does not change the issues, and was properly allowed. Bad faith, it is true, is not alleged in the original answer in express terms, but it is alleged by necessary implication, which amounts to the same thing.

The case was tried by a jury. It resulted in a verdict annulling the contract, dissolving the injunction, and condemning plaintiff to pay \$45,000 damages. Plaintiff has appealed, and defendant has answered the appeal, asking that the damages be increased to the full amount claimed in the answer.

Plaintiff has moved to strike out this answer, on the ground that it was filed too late. The Code requires the answer to be filed at least three days before the day fixed for argument. The case was fixed for the 17th, and the answer was filed on the 14th; hence, under the rule, too late. But on the 10th the parties had agreed that the case should be reassigned for the following month. This, as between the parties, had the effect of setting at naught the assignment for the 17th. What would have been the situation, had the court refused to sanction this agreement and to reassign the case in pursuance thereof, is a question unnecessary to be considered, since, as a matter of fact, the agreement

was sanctioned by the court and had full effect. We conclude that the answer was filed in time.

The trial below was conducted sharply, and, we may add, in a masterly manner; and no enlargement of pleadings has been permitted to be brought about by the admission of irrelevant evidence without objection.

The allegation in the petition that the defendant violated the contract "almost from the very beginning" is too vague and general to be considered as adding anything to the petition; and we do not understand it to be relied on as an additional ground of action. Therefore the sole grounds having to be considered in this opinion are those that are specified, namely:

(1) That defendant cut and floated timber from places not designated, and refused to cut and float from places designated; or, more specifically, that during the float the defendant, contrary to plaintiff's instructions and contrary to its own agreement and promise, took the timber in that part of the Paradis swamp made accessible to the pull boats by the canal, the so-called pull-boat territory, instead of taking the timber from the back part of the area of deadened timber in said swamp.

(2) That defendant cut the trees above the deadening circle.

(3) That defendant cut the trees too low down from the top.

(4) That defendant delivered pieces of logs, instead of whole logs; that is to say, cut the tree into several pieces, instead of delivering it in one piece.

(5) That defendant was blocking with branches and debris the canals and pockets which had been dug for the purpose of pulling the timber.

(6) That defendant was merely culling the swamp, instead of removing all the marketable timber; that is to say, was not taking out the timber of less than eight inches diameter, and was not taking all timber of six inches diameter and up.

(7) That as the result of defendant's operations plaintiff's swamp was being ruined, and plaintiff's canals were being choked up; that is to say, that the timber below eight inches and the timber left in the stumps and in the tops would be lost to plaintiff, and the swamp was being so blocked up that it would be impossible to get out what timber would be left in it.

It will be observed that the acts complained of are alleged to have occurred "within the past three weeks"; that is to say, during the flood, or float—in other words, after defendant had ceased to operate by the pulling process and had begun to operate by the floating process. Plaintiff not only is not relying, as a ground of action, upon any breach of the contract that might have occurred previous to the float, but could not do so. Any right it might have had in that connection it had waived by going on with the contract and in-

sisting upon a performance of it by defendant.

Naturally one cannot claim the benefits of a contract, insisting upon its performance, and at the same time ask its dissolution. When a breach occurs, an election must be made then and there between asking for a dissolution and insisting upon further performance, and the choice is made once for all. *Upton v. Adeline Co.*, 109 La. 674, 33 South. 725; 29 A. & E. E. of L. pp. 1103, 1106; 24 A. & E. E. of L. p. 625; 20 A. & E. E. of L. p. 33.

Defendant admits that it went counter to plaintiff's wishes in the matter of cutting timber in the front part of the Paradis swamp, instead of in the back part; admits that it cut the timber above the deadening circle; admits that it did not bring the trees out all in one place. Its contention is that on all these points the contract is silent, leaving matters to be regulated by custom and usage; and that it conformed strictly to custom and usage; that, under the contract, the right of plaintiff to designate the place where defendant should operate went no further than to designate the tract of land to be cleared, and did not extend to controlling defendant in regard to where to begin and where to end, or in what order to proceed, upon the tract of land after the same should have been designated for clearing; that the contract contains no express provision regarding the cutting of the tree, or the form in which the timber should be brought out. On all the other points, defendant challenges the assertions of plaintiff in toto.

We now proceed to discuss, each by itself, the several grounds of the injunction.

Blocking Canals with Débris.

This ground is practically abandoned, and may be disposed of summarily. Plaintiff made no attempt to substantiate it. Indeed, the proof is all one way, and part of it consists of photographs of the canal. Elfer and Leonard, the two swamp agents on whose report plaintiff brought the suit, state that they gave no such information. Leonard says that it is not a fact; that so far as he knows "the canals were open and all right." The statement of plaintiff that the court ruled out evidence on this point is not supported by the record. The court did not rule out any evidence tending to show a violation of the contract. The ruling in question related to proof of damages, and was to the effect that the allegation of damages was too vague and general to authorize the introduction of evidence.

Culling the Swamp.

Plaintiff's contention under this head is that at the meeting at Bowie, when the contract was amended and finally adopted the diameter of the trees to be taken was reduced to six inches, and all timber below eight inches diameter was to be measured and paid for as of 8 inches. Defendant denies that

any such verbal agreement was entered into. Westmoreland and Downman testify that it was, and Coguenhem and Walker deny it. The fifth person at the meeting, Wise, the attorney and notary who drew up the writing evidencing the result of the meeting, a wholly disinterested witness, testifies that the writing embodied all that was agreed to. This is conclusive; especially that the writing contains a clause reaffirming the original draft of the contract, except in so far as expressly modified. Beyond this there is the testimony to Nuttall, a disinterested and highly competent witness, to the effect that not for \$8 a thousand would he handle six-inch timber, even if measured as eight-inch timber; that it costs more than that. If this be true, how improbable it is that two experienced timber men, like Coguenhem and Walker, who represented defendant at this conference, would have consented to handle this class of timber for the \$5.50 named in the contract.

As to whether, up to the coming of the flood, the six-inch timber had been taken out, the evidence is conflicting. On the one hand, there is the positive testimony of Westmoreland that it was, and there are his letters of September 23, 1902, and March 21, 1903, complaining of certain small timber not being taken, and also a letter of defendant of March 26, 1903, in reply, saying that the complaint of "some small trees being left behind" was noted and would have attention. On the other hand, there is the positive testimony of Walker that never at any time during the execution of the contract defendant made the slightest pretense at taking out the timber below eight inches. And there is also testimony of one of the subcontractors to the effect that defendant's positive instruction to him was to deaden nothing under eight inches, and that defendant refused to pay him for 165 trees which he had deadened below that diameter. Furthermore, there is evidence going to show that, at the time of the flood, trees of that size were still standing at a place which before the flood defendant had cleared to the satisfaction of plaintiff's agents. On the subject of this standing timber, however, plaintiff's evidence was ruled out, and hence on that point the condition of the record is unsatisfactory.

Whether the "small trees" referred to in the letters of plaintiff were six or eight inch timber cannot be known positively from the record. The inference would be that they were eight-inch timber, since that was the smallest called for by the contract.

It is noteworthy that at the conference of 28th of January, 1903, to which extensive reference shall be made hereafter, the minimum was sought to be reduced to six inches, and that defendant refused to consent to the change.

Trees Cut Too Low from Top.

Another point on which the decided preponderance of the testimony lies on the side

of defendant is that of the topping of the trees. The witnesses who testify for plaintiff touching the leaving of good timber in the tops of the trees were Westmoreland, vice president and manager of the plaintiff company (no practical knowledge of swamping); Downman, president of plaintiff company (no practical knowledge of swamping); Elfer, plaintiff's swamp agent, or inspector; Dallas (experienced in swamping business), vice president of the Iberia Cypress Company, whereof Downman, president of plaintiff company, is president; Leonard, plaintiff's swamp inspector; Thorgenson (experienced swamper), unfriendly to Coguenhem, president to defendant company; Kelso (swamper); and Gutekunst, surveyor and timber estimator (in the regular employ of plaintiff).

Forgay, Angelo, and Hanson, experienced swampers, examined the swamp together at the request of plaintiff and were piloted around by Elfer and Leonard, plaintiff's swamp agents. Forgay was called to the stand by plaintiff, but was not examined as to the condition of the swamp, or as to the topping of the trees. Angelo and Hanson made a report disappointing to plaintiff, and were not called by plaintiff, but were called by defendant. The other witnesses who testified for defendant were defendant's swamp manager, Walker, and the following persons who had been taken into the swamp by defendant as experts to examine it with a view to testifying: O'Brien (has engaged in various occupations, now a planter, not connected with parties to the suit, no practical knowledge of swamping); Vincent (owner of pull boats, experienced swamper, not connected with parties to suit); Constant (swamper, subcontractor of defendant); Cotten (swamper, not connected with parties to suit); Bateman (occupation not stated, but not qualified as expert, not connected with parties to suit); Drew (owner of sawmill and experienced swamper, also president of bank, not connected with parties to suit); Nuttall (engineer and timber estimator for F. B. Williams & Co.); Walker (swamper, father of defendant's swamp manager); Sanders (sheriff of St. Mary parish, experienced in swamping).

It may be said, in general terms, that plaintiff's witnesses found that a considerable percentage of good timber had been left in the treetops, and that those of defendant found that none had been left. The testimony of Angelo and Hanson, who went into the swamp at plaintiff's request and accompanied by plaintiff's swamp agents, and who are totally disinterested parties, is of itself decisive. That plaintiff did not question Forgay is also very significant, especially from the fact that Forgay is in the employ of Downman, president of the plaintiff company. Another very significant circumstance is that during the float plaintiff made no complaint to defendant touching the manner in which the trees were being topped. The testimony

of Nuttall, timber estimator for F. B. Williams & Co., is to the effect that, if he had had to report on the swamp, he would have reported "the swamp was perfectly cleaned of all valuable timber." This testimony, coming from a witness so highly competent and free from any disturbing influence, is considered to be particularly strong.

Full Length of the Tree.

The original contract contains the following clause:

"All measurements of said cypress logs to be made according to what is known as 'Scribner's Log Rule.'"

Scribner's Log Rule, here thus adopted by reference, requires that a diameter be taken at each end of the log and the sum of the two diameters be divided by two for finding the true diameter.

The amended contract contains the following clause:

"It is further mutually covenanted and agreed that the measurements of timber are to be made on the full length of the log, and that the diameter is to be taken at the small end."

Defendant contends that this is nothing more than an amendment of the above measurement clause of the original contract, and means nothing more than that only one diameter is to be taken and that at the small end.

Plaintiff contends that it means this, and that it in addition means that the tree is to be brought out of the swamp and delivered its full length; in other words, that only one log is to be made out of each tree. No one, argues plaintiff, would ever think of measuring the log at less than its full length; hence, if this clause is construed as referring to the full length of the log, and not of the tree, it is rendered meaningless, or absurd.

We adopt defendant's view. The original contract says absolutely nothing touching the form in which the timber should be brought out; that is to say, whether the tree should be brought out in one piece, or might be cut into two or more logs. The matter was left to be governed by custom and usage. It is an entirely different and separate matter from the mere measurement of the delivered timber or computation of the contents of the log. The clause quoted above from the original contract made provision for this measurement, and for that exclusively, and had absolutely nothing to do with the form in which the tree should be brought out, whether in one or in several logs. It is so improbable as to be almost incredible that if, instead of leaving to custom and usage this matter of the form in which the timber should be brought out, the parties had intended to amend the original contract so as to embody a special agreement on the subject, they would not have expressed themselves explicitly—would not have said, for example, that the tree should be brought

out its full length, or in one piece, or that only one log should be made out of each tree—but that they would have contented themselves with speaking of the manner of measuring the delivered timber, or log; in other words, would have contented themselves with prescribing the manner in which the delivered timber should be measured, instead of prescribing the manner or form in which the timber should be brought out.

It is also exceedingly improbable that Coguenhem and Walker, who represented defendant in the making of this contract, two experienced timber men, would have subscribed to an agreement to bring the tree out its full length without qualifying the agreement so as to provide for the cases where it would not be possible to bring the tree out its full length. The evidence shows that the tree sometimes gets caught, or wedged, or "jacked," as it is called, and cannot be gotten out without being cut into two or more pieces. Leonard, plaintiff's witness, says that no timber man of experience would subscribe to an unqualified agreement to bring the tree out its full length. And yet this clause is an agreement of that kind, if plaintiff's interpretation is correct. We cannot but think that, if the parties had intended this clause to be an agreement to bring the tree out its full length, they would have qualified it.

In order to make the clause have reference to the tree, plaintiff has to contend that "log" means "tree." But everybody knows differently. We find Westmoreland himself, in his letter of August 1, 1902, making a sharp distinction between the two words. He says:

"The practice you are adopting of cutting our timber into log lengths in the swamp must cease at once."

Plaintiff contends that from the very beginning of the execution of the contract, and all along, defendant admitted its obligation to bring the trees out their full length. There can be no doubt that plaintiff insisted upon its right to have the trees brought out their full length. Letters of January 10, May 20, and August 1, 1902; testimony of Westmoreland, Downman, and Elfer. Defendant's answers to the letters are not in the record, but the witnesses just named say that to any and all remonstrances made on the subject of the undue cutting up of the trees defendant's agents would invariably answer that they would see that the trees were not cut up more than was necessary. Walker, defendant's agent, testifies that the matter was frequently discussed; plaintiff contending that they had the right to have the logs delivered the full length of the tree, and he contending that it was not so—that they could not show any such clause in the contract. We do not think that defendant's tacit, or even express, admission of its obligation not to cut up the trees unnecessarily, would amount to an acknowl-

edgment that the contract contained an express clause on that subject. Non constat that custom and usage would not require that much. It would seem to go almost as a matter of course that a contractor for getting out timber could not be permitted, even in the absence of any special stipulation on the subject, to cut up the trees unnecessarily, and that any protest against the unnecessary cutting up of the trees would naturally be met by him with the answer that if anything of the kind was being done the matter would be seen to. Defendant may well have denied that the contract contained any cast-iron clause on the subject, and yet contended that even without such a clause the trees could not be cut up more than usual or customary, or, in other words, necessary. The custom in pulling timber is to bring out the tree in its full length whenever practicable. It is cheaper to do so, as a good deal of work must be bestowed upon each piece preparatory to pulling it. We do not remember than any witness says that any trunk was cut after it had been pulled or brought to water.

Plaintiff's learned counsel argue cogently that the difference between the average contents of the logs as brought out before the float and as brought out during the float—658 feet and 307 feet, respectively—shows that during the float the trees were being unnecessarily cut up. The difference between these averages is in part explained by the fact that the timber that was brought out, during the float from one of the swamps, the Paradis swamp, had been felled for pulling, and was so crossed and piled up one on another that defendant had to cut it a great deal in order to float it out. It is not denied that defendant had the right to float it out. Some allowance, also, has to be made for the fact that at the beginning of the float, and until the water got deep, the floating was confined to the smaller trees. It is, moreover, shown that timber is usually cut shorter for floating than for pulling; also the stumps had to be cut somewhat higher. Walker testifies that when plaintiff's letter of complaint was received he went to Islands 2 and 3 to investigate, and found that the brake was very thick and that the trees had had to be cut up a great deal in order to get them out.

Our conclusion is that, in the absence of any contract obligation to bring out the timber in any particular form, defendant was not bound to do more than was required by custom and usage, and that the evidence does not show that defendant did not conform to custom and usage. The average length of the timber was 32.04, and this is shown to be a fair average. In the tow No. 81, of the 15th of April, with reference to which plaintiff made complaint, the shortest log was 14 feet; and there were only three of that length out of a total of 675; the others being of 16 feet and up. A significant

circumstance is that the timber floated by defendant compares favorably in point of length with that floated by plaintiff itself after the injunction.

After the one complaint of April 15th, plaintiff received timber on the 17th, 20th, 22d, 24th, and 25th without complaint; and it is also noteworthy that the two swamp agents, Elfer and Leonard, cannot remember whether this question of the cutting up of the tree was mentioned at all in their report of the 20th of April, on the strength of which the suit was brought. They incline to think it was not mentioned. This is significant, in view of the fact that the report, and the conversation attending it, bore upon the supposed violation of the contract. The two inspectors remember to have referred only to the two points of the cutting above the deadening circle and the taking of timber on the pull-boat territory.

Cutting on Pull-Boat Territory, or Right to Designate—Amended Contract.

At the conference of March 31st, in the office of the plaintiff company at Des Allemands—the conference held for the purpose of considering how defendant should operate during the float—plaintiff requested or instructed defendant to abstain from floating the timber from the so-called pull-boat territory; that is to say, from that part of the Paradis swamp made accessible to the pull boats by the canal, but to float the timber from the back part of the deadened area of timber. Plaintiff claims that it had the right, under the terms of the contract, to give this instruction to defendant, and that defendant, at this conference, admitted it. Defendant joins issue on both assertions. With the conference we shall deal later on, under a separate head. We shall confine ourselves under this head to considering what, apart from the admissions which defendant might have made at the conference, would be the proper interpretation of the contract, with reference to the right claimed by plaintiff to direct or control the course of defendant upon the land, after the same had been designated to defendant for operations under the contract.

The clause of the contract relied upon by plaintiff for claiming this right is the following:

"The party of the first part hereby covenants and contracts to deaden, cut, pull or float, boom, and tow the cypress timber located and situated on the swamp lands owned, leased, or otherwise held, or which may be hereafter acquired, by the party of the second part, located and situated on Lake Des Allemands, Bayou Des Allemands, and Lake Salvator, and such bayou or bayous tributary thereto, as may be designated by the party of the second part."

Plaintiff contends that under this claim defendant was bound to pull or float the timber "as may be designated by the party of the second part"; in other words, was

bound to follow the "designations" or instructions of plaintiff, not only with reference to the tracts of land to take timber on, but likewise with reference to what part of the land to operate on first.

Defendant's contention is that this clause relates exclusively to the identification of the tracts of land which were to be considered as embraced in the contract; that such a provision for the identification of the several tracts of land embraced in the contract was necessary, because these lands were not identified by the contract, but were merely vaguely referred to as being situated on the lakes and bayous named; that plaintiff was to identify them by designating them, and was even to have their lines surveyed, if necessary; that this clause, as found in the amended contract, was designed to subserve the same purpose, and have precisely the same scope, as the following clauses of the original contract, to wit:

"The Morgan City Timber Company, Limited, party of the first part, have agreed and covenanted, and by these presents do hereby covenant and agree and contract, to deaden, cut, pull or float, boom, and tow all the cypress timber located and situated in the swamp lands owned, leased, or otherwise held by the party of the second part, located and situated on Bayou Des Allemands and Grand Lake Des Allemands, in the parishes of St. Charles, St. James, St. John the Baptist, and Lafourche, as shown by the maps of said lands in possession of the party of the second part and to which reference is here made."

"The party of the second part further covenants and agrees to put the party of the first part on the lands hereinbefore described and to designate to it or its representatives the boundaries thereof, and, should any surveying be necessary to be done, or lines run or established, all such work to be done by the party of the second part at its own expense."

Under the contract, continues defendant, after a tract of land had been designated for the timber on it to be taken, defendant was left free to begin upon what part of the land it deemed best, without being hampered or interfered with by any instructions or control from plaintiff.

The first time plaintiff sought to exercise the right to control the movements or operations of defendant—that is to say, to go beyond merely designating or identifying the tract of land for defendant to take the timber from—was in January, 1903, a few months before the coming on of the float, which was in April. The circumstances were these: Plaintiff was not ready with the canal in the Paradis swamp, and, in order not to be placed in default in its obligation to furnish canals for defendant to operate in, sought to require defendant to locate its pull boats elsewhere. Plaintiff first "advised" and "suggested" that defendant do so; then it changed its tone to "wishes" and "instructions." Defendant paying no attention to the instructions, plaintiff spoke of "violation of contract." (Letter of January 20, 1903.)

Defendant at once demurred, saying:

"We did not then recognize your right to interfere with our work, and do not now." (Letter of January 22d, 1903.)

At this time, also, plaintiff sought to require defendant to operate the pull boats by the process known as "fantall," which differs from the ordinary process in that, instead of pulling at right angles with the canal, by means of numerous small pockets at short intervals along the canal, in such way that the territory covered from each pocket has the shape of a parallelogram, the pull boat operates at varying angles from one large pocket, and the territory covered has the shape of an open fan. This mode of operation seems to be unusual, and not practical in a swamp like the Paradis swamp in which plaintiff wanted to have the defendant adopt it. Defendant again objected, claiming that it was not bound under the contract to use this process, and that plaintiff had to furnish the usual and ordinary canals and pockets.

All this led to the holding of another conference. It took place on January 28, 1903, in the office of Mr. Downman, in New Orleans. At this conference Mr. Westmoreland began reading the letters which he had written defendant touching the location of the pull boats, and thereupon Mr. Mentz, the attorney of defendant, asked him whether he was able to point to any clause of the contract which gave him the right thus claimed to direct and control the operations of defendant. And Westmoreland was unable to answer.

It did not occur to Westmoreland to invoke the clause now being invoked, and to our mind it is perfectly plain that the clause has reference exclusively to the identification of the several tracts of land that were to be considered as embraced in the contract, and was never intended to bear the interpretation plaintiff is now contending for.

At this conference the fantall process was discussed. Plaintiff insisted that this fantall process was practical, and that defendant was bound under the contract to use it. No conclusion was arrived at. The conference wound up by a suggestion from Mr. Downman that the attorneys should draw up a contract under which the parties might get along smoothly.

On the trial plaintiff objected to all proof of what took place at this conference, on the ground that everything that was there said was in the nature of proposals of compromise. Mr. Howell, plaintiff's counsel, testifies that he understood this conference to be in the nature of a proposal of compromise. Mr. Mentz, defendant's counsel, testifies that he did not so understand. It seems to us that Mr. Howell's view is clearly erroneous. At this conference both parties were standing upon their rights, and neither was proposing to waive any part of same by way of compromise. The purpose of its calling was

the discussion of the existing contract, not the formation of a new one.

The attorneys prepared and submitted to each other drafts of a new contract, but no agreement could be reached; and it all came to nothing, and things went on as theretofore.

On February 26, 1903, defendant's counsel, Mr. Mentz, wrote a formal letter to plaintiff, putting plaintiff in default with reference to the furnishing of canals and pockets for the operation of the pull boats, and protesting against the insistence of plaintiff that defendant should operate by the "fantall" process, and demanding that the canals and pockets be furnished in the same shape in which they had been furnished theretofore—that is to say, in accord with usage and custom.

To this letter the plaintiff, through Mr. Howell, its counsel, replied that the plaintiff company insisted the fantall system was "just as practicable as the system insisted on by" the defendant company, and "denied most emphatically" that the system insisted on by the defendant was "in accord with custom and that heretofore followed under the contract."

While the fantalling question is not an issue in this case, it may be well to remark here, in passing, that the record shows that this process is used only when for some reason the other is impracticable; that it is much more expensive to the contractor and of doubtful economy to the contractee; also that it had not theretofore been used at all in the execution of the contract.

For want of canals and pockets, the pull boat No. 2 was, as a matter of fact, laid up on March 6, 1903, and did no work thereafter.

This was the situation when the breaking of the levee opened the prospect of a float, and Westmoreland summoned Coguenhem to Des Allemands for a conference.

Deadening Circle.

Before taking up the matter of this conference, however, it is well that we say a word in regard to how far the question of cutting the tree at the deadening circle is provided for in contract, and how far it had, up to the time of this conference, been a subject of discussion between the parties. The clause relied on by plaintiff as imposing on defendant the obligation to cut the trees at the deadening circle is the same as that relied on as imposing upon defendant the obligation to bring the tree out in one piece, namely:

"It is further covenanted and agreed that the measurements of timber are to be made on the full length of the log, and that the diameter is to be taken at the small end."

We can but repeat in the present connection what we said of this clause in the other connection, namely, that it has reference sole-

ly to the measurement of the delivered timber, and that if the parties had intended to depart from custom and usage and establish a special rule in a matter so important as that of how high from the ground the trees should be cut, they would not have left such special rule to be inferred from the peculiarity of the language made use of in providing for the manner of measuring the delivered timber, but would have taken the trouble to insert a special clause for the purpose.

Up to the time of the float no question had arisen in connection with the cutting at the deadening circle, and, in the nature of things, none could arise; for, as a matter of course, the deadening circle is cut where the tree is to be cut, and necessarily the tree is cut as low as practicable. Custom and usage on this point are well nigh as imperative as any contract could well be. Therefore up to the time of the float plaintiff had not had one word of complaint touching the height of the deadening ring, or the failure to cut at the deadening ring.

Conference of March 31, 1903.

This was the conference called for by Westmoreland when it became certain that the water would get high enough in the swamp for floating. Westmoreland brought up three questions: (1) That the defendant should start floating from the back part of the deadened timber in the Paradis swamp, and come towards the front; (2) that defendant should cut at the deadening circle; and (3) that defendant should hold or harbor the timber in the swamp, and not deliver it in greater quantities than plaintiff could conveniently handle. Coguenhem brought up the question of the scarcity of rafting materials, and of the greater quantity that would be needed for holding the greatly increased number of logs. There is no denial that these questions were brought up at this conference; but, as already stated, the witnesses disagree as to what was the understanding arrived at.

In so far as anything said at this conference might be sought to be proved for the purpose of showing a change in the written contract by subsequent verbal agreement on the two points of the right of plaintiff to control the operations of defendant and of the obligation to cut at the deadening circle, defendant objected to the evidence on two grounds: (1) That the petition did not contain any allegation of a change in the written contract by subsequent verbal agreement on the two points in question; and (2) that without special authorization from the board of directors the president of the defendant company was without power to change the contract, and that therefore any evidence of his having undertaken to do so would be irrelevant until proof had first been administered of such special authorization.

Both of these objections were sustained by

the court. The court let in the evidence, however, for the purpose of showing what interpretation the parties put upon the written contract. The first objection was good. What has not been alleged cannot be proved, and such subsequent agreement is not alleged. The second offers more difficulty; but it need not be here passed on, inasmuch as the evidence, which, as just stated, was admitted for purpose of showing contemporaneous interpretation, does not show that the officers of the defendant company undertook to change the contract at this conference.

In their brief the learned counsel for plaintiff define their position in regard to the effect of this conference on the contract, as follows:

"If the contract itself should not be considered as settling the controversy concerning the right of the plaintiff to designate what swamp land should be pulled and what swamp land should be floated, then the manner in which the contract was executed by the parties sufficiently determines that question in favor of the plaintiffs.

"That manner of execution was established at the interview of March 31st.

"That interview is, therefore, not so much a subsequent agreement between the parties as it is an agreement establishing how the subsisting contract should be executed."

It may be well to put in a clear light the distinction which counsel here make between an agreement to change the contract and an agreement to execute the contract in a particular way. The one would be a new agreement, and the other nothing more than an admission as to the meaning, or scope, of an existing agreement. In other words the position of counsel is, not that at this conference Coguenhem agreed to change the existing agreement, but that he admitted that the existing agreement meant what plaintiff now contends for; that is to say, a particular meaning is sought to be attached to the contract by proof of a verbal admission on the part of Coguenhem.

If this admission were down in black and white, or if it were conclusively established, we might have recourse to it as an aid in the interpretation of the contract. But in the first place, while we know what the propositions of Westmoreland at this conference were, we do know whether they were advanced as matter of right under the contract, or as matter upon which an understanding or accommodation might be arrived at irrespective of contract. In the latter event the acquiescence of Coguenhem would not necessarily have amounted to an admission in regard to the existing contract. A person may agree to do a thing in a spirit of accommodation, without thereby admitting any obligation. In the second place, and what is still worse, we do not know for certain what was Coguenhem's reply.

Westmoreland, Elfer, and Leonard testify positively that Westmoreland made the requests or demands, and that Coguenhem unqualifiedly acceded to them. Coguenhem

and Mayer deny that Coguenhem agreed to start at the back of Paradis swamp, and say that his reply in regard to cutting at the deadening circle was that he would cut as was usual and customary. Hubert, plaintiff's bookkeeper, heard only the last words of the conversation. He heard Westmoreland say to Coguenhem, in a loud and emphatic voice, as they were going out, that he wanted his trees cut at the ring, and did not want his swamp butchered. Hubert does not remember the exact words of Coguenhem, but says that they were an assurance that everything would be all right. Dallas, plaintiff's witness, corroborates Westmoreland, Elfer, and Leonard on the point of Coguenhem's having acceded to Westmoreland's propositions, but says that he can give Coguenhem's exact words, and that they were: "All right, I will comply with this as far as practicable." "As far as practical." This would not have been an unqualified accedence, but, on the contrary, a qualified one, and would go in corroboration of Coguenhem and Mayer. Later on, in his cross-examination, Dallas says that what impressed him most was the cheerfulness with which Coguenhem complied with Westmoreland's requests:

"Q. Now, do you remember Mr. Coguenhem's exact language? A. No, sir; not word for word; expressed himself as willing to comply with Mr. Westmoreland's requests. Q. I just want to know what he said. A. I don't remember his exact words; no sir. Q. Well, didn't he reply that he would float the timber in the customary manner, etc.? A. As far as practicable; yes, sir. Q. In the customary manner as far as practicable? A. Yes, sir."

None of the witnesses undertakes to give Coguenhem's exact words, except possibly Mr. Dallas; but, as just seen, Mr. Dallas admitted later on that he could not give the exact words. On cross-examination, Leonard is asked:

"Q. Didn't Mr. Coguenhem tell him he would float the timber in the usual manner? A. Well, I would have entered a protest in regard to that he agreed to that, and then he wouldn't butcher up the swamp—guaranteed he wouldn't butcher up the swamp. Q. Well, did he agree to that, is what I ask? A. Well, if I wasn't going to comply with a request I would have entered a protest. Q. Oh, you think because he didn't enter a protest he agreed to it? A. That is the way I take it. Q. And simply because he wouldn't butcher up the swamp, you think he agreed to cut it at the dead line. A. Yes, sir."

Again:

"Q. As a matter of fact, he didn't make any protest, and you inferred from that that he agreed to it? A. Yes, sir. Q. That is your inference? A. Yes, sir. Q. That was the strongest expression you heard him use about the matter. A. Yes, sir. Q. That's the nearest to an acquiescence or bargain you heard him make, wasn't it? A. Yes, sir; I guess so."

Now, the question is, did Coguenhem admit that under the contract his company was bound to obey plaintiff's instructions in regard to the manner of proceeding in the taking of the timber, regardless of how impractical they might be, and was bound to

cut the trees at the deadening circle, regardless of the impracticability of so doing, or did he merely give assurance that he would do things in the usual and customary manner, and would not butcher up the swamp.

If he admitted the former, then he receded from the position that he had occupied in his letter of two months back: "We did not then recognize your right to interfere with our work, and do not now"—which same position he occupied a few days later at the conference of January 28th in Downman's office in New Orleans, when Mentz called upon Westmoreland to point out any clause in the contract giving such right, and Westmoreland was unable to answer. It is highly improbable that the same man who had so recently challenged this right should now so cheerfully admit its existence. It is also highly improbable that Coguenhem, an experienced swamper, should agree to take this timber by proceeding from rear to front, when the evidence shows that the practical way of doing the work was by proceeding from front to rear. This is testified to by plaintiff's witness, Leonard, and is not denied by any of the swampers except by plaintiff's witness Kelso. Leonard's testimony on the point is, as follows:

"Q. Wouldn't it have been much easier to commence back there and floated the timber from there into the lake?

"A. It would, if they had roads cut there.

"Q. But it would not have been a great deal of trouble, if you didn't have a road, in order to get the timber, when you commence on the edge here?

"A. Well, they worked right there; they work back and put the road through.

"Q. Of course, they made a road as they went back?

"A. Yes, sir.

"Q. And that was a practical way of getting it out?

"A. Under the conditions it was.

"Q. A swamp that had not been prepared for floating, it was perfectly natural for you to start here on the lake shore, cut one tree, and cut a road to get it in, and then go 10 feet further, get another, bring it in, and so on? You think that was the proper way?

"A. Yes, sir.

"Q. And you think that was the practical way to have gotten at the timber, if they had floated?

"A. In that condition of the swamp.

"Q. And that was what prompted you in getting the timber out that way when you went in there?

"A. Yes, sir."

Leonard thought that Coguenhem's agreeing to cut the timber at the deadening circle during the flood was "the strangest thing he had ever heard." Strange, indeed, that an experienced swamper like Coguenhem should agree to cut at the deadening circle timber which had been deadened before the flood, especially when a high stage of water was looked for. The evidence shows that it would practically have been an agreement not to cut at all, for the axman stands in a boat on the surface of the water to cut the tree and the elevation of the cut must depend upon the elevation of the water. The tree being al-

ready partially cut at the ring, he prefers to cut there, if practicable; but if this ring be too low, and especially if it be under water, he is bound to cut above it. That Coguenhem never agreed to anything so absurd as to undertake to cut this timber at the deadening ring during the high water there cannot be the slightest doubt. For so agreeing he would have had to be a greenhorn or an idiot, and he was very far from being either. He doubtless, and very naturally, gave plaintiff every assurance that it was possible to give on the subject, that he would cut at the circle "as far as practicable," that he would not "butcher the swamp," etc.; but beyond this he could not have gone without practically renouncing his contract. Of course, if the contract had required him to cut at the circle, he would have been bound to admit the fact; but we have seen that the contract contained not a word on the subject.

Plaintiff was insisting upon a punctual delivery of timber during the float. If so, it had to allow defendant to cut the trees in the way shown to be usual and customary, and not in an impractical, or impracticable, way.

Our conclusion must be that any admissions that may have been made by Coguenhem at this conference are not before the court in such shape as to be relied on with any degree of certainty. Verbal admissions are unreliable evidence at best. Especially when the question relates to the interpretation of a contract. Even in connection with a signature, this court has said: "It is the very weakest species of evidence." *Plique and Lebeau v. Labranche*, 9 La. 559. Of admissions generally this court said in *McKown v. Mathes*, 19 La. 544: "Evidence of this kind is of the weakest character." And that estimate of the weight to be attached to verbal admissions has been so often repeated in our jurisprudence as to have become axiomatic. One of the reasons usually assigned for the weakness of this kind of evidence is its liability to error, especially when its exact language cannot be given. *Elliott on Evidence*, p. 242.

The patent error of Westmoreland, Elfer, and Leonard in their statement regarding the agreement to cut the trees at the ring, which it is simply impossible to believe Coguenhem agreed to, detracts greatly from the weight of their statement touching the agreement not to float from the pull-boat territory. They are equally positive as to both; and, if in error as to one, why not as to both? So far as Westmoreland is concerned, we have seen that he was equally positive that at the conference at Bowie, on January 8, 1902, Coguenhem had agreed to take the six-inch timber; and yet we have seen that he was contradicted in that statement by Wise, the notary, a perfectly disinterested witness, and by the written instrument drawn up for the express purpose of evidencing the agreement of the parties.

Counsel base an argument on the circumstance that the conference was harmonious; the argument being that things would not have been so pleasant if, instead of yielding to Westmoreland's wishes, Coguenhem had opposed them. The situation was that Westmoreland had attempted once before to interfere with defendant's work, and had met resistance, and had been unable to point to any clause in the contract justifying his action; that there was not a word in the contract about cutting at the circle, and that to ask defendant to do so when the circle might be level with, or below, the water, was practically to propose to defendant to forego the right to cut at all; and that the third proposition, that defendant harbor the timber in the swamp and do not deliver it in inconvenient quantities, was of doubtful foundation in the contract, whereas plaintiff's obligation to furnish rafting materials was one which fell squarely within that clause of the contract requiring plaintiff to furnish defendant with "such chain dogs as may be necessary," with no restriction upon the number of logs defendant might want to float at one time, so that plaintiff was menaced with having to furnish an enormously increased quantity of rafting materials. Those were the points that came up for consideration; and upon them Westmoreland received the assurance that defendant would harbor the logs in the swamp by means of a boom constructed at its own expense, and would deliver them in quantities as desired, and would in other respects comply with his desire as far as "practical," or "practicable," or would proceed according to usage and custom. It appears to us that Westmoreland would have been highly unreasonable in demanding more, or in not being satisfied with that much, and Coguenhem would have sacrificed the interest of his company had he agreed to more. Had he agreed to more and done it cheerfully, his cheerfulness might well, under the circumstances, have "impressed" Dallas, and his compliance have appeared to Leonard as being "the strangest thing in the world."

Confirmatory Letter.

Plaintiff lays great stress upon a letter that Westmoreland wrote to defendant nine days after the conference of March 31, 1903, as being confirmatory of what had taken place at the conference, which letter, it is said, was acquiesced in by defendant, who failed to reply to it. This letter reads as follows:

"Dear Sirs: As it now seems to be an assured fact that you will be able to float, we beg to confirm verbal conversation which the writer had with your Mr. Coguenhem some days ago, in which we stated that we would expect you to float, starting from farther end of the brake of timber in question. Your Mr. Coguenhem will very readily understand what we meant by this, as it was explained to him fully in person. We must also insist upon all trees being cut to the full length, as we do not propose to lose one single foot of

any tree. We will also expect you to hold all timber, both large and small, in the swamp, and only deliver to us such quantities as we may designate, as it will be impossible for us to hold more than two or three days supply at this point. You will therefore please instruct your various foremen here as to the above, and also notify them to let us know before they start out with any timber from the swamp, so that we can let them know exactly how many sticks we can take care of. We particularly mention this, as we understand you have four or five hundred trees already floated. We cannot receive these in any one tow; in fact, we hardly think we can take care of half of them. Pease, therefore, be governed accordingly. We remain."

Plaintiff says that to confirm a conversation by letter is a good business precaution, and that, not having answered the letter, defendant is bound by its recitals. In fact, plaintiff claims that the letter operates as an estoppel upon defendant; that the lawyers who brought the suit took it to be a correct recital of the understanding arrived at at the conference; and that, they having thus acted on this letter, defendant, who by silence had recognized the correctness of its recitals, is estopped from now occupying a contrary position.

But this letter, in the first place, contains not a word about cutting the trees at the ring. Westmoreland, on cross-examination, admits that the letter says nothing about cutting the trees at the deadening circle. He says, however, that the letter insists upon the timber being brought out the full length of the tree, and that this is the same thing as cutting at the ring. In this contention he is in a sense correct, since the tree is not brought out its full length if cut above the ring; but, in the same sense, the tree is not brought out its full length unless cut level with the ground, and, in our view, it is not more unreasonable to require the tree to be cut level with the ground, when there is no water, than to require it to be cut level with the water, or below the water, when there is water. Later on in his cross-examination Westmoreland says:

"I didn't think there was anything mentioned at that meeting about cutting the full length of the tree, but we had always had that understanding."

Still later on he invokes another part of the letter as having been intended to have reference to the agreement to cut at the ring, thus:

"Cutting the full length of the tree was an old proposition that we felt they always understood. I merely reiterated it, and as far as the second part of that sentence, that we do not propose to lose one single foot, that applies right directly to the deadening ring—to the agreement we had regarding the deadening ring."

All this, evidently, is a labored effort on the part of Westmoreland to put into this letter a reference to cutting at the ring, when as a matter of fact it is silent on that point. According to this new interpretation of the letter, the sentence, "We must expect all trees to be cut full length, as we do not propose to lose a single foot on any one tree," has reference in its first member to the cutting of the tree at the top, and in the second mem-

ber to the cutting at the bottom; i. e., at the ring. This is farfetched in the extreme. Evidently, if Westmoreland had intended to refer to a special agreement to cut the tree at the ring, he would have done so, and would not have contented himself with the vague declaration of a determination not to lose a single foot of timber, which, if taken literally, would mean that the trees must be brought out root and branch, which, therefore, was a mere figurative expression, and not the enunciating of a contract. It is perfectly plain that during a flood, as well as when there is no flood, the expressions "bring the tree out full length and not lose a single foot of timber," when used in connection with the execution of an ordinary contract to bring out timber, mean no more than to bring out the tree in an honest, businesslike manner, according to the spirit of the contract. It means to cut the tree as near the foot and to top it as near the head as circumstances will permit. It is futile for any one to contend that these expressions were intended to serve as a contemporaneous memorandum of a special agreement to the effect that during the flood the trees should be cut at the ring. If, therefore, this letter was intended to serve as a contemporaneous memorandum of what had taken place at the conference, the memory of its author failed him on one of the points that had come up at said conference.

And it would have failed him on another point. He testifies that at this conference Coguenhem agreed to furnish his own rafting materials for holding the timber. In the letter he makes no allusion to this, and here would be another point on which the letter would be defective, if intended to serve as a memorandum of the result of this conference.

Finally, the letter does not say that defendant has agreed to "start from the further end of the brake," but that the writer of the letter, in view of their conversation on the subject, "expects" that defendant will do so. It confirms the fact that at this conference Westmoreland expressed the desire, or expectation, that defendant would do as indicated; but it does not undertake to assert that defendant admitted an obligation in the premises.

Besides, when a letter confirmatory of a business conversation is to be written, good business principles would require that it be written just as soon after the close of the conversation as possible, and surely not later than the night of the same day, if circumstances will permit, whereas this letter was written nine days afterwards.

Our conclusion is that this letter was not intended to serve as a contemporaneous memorandum letter, but was simply one of the numerous letters Mr. Westmoreland was in the habit of writing.

The expression, "We confirm conversation which the writer had with your Mr. Coguenhem, in which we stated that we would ex-

pect," etc., coming from the average business man, would carry with it a very strong implication that the statement had been agreed to and that the expectation was founded upon a positive agreement; but Mr. Westmoreland appears to be given to jumping to a conclusion favorable to his side on any question, and to being very positive and emphatic in asserting it. Once before he had claimed in the most positive manner this right to dictate to defendant, and had gone so far as to assert that defendant by disregarding his instructions was violating the contract, and yet had been unable to point to any clause of the contract upon which such right could be founded. He had been equally one-sided in his insistence upon the use of the Doyle rule, and again in the matter of the computation of the contents of the logs, when his own attorney had ruled against him. He had understood defendant as having agreed at the conference of June 14, 1901, to take the six-inch timber, and yet nothing of the kind had been agreed to.

Estoppel.

The letter does not purport to confirm anything except the fact that Westmoreland had a conversation with Coguenhem, and that in the course of this conversation Westmoreland stated to Coguenhem that he would expect Coguenhem to "start from the further end of the brake." Nothing is said about contractual obligations. Such a letter did not necessarily call for an answer. Coguenhem had already given every assurance he could be expected to give on the subject, and probably had nothing further to say.

Moreover, defendant's failure to answer the letter could operate as an estoppel only if plaintiff had been led thereby to change its position; but plaintiff continued to occupy the same position precisely. The bringing of a suit is not a change of position within the meaning of the law of estoppel. The suit cannot create rights, nor change the legal situation. It can only enforce the existing rights, such as they happen to be. A litigant cannot create an estoppel against his adversary by merely filing a suit against him.

Defendant's Mode of Operation.

On the assumption that defendant was not bound to cut the trees at the circle, but had a right to cut them in the manner usual and customary in such cases, the proof is overwhelming that the trees were cut lower than usual. Indeed, plaintiff not only does not deny that fact, but seeks to turn it into an argument against defendant. Cutting lower than usual amounts, it is said, to an admission of the obligation to cut at the circle. The proposition involves a non sequitur. Had defendant cut at the circle, notwithstanding the difficulty, or impracticability, of so doing, or had defendant abstained altogether from cutting, owing to the difficulty

or impracticability of cutting at the circle, then defendant's conduct would have indicated a sense of obligation to cut at the circle. But the cutting lower than usual (though above the circle) indicates nothing more, in our view, than a purpose to comply, as far as practicable, with the request that the cutting be at the circle. Defendant gave assurance that it would do so, and the unusual lowness of the cut indicates a purpose to live up to the assurance thus given. Counsel's argument presupposes an indisposition on the part of defendant to carry out the contract in a spirit of liberality, or even of conservatism, though nothing is to be found in the record to justify such an assumption.

In giving a reason for desiring that defendant should start floating at the rear of Paradis swamp and come forward, instead of starting at the front and going back, plaintiff has shifted its ground. Westmoreland states this reason, as follows:

"I told Mr. Coguenhem that, as there seemed a very good prospect of there being a float, I knew full well under the terms of the contract that he would be permitted to float, but that I wanted a thorough understanding with him as to the methods that he proposed to use in floating, so as to avoid any misunderstandings in the future. Mr. Coguenhem asked me to state in particular what I meant, and so on. I told him that, first of all, I wanted him to start floating from the back of the swamp and to float towards the outer edge, or to the edge next to the lake, for the reason that the swamp next to the edge of the lake was already prepared for the pull boats, canals and pockets having been dug and dredged, so that in case the water receded, they would be able to go to work immediately with the pull boats, and keep them running continuously; whereas, if they floated from the pull boat grounds first, and the water receded, then we would be left without any canals and pockets for them to go to work in, and they would put us in default for keeping their boats idle."

Counsel, after stating that plaintiff had invested \$20,000 in dredge boats and other accessories, and that the canals and pockets theretofore dug were said to have cost \$10,000, proceeded as follows:

"With such expense incident to the designation of a swamp for pulling, it would have been extraordinary, shortsighted, reckless, and suicidal for the plaintiff to enter into a contract which would enable the defendant to totally deprive it of all benefit from such work and expenditure, by treating a swamp so prepared for pulling as one prepared for floating. The result would have been that the plaintiff might have been called on for hundreds of thousands of dollars for preparing for pull-boating the immense bodies of swamp owned or controlled by it, without such preparation ever being utilized; for, as in the present instance, the defendant might in every case claim the privilege of floating off the timber, thereby putting the plaintiff to the additional expenses of preparing another swamp for pull-boating after the float had subsided. If there had been only one pull boat location to prepare with canals and pockets, it would not have mattered to the plaintiff whether the timber was pulled off or floated off. It would have gotten its timber in either case, and would have been put by floating to no additional expenses for further preparation. Although the

expense of preparing the swamp would have gone for naught, the loss would not have any after effect.

"But the contract extended over a number of years, and affected an immense body of swamp land, and if a tract was prepared and designated for pull-boating, and the timber was thereupon removed by the shorthand process of floating, it would have been necessary for the plaintiff to at once prepare another swamp for pull-boating. The cost of the preparation of such other swamp would have been a direct loss to the plaintiff, due to the rapid floating off of the timber from the swamp prepared for pull-boating."

The reason which Westmoreland assigns is that, if all the timber made accessible to the pull boats by the canal were taken during the float, the plaintiff would not have any canal ready dug for defendant to operate in immediately after the float. The reason which counsel assign is that the expense of digging the canal would have been wasted.

Westmoreland's reason has a semblance of support in the facts, though, as we shall show presently, it has no real support; but counsel's reason has no support whatever in the facts. It loses sight of the fact that the canal so far as it had been completed was but the beginning of a longer canal, and that consequently, even if there had not been a solitary stick of timber made accessible by it in so far as completed, plaintiff would have had to dig it all the same. The timber had been deadened only up to a certain distance in the Paradis swamp, and the canal had been dug only part of this distance. Back of the deadened timber lay 1,200 acres of green timber, which could be reached only by a prolongation of this canal. There was no question of removing this green timber during the float. Therefore the floating of the timber made accessible by the canal in so far as completed would not have added one dollar to plaintiff's expenses.

Westmoreland's reason, we say, has only an appearance of support in the facts. It seems reasonable that, all things being equal, defendant should, even as a matter of accommodation, if not of actual contract, consent to float from that part of the land not already made accessible by the canal, and reserve for the employment of the pull boats immediately after the flood that part already made accessible; in other words, proceed in such manner as not unnecessarily to cause annoyance and embarrassment to plaintiff—as not unnecessarily to put plaintiff in default. But the fact of the matter is that for floating the timber which stood deadened in this Paradis swamp the proper place to begin was the outer edge of the swamp, as defendant did. This is shown by the testimony of Leonard, already quoted in this opinion, and also by the testimony of Walker. The further fact is that defendant's idea was to remove during the float every stick of the timber that stood deadened in this Paradis swamp. Walker testifies, and there is no reason to doubt his statement, that if any timber had been left it would have been

left next to the canal, to be taken by the pull boats. And the further fact is that when plaintiff undertook to do the same work it proceeded in the same manner.

Contract Not Violated.

Our conclusion is that defendant has not violated the contract. For pretending to a case against defendant, plaintiff must rely upon strained interpretations which the contract will not bear, and for reinforcing these more than doubtful interpretations it must rely upon the letters of Westmoreland and upon alleged verbal admissions. The court would be the more loth to condemn defendant upon these letters of Westmoreland and alleged verbal admissions from the fact that in every one of its disputes with Westmoreland defendant has been found to be in the right and Westmoreland in the wrong. We refer to the Scribner rule, to the mode of computation, to the location of the pull boats, to the six-inch timber, and to the fantail process. We are impressed with the fact that the experts whom plaintiff's agent took into the swamp for the condemnation of defendant returned a verdict in favor of defendant, and that the unanimous verdict of the experts was that the stumps were unusually low, so much so that plaintiff's learned counsel have sought to turn that circumstance as a weapon against defendant.

We are further impressed with the absence of complaint during the entire time of the float, although the two agents of plaintiff kept close watch. The timber was received and measured without demur. The tow as to which plaintiff made complaint had not been gotten out by defendant, but by a subcontractor, Comeaux, and hence what fault there had been was that of this subcontractor. Defendant promised to investigate, and it did so, and found that this particular tow had been gotten out under difficulties. (See testimony of Walker.) Much of defendant's work was being done by subcontractors with whom defendant settled on the same basis as with plaintiff. Knowing that plaintiff was keeping close watch over its work, and knowing that Westmoreland was wide awake to the rights of plaintiff and had in the past manifested a disposition to exact rather more than less of the full measure of these rights, and knowing that this float, which reduced enormously the cost of getting out the timber, was its golden opportunity to reap a harvest under the contract, defendant would hardly have jeopardized its position by the penny-wise and pound-foolish policy of doing things that would justify plaintiff in arresting the further execution of the contract.

Amount of Damages.

Plaintiff, by taking up and going on with the work that defendant was to do under the contract, and by breaking up all of defendant's arrangements and preparations for

carrying out the contract, has put the further execution of the contract by defendant out of the question; and hence, as it is found that plaintiff's suit was groundless, the only remaining question is the amount of the damages to which defendant is entitled.

We take from defendant's brief an abbreviated statement of the damages as itemized in the answer, to wit:

"That said injunction is wanton, malicious, was secured without right or excuse, and had damaged defendant in the following sums:

"(1) In the sum of \$25,000, for money expended in securing pull boats, paraphernalia, etc., to perform said contract, the same being without value without said contract.

"(2) In the sum of \$5,300, expenses incurred in preparing the timber for floating, by deadening, trailing, cutting roads, cutting down timber, purchasing float boats, making pile booms, cutting wood, etc.

"(3) In the sum of \$10,000, due for timber in various stages of floating, some being ready for floating out of the swamps, some in the boom ready for towing, and other portions of it actually in the boom at plaintiff's mill when the injunction issued.

"(4) In the sum of \$46,875, the amount of profit defendant would have realized by floating 12,500,000 feet of timber out of the swamp at a profit of \$3.75 per 1,000.

"(5) Further, that under the terms of the contract defendant was to float, during five years or more, all the timber in large bodies situated on Lake and Bayou Des Allemands and their tributaries, working until all was floated; that it would have taken five years or more to pull all said timber; that it would have pulled 1,000,000 per month, or 60,000,000 during said five years, at a profit of \$1.50 per 1,000, making a total of \$90,000, which was prevented by plaintiff's active violation of the contract, by its failure to furnish canals and pockets, and by the illegal issuance of the injunction.

"(6) That it has been damaged in the sum of \$2,647.50 on account of the failure of the plaintiff to cut the canals and pockets necessary to keep its boats busy; the expense of maintaining them when idle being the sum named.

"(7) That its pull boat No. 1 was idle for 36 working days, and its No. 2 was idle for 49 working days, during which time they could have pulled 1,700,000 feet of timber, making \$2,550 lost thereby.

"(8) That plaintiff is actually indebted to defendant in the sum of \$248.38 for logs already delivered to them.

"That, since plaintiff has made it impossible to perform said contract, defendant should be relieved from any obligation thereunder, and that it should recover from plaintiff, and from R. H. Downman personally, the sums recited.

"(9) Defendant avers its privilege on all the logs judicially sequestered, and that it is entitled to \$10,000 attorney's fees and expenses incurred in attending court.

"And it prays accordingly."

Plaintiff excepted to any evidence being admitted in support of this claim for damages, on the grounds, first, that the averments were not sufficiently specific, and especially that it was not shown how the pull boats came to be lost to the defendants; second, that the damages claimed were too remote, and especially as to future profits, dependent upon contingencies; and, third, that the claims were cumulative.

It is needless to discuss these objections at any length. As to the averments, they are clearly sufficient. As to the profits, the mak-

ing of them was the sole motive of defendant in entering into the contract. They were the sole inducement held out by plaintiff to defendant for entering into the contract. If profits such as these are remote, then the inquiry would be pertinent, when could profits flowing from the breach of a contract be proximate? Whether the proof of them is sufficiently certain to serve as a basis for judgment is another question. As to the objection of cumulation, it is in part well founded, but only in part. The matter appears to us to be plain, not calling for discussion. On all timber delivered and not paid for defendant is entitled to full contract price. On all timber that was not delivered, but that would have been delivered if plaintiff had not prevented the full execution of the contract, defendant is entitled to full contract price, less whatever further expenses it would have had to incur in the fulfillment of the contract. To illustrate: For the logs already at the mill, and not yet paid for, defendant is entitled to claim the full contract price. For those logs as to which the sole remaining expense was the towing, defendant is entitled to claim full contract price, less cost of towing. For the trees cut down, but not floated out, defendant is entitled to claim full contract price, less cost of getting out, etc. For the deadened trees, defendant is entitled to claim full contract price, less all costs except that of deadening. For the green timber, defendant is entitled to full contract price, less total cost; that is to say, is entitled only to the margin of profit. Beyond this defendant is entitled to nothing. In computing the damage the court will divide the timber into these four categories, and allow the full contract price, less the amount of the expenses yet remaining to be incurred in order that the contract price should be due.

Plaintiff contends that defendant is entitled to nothing, not even for the money expended in deadening the trees, and on the 3,000 odd logs already afloat and in various stage of delivery, of all of which plaintiff profited. The argument is that defendant was losing money, and would have gone on losing money, and was secretly glad of putting an end to the contract. This argument is at variance with the allegation of the petition that the price of the contract was a high price. If for pull-boating the price was high, how much the higher was it for floating, which is admittedly a very much cheaper process. There can be no serious question that the flood was a golden opportunity to defendant, and that defendant was actually engaged in making the most of it when the injunction was sued out.

Plaintiff argues that Coguenhem admitted that his company was losing money. The facts in that regard are these: In December, 1901, at the beginning of the execution of the contract, Coguenhem, in appealing for a settlement, used the expression that he had

been executing the contract faithfully "to the extent of a loss to ourselves;" and at some other time, not fixed, he said to Dallas that, owing to the frequent interruptions he was having in his work, he was losing money; and at one of the conferences he said he was losing money. We find nothing in all this worth dwelling upon. Business men not unfrequently complain of their losing money, when they do not know whether they are or not, and really do not mean to make any serious assertion on the subject.

It may be well to notice here a charge made in the oral argument, and repeated in the brief, that defendant "doctored" its books. An expert accountant in the employ of plaintiff spent a week on the books, and if there had been anything wrong about them the matter could have been, and no doubt would have been, called to the attention of this court. The sole facts upon which the charge is founded are that the bookkeeper transferred certain items from the operating expenses account to the investment account; and that this was done after the books had once been brought into court and examined by plaintiff and had been returned to defendant. But the books were not returned to defendant until every account in them, by order of the court, had been closed by the clerk of court in red ink; and the changes in question, three in number, were entered below these red marks, and as a matter of convenience.

Coguenhem, Walker, and plaintiff's bookkeeper, Winchester, put at 25 cents the cost of towing the timber after it is brought out of the swamp. Plaintiff would make this cost out to be 76.4 cents by asking Winchester whether all amounts charged to the steamers Richmond, Bertha C., Ruth, Armead, Naomie, and Edna D. were not for towing, and whether, if the towing cost \$9,700.26 and the number of feet towed was 12,691,645, the cost would not be 76.4. Where the counsel got the figure of \$9,700.26, the court is not informed. The court has searched in vain in the unindexed volume 5, containing the books of the defendant company, for it. But, assuming that it represents the amount figuring against said boats on the books, nothing shows that the only towing the boats did was of timber. As the witness observes to cross-examining counsel:

"You are assuming all the time this amount only represents the towing of timber."

Walker testifies that the first year the defendant made 59 cents and the second year, \$1.40, and the third year, \$1.11, or an average of \$1.16, profits per thousand feet of timber. Counsel point out that on the basis of this computation defendant would have realized \$14,722.30 of profits in the 22 months the defendant was operating, whereas Winchester, defendant's bookkeeper, shows that the profits amounted to only \$6,251.38. The computation made by Walker is founded on actual figures, and hence cannot be as far

out of the way as counsel would here contend; and, as the court proposes to rely to some extent on Walker's computation, a few words explanatory of why the comparison here made by counsel is misleading may not be out of place. The two figures do not stand for the same thing. Winchester at the end of defendant's operations deducts the liabilities from the assets and finds the above balance. Walker takes no account of capital stock, or interest on money invested, or of salaries of officers, but takes simply the actual cost of operating the pull boats, and allows \$10 per day for wear and tear, and deducts this from the contract price for the timber. If, from the result brought out by his mode of computation, there be deducted the \$5,350 of the capital stock, and the salaries of the officers, his figures, instead of being much out of the way will be found to correspond approximately with those of Winchester.

By this, however, we do not mean to imply that the result found by Winchester is correct; for it represents, as we understand, nothing more than the general result on the books, and leaves out items that ought to appear, and includes others that ought not to figure. For instance, as counsel well point out in their brief, it puts on the credit side the full amount expended on the pull boats as representing their present value, whereas a deduction of \$10 per day should be made, which represents as to boat No. 1 \$2,000, as to boat No. 2 \$1,500, and as to boat No. 3 an amount we have not the time to look up in the record. We assume here that the wear and tear on the boats is \$10 per day, even when idle. And on the debit side it includes one item of \$400, loss incurred in towing a barge for the plaintiff company, as a matter outside of the contract. There may be other items pro and con. The books of the defendant company are copied in the transcript in such shape as to be a sealed book to the court, except in so far as referred to by page in the briefs.

We do not agree with counsel for plaintiff that from the assets of defendant the amounts due by the subcontractors should be stricken out as bad debts. The money had been expended in the partial execution of subcontracts which the injunction put an end to; non constat that it would not have been paid, had plaintiff allowed the subcontracts to be fully executed.

The point is of no great importance, however, as the court, in the computation of defendant's future profits, does not propose to guide itself by the amount of the profits realized under the contract in so far as executed. To do so would be manifestly unsafe. For the execution of this large and important contract, having five years or more to run, defendant had to build from the ground up, had to organize a system of labor for operation in an uninhabited country, and—a by no means insignificant consideration—had to contend with the slowness and default of:

plaintiff in furnishing the canals and pockets in which to operate, and with the reluctance, tardiness, and failure of plaintiff to furnish a sufficiency of rafting materials. The results at the inception of the execution of such a contract, and under the circumstances, cannot be taken as a safe criterion of what the results would have been in the latter years of the contract, and especially during the float.

Even then, however, if all the expenses which defendant had incurred, up to the date of the injunction, upon the timber and in preparing the swamp for floating (all of which it was yet out of pocket), be added to the assets side of the balance sheet, some considerable profit would be shown. Granting that defendant's exhibit showing \$18,518.79 is to a great extent incorrect, still there would be a considerable profit.

Amount of Profits.

J. M. Smith, swamper for 13 years, thinks that to get out timber by floating from a swamp like the Paradis swamp, with a lake in front and a sea marsh on two sides, ought not to cost more than \$2 per thousand at the outside. This means to get the timber out into the lake, not including the cost of rafting, nor of deadening. Witness, the same season, got 2,400 trees with 15 men in the space of six weeks; 2,100 for himself, and 300 for another.

John Constant was getting out timber for defendant in the Paradis swamp at \$2 per thousand when the injunction came, and would have continued at the price but for the injunction.

Geo. Vincent had been engaged in the swamping business, pull-boating and floating, for the last 15 years; not done a great deal of floating; floated in Atohafalaya swamp in 1884 and 1903; went over Paradis swamp; could pull the timber for \$3.50 per thousand; \$4 would be an outside figure. That includes all expenses for preparations, interest on money invested, and everything. The timber could be gotten out by floating at \$2 to \$2.50; the latter being an outside figure. The Paradis swamp is an easy one to float.

Baley Cotton, swamper since 1886, has floated and pull-boated. Examined Paradis swamp. Timber could be floated for about \$2. The timber already deadened could be gotten out at a cost of \$1.50. Has run a pull boat off and on for nine years, and regularly for the last five years. Pulling the timber would cost \$3.50 to \$4, including everything. Got out 6,000 trees for himself same season, averaging 700 feet; floated two months and had 35 men employed.

Gua. Drew, sawmill, lumber, and swamping business since 1882, also president of bank, visited Paradis swamp. Timber could be floated at \$2.50 per thousand. Timber averaged 19 to 20 inches, and would run 500 to 600 feet. His estimate includes rafting.

F. J. Nuttall, timber estimator for F. B. Williams & Co.: Williams paid \$3 per thousand for floating timber in 1893. This includes deadening, tralling, and floating.

Emile Angelo, engaged in swamping business since 1890, owns three pull boats, and has both floated and pull-boated by contract. His cost of floating in 1903 ranged from \$2.10 to \$2.25. Paradis swamp should be floated for less, because there would be less tralling; say for \$2.

G. G. Walker, experienced swamper, examined Paradis swamp. He estimates cost of floating at \$2 and of pull-boating at \$3 to \$3.50.

John Sanders, experienced in swamping: Considering the openness of Paradis swamp, it would cost less than \$2 to float the timber out.

John Sanders, experienced in swamping: Considering the openness of Paradis swamp, it would cost less than \$2 to float. Constant, Bell, and Williams: To float timber at \$2 per thousand.

Winchester, testifying from the books of the defendant company, shows that, computing a day's work for one man as one man, the number of men employed and the number of logs floated out by defendant were as follows:

"April 7, 8 men floated 58 logs.
 "April 8, 18½ men floated 125 logs.
 "April 9, 15 men floated 113 logs.
 "April 10, 13 men floated 108 logs.
 "April 11, 18½ men floated 60 logs.
 "April 13, 27 men floated 128 logs.
 "April 14, 21 men floated 118 logs.
 "April 15, 26½ men floated 180 logs.
 "April 16, 25 men floated 105 logs.
 "April 17, 33½ men floated 136 logs.
 "April 18, 27 men floated 125 logs.
 "April 20, 34 men floated 171 logs.
 "April 21, 39½ men floated 235 logs.
 "April 22, 40 men floated 166 logs.
 "April 23, 47½ men floated 161 logs.
 "April 24, 45 men floated 199 logs.
 "April 25, 42 men floated 219 logs.
 "Or 475 men floated 2,407 logs.
 "These floaters averaged \$2 per day, including board, making \$950. On the basis of 350 feet to a log, it would make 842,450 feet, and cost \$1.12 per thousand; on the basis of 300 feet to a log, it would cost \$1.31 per thousand. To each of which 25 cents per thousand should be added for towing.
 "It would thus cost \$1.37 and \$1.56 per thousand delivered at the mill, respectively, as the logs averaged 300 or 350 feet."

The same witness, testifying from defendant's books, shows:

That from March 17 to March 30, 1903, pull boat No. 1, operating in Paradis swamp, pulled 541 logs, making 334,879 feet, representing under contract price.....\$1,841 85
 That the towing of this cost.....\$ 83 00
 The deadening, etc.....\$44 00
 Deterioration on pull boat at \$10 a day for 14 days..... 140 00
 1,068 53
 Profit\$ 773 32

—or a cost of \$2.30 per thousand for pulling.

Walker testifies that the cost of running a pull boat is as follows:

Engineer, \$2.50; fireman, \$1.50; wire guilder, \$1.50; boomer, \$2; wood passer, \$1.50; whistle blower, \$1.50; chain gang foreman, \$2.50; four men under him, at \$1.50, each, \$6; board for each at 50 cents per day, \$5.50; fuel, \$7; wear and tear, \$10. Total daily of running boat, \$41.50.

That the boat will pull 40 logs per day, averaging 700 feet, or 28,000 feet, making the cost of pulling \$1.50 per thousand. That the other expenses on the timber are the deadening and getting the timber ready for pulling, cutting up roads, and the towing, amounting to \$1.95, which, added to the \$1.50, makes \$3.45, the total cost of getting the timber out by pulling.

Defendant had a contract with Commeaux for getting out the timber of Islands Nos. 2 and 3 at \$3.50 per thousand. Commeaux was going on with the contract, and was well advanced with it, when the injunction stopped him. The further cost to defendant up this timber would have been the towing, or 25 cents per thousand.

The moment defendant's hands were tied up by the injunction plaintiff took up the work where defendant had left off, and went on in precisely the same manner, hiring some of the same men, and even using for a while defendant's camp boats; and after the water had subsided plaintiff went on with the pulling process. Plaintiff, in rebuttal, offered to prove what had been to it the cost of the work, and the court ruled out the evidence, on the ground that it was not properly rebuttal. In this we think the court erred. But the error is not of sufficient importance to necessitate a remanding of the case, since it could not affect the result. The evidence is so overwhelming as to what the outside expense of floating timber should be that any results of its own which plaintiff might show to the contrary would have to be attributed to its inexperience in the business. The court will, moreover, make allowance for the evidence by adopting the highest figure testified to by any of the experts, and that is \$3 floating and \$4 for pull-boating. This includes the cost of deadening and rafting, leaving to be added only the cost of towing, shown to be 25 cents per thousand.

On the pull-boating defendant is entitled to a profit of \$1.25 per thousand, and on the floating to a profit of \$2.25 per thousand.

That a large quantity of timber had been deadened, both in the Paradis swamp and in Islands Nos. 2 and 3, there is no question. As fixing the exact amount of this timber there is practically only the testimony of Walker; but, that testimony being contradicted, there is no good reason for not accepting it. He says that 23,000 trees had been deadened and paid for by defendant in the Paradis swamp, and 7,500 by Commeaux on Islands Nos. 2 and 3; that "about" 4,000

had been taken out of the Paradis swamp and 1,500 from the Islands Nos. 2 and 3. We will fix at 18,000 and 5,000, respectively, the number of deadened trees still in the two swamps on the day of the injunction; and we will fix the average number of feet per tree at 650 for the Paradis swamp and 250 feet from the Islands Nos. 2 and 3. Walker testifies that defendant would have floated out all this deadened timber during the float, and we think it would be perfectly safe to conclude that defendant would have floated at least one-half of it.

With respect to the deadened timber in the Paradis swamp the matter stands as follows:

Eighteen thousand trees, averaging 650, one-half equals 5,850,000 feet, at \$2.25 per thousand, equal \$13,162.50.

With respect to the deadened timber from Islands Nos. 2 and 3, the matter stands as follows:

Five thousand trees, averaging 250 feet, one-half equal 625,000 feet. On this timber, however, defendant could not have realized more than \$1.25 per thousand, as that was the margin of his profit under his sub-contract with Commeaux. This would fix the amount of this item of damages at \$781.25.

The contract of defendant had three years and one month more to run, and there was enough green timber in the Paradis swamp alone to have kept the boats of defendant occupied during this entire time. During the contract one pull boat was in operation 83 days, another 403, and the third, 118 days, making a total number of days for the three boats of 604. They pulled 10,516,063 feet, or 17,410 feet per day for each boat, or 52,230 per day for the three. Allowing 20 working days to the month, and the monthly capacity of the boats is 1,044,600. If we assume that the boats would do no more than supply the mill, we have 1,000,000 per month, which is the capacity of the mill, or 37,000,000, for the unexpired term of the contract, which, at \$1.25 per thousand would amount to \$46,250.

The foregoing represents the naked profit on the timber standing in the swamp. On that part of the timber which was in course of delivery defendant, as already explained, is entitled to recover, in addition to the naked profits, whatever part of the cost of delivering the timber had already been expended. For instance, on the timber already delivered, but not yet paid for, the amount which defendant is entitled to recover is \$5.50, or full contract price, and not merely the naked profit.

Under the writ of judicial sequestration the sheriff of the parish of St. Charles seized 800 logs in booms and 300 on the edge of the swamp; the sheriff of the parish of Lafourche seized 2,282 logs—a total, between the two sheriffs, of 3,382 logs.

It seems that on the day itself that the injunction was served a storm scattered the logs over the lake and sea marsh, and a great many of them were lost and could not thereafter be counted. Plaintiff had a considerable number of these gathered up and used them. Mayer, a few days after the service of the injunction, made an effort to count the logs, and, counting them as best he could, he found 3,210, whereof 1,182 were in Commeaux's canal.

Walker testifies that from the Paradis swamp 3,422 logs were gotten out during the float; that of these there had been delivered at the mill at the time of the injunction 1,197, leaving 2,225 boomed in different places in the swamp; that there were 466 logs in the mill boom, which were never measured or paid for by plaintiff, but were measured by Mayer and showed an average of 360 feet per log, or 167,760 feet.

Walker testifies, further, that 700 to 800 of the trees that had been cut down and prepared for pulling were left in the swamp. In another part of his testimony he fixes the number of these logs at 1,000. These logs not yet floated out were never counted, and it is not certain that they were not embraced in the 18,000 trees for which allowance has been already made, so that the court does not see its way clear to allowing anything on them.

On the 466 logs in the mill boom plaintiff is entitled to the full contract price, computed on the measurement actually made by Mayer; that is to say, \$922.68.

Adopting the same measurement for the 2,225 logs from the Paradis swamp, but not yet towed to the mill, and we have 801,000 feet, which at the contract price, less 25 cents for towing, equals \$4,205.25.

Fixing at 250 feet per log the 1,182 in the Commeaux canal, and we have 295,500 feet, which at the contract price, less 25 cents for towing, gives \$1,551.37.

What loss defendant suffered from the failure of plaintiff to fully comply with its contract to furnish canals is not proved with sufficient certainty. It is shown that pull boat No. 1 was idle for 29 working days, and pull boat No. 2 for 48; but there is no evidence that the crews of these boats were retained part and were not employed elsewhere during this time, except a vague statement of Coguenhem, in connection with the first day of idleness of one of the boats, to the effect that he did not dare discharge his labor. The wear and tear on the pull boats at the rate of \$10 per day during the idleness of the boats is not testified to positively by any witness. Winchester is not positive on the subject, and Kelso virtually denies it, or, at any rate, had not had such an experience with his pull boats.

Recapitulating, we tabulate the items as follows:

(1) Deadened timber in Paradis swamp, 18,000 trees, averaging 650 feet, one-half equal 5,850,000 feet, at \$2.25 per thousand.....	\$18,162 50
(2) Deadened timber on Island Nos. 2 and 3, 5,000 trees, averaging 250 feet, 1,250,000, at \$1.25 per thousand	781 25
(3) Profits under the contract during the 3 years and 1 month it had yet to run, 1,000,000 feet per month, during 37 months, at \$1.25 per thousand	46,250 00
(4) 466 logs at the mill, averaging 360 feet, 172,132, at \$5.50.....	922 68
(5) 2,225 logs in Paradis swamp booms, averaging 360 feet per log, 578,500 feet, at \$2.25.....	4,205 25
(6) 1,182 logs in Commeaux canal, averaging 250 feet.....	1,551 37
Total	\$66,873 05

From that deductions must be made. Had defendant gone on with the contract, it would have to pay the salaries of its officers, and would have lost the interest on the money invested in its operating outfit; also it would have had these profits only as they accrued from month to month.

The salaries of the officers were per month, as follows:

President	\$ 25 00
Manager	75 00
Bookkeeper	25 00
Mayer, agent, \$125 and expenses, say \$25 per month.....	150 00
Total	\$ 275 00

37 times \$275 equals.....	\$10,175 00
Interest thereon at 5 per cent. for one-half of 37 months.....	848 33
	\$11,023 33

Putting the value of the outfit at \$19,000, the amount at which Coguenhem offered it to plaintiff, and we have the interest on this amount at 5 per cent. for 3 years and 1 month, which equals.....	5,415 00
Inasmuch as the future profits of \$46,250 are payable and bear interest as of the date of judicial demand, May 25, 1903, whereas, had the contract continued, they would have accrued only from month to month, the mean interest from the date of the judicial demand to the date of the termination of the contract, June 9, 1906, at 5 per cent., must be deducted, viz.....	8,468 75

Total

Deducting the amount from the \$66,737.34 leaves \$45,832.01 as the amount of the damages.

As against R. H. Downman individually, on his alleged liability under the contract, the judgment must be set aside, as having been rendered without issue joined, either by default or otherwise.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside, in so far as it condemns R. H. Downman individually, as a party to the contract, and that this suit, as against R. H. Downman individually as a party to the contract, be dismissed as in case of nonsuit;

that said judgment be amended by increasing the amount thereof to \$45,832.01; and that, as thus amended, it be affirmed, with costs in both courts.

On Rehearing.

MONROE, J. By the order granting the rehearing the present inquiry is "restricted to the question of the quantum of damages to which the defendant may be entitled." In the opinion heretofore handed down, it was said:

"On all timber that was delivered and not paid for defendant is entitled to the full contract price. On all timber that was not delivered, but that would have been delivered if plaintiff had not prevented the full execution of the contract, defendant is entitled to the full contract price, less whatever further expense it would have had to incur in the execution of the contract."

Proceeding upon this basis, and considering. In slightly different order, the items which were dealt with in our former opinion, we now find that defendant is entitled to recover as follows, to wit:

(1) For 486 logs, averaging 360 feet and containing 167,760 feet of lumber, delivered, at \$5.50 per thousand (the contract price).....	\$ 922 68
(2) For 2,225 logs, averaging 360 feet and containing 801,000 feet of lumber, collected in booms, at \$5.50, less 25 cents for towing, \$5.25 per thousand	4,205 25
(3) For 1,182 logs, averaging 250 feet and containing 295,500 feet of lumber, collected, in Commeaux canal, at \$5.50, less 25 cents for towing, \$5.25 per thousand.....	1,551 37
(4) For 9,000 trees, averaging 650 feet and containing 5,850,000 feet of lumber, which defendant would have floated from Paradis swamp, at \$5.50, less \$3.35, for expenses, \$2.15 per thousand.....	12,557 50
(5) For 2,500 trees, averaging 250 feet and containing 525,000 feet of lumber, which defendant would have floated from Islands 2 and 3, at \$5.50, less expenses, \$1.25 per thousand	656 25
(6) For cost of deadening 9,000 trees in Paradis swamp, at 11 cents per tree	990 00
(7) For cost of deadening 2,500 trees on Islands 2 and 3, at 5 cents per tree.	125 00
(8) For loss by reason of depreciation in value of plant purchased for purposes of contract.....	5,000 00
	<hr/> \$26,008 05

1. Item 1 is undisputed save as to an error in our former calculation which is now corrected.

2 and 3. As to items 2 and 3, defendant's counsel suggest that the amounts heretofore allowed were smaller than they should have been and did not conform to the theory of the opinion, since the logs represented in them were ready for delivery, without further expense save that of towing to the mill, which alone should have been deducted from the contract price. Plaintiff's counsel, on the other hand, contend that the deduction

for towing should be 76 cents per thousand, instead of 25 cents per thousand, and rely upon the charge "for towing" as entered in defendant's books, from which, if those charges were applicable exclusively to the towing of logs, it would appear that the counsel are correct in their view.

It is not alleged that any other expense was to be incurred with respect to the logs in question than that of towing, and the obvious discrepancy between the theory of our former opinion and the decree, which was the result of mere inadvertence, has now been reconciled, as suggested by defendant's counsel. The contention of plaintiff's counsel fails to take sufficiently into account the evidence which has been adduced to the effect that the boats employed by defendant in towing logs were also engaged in other work, such as the supplying of the camps with laborers, provisions, and materials, and the towing of pull, tug, and dredge boats, and of barges laden with fuel, and that the entire expense was charged to the towing account. It is, however, necessary, in view of this testimony, to distinguish between the expense of towing logs and the other expense charged to the towing account, and in so doing we find that the expense of towing the logs ought not to have exceeded the amount which we have stated. In fact, whilst no witness who has been examined has undertaken to say that such expense would exceed 25 cents per thousand feet of lumber, several have testified that it could have been done for less, and we are of opinion that, in point of fact, it was done for less, by defendant.

4. Counsel for plaintiff question the sufficiency of the testimony of the witness Walker as to the number of trees deadened in Paradis swamp, and inquire why the court should have accepted it and have ignored the testimony of Gutekuntz, to whom they refer as an experienced professional estimator of timber. The answer is that we have not accepted the testimony of Walker as conclusive of the question, but only to the extent that it commands acceptance by its inherent probability and the support of other testimony. We have first deducted from Walker's estimate of the total number deadened 1,500 trees, and, after deducting from the remaining 22,000 the 4,000 trees removed prior to the issuance of the injunction, including the 2,225 placed in booms, have taken one-half of the 18,000 which remained, or 9,000 trees, as the number which we are satisfied that defendant would have floated from Paradis swamp. Walker testified that his object was to deaden a season's supply in advance, which we take to be a credible statement; and, as the mill turned out 50,000 feet of lumber per day, and would have consumed 22,000 trees, averaging 650 feet, in 296 days, it would have been imprudent not to have deadened that number.

As to the testimony of Gutekuntz, that witness undertook, in reply to a question asked

by plaintiff's counsel, to estimate the quantity of timber per acre in Paradis swamp, after having stated, when previously interrogated on the subject by defendant's counsel, that he was entirely unable to make such an estimate. We think he is the better judge of his own capacity; but, taking his estimate as made, he stated that Paradis swamp would "run" about 8,000 or 10,000 to the acre, and, on cross-examination, that he was not prepared to deny, if any one should so testify, that it might run 20,000 feet to the acre, and he estimated the number of trees at from 16 to 18 to the acre, which last figure would call for from 11,700 to 14,400 feet to the acre, as the trees may have measured 650 or 800 feet. Elfert, by whom the plaintiff was represented in Paradis swamp whilst defendant was operating there and afterwards, upon the other hand, testifies that there were from 10,000 to 20,000 trees deadened. He says:

"A. Nearer approximation, I think, would be 12,000; possibly, 15,000. Q. Possibly 20,000? A. Possibly; I never saw the list. I never counted the trees," etc.

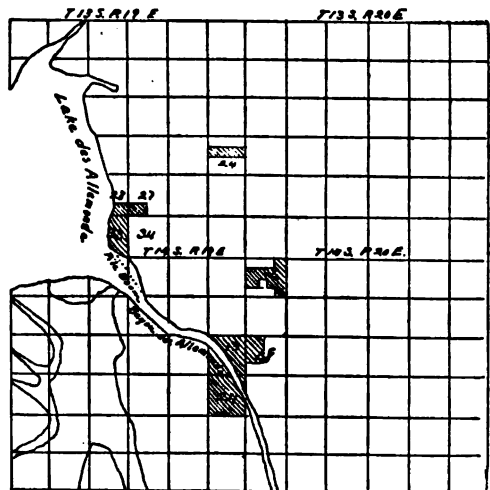
It may be here remarked that the land, which for the purposes of this litigation is called "Paradis Swamp," appears to be so called as representing certain tracts (in the midst of a large body of apparently swamp land) which were acquired from Edward Paradis by the Bowle Lumber Company, and by that company transferred, quoad the timber, to the Des Allemands Company, plaintiff herein. Mr. Downman, who is president and practically owner of both companies, gives the following, with other, testimony, to wit:

"I forget the exact acreage of Paradis swamp, some 2,000 acres, though, and there were probably 3,000 or 4,000 acres back of Paradis swamp of timber, with timber on them, that might have been operated, probably, under this contract."

The deed whereby the property was acquired, as copied in the transcript, purports to convey the following described tracts, viz.: Fractional sections 13 and 24, township 14, S., range 19 E.; S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 6, township 14 S., range 20 E.; W. $\frac{1}{2}$ of E. $\frac{1}{2}$ of fractional section 33, township 13 S., range 19 E.; S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 18, township 14 S., range 20 E.; N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 18, township 14, S., range 20 E.; S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 28, S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 27, S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 24, E. $\frac{1}{2}$ of fractional section 33, all in township 13 S., range 19 E.; also E. $\frac{1}{2}$ of E. $\frac{1}{2}$ of section 6, township 14 S., range 20 E.; S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 6, township 14 S., range 20 E.

According to the title before us, therefore, no land was acquired in section 34, of township 13 S., range 19 E. We infer, however, that there may be some error of description, and plaintiff's counsel have incor-

porated in a lately filed brief a sketch upon which the whole of the section mentioned, save N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, is represented as included in the swamp of which plaintiff had control, and as a matter of fact it was upon that section, as also upon the fractional E. $\frac{1}{2}$ of section 33 (adjoining to the west), and upon the S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 28 and S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 27 (adjoining to the north), that defendant, by plaintiff's instructions, operated under its contract. In the subjoined sketch we have shaded only the tracts called for by the title; but, taking those which plaintiff assumed to control, it seems that there were in the immediate field which was being operated when the injunction was issued 560 acres in section 34, 80 acres in section 27, 80 acres in section 28, and approximately 320 acres in fractional section 33, making a total of 1,000 acres.



It may be, on the one hand, that all of this particular land did not contain 22 trees to the acre, or that the whole of it was not operated; but, on the other hand, it does not appear that any one knew exactly where the lines were, and it is not improbable that, under the plaintiff's instructions, defendant deadened trees on land which is not included in the title which plaintiff sets forth, there being, as we should judge from the maps filed in evidence and from the testimony, including that of Mr. Downman, plenty of surrounding or adjacent swamp which bore the name of Paradis, though it may never have belonged to that gentleman, and the instructions under which defendant acted being in substance: "There is Paradis swamp. Go ahead and get the timber out." Upon the whole, we find no sufficient reason for doubting that 22,000 trees were deadened in what was called "Paradis Swamp." But, even if it were otherwise, it would not affect the immediate question under consideration, which is, how many trees would the defendant have floated out? since it might be assumed, for

the purposes of that question, that only 13,000 trees were deadened, a number which is fairly within the estimates of both Gutekuntz and Elfert. The remaining questions connected with this item are: Could the defendant have floated 9,000 trees during the remainder of the high-water period? and, if so, at what expense? The injunction was served on April 27th, and plaintiff thereafter floated timber until about June 1st, though it is probable that, during the last few days, only small trees were taken out in that way. We conclude that there were 28 days during which defendant might have operated to advantage, and within that time it would have been necessary for it to have floated timber at the rate of about 200,000 feet, or say 320 logs, averaging 650 feet, per day, in order to have taken out the 5,850,000 feet for which it is to be paid. During the same period of high water, Smith, a disinterested witness, with 15 men, floated 1,500,000 feet in six weeks; Vincent, with from 15 to 25 men, floated 6,000 logs in four weeks, dragging them eight or nine miles by hand; and others floated far beyond the requirements of the occasion now under consideration. It appears from the evidence, too, that, conservatively speaking, 1 man will float 4 logs per day, and that in fact defendant, with an average of 25 men, floated an average of 130 logs per day during the 19 days from April 7th to April 25th, and that on April 21st, with 39½ men (days' labor), it floated 235 logs. It further appears that defendant had increased its force to something over 100 men, and had arranged for a further increase, from all of which we conclude that it is safe to hold that it would have floated the quantity of timber stated from Paradis swamp, and also as many as 2,500 small trees from Islands Nos. 2 and 3. As to the expense: Smith, Constant, Vincent, Drew, Nuttall, and Sanders, disinterested witnesses, testifying from experience, say that it should not have amounted to more than \$3 per thousand, at the outside; the testimony of Nuttall being that F. B. Williams, by whom he was employed, had floated 35,000 trees, through eight contractors, at \$3 per thousand, from which it may reasonably be inferred that there was a profit in floating at that price. Walker and Mayer testify that the actual expense to the defendant was considerably under \$2 per thousand, and, whether they are correct or not, our conclusion is that defendant made, during the float, practically the first profit that it had earned under its contract. To the amount of \$3.25 per thousand, fixed by our former decree as the cost of floating this timber, including the towage, we have added 10 cents per thousand as the cost of completing the boom which defendant had begun and which would have been necessary to hold the timber as it accumulated.

5. Having given our reasons for holding that defendant would have floated 9,000 trees

from Paradis swamp and 2,500 from Islands Nos. 2 and 3, it is only necessary to say, in regard to the item 5, that we have fixed upon \$1.25 per thousand as the amount to which defendant is entitled, because we understand it to be conceded that the balance of the profit goes, or would have gone, to a contractor.

6. The deadening of those trees in Paradis swamp which we have not found that defendant could have floated inured to the benefit of plaintiff, who should therefore pay the cost.

7. The same as to the trees on Islands 2 and 3.

8. Our re-examination of the record has led us to the conclusion that the evidence adduced affords an insufficient basis for a judgment for prospective profits predicated upon future operations with the pull boats. The defendant company, like the plaintiff, is practically owned by a single individual (Manuel Coguenhem), who is not inexperienced, whether in business generally, or in the particular business out of which this litigation arises. In the course of his testimony, he says: "I have been pulling timber right along for a number of years." And Mr. Coguenhem had associated with him from the beginning, as his superintendent and swamp manager, Mr. Walker, who has been operating in swamps, pulling timber and floating it, all of his life. It is therefore safe to say that neither Coguenhem nor Walker had anything to learn with regard to the portion of the business which he undertook, and, having entered into the contract with plaintiff with a perfect understanding of its requirements, they operated under it for nearly two years, during which time they delivered between 12,000,000 and 13,000,000 feet of lumber, for which they were paid promptly, as the deliveries were made, amounts aggregating \$71,500. And yet up to the period of the float, as we conclude from a somewhat laborious reconsideration of their testimony and financial statements, they had made no money, or, at best, but a few hundred dollars. It is impossible, therefore, in considering the testimony of the different witnesses, and in following the calculations by which they show, on paper, a profit in "pull-boating" at this or that price, to escape the significant fact that, after an actual experience of about 19 months, in what is said to be an easily pulled swamp, the defendant did not earn that profit. And we cannot disabuse our minds of the conviction that, had the plaintiff repudiated its contract at the beginning, and had the defendant sued for the prospective profits of five years, instead of three, we should have heard the same testimony, and might upon the basis of that testimony have found the same reasons for awarding profits for the first two years as have been suggested, and as might be found, for awarding prospective profits for the last three years. It is evident, however, that a judgment render-

ed upon that basis, in so far as concerns the first two years of the contract, would have been lamentably unjust, since it would have given to the defendant a profit which its actual subsequent experience has demonstrated it would not have earned, and to which, therefore, it would not have been entitled. Who can assure us that a similar injustice will not be perpetrated, should we now condemn plaintiff to pay the prospective and theoretical profits which are here claimed? Certainly not the witnesses upon whom defendant relies, for their testimony is as applicable to the one period as to the other, and shows as conclusively that defendant should have made money whilst it was actually operating, though in point of fact it made none, as that it should or would have made money if it were, or had been, allowed actually to operate during the period here in question; and, as that testimony would have afforded an unsafe basis for a judgment in the one case, so, we fear, it would afford an unsafe basis for the judgment which we are asked to render in the other. It is said that the conditions might, or would, have been different during the last three years of the contract; but it was for the defendant to make it clear that there might, or would, have been such a change in the conditions as would have enabled it to accomplish that which, in actual experience, it had failed to accomplish, and this it has not done. We find from the record that whilst the contract was in force there were complaints from both parties; but until plaintiff filed this suit neither party considered the other sufficiently at fault to justify any particular action, and we see no reason for holding, either that defendant would have acted with respect to the conditions of which it complained, or that during the balance of the term of its contract it would have found no cause of complaint, nor has our recent investigation convinced us that its failure to realize a profit in its actual operations is to be attributed either to a lack of time for preparation or to anything that was done, or left undone, by plaintiff. We are, however of the opinion that, in this view of the matter, defendant is entitled to recover for the loss sustained by reason of the fact that it made an outlay of money for the purposes and upon the faith of a contract which was to have continued for five years, but which, through the fault of plaintiff, as we have held, was terminated within two years, the amount of which loss is to be measured by the depreciation, up to the date of the institution of this suit, in the value of the property of plant in which the money was invested, consisting of pull boats, tow boats, house boats, camp boats, pile drivers, barges, tools, etc., all valued by defendant, for the purposes of this suit, at something over \$21,000, though it appears to have been offered to the plaintiff for \$19,000. In some respects this valuation is manifestly unreasonable, as, for instance, in the matter of pull boat 1,

which was purchased by defendant's president, for his own account, for \$2,500 and sold to defendant, within a few days, for \$4,000, and is now valued at \$7,625.50; this valuation including all the wire rope with which it has from time to time been supplied, and the greater part of which has been worn out in the service in which the boat was engaged.

Upon the other hand, a portion of the plant, such as the house and camp boats barges, dinkies, and camps, had little or no value save for the purposes of the particular contract for which they were acquired. Without lengthening this opinion by entering into further detail, we conclude that \$5,000 should be allowed on account of this item.

For these reasons it is ordered, adjudged, and decreed that the judgment heretofore rendered in this case, as also the judgment appealed from, be amended by reducing the amount thereof to \$28,008.05, and that the former judgment of this court be further amended, in that defendant and appellee is now condemned to pay the costs of the appeal. It is further adjudged and decreed that in all other respects said judgment last mentioned be reinstated and made the final judgment of this court.

PROVOSTY, J. (dissenting.) The only possible claim defendant can have against plaintiff is for the contract price. Hence for putting an end to the contract the only possible claim defendant can have against plaintiff is for the contract price, less the cost of delivery; that is to say, the margin of profit. The majority opinion finds that this margin of profit is not proven with sufficient certainty, and yet it condemns plaintiff to pay on this demand \$5,000. If I took that view, I should allow only nominal damages.

But, in my opinion, we need not go outside of the judicial allegations of plaintiff to find that there was a margin of profit. Plaintiff alleges that the price was a high price. A high price means a margin of profit, unless the contractor is incompetent, and no one pretends to say defendant was not highly competent.

The execution of a contract of pulling and floating timber has to deal with comparatively stable conditions, and hence the testimony of men experienced in the business may be relied on in determining the cost of the process; and where a large number of such men, speaking from actual experience, testify positively and unanimously to the margin of profit in the business, a court of justice may without great risk, it seems to me, adopt the conclusion thereby established. In this as in all cases of damages the court deals in approximation. It fixes an amount as best it can under the circumstances. The conclusion is not likely to be very far out of the way, and, if slightly so, the sufferer but pays the penalty of his own act in violating the

contract, and has nobody to blame but himself.

The court makes, in my opinion, a serious mistake in basing its judgment upon the result of the first two years. The commencement of the execution of a large contract having several years to run can never be taken as a criterion for computing profits on the contract as a whole, especially where the work has to be done in a new and undeveloped country and the working outfit has to be built up from the ground. To compare great things with little, if a contractor were to undertake to construct the Panama Canal, he would not expect to make a profit on the first years of his contract. And neither this court, nor any court, would be willing to judge of the eventual cost of the Panama Canal by what the work there has cost the government thus far.

But, worse than this, the record, in my opinion, shows conclusively that the failure of defendant to realize a larger profit is due to the fault of the plaintiff in not furnishing the Paradis canal promptly, as a result of which the pull boats were kept idle on large expense, and in furnishing a shallow and crooked canal on Island No. 1 and 2, making the work slow and expensive, so that in effect, the majority opinion permits plaintiff to take advantage of its own wrong for defeating defendant's legitimate demand.

(117 La.)

No. 15,981.

**POLICE JURY OF CONCORDIA PARISH
v. CAMPBELL, Tax Assessor.**

(Supreme Court of Louisiana. June 4, 1906.)

**TAXATION — REDUCTION OF ASSESSMENTS —
POWERS OF POLICE JURY.**

The police jury, as a board of reviewers, has no authority to reduce assessments of its own motion, in the absence of a contest by the taxpayer.

(Syllabus by the Court.)

Appeal from Tenth Judicial District Court, Parish of Concordia; John S. Boatner, Judge.

Action by the police jury of Concordia Parish against E. P. Campbell, tax assessor. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel Lucius Elam, for appellant. Nathan Meredith Calhoun, for appellee. Walter Guion, Atty. Gen., for the State.

PROVOSTY, J. This suit is by the police jury of Concordia parish against the assessor of that parish. The petition alleges that the assessor appraised the property on his roll, not according to its actual cash value, as required by law, but according to an agreement entered into by him with the assessors of neighboring parishes, whereby a scale of values suitable for the neighboring parishes, but excessive for the parish of Concordia, was adopted; and that petitioner, by resolution, reduced this scale; but that the assessor

has refused to recognize the reduction. The prayer is that the court declare the reduction to be just, and compel the assessor to comply with it.

The lower court sustained an exception of no cause of action, based upon the following grounds, among others: that the police jury is without interest to maintain this suit; and that the reduction is not alleged to have been made at the instance of any taxpayer, and the police jury is without authority to reduce assessments of its own motion.

The exact point thus presented was considered by this court in the case of *Union Oil Company v. Assessor*, 48 La. Ann. 1350, 20 South. 1007, where this court said:

"We are of the opinion that in the matter of the correction of the assessment of individual citizens or corporations, the board is authorized to take action only upon a special opposition made by the party alleging himself to be aggrieved, and that a sworn declaration made by him, such as is called for in section 19 of the act (Act 1890, p. 129, No. 106) is required as essentially necessary for the purposes of such a contest before the board. We are of the opinion that it is no part of the duty of the board of reviewers to vindicate the wrongs either actual or supposed, of individuals, and take more interest in their affairs than they themselves and by taking action in their behalf practically dispense the parties from declaring, under oath, that they have, in point of fact, been injured and what, in their opinion, and what the extent of that injury is, and enabling them to obtain relief through the voluntary action of the board from which they had cut themselves off by laches and inaction."

What is here said has reference to the act of 1898, and not to the act of 1902, under which the police jury acted in this case: but it has, if anything, still more cogent application under the latter act, since the only change made by the latter act with respect to the relative powers of the police jury and the assessor is that it requires that, in case of disagreement between the two the decision of the assessor shall prevail; whereas, under act of 1898, the decision of the police jury was to prevail.

Nor does the above decision conflict with *State v. Tax Collector*, 39 La. Ann. 635, 2 South. 59. What was there said, touching the dual function of the board of reviewers, was based upon a certain equalization clause, to be found in the act of 1882, with which the decision dealt, but not retained in the acts of 1898 and 1902, to wit:

"And they shall also equalize the assessments of all properties of like character and relative value within their respective parishes." Act No. 96, p. 127, § 24.

The "also" in this clause has a force indicative of a second, or dual, function.

Nothing equivalent to this clause is found in the Acts of 1898 and 1902; although, it must be admitted, the second paragraph of section 24 is so ambiguously worded as to leave the legislative intention somewhat in doubt. We think, however, that the appeal to the courts which the paragraph has reference to is the

appeal in behalf of some complaining taxpayer. The language is: "as provided in the act"; and the only appeal to the courts "provided in the act," is that in behalf of a complaining taxpayer.

Judgment affirmed.

(117 La.)

No. 18,091.

STATE v. RAMBO.

(Supreme Court of Louisiana. June 4, 1906.)

CRIMINAL LAW—APPEAL—REVIEW—BILL OF EXCEPTIONS—HOMICIDE.

The ruling of the trial judge that no overt act or hostile demonstration has been proved to his satisfaction, and therefore, that no proper foundation has been laid for the admission of proof of prior communicated threats, previous difficulties, or the dangerous character of the deceased, is reviewable on appeal, when all the evidence on which the trial judge acted is brought up by bill of exceptions; but such ruling will not be disturbed unless it be made to appear that the judge a quo has abused the sound legal discretion vested in him. *State v. Feazell* (not yet officially reported) 40 South. 698, reaffirmed.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 698.]

(Syllabus by the Court.)

Appeal from Third Judicial District Court, Parish of Bienville; James Edward Moore, Judge.

Fed. Rambo was convicted of manslaughter, and appeals. Affirmed.

Joseph Rush Wimberly and William Chapelle Barnette, for appellant. Walter Guion, Atty. Gen., and John C. Theus, Dist. Atty. (Lewis Guion, of counsel), for the State.

LAND, J. Defendant was indicted for the murder of one Mitchell Jackson, was found guilty of manslaughter, and was sentenced to imprisonment at hard labor, for the term of seven years.

Defendant has appealed, and relies for reversal on a single bill of exception.

On the trial the defendant offered to prove that the deceased had shot five other negroes, and was a bad and dangerous man. The testimony was ruled out by the trial judge for the reason that no overt act had been established.

Phillip Matthews was the only eyewitness to the homicide, and he testified that he and the deceased had gone hunting, and were returning along the road toward home when the shooting took place.

This witness stated that the defendant fired from the inside of a field; that there was a fence between the parties and defendant was standing by a hickory snag; that the first shot struck the deceased in the left side of the head and the second shot struck him in the right side; that after the shooting the defendant got over the fence and came to where the deceased was lying, and stayed there until the wife of the deceased and one Isaiah Scott arrived.

This witness further stated that "the first he knew the defendant shot the deceased from the field."

In his per curiam the judge said that Phillip Matthews stated that the first intimation he and the deceased had of the presence of the defendant was the firing of the first shot; that the accused reloaded his gun, which was a single-barreled breechloader and fired another shot into the side of the deceased; that the wounds were made with buck shot.

Isaiah Scott and Polly Williams testified that they saw the defendant shortly after the shooting, and that he told them that the deceased had not seen him, that he had not said a word to the deceased, and that he had got one and would get the other. A witness for the state testified that the defendant and the deceased had a fight a few days before the homicide, and that the deceased shot at the defendant.

Defendant testified substantially that the deceased had shot at him a few days previously; that he was afraid of the deceased and had avoided him; that he was coming down the road and he saw the deceased and Phillip Williams coming meeting him and they both had their guns, that the deceased had a pan of potatoes, and that as soon as he saw him, he threw down the potatoes, and started to shoot the defendant; that the deceased had raised his gun and was starting to level it at defendant, when the latter fired and "seemed to knock the deceased crazy"; that the deceased kept doing as if he were trying to shoot the defendant, who reloaded his gun and shot the deceased again, who thereupon fell to the ground.

A Mr. Sam Carter, a storekeeper of the vicinity, went to the scene of the shooting with the boy, Phillip Williams, who pointed out the place whence the shots were fired. Mr. Carter found no tracks at the spot indicated and no bullet marks on the intervening rail fence. This witness further stated that Phillip Williams said that he ran off when the first shot was fired.

Mr. Carter visited the scene of the shooting with the defendant, who pointed out the spot in the road where he was standing when he fired the shots. The witness found gun wads at about the right distance between said spot and the place where the deceased fell. The testimony of Phillip Williams that the deceased was shot in the left side of the head, which fact is not disputed, seems to corroborate his statement that the first shot came from the field on the side of the road.

This conclusion is re-enforced by the statement of two witnesses that the accused declared that the deceased did not see him.

The district judge was of opinion that the evidence showed that the deceased was shot from ambush, and that the testimony of the accused as to the overt act was not entitled to any credit.

The jury must have been of the same opinion.

In a similar case, we recently held that the hostile demonstration constituting the overt act, must be proved to the satisfaction of the trial judge, and that while we will review his ruling when all the evidence touching the question of overt act is before us, the evidence must be clear and convincing to authorize our interference. *State v. Feazell* (La. No. 15,922, not yet officially reported) 40 South. 698. We see no good reason for holding that the district judge has abused the discretion vested in him.

Judgment affirmed.

(117 La.)

No. 16,054.

WENAR v. LEON L. SCHWARTZ,
Limited.

(Supreme Court of Louisiana. June 4, 1906.)

CORPORATIONS — INSOLVENCY — RECEIVER — SALE OF ASSETS.

The spirit of our law, as indicated by the text applicable to insolvencies, seems to be that, in matters of that kind, the question whether the property should be sold in bulk or in parcels had best be left to the creditors. Hence, in the matter of the receivership of a corporation, where the creditor holding the vast majority of the claims, in amount (being perhaps a majority in number, as well), requests that the sale be made in bulk, it will be so ordered, unless there be shown some conclusive reason to the contrary.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 231, 233.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by Charles Wenar against Leon L. Schwartz, Limited. From an order commanding the receiver to sell the assets of defendant in bulk, Leon L. Schwartz, Limited, appeals. Affirmed.

Sergeant Smith Prentiss, for appellant. Saunders & Gurley, for appellee A. Marx, receiver. Emile Joseph Meral, Charles Rosen, and William Stirling Parkerson, for appellee creditors.

MONROE, J. This matter comes before the court upon an appeal from an order directing the receiver to sell, in bulk (rather than in lots), the assets of the defendant corporation, consisting of a stock of dry goods and millinery, fixtures, open accounts, and the balance of a lease of a desirably situated store. The total value of the assets is about \$52,000, and the liabilities amount to about \$64,000. Creditors whose claims amount to more than \$50,000 seem to approve of the sale, in bulk, and those who oppose the sale in that way constitute a small minority in amount, though numerically there is perhaps not much difference between them and the others. The spirit of the law (Rev. St. § 1799), as shown by the textual provisions re-

lating to insolvencies, is that, in such matters, the parties having the greatest interest, to wit, the creditors, should be allowed great latitude, and it is an accepted rule that in receiverships considerable discretion is allowed the receiver as to whether he should sell the property in his hands in bulk or in parcels. High on Receivers, p. 150, § 196. In the instant case, the receiver agrees with the creditors holding the larger claims that it would be to the advantage of all concerned to have the sale made in bulk, and the record furnishes us with no sufficient reason for holding to the contrary.

The judgment appealed from is, accordingly, affirmed.

(117 La.)

No. 16,061.

STATE v. CALHOUN.

(Supreme Court of Louisiana. June 4, 1906.)

GRAND JURY—COMPETENCY.

A grand juror is not rendered incompetent because charged with a violation of a municipal sanitary ordinance; which is not a "crime or offense" within the intentment of section 1, Act No. 135, p. 216, of 1898.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Tom Calhoun was convicted of manslaughter, and appeals. Affirmed.

Thomas Fletcher Bell, Jr., and W. E. Maples, for appellant. Walter Guion, Atty. Gen., and James Martin Foster, Dist. Atty. (Lewis Guion, of counsel), for the State.

LAND, J. Defendant was indicted for murder, found guilty of manslaughter, and sentenced to imprisonment at hard labor for a term of two years.

Defendant has appealed, and relies for reversal on a single bill of exception reserved to the overruling of his motion to quash the indictment on the ground of alleged incompetency of one of the grand jurors.

It appears that Herman Loeb was duly selected and sworn in as a member of the grand jury in September, 1904.

On February 5, 1906, a charge was made in the city court of Shreveport against the said Loeb for failing to make sewer connections as required by the city ordinance. On the next day Loeb appeared in the city court, pleaded not guilty, was tried, and fined \$5. He appealed to the district court and gave bond as required by law. During these proceedings the grand jury was in session, and on February 7, 1906, returned the indictment in question. The ground of the motion to quash was that the pendency of the said charge in the city court rendered Loeb incompetent to sit as a grand juror.

Section 1 of act No. 135, p. 216, of 1898, prescribes that a grand juror must be a citizen of the United States, a bona fide

male resident of the parish for one year next preceding his service, "not under interdiction or charged with any crime or offense nor convicted at any time of any crime or offense punishable by hard labor, unless he has been pardoned."

It is obviously improper for any person "charged with any crime or offense" to sit as a member of a grand jury whose sworn duty is to inquire into all violations of the criminal statutes of the state. But neither the letter nor the reason of the prohibition apply to mere violations of local municipal ordinances, which do not come within the jurisdiction of grand juries, and which do not contravene any of the criminal statutes of the state.

In *State v. Thibodeaux*, 48 La. Ann. 600, 19 South. 680, the grand juror was charged in an indictment with having failed to perform the duties of a road overseer.

In *State v. Nicholas*, 109 La. 84, 33 South. 92, the grand juror was charged by information with having willfully neglected and refused to pay a per capita road tax imposed and levied under an ordinance of the police jury under express powers conferred by statute and article 291 of the Constitution of 1898, to pass such ordinance and enforce the same by indictment or information in the name of the state. In that case, the court said:

"Ordinances enacted by police juries under this delegation of powers, which may be enforced in the name of the state, stand before the courts with the force and authority and character of state enactments."

A violation of a sanitary ordinance of a city is neither a crime nor an offense within the intendment of the statute.

Judgment affirmed.

(117 La.)

No. 16,137.

STATE v. WARREN.

(Supreme Court of Louisiana. June 4, 1906.)

1. CRIMINAL LAW—APPEAL—RECORD.

Where an alleged overt act on the part of the prosecuting witness is relied on as a defense to the charge of shooting with intent to kill, and neither the recitals of the bill of exception nor any evidence annexed show the relation, in point of time or circumstance, between such act and the shooting, this court is obliged to accept as correct, the ruling of the trial judge to the effect that no overt act was proved.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2933, 3014, 3030.]

2. SAME—NEW TRIAL.

A motion for new trial which merely presents the theory of the defense as to the facts, brings up nothing upon which this court can act.

3. SAME—VERDICT.

Where the record shows that the verdict was properly indorsed on the back of the bill of information, the fact that it was entered on the minutes without the name and official capacity of the foreman being added is immaterial. (Syllabus by the Court.)

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Calvin Kendrick Schwing, Judge.

George Warren was convicted of shooting with intent to kill, and appeals. Affirmed.

John Howell Pugh, for appellant. Walter Gulon, Atty. Gen., and Albin Provosty, Dist. Atty. (Lewis Gulon, of counsel), for the State.

MONROE, J. 1. Whilst defendant was being tried for shooting with a dangerous weapon, with intent to kill, his counsel reserved a bill of exceptions from which it appears that the prosecuting witness was asked, on cross-examination, whether he had not "advanced on the accused with a hickory stick in his hand, and in a threatening manner," to which he answered in the affirmative; whereupon, or later, he was asked "If he had not on one occasion shot a negro, on the Front Place, under similar circumstances, which fact was known to the accused," to which it was objected that a proper foundation had not been laid, and the objection having been sustained on the ground as stated by the court that no overt act had been shown the bill was reserved. No testimony was taken down, and we have no other information as to the matter at issue than as thus stated in the bill. We are not informed of the relation in point of time or circumstances between the alleged overt act, on the part of the prosecuting witness, and the shooting, by the accused, and, in the absence of such information, we are compelled to accept as correct the ruling of the trial judge that no overt act was proved.

2. We find in the record a motion for a new trial and a bill of exceptions to the overruling of the same, but the motion merely presents the theory of the defense, and challenges the correctness of the verdict, because that theory was not adopted, thus presenting the issues of fact which were decided by the jury, and as to which this court is without jurisdiction.

3. We also find a motion in arrest of judgment based upon the ground that the minutes of the court read, "Guilty as charged," instead of "Guilty as charged. S. D., Foreman." The record, however, shows that the verdict was indorsed on the back of the bill of information, with the signature of the foreman attached in due form.

The judgment appealed from is accordingly affirmed.

(117 La.)

No. 15,840.

KUHL v. ST. BERNARD RENDERING & FERTILIZING CO. et al.

(Supreme Court of Louisiana. June 4, 1906.)

1. NUISANCE—TRACK IN PUBLIC STREET—SUIT BY TAXPAYER.

A tram or rail way track constructed on a public street, or highway, by an individual, for his own use, whether with, or without, the au-

thority of the police jury, may be decreed a nuisance, at the suit of a citizen and taxpayer whose personal comfort and property rights are thereby affected.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 164-169.]

2. SAME—LIABILITY FOR DAMAGES.

One who conducts a business, even though otherwise lawfully, in such a manner as to inflict unnecessary injury upon others, is liable in damages, and, a fortiori, is he liable when the business is unlawfully conducted in other respects as well?

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 6.]

(Syllabus by the Court.)

Appeal from Twenty-Ninth Judicial District Court, Parish of St. Bernard; Nemours Henry Nuñez, Judge.

Action by John Kuhl against the St. Bernard Rendering & Fertilizing Company and others. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

A. E. & O. S. Livaudais, for appellant. McCloskey & Benedict, for appellees.

MONROE, J. Plaintiff alleges that he is a taxpayer of the parish of St. Bernard, residing on Mehle street, and that the defendants, the St. Bernard Rendering & Fertilizing Company and Wm. L. Mehle, are maintaining a nuisance in his neighborhood, which makes his residence well nigh uninhabitable and life a burden to his family and himself, for this, to wit:

That said company operates a rendering establishment, of which said Mehle is the owner and lessor, and also a rail or tram way extending from said establishment to and along Mehle street, and in front of petitioner's residence; the rails of which are laid on the street and banquette, and thereby obstruct the use of and traffic upon the same, and constitute a nuisance which affects petitioner personally, and is detrimental to his property; that defendants are now using said tramway for conveying the carcasses of dead animals from a point opposite to petitioner's residence, to which they are brought in carts, to said establishment; that it has been their custom to allow said carcasses to remain on the carts all night and transfer them to the cars on the following morning, and that the stench arising therefrom is so intolerable as to deprive petitioner and his family of sleep and to threaten them with pestilence; that he has remonstrated but to no purpose; and that he has sustained damage, through inconvenience and discomfort, to the amount of \$2,000, and through detriment to his property to the amount of \$500. He therefore prays that said tramway be decreed a nuisance, and that defendants be enjoined from using, and ordered to remove, the same; or, in default of their so doing, that it be removed by the sheriff. The answer is a general denial. There was judgment in the district court rejecting plaintiff's demand, entirely, as to Wm. L. Mehle (who was not

shown to be in any way connected with the matters complained of), and rejecting the demand, as against the company, that the tramway be decreed a nuisance, but holding that the said company had inflicted injury upon plaintiff by the manner in which its business has been conducted, to the extent of \$50, and from the judgment so rendered, plaintiff has appealed, and the defendant company has answered, praying that said judgment be amended by rejecting the demand altogether.

From the evidence it appears that Mehle street runs from the river in the direction of the lake, and is, approximately, 60 feet wide, including the banquettes (or space intended for banquettes); that plaintiff's residence is situated on the upper side of the street, about two squares from the river, and immediately opposite to the premises of Mr. Oliver Patton (who is connected with the defendant company), in which premises a terminus of the track (or tramway, as it is called) here complained of is situated; the other terminus being at the factory (meaning the defendant's rendering establishment). The distance from the property line on the upper side of the street to the track is 45 feet, and from the property line on the lower side of the street to the track, say 15 feet, though in some places, it seems to be less. There is a bridge or wooden causeway, extending from Patton's place out to the track, upon which carts, containing dead animals are driven, and their burdens are there shifted to the cars, and, by the latter, conveyed to the factory, which is some distance back in the direction of the lake. The business as thus conducted is, at best, exceedingly offensive, both to sight and smell, and is rendered more so by the fact that when the carts arrive after a certain hour in the evening the shifting of their loads is deferred until next morning, and the surrounding atmosphere is, in the meanwhile, surcharged with an insufferable stench. The track in question, situated as it is upon the lower side of the street, does not obstruct travel along the roadway, but, as the cross-ties and rails stand boldly above the level of the ground, it is impossible to cross it with vehicles and inconvenient to pedestrians, and the owners of property on that side are debarred the use of or privilege of making a banquette, and are compelled to get in and out of their premises through openings on other streets (the next parallel street, or cross street).

The defendant undertakes to show a grant from the police jury, but it appears that the records have been lost, and the most that was done (over the objection of the plaintiff) in that direction was to produce a copy of the official journal of the parish in which, as part of the proceedings, on June 1, 1891, the following appears, to wit:

"Communication from T. Patton asking leave to lay railroad track from factory to slaughter house was received and granted."

It is not pretended that the track here in question runs to the slaughter house, and if there is anything in the transcript before us which connects the defendant company with the indefinite grant thus made it has escaped our attention. It appears that within the past 18 months a petition, signed by a number of property holders, was presented to the police jury, making the same complaints as are made in the petition herein filed; that a counter petition was presented, representing that the track is a convenience to the neighborhood; that the police jury referred the matter to the board of health, and that so far nothing has been done. It also appears that the defendant uses the railway in question only now and then; that is to say, in bad weather; and that during the greater part of the year, it gets the carcasses to the factory by some other route, or means of conveyance. It also appears that matters were as they are now when plaintiff, several years ago, built, or bought, the house which he now occupies, and, though that complained of is paramount, that there are about as many other bad smells in the neighborhood as in the city of Cologne.

Opinion.

The proceedings of the police jury relied on as showing the grant of a franchise were inadmissible, under the pleadings, and should have been excluded. They, however, prove nothing to the point, for the reason (among others) that neither Mehle street nor any other public highway is mentioned. Moreover, the grant, upon its face, purports to be made for the personal benefit of the grantee, and the police jury was without authority to turn over a street, or highway, to an individual. Civ. Code, arts. 453, 458; *Mayer v. Metzinger*, 8 Mart. (O. S.) 296; *Hebert v. Benson*, 2 La. Ann. 770; *Bradley et al. v. Pharr*, 45 La. Ann. 426, 12 South. 618, 19 L. R. A. 647; *Elliott on Roads & Streets*, 565.

Even had the defendant been authorized to make use of the street or highway for the purpose of its business, it would be liable for the injury sustained by reason of the manner in which that business was conducted. *Chicago & G. W. R. R. Co. v. First Methodist Church*, 102 Fed. 85, 50 L. R. A. 488, 42 C. C. A. 178; *Froelicher v. Oswald Iron Works*, 111 La. 706, 35 South. 821, 64 L. R. A. 228.

It is, therefore, ordered, adjudged, and decreed that the judgment appealed from be reversed and amended, in that the tramway referred to in the petition is now decreed to be a nuisance, which is to be removed from Mehle street by the defendant, the St. Bernard Rendering & Fertilizing Company, or by the sheriff at the expenses of that company. It is further decreed that in other respects said judgment be affirmed; the St. Bernard Rendering & Fertilizing Company to pay all costs.

(117 La.)

No. 15,894.

STATE ex rel. TURNER v. BLANCHARD,
Governor, et al.

(Supreme Court of Louisiana. June 4, 1906.)

PUBLIC LANDS — STATE LANDS — PUBLIC
LEVEE.

An embankment built out in a lake, with earth from the bottom of the lake, to serve as a public levee, and still serving as such, is not subject to entry and sale as public land, though the bed of the lake belong to the state.

(Syllabus by the Court.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; George Kent Favrot, Judge.

Application by the state, on the relation of W. G. Turner, for writ of mandamus. Newton C. Blanchard, Governor, and A. W. Crandall, register. From an order denying the writ, plaintiff appeals. Affirmed.

Wickliffe & Falls, for appellant. Walter Gulon, Atty. Gen. (Lewis Gulon, of counsel), for appellees Blanchard and another. Bernard McCloskey (Arthur McGuirk, of counsel), for appellee Orleans Levee Board, intervener. J. E. Le Blanc, Jr., and Laycock & Beale, for appellee John E. Salles, intervener.

PROVOSTY, J. Act No. 30 of 1871, p. 75, authorized a certain private corporation to dig canals and build levees, above and below the city of New Orleans from river to lake, and along the shore of the lake, for the drainage of the city and its protection from overflow. The scheme was that the earth taken from the canals should form a levee by being piled along the outer bank of the canal. The work was to be paid for by the city, at the rate of 50 cents per cubic yard. By special provision of the act, the board of administrators of the city was to locate the canals and levees and to "procure the title to the lands necessary for said works." Although the act provided that the works should be "within the corporate limits of the city," and although the corporate limit of the city along the lake was the shore of the lake, the levee along the lake was located out in the lake, about 800 or 1,000 feet from shore; the water being very shallow. The enterprise seems to have fallen through, but not until there had been built that part of the levee along the lake from the New Basin canal to the upper limit of the city, and also that part along the upper limit of the city from the lake to within a few squares of the river. In this levee, built out in the lake, two gaps were left, for the purpose of drainage; one of 45 feet, at the starting point, or point of junction with the bank of the New Basin canal, and one of 25 to 30 feet, at the turn towards the river, or point of junction with the upper protection levee. As the result of leaving these two gaps open, the levee out in the lake answered to the de-

scription of an island—land surrounded by water. It was 2,200 feet long by 150 to 200 feet wide. The work was done in 1872. In the course of time this levee standing out in the lake came to be used as a pleasure resort by permission of the authorities of the city of New Orleans, and is known as "West End."

The Orleans levee district was created in 1890, with limits corresponding with those of the city of New Orleans. The commissioners of the district have completed the levee above the city and built a levee from river to lake below the city, and also along the lake from the New Basin canal to the lower limit of the city; this last levee being further inland—inside, not outside, of the shore of the lake. Thus, there being a levee also along the river, the city of New Orleans, east bank, is circled by a levee whereof this levee in the lake forms a part. Owing to the two gaps in it and to the New Basin canal, which is, in a sense, another gap, since its upper bank overflows during storms, this levee in the lake is very far from perfect. But the evidence shows that, notwithstanding these gaps, and such as it is, it forms a component part of the levee system of the city; that it aids materially in the work of protection, because the filling up of the basin back of it through these narrow gaps takes time, and the high tide subsides before any injury can be done. That it is considered to be a part of the levee system is shown conclusively by the fact that, when a storm destroyed it partially some years ago, the levee board staked out another levee further inland to take its place, and would have built this other levee had not the damage done by the storm been repaired. The levee board, however, has never exercised any jurisdiction over it, as is shown by the fact that the permission to occupy it as a pleasure resort has been derived from the city and not from the levee board, and by the further fact that, not the levee board, but the city, attended to having it repaired when it was damaged by the storm.

Plaintiff has applied to the state land office to sell him this piece of levee, as public land subject to entry and sale, and, upon the refusal of the land office to do so, has brought this mandamus suit. He invokes Act No. 124 of 1902, p. 206, section 1 of which provides as follows:

"Be it enacted by the General Assembly of the state of Louisiana, that all islands, other than sea marsh islands, belonging to the state, as well as all other lands of the state, not the property of any levee district, nor within the limits of any levee district which were formerly the beds of lakes, or other bodies of water, whether navigable or unnavigable which are now, or may hereafter become dry in whole or in part by reason of the recession therefrom of the waters which formerly covered the same, be and the same are hereby declared to be open to entry and sale for account of the state for school purposes as hereinafter provided."

The learned counsel for plaintiff argues that the beds of lakes belong to the state, by

right of eminent domain; that this levee was formerly a part of the bed of Lake Pontchartrain, and has never been alienated, and therefore belongs to the state, and forms part of the public lands of the state; that it is not situated within the limits of any levee district; and that therefore, whether as an island belonging to the state, or as land formerly the bed of a lake from which the water has receded, it is subject to entry and sale under the above statute.

But, manifestly, whether this levee belongs to the state or not, it is a public work, paid for by the city of New Orleans and serving the purpose of its construction, and does not fall within the category of lands to which this statute has reference, and is not subject to entry and sale as public land.

The levee board intervened in the suit, praying that plaintiff's demand be rejected, and that it (the levee board) be decreed to be entitled to the possession and control of this levee. The latter demand cannot be entertained, for the reason that it is, in reality, directed against the state or the city of New Orleans, and that the state cannot be sued without her permission, and the city of New Orleans is not a party to the suit.

Judgment affirmed.

NICHOLLS and LAND, JJ., take no part, not having heard the argument.

(117 La.)

No. 16,024.

KRANTZ et al. v. NOONAN et al.

(Supreme Court of Louisiana. June 4, 1906.)

COURTS—SUPREME COURT—JURISDICTION.

Case ordered to be transferred under Act No. 58, p. 135, of 1904, to the Court of Appeal for want of jurisdiction of the Supreme Court of the appeal.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by the widow of Frederick Krantz and Julian B. Habans against J. J. Noonan and S. M. Higginbottom. Judgment for defendants, and plaintiffs appeal. Dismissed.

Robert John Maloney, John Watt Duffy, and Nicholas Eugène Humphrey, for appellants. Cage, Baldwin & Crabites, for appellees.

Statement of the Case.

NICHOLLS, J. The plaintiffs alleged that they were taxpayers and residents of New Orleans, and owners of certain property which they described.

That the property of petitioners was jointly worth over \$3,000; the value being chiefly owing to the fact that there were no obstructions of any kind intervening between the said properties and the water of Lake Pontchartrain.

That J. J. Noonan and S. W. Higginbottom, who are likewise residents of this city, had begun the construction on the lake near the shore, and in front of petitioners' property, of a clubhouse, or pleasure camp, and, notwithstanding that they were not the owners of any land, or vested with any authority to build the said place, they were constructing, and would continue to construct (petitioners having been informed by them of the building), to the irreparable and great injury of petitioners. That the building of a clubhouse or pleasure camp at the said place was a public nuisance, closing off the view of the lake to petitioners, as well as being a detriment to the Pontchartrain public school, which adjoined petitioners' property. That the same will destroy the value of all the property in the square bounded by Touro and Frenchman streets facing the lake shore as residential property. That writ of injunction was necessary and material in the premises, as petitioners had no other remedy at law.

In view of the premises, they prayed that, the annexed affidavit and bond considered, upon security being furnished in the amount fixed by the court, a writ of injunction issue herein enjoining and restraining the said J. J. Noonan and S. W. Higginbottom, or any other parties in their employ from further building or constructing the said clubhouse or pleasure camp, and that they be cited and served with a copy of this petition; that after due proceedings had petitioners have judgment in their favor maintaining and perpetuating the said injunction, and commanding the defendant to remove any and all obstructions placed by them on the lake before or near petitioners' property. Petitioners further prayed for all cost, as well as all orders of relief necessary in the premises.

This petition was verified as to its allegations by the affidavit issued.

Defendants excepted to the petition on the grounds that:

First, that the same was vague, general, and indefinite and not such as to permit exceptors safely to answer.

Second, that the same set forth no cause of action.

In view of the premises, exceptors prayed that these exceptions be maintained, and that plaintiffs' petition be dismissed at their cost, and for general relief.

Plaintiffs filed an amended and supplemental petition, in which, in addition to their original allegations, they averred that defendants were causing to be erected, and about to erect, a structure, dwelling, or clubhouse on the lake shore in front of the property of petitioners or adjacent thereto, below the high-water mark, and had driven piling in the soil for the support of the said clubhouse, dwelling, or structure.

That the said defendants were without any right or warrant in law to cause any structure of any nature or any obstruction of any

character to be erected in or upon the said lake, without the consent or authority of the municipal or state authorities, which said authority petitioners specially averred the said defendants had not in any manner obtained; but, on the contrary, the said defendants were causing the said structure, or building, or dwelling to be erected in defiance of the municipal or state authorities, and that the said municipal or state authorities had no right whatever, even if the said defendants had obtained a permit for the erection of said building or structure, to grant the same, petitioners being entitled, as citizens of the state and city, to the free and unobstructed use of the said lake, and particularly the place where the said building or structure was about to be erected.

That the said building, if erected and occupied for the purposes and uses contemplated by the defendants, as exemplified by the statement of counsel for the defendants, in open court, then the said building would contain toilets, from which all sorts of fecal matter and other refuse would be thrown into the lake, and would necessarily be washed upon the shore and become dangerous to the public health, which would constitute a nuisance, from which the said defendants should be enjoined as originally prayed for. That the buildings contemplated by the defendants, if placed upon the pilings driven by the said defendants, for the support of the said structure, and erected as contemplated, in that event the storms which were of annual occurrence along the lake shore would cause the said buildings and pilings to become dilapidated, loose and dangerous, and the same, when washed upon the shore, would cause irreparable injury to the property of the petitioners and would be a constant menace to their lives and property.

In view of the premises and annexed affidavits being considered, petitioners prayed that their amended and supplemental petition be filed and served on the defendants; that there be judgment in favor of petitioners and against the said defendants, perpetuating the injunction herein sued out, and ordering and decreeing the removal of the said obstruction placed by the defendants upon the said lake, as aforesaid; and that the writs of injunction herein sued out be perpetuated, reserving to petitioners all their rights and actions in damages, as under the law they may be entitled, and for all necessary orders, costs, and for general relief.

The district court overruled defendants' exceptions.

Defendants answered, pleading first the general issue. Further answering, they averred that the construction they were erecting on the bottom of the lake shore was a small camp of the nature of dozens of others built along in the shallow water of Lake Pontchartrain, and which had been built from time out of mind.

That the purpose of this camp was to give respondents a place where they could carry their wives and children on Sundays, and spend the day out on the water at a cost within their means; they being men of limited means, making their living by daily work. That this erection was not in front of the properties owned by the petitioners and would not, in any manner, interfere with any of the legal rights of petitioners. That the allegations of the petitioners, declaring that the building to be erected by respondents would constitute a nuisance for the reasons stated in the supplemental petition, were so baseless and far fetched as to be absurd. Respondents charged that the issuance of the injunction in this case was a gross abuse of the processes of the court.

On trial the district court dissolved and set aside the injunction and dismissed plaintiffs' demand. Plaintiffs appealed.

Opinion.

The defendants do not pretend that they are owners of the property on which they are constructing the wharf and building of which the plaintiffs complain in the bed of the lake, or to have the consent of either the state or municipal authorities to place it there, or that of any one else. Their defense rests principally upon the want of legal right or interest in the plaintiffs to question their action. They maintain that, so long as the owners of the property, whether city or state, take no adverse action in the premises, the plaintiffs have no right to interfere.

The district judge assigned no reasons for his ruling beyond the stereotyped assigned ground that it was "by virtue of the law and the evidence." We have therefore to deal with it conjecturally. We do not think that the court intended to hold that, if the acts complained of were, in fact, of such character as to cause the plaintiffs a special injury, one separate and distinct or more direct than that suffered by the public at large, they would have no legal right of themselves to apply to the court for relief, but would have to depend upon action taken or to be taken by the municipal or state authorities.

It was testified, on the trial of the case, that parties desiring to place structures such as those being constructed by the defendants, on the bed of the lake, were required to obtain a permit so to do from the city authorities.

Defendants deny that the work which is in process of construction by themselves has, in fact, injured the plaintiffs or their property, or, would be likely to injure them specially or to any extent thereafter. They maintain that, if they now suffer, or will hereafter suffer, the special injuries which they make the basis of their action, they will equally suffer, independently of their (defendants') acts, from those of other parties

having similar structures in the neighborhood, and from the additional fact resulting from the situation of their properties upon the front of a lake 20 or more miles wide and 40 long, whose waters in times of storm throw up against its shore throughout its entire length and in whatever direction the wind may blow, and cast them, logs, bath-houses, wharves, and whatever other objects may be detached from their foundations. They maintain that the abatement of their particular structure would leave the defendants in the same condition which they would be were it continued. They made the same defense as to the claim of the deposit near their properties of offensive matter prejudicial to health and unbearable to comfort and pleasure.

They deny the fact of such deposit, and assert that, if such deposit did exist, it was not to such an extent as would cause any great discomfort or affect health.

It is claimed by plaintiffs that the testimony shows that, by reason of the ordinary direction of the wind in times of storm, and the situation of the properties of the defendants, the latter are specially likely to have the logs, the detached bathhouses, and wharves which are driven about at the mercy of the storm thrown upon them and likewise to have offensive matter thrown upon or near their residences. That it was shown that by reason of the storms in the last few years, with the resulting destruction of the bath-houses and wharves already constructed in the bed of the lake, but some 100 feet further removed from plaintiffs' properties, the latter had been injured to a very considerable extent from the debris being thrown against and upon them.

It is very questionable, under the evidence, whether the constructions placed in the bed of the lake by the plaintiffs are built sufficiently strong or high enough above the water to withstand any severe storm. It may be that the plaintiffs, under such circumstances, have shown sufficient special interest and right to protection to authorize them to demand that the work of the defendants should be held in abeyance until they should have obtained a permit from the constituted authorities, state or municipal, after an investigation by them into the facts, and the condition of things had been fixed between themselves and the authorities.

Whether storms will occur, and what their degree of violence and effect will be, are, of course, matters which will be purely dependent upon such facts as may hereafter develop. Should injury in fact result, the exact extent of that injury through the structure of the defendants is, at present, impossible to fore-shadow.

Plaintiffs do not attempt to fix, nor are they in a position to fix, the exact amount of the damage which they may suffer from it. They allege the value of their combined properties to be \$3,500, and assert that the build-

ing of the constructions will destroy the value of all the property in the square bounded by Touro and Frenchman streets, facing the lake shore; but that is a very indefinite, sweeping assertion, obviously incorrect as to accuracy. The district court evidently had jurisdiction of the subject-matter. It dissolved plaintiffs' injunction and dismissed the suit. It may be that the court erred, but the matter in dispute has not been alleged nor shown by affidavit or evidence to be as to amount and value such as would authorize this court to reverse its judgment, even if it were wrong.

We do not think we have jurisdiction to entertain this appeal.

For that reason, it is hereby ordered, adjudged, and decreed that this case be transferred to the Court of Appeal, parish of Orleans (for want of jurisdiction of the Supreme Court to entertain the appeal herein), under Statute No. 56, p. 135, of 1904, provided that, before said transfer is made, the appellants or their attorney of record shall make oath, as required by that statute, and, should appellants fail to file the said affidavit required by said statute within 10 days from the rendition of this order, the appeal to this court herein shall be considered dismissed; the costs in this court of this appeal to be paid by appellants, in either event.

(116 La.)

No. 16,036.

STATE ex rel. CURTIS v. THOMPSON et ux.
(Supreme Court of Louisiana. June 4, 1906.)

1. PARENT AND CHILD—CUSTODY OF CHILD—EVIDENCE.

In a controversy over the custody of a minor child, a judgment of divorce alleged but not offered in evidence, cannot be considered in determining the issues.

2. ESTOPPEL BY PLEADINGS.

A husband who, in suing for a divorce, alleged that there was no issue of the marriage, and that a child born to the wife after she had left the matrimonial domicile was an adulterous bastard, is bound by such allegations, it appearing that a judgment of nonsuit only was rendered in said suit.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 2-5.]

3. PARENT AND CHILD—CUSTODY.

Where, in a suit by an alleged father for the custody of a minor child, he is confronted by his own previous allegations that the child was an adulterous bastard, and his allegations that the physical and moral welfare of the child is seriously endangered by the neglect or immoral habits of the mother, are not sustained by the evidence, the district judge properly dismissed the action under the provisions of Act No. 79, p. 91, of 1894.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Somerville, Judge.

Application by the state, on the relation of Charles Curtis, against Andrew Thompson and Mary Owens for the custody of a minor child. Judgment for defendants, and plaintiff appeals. Affirmed.

Gilbert Louis Dupré, Jr., for appellant.
Rolla A. Tichenor, for appellees.

LAND, J. Relator alleges that on June 28, 1903, he obtained a divorce from his wife, Mary Owens, on the ground of infidelity, as shown by copy of judgment annexed to the petition; that at the time of the institution of said suit for a divorce the said Mary Owens was living in adultery with Andrew Thompson, to whom she is now married; that said defendants have in their custody, Carrie Curtis, the issue of the marriage of relator and said Mary Owens; that the said child is not properly cared for, nor properly fed or clothed, and her morals utterly neglected; the surroundings being such that the child will be reared in ignorance and immorality; and that relator is abundantly able to educate, support, and properly care for his said child, and is anxious to do so.

The relator prays for judgment awarding him the custody and care of said child. The petition was verified by relator's affidavit. The copy of judgment annexed to the petition shows that on May 12, 1903, an absolute judgment for divorce was rendered in favor of relator, and against Mary Owens.

This judgment is however silent as to custody of the child.

Answering, the respondents, pleaded the general issue, and then admitting the possession of the child, averred that in suit No. 67, 850 on the docket of the civil district court, the relator alleged in his petition for a divorce that the child, Carrie Curtis, was an adulterous bastard born after his separation from Mary Owens, which allegation formed the basis of his charge of adultery in said suit.

Respondents further averred that in his subsequent suit for a divorce, plaintiff alleged that there were no children born of his marriage with Mary Owens, and did not ask for the custody of any children. Respondents finally denied that the minor was improperly cared for.

The relator did not offer in evidence the alleged judgment of divorce or any proceedings in the suit in which it was rendered.

The relator testified that at the time the divorce suit referred to in the petition was instituted there was one child, Carrie Curtis, issue of his marriage with Mary Owens.

Relator further testified that this child was born about six months after he had separated from Mary Owens, who gave birth to another child about three or four months after he obtained a judgment of divorce.

The record in the first suit of Charles Curtis v. Mary Owens was filed in evidence by the respondents. All of this record, except the petition has been omitted from the transcript by consent of counsel.

We are informed by the district judge that this first suit was instituted in May, 1902, and that the judgment of nonsuit was rendered on January 7, 1903.

In this petition the plaintiff alleged that he was married to Mary Owens in September 1891; that of said marriage there had been no legal issue; that Mary Owens left the matrimonial domicile in March 1900, and has since remained away; that after she left the matrimonial domicile, his said wife gave birth to a girl child, still living, "whom she, his said wife, unblushingly declares is not his offspring"; and that "petitioner therefore charges his said wife with the crime of adultery." Wherefore the plaintiff prays for judgment of absolute divorce.

The evidence does not show what proceedings were had in the second suit or the nature of the judgment rendered. It seems, however, to be conceded that plaintiff obtained a judgment of divorce.

Both parties have remarried. It is shown that the child was born prior to the institution of the first suit.

We agree with the district judge that the present proceeding was taken under Act No. 79, p. 91, of 1894, and not under the alleged judgment of divorce rendered in May, 1903.

The petition does not claim that relator is entitled to the custody of the child by the force and effect of said judgment, which he did not even offer in evidence. The grounds of relief alleged are those set forth in Act No. 79, p. 91, of 1894, empowering district judges to remove children from the custody of parents, tutors, or other persons having care of them, whenever the physical or mental welfare of the child is seriously endangered by the neglect or abuse of the vicious or immoral habits of the custodian.

The district judge found that the respondents had been lawfully married; were above the average of colored people, and that the

mother of the child was decent and reputable and concludes his opinion as follows:

"It is the best judgment of the court that this little girl, who is about five years of age, should remain with her mother, who has been the custodian of the child from the date of its birth, without any claim being made by relator, her former husband; on the contrary, the relator has repudiated the paternity of the child."

The court a qua, in deciding the issues properly declined to consider the record and judgment in the second suit which had not been filed in evidence, and which were not really the basis of the present proceeding.

The allegation of paternity in the present proceeding is repelled by the previous judicial allegation of the relator that there was no issue of the marriage, and that the child was an adulterous bastard.

The judgment of nonsuit in the first divorce suit decided nothing.

The allegations of the petition in that suit were not adjudged to be unfounded, and plaintiff was left free to urge them in a subsequent action.

There is no good reason why relator should not be bound by such allegations, which so far as the record shows have never been adjudged to be untrue.

No court would award the custody of a child to a litigant making such allegations.

We do not know what the relator alleged or prayed for in the second suit for divorce.

From his own allegations it appears that the judgment did not award to him the custody of the child. What his rights may be under such alleged judgment cannot be considered in the absence of the record.

We consider the judgment rendered herein as merely provisional, and it is affirmed.

McDONALD et al. v. SANFORD.

(Supreme Court of Mississippi. July 8, 1906.)

HOMESTEAD—INCUMBRANCE—CANCELLATION.

A husband and wife can maintain a bill in chancery to cancel a decree, in a suit to which the wife was not a party, declaring that an instrument executed by the husband alone constituted an incumbrance on the homestead.

Appeal from Chancery Court, Covington County; J. L. McCaskill, Chancellor.

Suit by R. McDonald and another against Mrs. N. A. Sanford. From a decree sustaining a demurrer to the bill, complainants appeal. Reversed and remanded.

On January 8, 1900, R. McDonald, one of the appellants herein, gave the husband of appellee a note to secure borrowed money, as follows:

"Williamsburg, Miss. On or before Jan. next, 1901, I promise to pay to N. A. Sanford the sum of \$450.00, bearing interest from date until paid, for value received, this Jan. 8th, 1900. R. McDonald.

"And to make the above note good, or in case I fail to pay the above specified amount, bearer to have the following described lands named, to wit: S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, section 36, T. 8, R. 16 W. R. McDonald."

On February 9, 1905, Mrs. N. A. Sanford filed a bill in the chancery court against R. McDonald alone, asking that the above note be declared a mortgage on the property therein described, alleging that the land was not appellant's homestead. On the hearing May 2d a decree was rendered against him, and a commissioner appointed to sell the land for satisfaction of the indebtedness. Afterwards on June 7, 1905, R. McDonald and Luella McDonald, his wife, filed their bill to cancel the above decree charging that the land was a homestead, and was a homestead at the time the note was given and at the time the decree was rendered, and that the indebtedness had been fully paid; that Mrs. Luella McDonald knew nothing of the execution of the note by her husband, and knew nothing of the suit in chancery declaring it a mortgage on the homestead; and that R. McDonald was deterred by duress from appearing and defending the former suit. Mrs. Sanford demurred to the bill of complaint, and the court sustained the demurrer; and this appeal is prosecuted from the action of the court in sustaining the demurrer.

McIntosh Bros., for appellants. R. L. & E. L. Dent, for appellee.

WHITFIELD, C. J. This was an original bill, not a bill for review, and, if its allegations are sustained, the grossest possible fraud on the part of appellee will be shown. There was no *res adjudicata* as to the rights of the wife in the homestead, growing out of the decree in the original suit, since she was not made a party to that suit. The authorities cited by learned counsel for appellee on this point have no application. The case of

Pounds v. Clarke, 70 Miss. 263, 14 South. 22, announces a wholly unsound proposition, and it is hereby overruled. Whatever name may be given to the wife's interest in the homestead, whether it be called an estate, or an interest, or a claim, or a right, or a veto power merely, it is such an interest or right as the statute requires to be conveyed by a deed, and a deed to the homestead without the wife joining in the conveyance has been correctly held. In the case of G. & S. I. R. R. Co. v. Singletary (Miss.) 29 South. 754, to be an absolute nullity. And it was further held in that case that the husband himself was not concluded, as to his own interest even, from bringing the action of trespass to recover damages from the railroad company for laying its right of way over the land to which the husband had executed a conveyance without the joinder of the wife; the land being homestead property. The same doctrine precisely was held in *Revalk v. Kraemer*, 68 Am. Dec. 306, a California case. There *Revalk* had given a mortgage upon the homestead which was not signed by the wife, and a bill to foreclose was filed against *Revalk*, without making the wife a party, and a decree was rendered against him alone, subjecting the property to sale. Afterwards *Revalk* and his wife filed a bill for an injunction to restrain the sale, and the court said: "The wife was not a party to the suit, and could not in any way be affected thereby, nor could the rights of the husband as to the homestead be affected by the proceedings in that case. When the husband appears alone and defends the suit, his right to the homestead is no more concluded by the decision than by his separate execution of the deed or mortgage. The legal proceedings, to be conclusive against either, must embrace both."

In the case of *Larson v. Reynolds & Packard*, 13 Iowa, 579, 81 Am. Dec. 444, it is also expressly held that the wife is not estopped by a decree foreclosing a mortgage on a homestead executed by the husband alone, and that she cannot be ousted from possession by sale made under such a decree. And the court said, on page 582 of 13 Iowa, page 447 of 81 Am. Dec.: "The right of the wife to the homestead differs from that of dower, and the provisions of the statute as to its conveyance or incumbrance are also different. But the difference arises necessarily from the rights and privileges reserved to the wife during and after the life of the husband. Thus the husband may fail to select, plat, mark out, and record the homestead; and, if so, the privilege then devolves upon the wife. So the deed passes nothing, not even his interest, if she does not join. Upon his death she has the right to continue its occupation, and it cannot be taken from her by his will or devise. And if she does not survive the husband, her issue may upon a certain contingency take the whole homestead. From which premises it is reasonably clear that the wife's right or interest in the homestead is

not merely an inchoate one, to become vested after his death, and which after assignment may be disposed of by a judicial sale for the debt of the husband; but that the occupation of it as a home gives her a right therein, without any further act on her part, or any one for her, which cannot, without her consent, be divested. The homestead belongs, as it were, to the family. It is for the benefit of the family, parents and children. As to its conveyance, the law contemplates that there shall be a concurrence of both minds, of the two heads so to speak, before the dwelling place of the family shall be incumbered, or the rights of either one be divested or affected. It is seen, therefore, that the will of the wife is theory as supreme as that of the husband." And in the case of *Sargent v. Wilson et al.*, 5 Cal. 504, it is held: "Where an action is brought to foreclose the mortgage upon property claimed as a homestead, the wife of the mortgagor is a necessary party to a full adjustment of the controversy, and should be allowed to intervene." And the case was reversed in order to permit her to intervene. This same doctrine is held in many other cases not necessary to cite.

The plain purpose of our statute on this subject was to protect the wife in the shelter and refuge of a homestead, unless she has herself joined in conveying away the homestead, and whatsoever name her right may be designated, it is perfectly manifest that no conveyance or mortgage of the homestead, without her joining in the conveyance, is anything less than utterly void. And a bill filed by a creditor of the husband to foreclose an incumbrance on the homestead executed by the husband alone, if it shall result in a decree for the sale, results in a decree that is void for the obvious reason that the wife was an essentially necessary party. The doctrine announced in the case, which we unhesitatingly overrule, operates an absolute nullification of our statute providing that a wife must join in a conveyance for the incumbrance of a homestead. The doctrine which we approve is laid down, also, in 15 A. & E. Ency. of Law, 683 (last clause of the section). It will be seen by an examination of the notes that the overwhelming weight of authority is to that effect. Amongst the cases cited are *Cummings v. Busby*, 62 Miss. 195, and *McKenzie v. Shows*, 70 Miss. 388, 12 South. 336, 35 Am. St. Rep. 654. In the first-named case the court, speaking through Campbell, C. J., held the trust deed executed by himself alone to secure his debt absolutely void. The creditor had advertised the property under the trust deed, and bought it in. Afterwards Busby and wife brought an action of ejectment to recover the lands. The sole question in the case was whether the deed was void or voidable, and the court held that the deed of trust was void, and that the husband and wife could both join in an ejectment to recover the land. Here is a case holding that, whatever the interest of the wife

is, it is such an interest or right that she can maintain ejectment to recover it. In the case of *McKenzie v. Shows* the court expressly held that the conveyance of the homestead by the husband without the wife's joinder conveyed no estate whatever of any kind. The court said: "There is no estate in reversion expectant upon which the appellants can enter upon the proper sale of the homestead by the husband and wife jointly, for the reason that the attempted conveyance and incumbrance of the husband alone, in the sale by deed of the timber, was absolutely invalid to convey any right or title. Collins, the purchaser of the timber, acquired nothing by the invalid conveyance from the husband alone. We are not inclined to eat away a wise and most beneficent statute, designed for the welfare and support and comfort of wife and children, by ingrafting any exceptions upon it. The law must be upheld and enforced as written, and this we do by declaring Yawn's deed to the timber on the homestead an incumbrance upon the title and invalid for any purpose."

The decree is reversed, the demurrer overruled, and the cause remanded, with leave to answer within 30 days from the filing of the mandate in the court below.

RECTOR et al. v. ALCORN et al.

(Supreme Court of Mississippi. June 11, 1906.)

WILLS—CONSTRUCTION—PRECATORY TRUST.

A will recited the affection and watchfulness of testator's wife; devised certain land to a son; recited that since a prior will certain real estate had been deeded to the daughters as their share of the real estate, "leaving them to inherit such shares of my personal estate * * * which in the judgment of my executors they may be entitled to"; bequeathed "all the balance of my estate * * * to my beloved wife. * * * to be hers and to be disposed of as she may think best. I have full confidence in my said wife, and have abiding faith that she will deal justly with our children"—and appointed the wife and son executors. *Held*, that the will made independent provision for the wife, without the creation of a precatory trust.

[Ed. Note.—For cases in point, see vol. 49. Cent. Dig. Wills, §§ 1587-1589.]

Appeal from Chancery Court, Coahoma County; Percy Bell, Chancellor.

Bill in chancery filed by Rosebud Alcorn Rector and others, daughters of Gov. Jas. L. Alcorn, deceased, against Amella W. Alcorn, widow of Gov. Alcorn and mother of complainants, against May Yates Alcorn, widow and executrix of James Alcorn; deceased (son of Gov. Alcorn), and against James L. Alcorn, the infant son of James Alcorn, deceased, seeking to have a precatory trust under the residuary clause of the will of Gov. Alcorn declared in favor of the children and descendants of Gov. Alcorn. From a decree in favor of defendant May Yates Alcorn, complainants and cross-complainant Amella W. Alcorn appeal. *Affirmed*.

The will of Gov. Alcorn is as follows:

"The last will and testament of James Lusk Alcorn, of the county of Coahoma, state of Mississippi:

"I, James Lusk Alcorn, of the county and state aforesaid, now in full possession of my mental vigor, but feeble in body, being now in the seventy-seventh year of my age, besides being afflicted with paralysis, which has preyed upon me for the past two years, a constant menace to my life, reminding me that at any day or hour I may be called to visit for eternity that shadowy land from which there can be no return, and being moved by a natural concern for the wife who has been so affectionate to me, and who has watched over me in my affliction, and who has not ceased her watchfulness, during my long affliction, having thought proper to make this my last will and testament, hereby revoking all others by me heretofore spoken or written, either as wills or codicils in any form whatever.

"Item 1. I desire that my son James, my only living son, shall inherit my personal effects, my watch, my walking canes, my few jewels, to be his, to be disposed of as he may see fit. I have heretofore given my son of my estate, and have made him a deed therefor, which he now possesses. In addition thereto, I now give and bequeath to him that portion of my estate known as the 'Cammack Plantation,' embracing as it does about eight hundred acres of land, with a small settlement thereon. My son James has treated me with great affection, and I love him with deep affection. and I request that my wife, Amelia, to whom I bequeath my estate, shall treat him with that favoritism and partiality which I well know her heart inclines her to do.

"On the 21st of June, 1892, I executed a will by which I devised the most of my estate. Since then my life has been spared and many changes have taken place. I have deeded to my daughter, Justina A. Swift, of San Francisco, California, an estate in lands, which I considered her share of my real estate. I have likewise conveyed by deed to my daughter Angelina an estate which I designed as her portion of my real estate, leaving them to hereafter inherit such shares of my personal estate as I may die possessed of, and which, in the judgment of my executor, they may be entitled to, and which my estate may be able in equity to give.

"All the balance of my estate, real personal and mixed, together with all my rights and credits of whatever kind, I give and bequeath to my beloved wife, Amelia W. Alcorn, to be hers and to be disposed of as she may think best, I have full confidence in my said wife, and have abiding faith that she will deal justly with our children and the descendants of them.

"This my holographic will, written in my own hand, I make and publish the thirteenth of April, 1873.

"And I do hereby appoint my said wife Amelia and my son James, my executors and do desire the chancery court to permit them, or the survivors of them, to enter upon the discharge of their duty without the execution of any bond, and without filing any inventory of my estate whatever.

"Witness my signature the day and date above written."

The bill alleges that after the death of Gov. Alcorn his son James began to lay schemes to get possession of the property devised to Mrs. Amelia W. Alcorn, and that by false representations and undue influence said James finally succeeded in having his mother convey to him the property which had been devised to her, according to the allegations of the bill, in trust, and for which she held only a life estate; and the bill asked a construction of the will and a cancellation of the deed from Mrs. Amelia W. Alcorn to him, and that May Yates Alcorn and others, his heirs at law, be restrained from asserting any claims to the property. Mrs. Amelia W. Alcorn answered, admitting fraud and misconduct on the part of said James, as alleged in the bill, and made her answer a cross-bill against May Yates Alcorn, individually and as executrix of her deceased husband and as guardian of her minor child. She stated that, in case the court should decree that by the terms of said will a precatory trust was created, she was willing to assume her duty as trustee under said will, but if the court should find adversely to the theory of the trust and that she took the fee in her own right to the property so devised to her under the will of Gov. Alcorn, then that the fraudulent instruments above mentioned be canceled as clouds, and for a discovery and accounting against the codefendants. The codefendants, May Yates Alcorn and her minor son, James L. Alcorn, demurred to the original bill and the cross-bill, and the court sustained both demurrers, and the complainants and cross-complainants both appeal.

J. W. Cutrer, for appellants.

Calvin Perkins, for appellees, cited: *Lucas v. Lockhart*, 10 S. & M. 466, 48 Am. Dec. 766; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Foose v. Whitmore*, 82 N. Y. 406, 37 Am. Rep. 572; *Randall v. Randall*, 135 Ill. 398, 25 N. E. 780, 25 Am. St. Rep. 373; *Clay v. Woods*, 153 N. Y. 134, 47 N. E. 274; *Post v. Moore*, 181 N. Y. 15, 73 N. E. 482, 106 Am. St. Rep. 495; *Gibbins v. Shepard*, 125 Mass. 541; *In re Hamilton*, L. R. 2 Ch. Div. 370; *Meredith v. Heneage*, 1 Sim. 542; *Eaton v. Watts*, 4 L. R. Eq. Cas. 151; *In re Hutchinson et al.*, L. R. 8 Ch. Div. 540; *Howaorth v. Dewell*, 29 Beav. 18; *Bardswell v. Bardswell*, 9 Sim. 319; *Pope v. Pope*, 10 Sim. 1; *Hoy v. Master*, 6 Sim. 568; 2 Pom. Eq. § 1016.

CALHOON, J. From an examination of the entire will of Gov. Alcorn, which the re-

porter will print, we do not take the view that the words in reference to Mrs. Alcorn are precatory. If they are construed as not merely expressions of confidence in her acting wisely, but as imperative to control her as trustee, it seems to us the whole purpose, as indicated by the language used in reference to her, to make independent provision for her, is defeated. The contentions on both sides are so lucidly and fully put that we need only say that we agree with the authorities produced by the appellee.

Affirmed on appeal and cross-appeal.

McINTOSH BROS. et al. v. RUTLAND.
(Supreme Court of Mississippi. June 18, 1906.)

1. SALES — GROWING TIMBER — OPTION ON LAND.

A contract for the sale of timber on land owned by a husband and wife, providing that if the owners failed to deliver the timber the purchaser might enter the land and cut it, was a contract of purchase and not an option on the land, and hence proceeds from said sale accruing after the death of the wife descended to the husband and a minor daughter.

2. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION OF ESTATE—PROCEEDINGS.

Where the only assets belonging to the estate of a deceased wife were the proceeds of the sale of certain timber, the assignee of the husband, entitled to a share thereof, could maintain a bill for the distribution of the funds in the hands of the administrator.

Appeal from Chancery Court, Covington County; J. L. McCaskill, Chancellor.

"To be officially reported."

Action by McIntosh Bros. and another against H. C. Rutland, administrator of M. E. Culpepper, deceased. From a decree in favor of defendant, complainants appeal. Reversed, and cause remanded.

M. M. Culpepper and his wife, Mrs. M. E. Culpepper, entered into a contract with the Leake Milling Company for the sale of merchantable pine timber on certain land which they owned. Under the terms of the contract, if the Culpeppers failed to deliver said pine timber, the Leake Milling Company was authorized to enter upon the land and cut said timber. Mrs. Culpepper died before the contract was fulfilled, leaving as her heirs her husband, M. M. Culpepper, and their daughter, a minor. M. M. Culpepper, after the death of his wife, assigned all his interest in the contract to one Thomas Chain, and said Chain assigned one-half the interest he acquired to McIntosh Bros. After the appointment of H. C. Rutland as administrator of the estate of Mrs. M. E. Culpepper, the Leake Milling Company, with the consent of said administrator, entered upon the property and began cutting the timber, and paid said administrator for the timber so cut. McIntosh Bros. and Chain filed a petition in the chancery court asking for a distribution of the funds in the hands of the administrator, claiming one-half interest in same. The administrator filed a demurrer, alleging

that the bill failed to show that M. E. Culpepper was the owner of the land at the time of her death, and hence failed to show any interest descendable to her husband. The chancellor sustained the demurrer, and this appeal is prosecuted on the ground that the agreement was a contract for the purchase of the timber, and not an option on the land.

Sullivan & Tally, for appellants. Livingston & McLaurin and Alexander & Alexander, for appellee.

WHITFIELD, C. J. The instrument in this case evidencing the agreement as to the sale of the timber is a plain contract, and not a mere option at all. The interest in the proceeds of the timber, upon the death of the wife, descended to the husband and daughter. The husband, for a valuable consideration, assigned his entire interest away. It is averred in the bill that there are no other assets belonging to the estate, except the interest in the proceeds of this timber. On this state of facts, averred in the bill, it is perfectly manifest that the demurrer should have been overruled.

The decree is reversed, the demurrer overruled, and cause remanded for answer within 30 days from filing of mandate in the court below.

JAYNE v. DRAKE.

(Supreme Court of Mississippi. April 30, 1906.
Suggestion of Error Overruled.
June 25, 1906.)

BROKERS—EXCLUSIVE CONTRACT—MUTUALITY—REVOCATION.

A contract without consideration by a landowner, merely giving one the exclusive agency for a year to sell the land on commission, may be revoked prior to a sale, being without mutuality.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 11.]

Appeal from Circuit Court, Hinds County; D. M. Miller, Judge.

Action by R. K. Jayne against Mrs. Annetta Drake for real estate commissions. Action dismissed, and plaintiff appeals. Affirmed.

Mrs. Drake entered into an agreement with Jayne whereby he was to act as her agent in the sale of certain property and executed the following instrument in writing, for which there was no consideration: "Jackson, Miss., Feb. 10, 1902. In consideration of my desire to sell, I hereby place my home and plantation, lying in the western suburbs of the city of Jackson, in charge of R. K. Jayne for the remainder of the year 1902 under the following agreement: Jayne is to have the exclusive selling, and is to account to me for \$60.00 an acre. I am to sign deed or deeds to such party or parties and for such consideration as Jayne shall request, and he is allowed to retain any excess over the sum named as his compensation. There are 269 acres in all. Witness my signature this the

10th day of February, 1902. Annetta Drake." The testimony showed that during the fall of the year Mrs. Drake told Jayne to offer the land at \$60 per acre, and that she would pay him 5 per cent. commissions out of that price, and that he would submit offers for a part of the place to her, and she would accept or reject at pleasure, and for such offers she was not bound to make any deed. On December 30th one Barrett offered \$100 per acre for 47 acres of the land, but Mrs. Drake declined the offer. On December 31st, no sale having been effected, Mrs. Drake told Jayne she could not give him the exclusive handling of the place, and would place it in the hands of other real estate men, and would also try to sell it herself, but that he could still continue his efforts to sell it. On January 2, 1903, Barrett purchased part of the land direct from Mrs. Drake; the purchase price being \$9,103.80. Jayne afterwards claimed 5 per cent. commissions from Mrs. Drake, alleging that he had been instrumental in effecting the sale, in that he had brought the parties together and had begun negotiations with Barrett before the 1st of January, and that, even if the sale were effected after January 1st, under his verbal agreement he had a right to claim commissions for sale which he effected.

Robt. Lowry and P. H. Lowry, for appellant. Wells & Wells, for appellee.

TRULY, J. It is impossible to extricate the case of appellant from the rule announced by this court in *Kolb v. Land Company*, 74 Miss. 567, 21 South. 233.

Affirmed.

JONES v. JONES.

(Supreme Court of Mississippi. April 30, 1906. Reargument Denied June 25, 1906.)

1. REFORMATION OF INSTRUMENTS—EVIDENCE—WEIGHT—SUFFICIENCY.

One seeking to reform a deed, the recitals of which are definite and unambiguous, must establish, not only by a preponderance of the testimony, but practically to the exclusion of every other reasonable hypothesis, that mutual mistake, fraud, or error occurred in the making of the deed.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 160.]

2. SAME.

In a suit to reform a deed, evidence examined and held not to establish fraud, error, or mutual mistake sufficient to authorize a reformation.

Appeal from Chancery Court, Madison County; R. B. Mayes, Chancellor.

Bill in chancery to reform a deed by Fred Jones against Andrew Jones. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

Reuben Jones owned a plantation. Just before his death he made a will, leaving the house in which his lawful wife, whom he had abandoned, lived, to her, and leaving his

plantation to his brother, Fred Jones. The widow renounced the will and instituted proceedings in chancery. Finally, in order to get the suit dismissed, Fred Jones agreed to convey to Andrew Jones, an illegitimate son of Reuben Jones, deceased, 90 acres of the plantation. A tract of 10 acres with a house on it was selected, and another tract supposed to contain 80 acres was designated and pointed out. The deed to the second tract called for 80 acres, and after the deed had been executed to both the 10 and the 80 acre tracts Fred Jones discovered that the second tract which he had designated contained only 62 acres, and that the 80-acre conveyance which he had made to Andrew Jones included 18 acres of land which he (Fred) was working and did not wish to surrender. He thereupon filed his bill for reformation.

J. B. Chrisman, for appellant. H. B. Greaves, for appellee.

TRULY, J. We find ourselves unable to agree with the chancellor in his conclusion that the deed from appellee to appellant should be reformed. It appears to our mind conclusive that the real intention of the parties was that appellant should have 90 acres of land. We find no such preponderance of testimony establishing fraud, error, or mutual mistake as would authorize the interposition of a court of chancery to order a change in the deed. This is not a case where one party gives as an act of bounty a tract of land to another, but is a transaction in which for a certain stipulated money price certain definitely described land was conveyed. The deed in its terms is free from any ambiguity, doubt, or uncertainty; the land conveyed being described with absolute accuracy, so as to exactly convey the specific number of acres.

The appellant contends that the number of acres was the only important matter determined on in advance, and that the description was written so that it would embrace the specific acreage, and not that it might include any particular tract of land. This testimony is in our judgment strongly corroborated by the subsequent conduct of the appellee in granting a right of way from one tract to another, in which the description of the two parcels previously conveyed was again recited. So, also, it is corroborated by the repeated statements of the appellee, after the conveyance, that he had conveyed, and that it was his intention to convey, to appellant 90 acres of land. Adhering to the arbitrary, but salutary, rule which requires a party seeking a reformation of a deed, the recitals of which are definite and unambiguous, to establish, not only by the preponderance of the testimony, but practically to the exclusion of every other reasonable hypothesis, that mutual mistake, fraud, or error occurred in the making of the instrument sought to be reformed, we are constrained to hold that the proof in this

case falls to measure up to that requirement. The decree is not justified by the facts, and cannot be sustained.

The decree is reversed, the cause remanded and the bill dismissed.

COLEMAN v. HOLDEN et al.

(Supreme Court of Mississippi. May 28, 1906.
Suggestion of Error Overruled
June 25, 1906.)

LANDLORD AND TENANT—RIGHT OF INGRESS AND EGRESS — RIGHTS OF TENANT — DAMAGES.

A lessee, during the period of his term, has all such rights as to ingress and egress in respect to obstructing or interfering therewith as the fee owner would have, except as to the extent of damage, and a leasehold interest in property constitutes an estate as susceptible of damage by reason of the closing of a street whereon the property abuts and the erecting of a building on such street as that of a fee owner, except as to the extent of damage.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 465, 509.]

Appeal from Chancery Court, Lauderdale County; J. L. McCaskill, Chancellor.

Petition for injunction by S. S. Coleman against E. W. Holden and others. From a decree dissolving a temporary injunction, petitioner appeals. Reversed.

Petition for injunction, seeking to restrain the defendants from erecting a compress, etc., on certain property in the city of Meridian, reciting that the property comprises certain streets of the said city. A temporary injunction was issued, and the case was heard on motion to dissolve the injunction. The facts are in substance as follows: Breece Bros. Manufacturing Co. leased from the Eagle Cotton Oil Company, the then owners of the lands, a part of certain property (describing it), "streets and avenues excepted." The lease was for three years and rent payable annually in advance. Afterwards appellee Holden purchased the fee in said property from the Eagle Cotton Oil Company, and the deed thereto recited the existence of the lease in favor of Breece Bros. Manufacturing Company, and assigned to Holden all the rights of the Eagle Cotton Oil Company in said lease. Thereafter appellant Coleman purchased the lease of Breece Bros. Appellees began the erection of a compress, warehouse, and cotton shed on the property purchased of the Eagle Cotton Oil Company by them, and were building in portions of certain streets which intersected said property. Said streets had been dedicated and accepted by the city, but had never been opened up by the city or used by the public. While the work was going on the appellees applied to the city authorities and obtained the passage of an ordinance authorizing them to close and use these streets. This action was taken over the protest of the owner of the lease of Breece Bros. Manufacturing Company. The city of Meridian is not governed under the Code chapter on municipalities, but

operates under a special charter and amendments thereto. Neither the charter nor the amendments give the municipality any authority to close up streets. Appellant contended that his purpose in buying the lease of Breece Bros. Manufacturing Company was to erect a small manufacturing plant on the portion of the property leased and that the erection of the compress by appellees, closing the streets aforesaid, would be injurious to him and interfere with his leasehold. No compensation was offered to him for damages he would sustain by the closing of said streets. Appellees relied on the fact that the streets had never been opened or used, and the authority of the municipal council in closing said streets authorized him to use them.

Ethridge & McBeath and Neville & Wilbourn, for appellant. G. Q. Hall and Hall & Jacobson, for appellees.

WHITFIELD, C. J. This case is practically controlled by the principles announced by us recently in the case of *City of Meridian v. Mrs. Rhoda Poole*, 40 South. 548. The only principle calling for enunciation in addition to what we there said is this: That a lessee, during the period of his term, has all the rights, as to ingress and egress, as to obstructing or interfering therewith, as the owner in fee would have, except as to the extent of damage. See, as fully supporting this proposition, *Coombs v. People* (Ill.) 64 N. E. 1056; *Proctor v. Hannibal R. R. Co.*, 64 Mo. 112; *Gilligan v. Board of Aldermen of Providence*, 11 R. I. 258; *Johnson v. Richardson*, 33 Miss. 463. One who owns a leasehold interest in property possesses an estate just as susceptible to damage, by reason of the closing of the street and building in the street on which such property abuts, as if he owned the fee, except, of course, as to the extent of the damage.

The decree is manifestly erroneous, and is hereby reversed, and the cause remanded, injunction reinstated, and the case will be proceeded with in accordance with this opinion.

COMSTOCK BROS. v. NORTH.

(Supreme Court of Mississippi. June 25, 1906.)

1. VENDOR AND PURCHASER — OPTIONS — OFFERS — REVOCATION.

A letter from plaintiffs to defendant reading: "We will withdraw [certain land] from the market until January 1st, 1904, during which time, you may send your men to look it over, and if, at the expiration of the time, * * * you desire to take this land, we will sell you eight-ninths and give you warranty deed on the same at the rate of \$20 per acre, and in the meantime we will try to get the consent of the parties holding the other one-ninth at the same price, but will not guaranty their consent"—was not an option, but a mere offer to sell the land, having no consideration to uphold it, and hence was revocable at plaintiff's pleasure before acceptance by defendant.

2. SAME—CONSIDERATION—NECESSITY.

Contracts for options must be supported by a sufficient consideration.

3. SAME—SUFFICIENCY.

Where plaintiffs wrote to defendant that they would withdraw certain land from the market until January 1st, during which time defendant might send his men to examine it, and if, at the expiration of a certain time, defendant decided to take the land, plaintiffs would sell him a portion thereof at a certain price, the fact that defendant thereupon incurred considerable expense in examining the land for the purpose of informing himself as to whether it would be a desirable purchase, and that he thereafter communicated the information by him so acquired to plaintiffs, did not constitute a consideration upholding the letter as a contract for an option; the letter imposing no such condition, and defendant's actions being for his own benefit and entirely voluntary.

4. PLEADING—ALLEGATIONS—EFFECT.

Where a letter written by plaintiffs to defendant lacked the essential quality of a consideration to make it an option, its character could not be changed by a reference thereto as an option in pleading.

Appeal from Chancery Court, Harrison County; J. O. S. Sanders, Special Chancellor.

Bill by Comstock Bros. against J. E. North. From a decree overruling a demurrer to defendant's cross-bill, complainants appeal. Reversed.

Comstock Bros. filed a bill in chancery to have canceled, as a cloud on their title, a certain letter to J. E. North, which was claimed by North to be an option in his favor. North answered, and also filed a cross-bill, asserting the validity of the option and praying specific performance. Comstock Bros. filed a demurrer to the cross-bill, which demurrer was overruled by the court below, and Comstock Bros. appeal.

Shivers & Shivers, Bowers, McDonald & Griffith, and Jas. H. Neville, for appellants. Ford & White, for appellee.

MAYES, J. On the 31st day of October, 1902, Comstock Bros. wrote to J. E. North as follows: "Cincinnati, O., Oct., 1902. Mr. J. E. North, Bond, Miss.—Dear Sir: We will withdraw our Mississippi tract in Harrison and Pearl River counties from the market until January 1st, 1904, during which time you may send your men to look it over, and if, at the expiration of the time or February 1st, 1904, you decide to take this land, we will sell you eight-ninths and give you warranty deed on the same at the rate of \$20 per acre, and in the meantime we will try to get the consent of the parties owning the other one-ninth at the same price, but will not guaranty their consent. Yours truly, Comstock Bros." On the 10th day of April, 1903, Comstock Bros. filed their bill in the chancery court of Harrison county, the allegations of which, briefly stated, are that they are the owners of an eight-ninths interest in a large body of land situated in Harrison county, state of Mississippi, and describing the said property by metes and bounds, setting forth their deraignment of

title. The bill states that upon receipt of the letter by North he had same recorded with the chancery clerk of Harrison county, claiming it to be an option on the land described in the bill, and prayed for a cancellation of the said letter as a cloud upon their title and that the same be declared null and void. The defendant, North, answered the bill, and claimed that the above letter gave him a valid and binding option for the purchase of said land up to February 1, 1904, and claimed that, acting under said option, he had expended a large sum of money in causing the land to be looked over and examined, and is still doing so, and is willing, able, and ready to carry out his part of the contract as contained in the letter set out above. On the 1st day of February, 1904, the defendant North asked and obtained leave of the court to file a cross-bill. The substantial allegations of the cross-bill are that North, after receipt of above letter, expended a large sum of money in making the examination and investigation of the land of Comstock Bros. lying in Harrison county, and said letter gave to defendant North a binding option on said land until February 1, 1904. The cross-bill then states: "It was agreed between this cross-complainant and said defendant that cross-complainant should, at his own expense, cause examination and investigation to be made of the land, and in consideration thereof cross-complainant should have the right or option to purchase said realty at any time up to the 1st day of February, 1904, at the rate of \$20 per acre." Acting upon this, and at his own expense, North expended a large sum of money, something in excess of \$5,000. The cross-bill then concludes with the prayer for an accounting, under the direction of the court, for the purpose of ascertaining the amount required to be paid by North for the land as the purchase money, and stated that when this is ascertained North is ready to pay. The cross-bill also prays that, upon the payment of the amount that the court shall ascertain to be due, Comstock Bros. be required to execute to North a deed to the land described in the bill. The cross-bill does not allege that there had ever been, at any time, any acceptance of the proposal made by Comstock Bros., and seems to rely for this upon the fact that North went to great expense in examining the land. The money is not paid into court, and no tender of it is made, other than the willingness expressed by North to pay same when the court shall ascertain the amount due. On the 2d day of February, 1904, Comstock Bros. asked leave to dismiss their original bill, which was granted by the court, and a decree entered on the 4th day of February, 1904, allowing Comstock Bros. "to withdraw their original bill, without prejudice to the right of defendant to proceed under his cross-bill, and to obtain thereby such affirmative relief independent of the original bill as the cross-

bill might entitle him to." Comstock Bros., after filing answer denying all allegations of fraud made in cross-bill, demurred to the cross-bill of North, setting up ten different grounds of demurrer.

We only notice the second ground, which is: "Because the written contract, or option, relied upon in said cross-bill, is void on its face, for uncertainty and want of description of any lands, and for want of consideration." The letter written by Comstock Bros. to the defendant is nothing but a mere offer to sell to North the land in question, having no consideration to uphold it, and therefore revocable at the pleasure of Comstock Bros. before acceptance by North. The allegations of the bill do not show any acceptance on the part of North, or state facts which would constitute an acceptance on his part. All contracts for options must be supported by a sufficient consideration, which it utterly wanting in this case. It is true that Comstock Bros., in writing to North, say: "You may send your men to look it over, and if, at the expiration of the time or February 1st, 1904, you decide to take this land, we will sell you eight-ninths interest and give you warranty deed," etc. North alleges in his cross-bill that, acting upon this clause of the letter, he sent men and expended large sums of money in obtaining information in reference to the land, which he communicated to Comstock Bros. and which they are attempting to use for their own benefit. Where an option is conditioned upon the performance of certain acts, the performance of the acts may constitute a consideration to uphold the contract for option; but there is no such condition imposed by this letter, and, if it be true that North has communicated to Comstock Bros. the information gathered by him in making the investigation, it was a purely voluntary act of his, not contemplated or stipulated for by the terms of the letter, and therefore imposing no obligation on Comstock Bros. not stipulated for or mentioned in the letter of proposal. All the expense in examining the land incurred by North was incurred on his own account, for the purpose of informing himself as to whether or not it would be desirable for him to make the purchase, and was not in any way intended to benefit Comstock Bros. so far as is shown by the letter; nor was it incurred in their behalf, nor did it create any consideration for the option. It is true that in the original bill of Comstock Bros. they refer to this letter as an option; but it lacks the essential quality to make it such, and the character of its obligation cannot be changed by a loose reference to it in any pleading as an option, thereby giving it a consideration which would uphold it when a consideration is utterly wanting. The base of the rights of both parties is found in this letter, and is utterly insufficient to uphold a decree for specific performance. *Kolb v. Bennett Land Co.*, 74 Miss. 567, 21 South. 283; *Stitt v.*

Huldekoper, 84 U. S. 884, 21 L. Ed. 644; *Miller v. Douville & Gallagher*, 45 La. Ann. 214, 12 South. 132; *School Directors v. Trefethren*, 10 Ill. App. 127; *Larmon v. Jordan*, 58 Ill. 204; *Ency. of Law*, vol. 21 (2d Ed.) p. 926, and authorities cited under head of "Consideration"; Page on Contracts, § 305.

Let the decree be reversed, and the cross-bill dismissed.

WATKINS v. McDONALD et al.

(Supreme Court of Mississippi. June 25, 1906.)

1. APPEAL AND ERROR — PRESENTATION IN LOWER COURT—ISSUE NOT RAISED.

Where a bill to cancel conveyances made under trust deeds alleged an assignment of a trust deed, and the answer admitted such assignment, it could not be questioned on appeal by complainant.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1066.]

2. SAME.

In an action to cancel conveyances made under trust deeds, it cannot be contended for the first time on appeal that the holder of the trust deed exhausted her power by appointment of a certain substituted trustee.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1070.]

3. SAME—REVIEW—QUESTIONS OF FACT—EVIDENCE—SUFFICIENCY.

Where, in an action to cancel conveyances made under trust deeds, a certain trustee swore that he refused to act and in writing, a finding by the court that he so refused will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3979-3982.]

4. MORTGAGES — FORECLOSURE OR POWER OF SALE—APPOINTMENT OF SUBSTITUTED TRUSTEE.

The appointment of a substituted trustee in a deed of trust need not be made on the paper itself, where the paper was so filled with writing that it could not be so made, and it was written on separate paper attached to the original.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1041.]

5. SAME.

Where the owner of a trust deed is very feeble, a substitution of trustees is sufficient, though not signed with his own hand, if signed by his express direction, in his presence and the presence of another.

Appeal from Chancery Court, Neshoba County; J. F. McCool, Chancellor.

Bill by James Watkins against Annie McDonald and others to cancel conveyances made by the trustee in two deeds of trust. On the trial the court dismissed the bill, and from this decree, complainant appeals. Affirmed.

S. A. Witherspoon, for appellant. O. A. Luckett, for appellees.

CALHOON, J. This is an effort, in equity, to cancel conveyances by a substituted trustee on sales by him made under two trust deeds, one to secure Hugh McDonald and the other to secure Mrs. Fox, who assigned hers to McDonald. The contentions here in support of this effort are:

1. That Mrs. Fox did not assign her trust debt. This is easily disposed of, because the bill charges that she did assign it, and the answer admits it.

2. That Mrs. Fox, on appointing one Ross as substituted trustee, exhausted her power. But this point was not made below, and cannot be made here, even if sound on the facts.

3. That the trustee, Sanders, did not refuse to act. But he swears that he did refuse to act, and in writing, and the court found that he did, and this ends this contention.

4. That the appointment of the substituted trustee was not on the paper itself. But it could not be, as the paper was so filled with writing that it could not be. However, it was written on separate paper, which was attached to the original. This is enough.

5. Inadequacy of price. But the chancellor found to the contrary, and correctly so on the evidence.

6. That McDonald was insane when he appointed the substituted trustee and when the sale was made. But the chancellor found that he was not on the evidence.

7. That the writing of substitution was not signed by McDonald with his own hand. But his name was signed by his express direction, he being physically very feeble, in his presence and the presence of others. This is surely sufficient.

The learned chancellor was correct in all his rulings in this voluminous record.

Affirmed.

METCALFE et al. v. MERCHANTS' & PLANTERS' BANK et al.

(Supreme Court of Mississippi. July 2, 1906.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—PAYMENT OF CLAIM—STATUTORY PREFERENCES.

Under Ann. Code 1892, § 3077, making moneys deposited in bank by any officer having the custody of public funds a trust fund, and not liable to the claims of general creditors of the bank, public moneys deposited by a sheriff have priority of payment on an assignment for the benefit of creditors.

2. SAME—SETTING ASIDE ASSIGNMENT—FORM OF REMEDY.

Ann. Code 1892, c. 8, relative to assignments for benefit of creditors, provides that any creditor may file a cross-petition against the receiver, making the assignor or other persons defendants, and show that the assignment is fraudulent, or ought not for any other reasons to be enforced. A complaint filed by depositors, holders of exchange and stockholders of a bank which had made an assignment for the benefit of creditors, against the bank, its officers, directors, assignees, and receivers, sought various forms of relief against independent acts of commission and omission, and was styled on cross-petition or bill of complaint, and asked that it be treated as a cross-petition or bill, as the equities of complainants might require. Held that, on motion of defendants, it was proper to compel complainants to elect whether they would proceed as upon an original bill in equity or as upon a cross-petition under the statute.

3. SAME—PLEADING—COMPLAINT.

Where a cross-petition under the statute did not claim the assignment to be fraudulent and did not give any valid reason why it should not be enforced, and it appeared that the assignment conveyed everything, and that under it the various suits necessarily, as indicated in the complaint, might be instituted by the assignee and receiver, a demurrer to the cross-petition was properly sustained.

4. JUDGES—DISQUALIFICATION—OBJECTIONS.

An averment in a cross-petition filed under the statute that the chancellor was disqualified to take charge of the assignment proceedings, because "a party to said suit and interested therein," was insufficient, where it did not appear from the pleadings that he was a party or interested.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 227.]

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS—SETTING ASIDE—PLEADING.

A general charge that the assignment was not "lawfully executed," etc., was demurrable, as not stating facts to show in what particular it was unlawful.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignment for Benefit of Creditors, §§ 1059-1061.]

6. SAME—GROUNDS OF ACTION.

The fact that an improper assignee or receiver had been appointed was no basis for a cross-petition under the statute, as any creditor could apply for his discharge.

Appeal from Chancery Court, Washington County; Percy Bell, Chancellor.

Suit by George Metcalfe and others against the Merchants' & Planters' Bank and others. From a decree sustaining a demurrer to the complaint, complainants appeal. Affirmed.

Jayne & Watson, for appellants. Percy & Campbell and Shields & Boddie, for appellees.

CALHOON, J. The complaint of appellants in the court below is presented in two aspects, and is filed by depositors, holders of exchange, and one stockholder of appellee bank, against the bank, its officers, directors, guarantors, sureties, assignees, receivers, and certain public officials, seeks a variety of relief against a variety of separate independent acts of commission and omission, styles itself "a cross-petition or bill of complaint," and asks the court to treat it "as a cross-petition or bill of complaint as their equities may require," and "that this cross-petition be treated as a cross-petition or bill of complaint as this court may deem proper and necessary." On motion of defendants the complainants were compelled to elect whether they would proceed as upon original bill in equity, or as upon cross-petition under Ann. Code of 1892, c. 8, in reference to "assignments for benefit of creditors." To this action compelling election they excepted, and then elected to stand in the court as upon cross-petition, whereupon a demurrer to it as such was sustained. Appended to this instrument is what appears on its face to be a perfectly valid general assignment, without preferences, for the equal benefit of

all creditors, of every species of property, right, and claim, to one Atterbury, as assignee, against whom no objection appears, but who subsequently resigned and J. S. Walker, president of the bank, was appointed in his stead, and he is objected to as being interested. Objection is made to the allowance of a prior claim of the sheriff for public moneys deposited, which they say should be postponed to previous depositors. Another objection is in these words: "That the chancellor passing upon said matters and making the orders therein was disqualified to act in the matter, adjudicate thereon, or to make the orders, decrees, and appointments therein made, because he was a party to said suit and interested in the cause, and is still a party thereto and interested therein."

On the point of the deposit by the sheriff we decide that it was a trust fund, under Ann. Code 1892, § 3077, and entitled to priority of payment out of the assets of the bank. *Fogg v. Bank*, 80 Miss, 755, 32 South. 285.

The averment that the chancellor was disqualified, because "a party to said suit and interested therein," is insufficient, because it is not explained how he was a party or how interested. He nowhere appears to be a party on the pleadings, nor is it shown how he was interested.

It was correct to compel complainants to elect whether they would proceed by way of original bill or by cross-petition under chapter 8 of the Code. It is not insisted that the assignment was fraudulent, nor is any valid reason given why it should not be enforced. It conveyed everything, and under it the various suits necessary, as indicated in the complaint, to recover property or money rights, may be instituted by the assignee and receiver at the instance of any creditor. The two proceedings sought to be simultaneously or alternatively prosecuted in the same proceeding were properly disallowed.

The general charge that the assignment was not "lawfully executed," etc., is demurrable in not stating facts to show the court in what particular it was unlawful. On its face it appears perfectly valid and lawful. If there was, as complained of, an improper assignee or receiver in charge, it is no basis for this bill. Any creditor could apply for his discharge.

Affirmed.

BARATARIA CANNING CO. v. OTT et al. (Supreme Court of Mississippi. July 2, 1906.)

1. APPEAL—LAW OF THE CASE—SCOPE OF DECISION.

Land fronting on a sound was leased, and the lessee obtained from the county board of supervisors the right to bank, plant, and cultivate oysters in the sound within the limits of the entire front of the property, and thereafter the lessor deeded the land to the lessee, reserving all "littoral and aquatic rights appurtenant to the land," and in a suit between the parties it was decided on appeal that, the

lessor having had no exclusive right to the water or fish and the grant of the supervisors having vested a property right in the lessee, the reservation was of a thing which would not otherwise have passed under the deed, and did not deprive the lessee of his exclusive right to the oysters. *Held*, that such decision did not bar a reformation of the deed after remand of the cause on the ground that the real intent of the agreement between the parties had been that the lessor should have the right to the oysters and oyster beds.

2. SAME—PLEADING—AMENDMENT—ANSWER.

Where, in a suit to restrain defendants from committing trespasses on oyster beds claimed by complainant, the answer and cross-bill claimed that defendants were entitled to take oysters from such beds under the terms of a written contract between the parties, and on appeal it was decided that defendants had no such rights under the contract, it was within the discretion of the trial court to permit defendants to amend their answer and cross-bill, so as to seek a reformation of the contract on the ground that its language did not express the true agreement between the parties.

3. REFORMATION OF INSTRUMENTS — MISTAKE OF LAW—MEANING OF LANGUAGE USED.

Land fronting on a sound was leased, and thereafter the county board of supervisors granted the lessee the right to cultivate oysters within the limits of the front of the property, and subsequently the lessor conveyed the land to the lessee; the deed reserving "all littoral and aquatic rights appurtenant" to the land. *Held*, that the lessor was entitled to have the provision in the deed reformed in accordance with the actual intention of the parties that the lessor should have the exclusive right to the oysters, which intention was not shown by the language used.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, §§ 61-76.]

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

"To be officially reported."

Bill by the Barataria Canning Company against John Ott and others. From a decree overruling a demurrer to an amended answer and cross-bill, defendants appeal. Affirmed.

See 37 South. 121.

Harper & Harper, for appellants. Ford & White, for appellee.

WHITFIELD, C. J. The amended cross-bill substantially makes this case in brief: That both parties, appellant and appellees, mutually intended by their deed and agreement that appellant should convey to appellees "all the oysters, oyster beds, and all other rights and privileges then held by said appellant in the waters of the said bay northward and eastward of the line indicated in said instrument, and forever conveyed, abandoned, and released to the appellees all the property rights and privileges then held by them in that portion of said waters of said bay to the northward and eastward of said line indicated in said instrument," and that in consideration of said agreement, and its execution on the part of appellant, the appellees agreed to convey to the appellant, in fee simple, certain land on which its canning factory stood, to which it then held a lease originally for 25 years, and that appellant

agreed, in consideration of this conveyance, to pay appellees \$6,000, and "surrender forever to appellees the right to oysters and oyster beds held by it in the waters of the bay of Biloxi, to the northward and eastward of said line indicated in the said agreement," and that but for this understanding as to the contract actually made between the parties the appellees would never have consented to have parted with what they did part with for the sum of \$6,000. The appellees in the cross-bill expressly allege that the following paragraph in the agreement below set out, together with the other recitals and stipulations of the said instrument, had the effect to convey "to them all the oysters, oyster beds, property rights, and privileges then held by said appellant in the waters of the said bay of Biloxi to the northward and eastward of said line indicated in said instrument," and that appellees accepted the said \$6,000 and executed said instrument under that belief. The said paragraph is as follows:

"And it is expressly understood that the said Barataria Canning Company, by its acceptance of the grant evidenced by this instrument, shall for itself, its legal representatives, and its successors in interest, disclaim any right of claim to the exercise of any littoral and aquatic rights and privileges, appurtenant and attached to said land, or vested in the grantors as the owners of said land, to the northward and eastward of said line so established, no matter what the actual conformation of the shore line may or shall be, or become or be made, and the respective concessions and disclaimer here made by the parties hereto, each in favor of the other, shall be held and understood as reciprocal, and as furnishing mutual consideration each for the other."

This court held in the former opinion that "littoral and aquatic rights" are simply those rights which, "in default of special statutory provisions to the contrary, pertain to the lands abutting upon tide waters to which the common-law doctrine of riparian ownership does not apply." And in another part of the opinion they were defined to be "the privilege of landing his boats, hauling his nets, gathering of seaweeds and shells, and taking sand from the beach between the high and low water marks, and in some jurisdictions the right to erect wharfs and piers and bath houses in the water in front of his property." It is obvious that, if this is all that was meant by "littoral and aquatic rights," the appellees fail wholly to get what they intended to get as to the right to oyster plantations, etc., in the waters northward and eastward of the line indicated in the agreement. If the allegations of the cross-bill are true. In fact it is obvious that "littoral and aquatic rights," within this definition, amounted to nothing, were absolutely valueless so far as the right to set out and use oysters in the part of the waters of the bay indicated, was concerned. The prayer of the cross-bill was

in the alternative: First, that the instrument of writing, marked "Exhibit No. 2" to the amended answer and cross-bill, may be reformed so as to embrace and set forth, in proper and apt language, the real intent and purpose of the agreement between the appellant and appellees, etc., and for an accounting to be taken of all oysters removed, etc., and for a decree for their value, and for an injunction against the appellant restraining it from removing any oysters, and interfering with appellees, etc., or, if the court on final hearing should hold the said agreement void for want of mutuality, then that the court should decree the appellant entitled to receive back the \$6,000 so paid by appellant to appellees as aforesaid, and which \$6,000 the appellees had tendered to appellant, and that said instrument, Exhibit No. 2, should be canceled and held for naught, etc., and that the rents under the original lease from said Mary Ott to appellant should be decreed to be paid appellees as though such instrument had never been executed, and that the injunction heretofore granted against appellees should be dissolved, etc. There was a demurrer to this amended answer and cross-bill, which was by the court overruled, and this cause is here on appeal from that action of the chancellor.

The contention of appellant that the former decision of this court is *res judicata* of the present contention presented by this amended answer and cross-bill is a clear misconception of the case made by said answer and cross-bill. All that was done by this court, in its former opinion, was to declare the rights of the respective parties to the instrument according to the terms of the instrument as interpreted by the court. The object of appellees in the present pleading is in no way to assail the correctness of that decision; but, accepting it—accepting the interpretation put upon the terms of said agreement, especially the phrase "littoral and aquatic rights"—the said cross-bill avers that the instrument did not correctly set out, so interpreted, the contract actually made between the parties; that one contract was actually entered into between the parties, the one insisted on by appellees, but that through the use of inapt words that contract so actually made was not contained in or expressed by said instrument, and prays simply the reformation of the instrument to make it speak the contract actually entered into by said parties, or alternatively as stated. It was perfectly competent for the court below to permit the amendment of the answer and cross-bill. *City of Winona v. Minnesota*, 29 Minn. 68, 11 N. W. 1128. This case falls clearly within the principles set out in the following authorities: "If an agreement is what it was intended to be, equity would not interfere with it because the parties had mistaken its legal import and effect. If, on the other hand, after making an agreement, in the process of reducing it to a written form,

the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement, or by cancellation, or by reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made, but the mistake of law prevents the real contract from being embodied in the written instrument. In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing." Pomeroy on Equity Jurisprudence, vol. 2, § 845. "In entering into contracts, parties are deemed to know the principles established by law, and contracts are construed with reference to the law applicable to the subject-matter of the contract, and in that sense the law as it actually is enters into and forms part of the contract that the parties make. If, however, in a given case, the parties actually mistake or misunderstand the principle of law applicable to the subject-matter of the contract, and reach an agreement relying upon this mistake of the law, there is no ground upon which a court of equity can reform the contract. The court cannot know whether the parties, if they had correctly understood the law, would have entered into any contract on the subject, or what terms they might have reached touching the same. While the court might, therefore, be entirely satisfied that the parties, had they in fact correctly understood the principles of law applicable to the case, would not have made the contract they did make, the court cannot know what contract they would have made, if any, and therefore in such case the court cannot reform the contract, although it might be justified in setting it aside. When, however, the mistake lies, not in a misunderstanding of the principles of the law controlling the subject of the contract or the rights of the parties connected therewith, but merely in the terms proper to be used in defining the actual contract of the parties, such a mistake, though in one sense a mistake of law, is one that a court of equity will correct." *Abraham v. North German Ins. Co.* (C. C.) 40 Fed. 717. "A husband and wife agreed to purchase land, each to pay one-half of the purchase money and to hold the land as tenants in common. The husband drew the deed, but by misunderstanding as to the effect of the language employed the deed created an estate by entireties. Held, that the deed would be reformed. *Brown v. Brown*, 79 Hun, 44, 29 N. Y. Supp. 652; 42 Am. Dig. (Cent. Ed.) col. 1093, par. p. Where the parties to a deed intend

that a fee simple should be conveyed, but the word heirs was omitted, so that only a life estate was conveyed, reformation will be decreed, though the omission arose from a mistake of law. *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976; 42 Am. Dig. (Cent. Ed.) col. 1093, par. 'r'."

Clearly here the averments of the cross-bill give a case in which there was not a mistake as to the legal import of the contract actually made, but the mistake was in using words which absolutely prevented the real contract from being made at all, or, as Pomeroy so clearly puts it, "the instrument as written fails to express the intention which the parties had in making the contract which it purports to contain," and hence falls precisely within the class which equity will reform. No better statement of the principle has ever been made than that made by Judge Campbell, for this court, in *Hall v. Lafayette*, 69 Miss. 540, 13 South 39, when he said: "If an agreement is just what the parties intended it should be, no matter what led to it, there can be no interference with it; but if, in putting it into form, it fails to express and stipulate for what the parties understood and intended it should, a case is made for a court of chancery." But, besides this, this amended answer and cross-bill alleged facts as to the action of appellant in inducing appellees to believe that their title to the oysters and oyster beds would not be questioned if they accepted and executed the deed as drawn, which, if true, make out a case of actual fraud, and it is expressly held that this would have entitled appellees to the relief sought by the cross-bill. Pomeroy, perhaps the greatest of all Equity writers, says: "Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, produced, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud. It is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party." Pomeroy, Equity, vol. 2, § 847.

We are clearly of the opinion that the former judgment of this court constitutes no bar to the granting of the relief sought by the cross-bill in this cause, and that the demurrer was, therefore, properly overruled. What the court held before is the law of the case within the limits of that holding, and the court held nothing absolutely as to whether, granting this instrument to mean what the court construed it to mean, it might not, so construed, wholly fail to con-

vey and contain the contract actually entered into by the parties. The cross-bill does not question the previous holding in any respect. Recognizing its full extent and force, it merely avers, accepting its construction of the contract, that no such contract was ever actually made, and asks the court to reform the instrument so as to make it speak the very contract mutually intended to be made, and in fact, actually made, by the parties. If the appellees shall maintain their contention, that both parties mutually intended to make and actually did make the contract they contend for, but that this instrument does not set it out, then clearly the instrument should be reformed as prayed for. But this is a matter to be developed on the testimony.

The decree is affirmed, and the cause remanded, with leave to answer within 30 days from the filing of mandate in the court below.

McDANIEL et al. v. HURT et al.

(Supreme Court of Mississippi. July 2, 1906.)

APPEAL—ACADEMIC QUESTIONS.

Where, in a suit to enjoin an election, the court declines to hear the evidence, dissolves the temporary injunction, and denies a supersedeas, but grants an appeal for the purpose of settling the principles of the case, and the election is held, the appeal will not be entertained, as no actual controversy is involved, and a reversal would do no good.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 75, 64.]

Appeal from Chancery Court, Perry County; T. A. Wood, Chancellor.

"To be officially reported."

Suit by J. L. McDaniel and others against Walter Hurt and others. Decree for defendants. Plaintiffs appeal. Dismissed.

J. L. McDaniel and others, resident citizens and taxpayers of Perry county, filed a petition seeking to enjoin the defendants, election commissioners of said county, from holding a special election to fill a vacancy in the office of sheriff. The chancellor refused to take jurisdiction of the case, declined to hear evidence, and dissolved the temporary injunction, but granted an appeal, without supersedeas, to the Supreme Court, for the purpose of "settling the principles of the case." The special election was held, and the vacant office filled by said election.

Sullivan & Tally, for appellants.

WHITFIELD, C. J. This court cannot entertain an appeal where there is no actual controversy. See Ency. Pl. & Prac. vol. 2, p. 341, § 4; and see, especially, note 2 on page 343, and the authorities therein cited, particularly *Chamberlain v. Cleveland*, 1 Black (U. S.) 419, 17 L. Ed. 93, *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620, 33 L. Ed. 1016, and *Chicago R. R. Co. v. Dey*, 76 Iowa, 278, 41 N. W. 17, in which last case it is held that,

"where the cause on appeal relates to questions involved in rights which have ceased to exist, the appeal will be dismissed." It is also laid down on page 344, in note 1: "The appellate court will not determine a cause involving nothing more than a question of costs"—citing numerous authorities.

Again, the object of this injunction was to prevent the holding of the election for sheriff. The injunction was dissolved, and a supersedeas denied, and then, curiously enough, an appeal granted, as alleged, for the purpose of "settling the principles of the cause." The whole cause was "settled" when the election was held, and, the injunction being dissolved and the supersedeas denied, the officers properly proceeded to hold, and did hold, the election. We are in the attitude of being asked, by this appeal to reverse this decree, reinstate the injunction, and to make the injunction perpetual, against the holding of an election which has been already held. An injunction is not granted to prevent the occurrence of a thing which has already occurred. In 16 Ency. of Law (2d Ed.) 362, the law is thus stated: "It is a general rule that rights already lost and wrongs already perpetrated cannot be corrected by injunction, and that the party aggrieved must seek some other remedy for redress."

On both the grounds indicated, therefore, this appeal should be, and is hereby, dismissed.

NEW YORK LIFE INS. CO. v. McINTOSH.

(Supreme Court of Mississippi. July 2, 1906.)

INSURANCE—LIFE POLICY—ESTOPPEL.

Deceased applied for a life policy and paid a premium, to be returned if the policy was not issued. After he refused to accept a different policy, he received a letter from the agent stating that he had just been advised that the company had reconsidered the application and would issue a policy covering full amount from start on plan applied for, and that as soon as it arrived it would be sent to deceased. Deceased relied on the letter, and considered his life insured, but on arrival of the policy, deceased being sick, it was not delivered. *Held*, that the company was estopped to deny the insurance.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 202, 254.]

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Suit by Mary McIntosh, executrix, against the New York Life Insurance Company. Decree for plaintiff, and defendant appeals. Affirmed.

After the reversal of this case on the former trial (*New York Life Insurance Co. v. McIntosh*, 38 South. 775), the plaintiff filed an amended bill setting up estoppel on the part of the defendant to deny the issuance of an insurance policy to the husband of complainant. Complainant avers that her husband relied upon a certain letter written by one Elson, an agent of defendant, and,

thus relying on said letter, considered his life insured with defendant company. The letter is as follows: "Meridian, Miss., February 16, 1904. R. McIntosh, Esquire, Gulfport, Miss.—My Dear Sir: I have just been advised that the company have reconsidered your application and will issue policy covering full amount from the start on plan applied for. As soon as policy arrives I will send to you. With regards, I am yours, J. Elson." To the amendment to the bill defendant interposed a demurrer, which demurrer was overruled, and from the action of the court in overruling the demurrer the defendant appeals.

Ford & White, Rice & Montgomery, and James H. McIntosh, for appellant. Harper & Harper, for appellee.

WHITFIELD, C. J. The amended bill sufficiently sets up facts constituting an estoppel, if true; and, as the demurrer admits their truth, it was properly overruled.

The decree is affirmed, and the cause remanded, with leave to answer within 30 days from the filing of the mandate in the court below.

GULF & C. RY. CO. v. HARTLEY.

(Supreme Court of Mississippi. June 11, 1906. Suggestion of Error Overruled July 6, 1906.)

1. APPEAL—HARMLESS ERROR—RULINGS ON EVIDENCE.

In an action for trespass on land, an erroneous ruling that plaintiff might show damages in consequence of trespasses committed after the filing of the declaration was harmless, where there was no proof of any such trespasses.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4146.]

2. TRESPASS—ACTION—ISSUES AND PROOF.

In an action for trespass on land, evidence as to trespasses committed after the filing of the declaration is inadmissible.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 135.]

3. SAME—EVIDENCE.

Though, in an action for trespass on land, there was no distinct proof of trespasses after the filing of the declaration, it was prejudicial error to permit plaintiff to testify as to deterioration in value from trespasses after the filing of the declaration.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 135.]

Appeal from Circuit Court, Webster County; J. T. Dunn, Judge.

"To be officially reported."

Action by A. H. T. Hartley against the Gulf & Chicago Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Appellee brought suit on November 23, 1904, for \$3,000 damages on account of certain alleged trespasses committed by appellant upon his land between November 11, 1904, and the date of the filing of the suit.

The railroad company was, at the time of the alleged trespass, engaged in grading its line of railway, and in making its grade crossed the premises of appellee and threw up an embankment. The declaration charges that the entry was without legal right and without consent on the part of appellee, but over his protest. Appellant pleaded a previous condemnation of the land by eminent domain proceeding which was at that time pending on appeal to the circuit court. A demurrer to this plea was sustained. Appellant afterwards filed a plea of *res adjudicata*, setting up a second condemnation proceeding which was decided on January 5, 1905, and which has been fully satisfied and paid off by said railroad company. A demurrer to this plea was also sustained. The case went to trial on the merits. According to the plaintiff's testimony, his damage was \$750. The testimony of other witness varied, some estimating the damages as high as \$2,000. On the trial the court ruled that the railroad company might show damages suffered in consequence of trespasses committed between the filing of the declaration on November 23, 1904, and January 5, 1905, the date of adjudication of the second and final eminent domain proceeding. The record does not show, however, that any trespasses were committed after the filing of the declaration and before January 5, 1905. The court allowed the appellee to testify to a deterioration in the value of his property caused by the trespasses after the filing of the declaration and prior to January 5, 1905. The appellee recovered a verdict for \$1,500, and the railroad company appeals.

May & Flowers, for appellant. Daniel & Adams and A. F. McKeighney, for appellee.

WHITFIELD, C. J. There is no proof of any trespass committed after the filing of the declaration. The ruling of the circuit judge, therefore, to the effect that plaintiff might show damages suffered in consequence of trespasses committed between the filing of the declaration and January 5, 1905, though erroneous, is not reversible error, so far as the proof of distinct trespasses is concerned.

But there is fatal error in the record in this: that the plaintiff was allowed to prove the deterioration in value in his property caused by the trespasses after the filing of the declaration and up to the 5th of January, 1905. He was asked: "What was the damage and injury done you by reason of this alleged trespass to this barn and the premises, all of which, if any, by reason of this trespass from November 11 up to January 5, 1905, what was all of your damage or injury, if any?" This was objected to by defendant, the objection was overruled, and defendant excepted, and the witness answered: "The damage to this building and the land, etc., and the shape it left the prop-

erty in, I should say it damaged the sale of the place \$750 probably." And again he states that "the place would not have brought as much by \$750 on account of the damage done to it." That is to say, the witness was manifestly allowed to testify to the deterioration in value suffered by the place by reason of trespasses committed after the filing of the declaration and up to the 5th of January, 1905. This was fatal error.

Reversed and remanded.

PULLMAN CO. v. STEARN.

(Supreme Court of Mississippi. July 6, 1906.)

CARRIERS—INJURIES TO PASSENGER—PROXIMATE CAUSE.

A passenger, having through railroad transportation and a check evidencing his right to occupy a through sleeping car, was directed to leave his car at an intermediate point and there board another car. After alighting from the car, he was directed to go to the depot, and while walking on the depot platform he fell and was injured. *Held*, that the failure of the sleeping car company to fulfill its contract for continuous passage was not the proximate cause of the injury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1245, 1579–1582.]

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by S. G. Stern against the Pullman Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Plaintiff was en route from Colorado to Memphis, Tenn., having through railroad transportation and a berth check evidencing his right to occupy a through Pullman sleeping car while on his journey. When the train reached Kansas City, the plaintiff was informed by the Pullman conductor that the car in which he was riding would be cut out at Kansas City and not carried through to Memphis, telling him, also, that he would not be inconvenienced by getting off at Kansas City, and that the porter would take his baggage out of the car and place it on another Pullman car, which would be standing on the track. On arriving at Kansas City, plaintiff disembarked; the porter taking his baggage. The other car to which he was to be transferred was not standing near the car from which he disembarked, and the porter did not assist him in finding it, but turned his baggage over to him and told him to go up to the depot and see an official of the company, which he did, and was given a through check to Memphis in another sleeper. In going up to the depot after leaving the train at Kansas City he slipped and fell, striking his knee on the platform, and received an injury, for which he brought this suit. On the trial below, the defendant objected to all testimony about injuries received by plaintiff while walking to the depot. The court overruled the objection, and the case went to the jury, who rendered a verdict for

the amount sued for, and appellant appeals, assigning as error the admission of testimony as to the injury received after the appellee had left the car. The contention of the appellee on appeal was that the Pullman Company had contracted to transfer him from Colorado through to Memphis in a particular berth in a particular sleeping car, and that, when the appellee was induced to leave the car through a representation of the conductor, the appellant was liable for any injury received by the appellee in going from one car to another.

McWillie & Thompson, for appellant.
Bramlette & Tucker, for appellee.

WHITFIELD, C. J. The court below erred in admitting evidence against appellant to show the liability on the part of appellant for damages caused appellee growing out of his slipping and falling on a platform, after he had left the Pullman car. The failure of the Pullman Company to fulfill its contract for continuous passage to Memphis, Tenn., was in no way the proximate cause of this injury. We decide nothing, at this time, as to the liability of the company otherwise.

Reversed and remanded.

BROWN v. YAZOO & M. V. R. CO.

(Supreme Court of Mississippi. July 6, 1906.)

CARRIERS—INJURY TO PASSENGER—PRESUMPTIONS OF NEGLIGENCE—EVIDENCE.

The testimony of a passenger that his and three other cars left the track suddenly and turned over, injuring him, shows a defect in the rails, or wheels of the cars, at the time of the accident, and requires the carrier to explain the accident in order to escape liability.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1283–1294, 1307–1314.]

Appeal from Circuit Court, Wilkinson County; M. H. Wilkinson, Judge.

Action by D. W. Brown against the Yazoo & Mississippi Valley Railroad Company for injuries received while a passenger. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Bramlette & Tucker, for appellant. Mayes & Longstreet, for appellee.

CALHOON, J. Appellant's only contention in his motion for a new trial was that it was error to exclude his testimony and peremptorily instruct the jury to find for the railroad company. He was the only witness in the case, and testified that he and his wife and three children were paid passengers on appellee's train, that his car and three other cars suddenly left the track and were turned over, causing some bruises, sickness, etc. We think this a case where the thing speaks for itself, and shows that, manifestly, there was some defect in the rails, or wheels of the cars, at the very time of

the accident, so as to put the railroad company to an explanation. The courts will not go beyond the case shown to imagine that the trouble might have been from an unforeseen cause, such as a freshet, storm, felonious tampering with the rails, etc.

Reversed and remanded.

GRAVES v. GRAVES.

(Supreme Court of Mississippi. July 6, 1906.)

1. DIVORCE—GROUNDS—DESEPTION—WHAT CONSTITUTES.

A wife deserted her husband without cause. In about a year she returned to his house and remained there about a year and a half. During that time the parties occupied separate portions of the house, she refusing to cohabit with her husband. The refusal to cohabit continued for more than two years. *Held*, that the husband was entitled to a divorce on the ground of desertion.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 107-139.]

2. SAME—EVIDENCE—ADMISSIBILITY.

In a suit by a husband for divorce, evidence of statements of the wife as to her relations with her husband is admissible.

Appeal from Chancery Court, Harrison County; T. A. Wood, Chancellor.

Bill for divorce by H. T. Graves against Susan H. Graves. From a decree dismissing the bill, complainant appeals. Reversed, and decree rendered.

Ford & White, for appellant.

CALHOON, J. The decree final on this bill for divorce from the bonds of matrimony is in the following words: "This cause coming on to be heard on bill, personal service, and oral proof had at the hearing, which has been reduced to writing and filed as a part of the record in this cause, the court, having considered the same, doth find that about three years ago defendant deserted complainant without cause; that she lived away from him about a year, during which time there was some hotly contested litigation between complainant and defendant, both over their children and their property; that defendant, on the advice of her counsel, in order to protect her property rights, returned to their home, which was involved in the litigation; that she remained at home about a year and a half, and cared for their children, who had been awarded to her husband; that complainant paid her for this service; that during the time they lived in the same house they ate separately and occupied separate portions of the house, and during all the time they lived in the same house defendant persistently and obstinately refused to cohabit with complainant as his wife, and that defendant had not cohabited with complainant since she left him three years ago; and that this refusal to cohabit with complainant has been continued, willful, and obstinate for more than two years next before the filing of the bill of complainant

in this cause. But the court further finds that, as a matter of fact, complainant and defendant did live in the same house, although occupying towards each other the attitude of strangers. This fact the court holds will prevent the complainant from having a decree, for the reason that the court holds, as an abstract rule of law, that a decree of divorce on account of desertion can never be predicated on a state of facts showing that complainant and defendant have occupied the same house as their place of abode within two years. The court further holds that the testimony as to the statements of defendant as to her relation with complainant are incompetent. It is therefore ordered that complainant's bill be dismissed without prejudice. Ordered, adjudged, and decreed this 17th day of April, 1906."

The court below was correct in its finding of facts, but we cannot agree with the learned chancellor in the opinion that there can be no desertion where the parties live under the same roof for part of the two years. Abandonment—desertion—may be as complete under the same shelter as if oceans rolled between. 1 Bishop, Marriage & Divorce, §§ 1672, 1676, cited by counsel. The custody of the children having been awarded by the court to the husband, the appellant, in previous proceedings, we need not consider that. The evidence is competent. 3 Wigmore, Ev. pp. 2729, 2773.

Reversed, and decree here of divorce from the bonds of matrimony.

MOSELEY v. STATE.

(Supreme Court of Mississippi. July 6, 1906.)

1. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

On a prosecution for murder, the defense was self-defense, and there was evidence to show violent conduct on the part of decedent directed at accused at a certain house, and that accused left there, and was followed by decedent, who made a deadly demonstration at the time of the killing; and the court instructed that if accused willfully shot decedent, and at the time of the shooting decedent had done nothing to accused, except to curse at him, and had been guilty of no act reasonably calculated to have aroused accused's apprehensions for his life, accused was guilty of murder, however much accused might have been afraid of decedent, or however much reason the jury might believe the accused had for such fears on account of decedent's conduct previous to the killing. *Held*, that the instruction was erroneous as excluding from the consideration of the jury those matters which occurred prior to the killing and at the time thereof.

2. SAME—EVIDENCE—CHARACTER AND HABITS OF DECEDENT.

Where, on a prosecution for murder, the defense was self-defense, and there was evidence tending to show that decedent was under the influence of cocaine, and that accused knew decedent's character, it was error not to permit accused to show that decedent was dangerous when under the influence of cocaine.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 391-395.]

Appeal from Circuit Court, Yazoo County; D. M. Miller, Judge.

William Moseley was convicted of murder, and he appeals. Reversed and remanded.

William Moseley was convicted of murder, and appeals. The testimony showed that prior to the killing he was at the house of one Harriet Taylor in company with several others: that Alf Williams came to this house and was bolsterous, and used insulting language towards appellant; that appellant left the house and went to his store; that Williams afterwards followed him to the store, where an altercation occurred. The testimony as to the occurrence was conflicting. The difficulty terminated in appellant shooting Williams with a pistol which he took from under the counter. Williams died from the effects of the wound. Appellant pleaded as a defense that he was apprehensive of being killed or receiving serious injury at the hands of the deceased at the time he fired fatal shot. On the trial the court permitted defendant to show the general reputation of deceased for peace or violence, and further permitted testimony to the effect that deceased was under the influence of cocaine at the time of the killing, and further permitted evidence as to the conduct and manner of deceased at the time of the killing. The court refused to permit proof of the effect of cocaine on deceased. This was assigned as error, as was also the giving of the sixth instruction for the state, which is as follows: "No. 6. The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that Moseley willfully and deliberately shot and killed Alf Williams, and that at the time of the shooting Alf had done nothing to Moseley but curse and swear at him, and had been guilty of no act or conduct which was reasonably calculated to have aroused the fears or apprehension of Moseley for his own life or person at the hands of Alf, then Moseley is guilty of murder, and the jury should so find, however much afraid they may believe Moseley was of Alf, or however much reason they may believe Moseley might have had for such fears or apprehensions on account of Alf's conduct previous to the time of the killing."

Henry, Barbour & Henry and Campbell & Campbell, for appellant. R. V. Fletcher, Asst. Atty. Gen., for the State.

CALHOON, J. The fierce and violent conduct of the deceased at the house of Harriet Taylor, especially directed at the accused and with no sort of provocation; the fact that the accused left there and went to his storehouse, which was also his home, in order to avoid trouble with the deceased; the fact that the deceased followed him; and the fact of the hostile and deadly significance of the demonstration of the deceased towards the accused at the very time of the killing—

all as testified to on behalf of the accused, made it error to give the sixth instruction for the state. The concluding sentence of it excludes consideration by the jury of all that occurred at Harriet Taylor's just preceding the killing, and, in truth, of the actions at the store. It is not possible for a jury to put itself in the place of the accused, and feel as he did, without a view of these matters; occurrences too closely interwoven to allow of separation in determining whether or not the accused shot in self-defense from the lights before him. We adopt the conclusion of those authorities which hold that testimony is admissible of the character of the deceased when under the influence of cocaine. A man may be peaceable and quiet when sober, but a terror when affected by cocaine. There was testimony offered to show this, and it is shown that defendant knew his character, and there is testimony sufficiently tending to show that deceased was under the influence of the stimulant to give Moseley the right to such testimony of character.

We agree with the trial court, however, that particular instances of violence in other cases are not admissible.

Reversed and remanded.

PITTMAN v. STATE.

(Supreme Court of Florida, Division A. April 10, 1906.)

1. WITNESSES—CRIMINAL PROSECUTIONS—PROCURING ATTENDANCE—CONSTITUTIONALITY OF STATUTE.

Chapter 5132, p. 71, of the Laws of 1903, prescribing the requisites to be complied with by parties charged with crime in applications for the procurement of witnesses for their defense at the cost of the county, is not in conflict with or violative of either section 11 or section 14 of the Declaration of Rights of the state Constitution of 1885. And, when the cost of the procurement of such witnesses is initiatory proposed to be thrown upon the county, a sound judicial discretion is vested in the trial judge to determine whether or not the statutory requirements have been properly complied with, and also to determine the bona fides of such application, and an appellate court will not disturb the action of the trial judge upon such application, unless an abuse of this judicial discretion is clearly made to appear.

2. SAME—APPLICATION FOR PROCESS—TIME.

Applications under chapter 5132, p. 71, of the Laws of 1903, for the procurement of witnesses, at the cost of the county, for the defense of parties charged with crime, should be seasonably made at the earliest reasonable opportunity, and not withheld until the case is actually called for trial.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 2.]

3. CONSTITUTIONAL LAW—SIXTH AMENDMENT—APPLICATION.

The sixth amendment to the federal Constitution has reference only to powers exercised by the government of the United States, and not to those of the states.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 149.]

4. CRIMINAL LAW—APPEAL AND ERROR—CONTINUANCE—DISCRETION OF COURT.

In criminal as well as in civil cases an application for a continuance is addressed to the sound judicial discretion of the trial court, and the denial of such a motion will not be reversed by an appellate court, unless there has been a palpable abuse of this judicial discretion, which must be clearly and affirmatively made to appear in the bill of exceptions; the rule being that motions for a continuance in criminal cases are to be even more closely scanned than in civil cases, because of the greater temptation to delay.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3045.]

5. SAME—WAIVER OF ASSIGNMENTS OF ERROR.

Where there are assignments of error in a criminal case which are not argued, but merely repeated and insisted upon in the brief of plaintiff in error, an appellate court is not required to do more than read the record carefully in connection with such assignments, and, if it discovers no plain or glaring error prejudicial to the plaintiff in error, under such assignments, the judgment will not be reversed because of such assigned errors.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3013.]

6. SAME—OBJECTIONS BELOW—NECESSITY.

An appellate court will not consider any grounds of objection to the admissibility of evidence, except such as were made in the court below; the plaintiff in error being confined to the specific grounds of objection made by him in the trial court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2639.]

7. SAME—EVIDENCE—ORDER OF INTRODUCTION.

The trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court when a clear abuse thereof is made to appear.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3063.]

8. SAME—ADMISSION OF EVIDENCE—FAILURE TO FURNISH FOUNDATION.

If evidence, apparently incompetent only because its relevancy is not apparent, or because it is not the best evidence, is offered, the court may, in the exercise of its discretion, receive it conditionally, if counsel gives assurance that he will supply the necessary foundation afterward. If, however, such evidence is so conditionally received, and the necessary connecting evidence is not introduced, so as to show the relevancy of the admitted evidence, the court should exclude the evidence so received on its own motion, but, if the failure to connect be not apparent or glaring, the objecting party should move to exclude.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1611, 1612.]

9. SAME—TRIAL—GENERAL OBJECTIONS TO EVIDENCE.

General objections to evidence proposed, without stating the precise grounds of objections, are vague and nugatory, and are without weight before an appellate court, unless the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2646.]

10. SAME—ADMISSIBILITY OF EVIDENCE.

Evidence of circumstances tending to connect the accused with the commission of the alleged crime, even though inconclusive, is properly admitted.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 849.]

11. SAME—OPINION EVIDENCE—FORGERY—PROOF OF SIGNATURE.

In a prosecution for forgery it is not error to permit a witness to testify as to the signature of the defendant, when such witness has testified that he had seen defendant sign his name on different occasions, and thought he was familiar with defendant's signature.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1047.]

12. SAME—OTHER OFFENSES.

In a prosecution for forgery, it is competent to show that about the time of the alleged forging and uttering by defendant other similar instruments had been forged or uttered by him, in pursuance of a general scheme to defraud, and the fact that defendant was under indictment for the forgery of some of the other instruments does not affect their admissibility in evidence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 833.]

13. WITNESSES—CROSS-EXAMINATION AND IMPEACHMENT—DEFENDANT AS WITNESS.

For the purpose of discrediting a witness, a wide range of cross-examination is permitted as a matter of right in regard to his motives, interest, or animus as connected with the cause or parties thereto, upon which matters he may be contradicted by other evidence, and the rule applies to the cross-examination of a defendant, when he voluntarily offers himself as a witness, to the same extent and with like limitations as to other witnesses. The motives, interest, or animus of a witness are not collateral matters, and these may be shown and considered by the jury in estimating the credibility of a witness, and as to such matters he may be contradicted.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1106-1108.]

14. CRIMINAL LAW—APPEAL AND ERROR—FAILURE TO EXCEPT.

An assignment predicated upon the refusal of the trial court to give a certain requested instruction cannot be considered by an appellate court, in the absence of any showing that an exception was taken to said ruling.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2668.]

15. FORGERY—EVIDENCE—SUFFICIENCY.

Evidence examined, and found sufficient to support the verdict.

(Syllabus by the Court.)

Error to Circuit Court, Holmes County; Francis B. Carter, Judge.

J. T. Pittman was convicted of forgery, and brings error. Affirmed.

Benjamin S. Liddon, for plaintiff in error. W. H. Ellis, Atty. Gen., and J. Walter Kehoe, State's Atty. First Judicial Circuit, for the State.

SHACKLEFORD, C. J. The plaintiff in error, J. T. Pittman, hereinafter referred to as the defendant, was indicted by the grand jury at the spring term in May, 1905, of the circuit court for Holmes county for the crime of forgery. The indictment contained two counts; the first count charging the defendant with the forgery of a certain written instrument therein fully described, and the second count charging the defendant with the uttering and publishing of the same written instrument which in the first count he was charged with having forged. The defendant was tried at the fall term of said court held in

October, 1905, which trial resulted in his conviction of the crime charged in the second count of the indictment, and he was sentenced to be confined at hard labor in the state prison for the term of five years. From this judgment and sentence he seeks relief here by writ of error, returnable to the present term. The person whose name the defendant was charged with having forged was C. L. Douglass, and the written instrument to which the name of the said Douglass was appended was a note under seal, dated the 4th day of May, 1904, for the sum of \$46, in payment for 20 sacks of fertilizer, and payable to the Virginia-Carolina Chemical Company, which was alleged in the indictment to be a corporation, or to its order, on or before October, 1904.

The first error assigned is that "the court erred in refusing to issue subpoena for witnesses W. R. Stanley and J. M. Holliday upon the affidavit of the defendant of insolvency made October the 9th, 1905."

The bill of exceptions discloses that on the 9th day of October, 1905, the defendant presented his affidavit to the trial court, reciting therein the fact of his insolvency, and that C. A. Douglass, W. R. Stanley, W. D. Locke, and J. M. Holliday were material witnesses on behalf of the defendant in said cause, by whom he expected to prove that each of said witnesses was present when the note in question was executed and saw C. L. Douglass execute said writing, and defendant prayed that subpoena issue for each of said witnesses. The court refused to issue subpoenas for all of the requested witnesses, for the reason that at the time the application was made for the witnesses applications were made by the defendant for witnesses in eight other cases pending against him upon indictments found by the same grand jury charging him with other forgeries, and uttering other forgeries about the same time of the one charged in the indictment in question, in most of which applications more than two witnesses to the same fact were asked for, in several cases the same witnesses being asked for in more than one application, and in the application in question four witnesses to the same fact were asked for, but allowed two of said witnesses to be selected by the defendant to be subpoenaed. The defendant excepted to the ruling of the court, but selected the names of W. D. Locke and C. A. Douglass as the two witnesses to be allowed upon the applications, stating that in more than one of the other cases the court had, upon his application, allowed subpoenas for W. R. Stanley and J. M. Holliday.

In his brief defendant admits that "the application for witnesses was not a full and technical compliance with the act (Rev. St. 1892, § 2868) or chapter 5132, p. 71, of Acts of 1903, so as to entitle the defendant to have process for witnesses at the expense of the state or rather county."

We fully concur in the admission, but,

even if all of the requirements of the law relating thereto had been fully complied with, we fail to see wherein the defendant was harmed in any way by the action of the court, inasmuch as all four of the witnesses named in the application had been subpoenaed by the court, at defendant's request, in other prosecutions for forgery pending against him, for the same term of court at which he was tried on the indictment in the case at bar. We are of the opinion that this assignment is utterly without merit. Therefore further discussion of it would be fruitless.

The second assignment is that "the court erred in refusing to direct subpoenas to be issued for Frank Richardson and J. M. Holliday upon the præcipe of the defendant."

In his brief defendant says this assignment "presents a legal proposition involved in better shape," and he submits the argument made in support of it in support of the first assignment as well.

We find from the transcript that the defendant was arraigned and entered his plea of not guilty on the 19th day of October, 1905; that on the 24th day of said month he filed a præcipe with the clerk for a subpoena for the two witnesses, J. M. Holliday and Frank Richardson, returnable instant; that on the same day of the filing of said præcipe defendant filed a motion for an order from the court directing the clerk to issue the subpoenas, reciting therein that the clerk refused to issue the same, and also filed with the motion his affidavit, in which M. C. Pittman joined, to the effect that each was a defendant in the cause and innocent of the crime charged, that said witnesses are material, and that defendant could not safely go to trial without them; that both witnesses reside in Holmes county; and that the clerk refused to issue subpoena for them. We further find that, when the motion came on to be heard, the court interrogated the clerk concerning the matter, who replied that he had refused to issue the subpoena for the reason that defendant had neither paid nor tendered to him the costs on that behalf, but had failed or refused so to do, and that said witnesses had not been allowed to be summoned upon an affidavit of insolvency, whereupon the court overruled the motion and refused to direct the clerk to issue the subpoenas, to which ruling the defendant excepted, and this forms the basis for this assignment.

Defendant admits that M. C. Pittman signed the affidavit with him through mistake. In passing upon the first assignment we found that J. M. Holliday was one of the four witnesses named in the application for subpoenas, which application recited that defendant expected to prove that each of said witnesses was present when the note in question was executed and saw C. L. Douglass execute the same; that the court allowed defendant to select any two of said witnesses to have subpoenaed; that defendant selected W. D. Locke and C.

A. Douglass, the other two witnesses, J. M. Holliday and W. R. Stanley, having been ordered subpoenaed upon application of defendant for the same term of court in other forgery prosecutions pending against him. It is admitted that no order had been made by the court for subpoenas for these two witnesses in the case at bar upon an insolvency affidavit of defendant. Whether Frank Richardson, the other witness named, had been ordered subpoenaed in any of the other prosecutions pending against defendant we are not advised, and neither are we informed what defendant expected to prove by said witness. We have already seen that defendant was arraigned on the 19th day of October, but had presented his praecipe and application for witnesses on the 9th day of said month. We further find that the instant case was called for trial on the 24th day of October, on which day the defendant filed his praecipe for the two witnesses, and also made his application to the court for an order to the clerk directing the issuance of subpoenas for them. No reason or excuse whatever is shown for the delay in seeking to have the witnesses subpoenaed. Neither was the court informed as to where the witnesses were then to be found; the only information given being that they resided in Holmes county. In his application for subpoenas the defendant asks for the postponement of the case until he could procure the attendance of the two witnesses or else take their depositions. We further find that on the 17th day of October the defendant filed a motion for a continuance of the case until the next term, on the ground of the absence of C. A. Douglass and W. D. Locke, two material witnesses, by whom defendant said he expected to prove that the note with the forgery of which defendant was charged was actually signed by C. L. Douglass, and therefore not forged at all. The denial of this motion forms the basis for the third assignment, and we shall deal with it later. We simply wish to call attention now to the fact that the motion for a continuance was before the court at the time that the ruling was made on the application for subpoenas; but just when the ruling was made on the motion for a continuance we cannot tell with certainty from the transcript, presumably, however, on the 24th day of October, the day the case was called for trial. We further find that defendant admits in his brief that he was not seeking or demanding that these two witnesses be subpoenaed on any insolvency affidavit, but simply demanding the issuance of a subpoena for them upon his affidavit that they were material, as a matter of right, without the payment of cost in advance; this right being claimed as a "constitutional privilege." In other words, if we correctly understand the contention of defendant as made in his brief, as well as in his oral argument, it is that he had a con-

stitutional right to wait until the day appointed for his trial and then demand of the court the issuance of subpoenas for as many witnesses as he wished by the clerk, returnable instanten, without any excuse or reason being given for the delay, without any information being furnished to the court of the purpose for which the witnesses were wanted or the facts to which they were expected to testify, without paying the clerk his costs therefor, but refusing to do so, and without making an insolvency affidavit upon which to base his application for an order for the subpoenas, though both the clerk and the court had been apprised by other affidavits filed by defendant that he was insolvent, and to have the cause postponed until defendant could procure the attendance of the witnesses or else take their depositions. These are the facts disclosed by the transcript. In support of his contention defendant cites sections 11 and 14 of the Declaration of Rights of the state Constitution of 1885, which sections are as follows:

"Sec. 11. In all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

"Sec. 14. No person shall be compelled to pay costs except after conviction, on a final trial."

Defendant also cites and relies on the sixth amendment to the Constitution of the United States, which is as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 2875 of the Revised Statutes of 1892 is also relied on, which is as follows:

"Sec. 2875. Accused to have compulsory process for witnesses.—If the accused shall desire witnesses to be summoned, either before the committing magistrate or before the court in which he is to be tried, the clerk or justice shall, upon application of himself or his counsel, issue subpoenas and necessary process to compel the attendance of the accused's witnesses."

The sixth amendment to the federal Constitution, quoted in full above, has no applicability to the instant case for the reason that this amendment, as is also true of all of the first eight amendments, has reference only

to powers exercised by the government of the United States, and not to those of the state. *Ellenbecker v. District Court of Plymouth Colony*, 134 U. S. 81, 10 Sup. Ct. 424, 33 L. Ed. 801. Also, see *Williams v. Hert* (C. C.) 110 Fed. 166, text 168; *Mischer v. State*, 41 Tex. Cr. R. 212, text 240 et seq., 53 S. W. 627, 96 Am. St. Rep. 780, et seq.; 9 Fed. St. Ann. 325, and numerous authorities there cited. This being true, the opinion of Chief Justice Marshall, in *U. S. v. Burr*, Fed. Cas. No. 14,692d, *Coombs' Trial of Aaron Burr*, cited and relied upon by defendant, is not in point.

At common law, in cases of felony, a defendant could not demand as a matter of right compulsory process for his witnesses. See 22 Ency. Pl. & Pr. 1330; *U. S. v. Reid*, 12 How. (U. S.) 361, 13 L. Ed. 1023; 4 Black. Comm. *pp. 359, 360.

This leaves for our consideration sections 11 and 14 of the Declaration of Rights in our state Constitution and section 2875 of the Revised Statutes of 1892, all of which have been set forth in full above.

Section 2875 of the Revised Statutes of 1892 has reference more especially to preliminary proceedings in the courts of justices of the peace or committing magistrates, as a reference to the original act found on page 121 of the Laws of 1828 will show; it being a territorial act, and, of course, enacted prior to the adoption of any state Constitution. At the time of its incorporation into the Revised Statutes of 1892, sections 2867, and 2868, which originally formed sections 2 and 4 of chapter 3702, p. 47, of the Laws of 1887, were also incorporated therein, with some modifications. These sections provided for the issuing of subpoenas for defendant's witnesses, at the expense of the state, upon a proper insolvency affidavit, and were held to be constitutional in *Buckman v. Alexander*, 24 Fla. 46, 3 South. 817; *Jenkins v. State*, 31 Fla. 190, 12 South. 680. It may also be well to note that section 9 of article 16 of the Constitution was amended by a joint resolution of the Legislature of 1893, which was adopted at the general election in 1894, so as to make the legal costs and expenses in criminal cases, when the defendant is insolvent or discharged, payable by the counties where the crime is committed, instead of by the state. See Laws 1893, p. 400. Sections 2867 and 2868 of the Revised Statutes of 1892 were modified by section 3 of chapter 4120, p. 45, of the Laws of 1893, which reads as follows:

"Sec. 3. Defendants in criminal cases in all the courts of this state shall be entitled to have their witnesses summoned as now provided by law, but no compensation or mileage shall be paid to such witnesses by the state."

In *Boyd v. State*, 33 Fla. 316, 14 South. 836, the constitutionality of this section was assailed, but it was found unnecessary to pass thereon for reasons therein stated.

The law in force in regard to the summoning and payment of defendant's witnesses in a criminal case, at the time of the trial in the instant case, was chapter 5132, p. 71, of the Laws of 1903, which reads as follows:

"Section 1. In all criminal cases prosecuted in the name of the state in the circuit courts of the state, where the defendant is insolvent or discharged, the county shall pay the legal expenses and costs as is now prescribed by law for the payment of costs incurred by the county in the prosecution of such cases; provided, that there shall not be more than two (2) witnesses summoned and paid to prove the same fact, and provided further, that before any witness is subpoenaed on behalf of a defendant in the circuit court, or criminal court of record, an application shall be made to the judge, in writing, on behalf of the defendant, setting forth the substance of the facts sought to be proven by the witness or witnesses, making affidavit that the defendant is insolvent, and if, upon such showing, the circuit judge is satisfied that the witness or witnesses are necessary for the proper defense of the defendant, he shall order that subpoena issue, and that the costs as herein provided shall be paid to said witness or witnesses, and not otherwise; provided, that the provisions of this act shall not apply to any courts in this state except to circuit courts and criminal courts of record."

In the case of *Buckman v. Alexander*, 24 Fla. 46, on page 50, 3 South. 817, 818, which we have already cited, referring to sections 11 and 14 of the Declaration of Rights in our state Constitution, this court used the following language:

"Then, taking these clauses of the Constitution together, we think it clear that the accused, whether solvent or insolvent, is entitled to have process for his witnesses, and to have the same served, without payment of the fees of officers; that, if insolvent or discharged, the state shall pay the costs of the prosecutions under regulations prescribed by law; and that, if solvent he cannot be made to pay costs until conviction on final trial, having none to pay if discharged. Does the act in question, prescribing regulations, violate these provisions? Though the case before us does not fully present the question, the importance to the public of its early determination induces us to express our conclusions on it."

It should be observed, however, that in that case the question before this court was as to the payment of the witnesses of defendant by the state; he having been acquitted.

The case of *Jenkins v. State*, 31 Fla. 190, text 193, 12 South. 680, 681, is more nearly in point. In that case this court used the following language:

"While section 11 of our constitutional Declaration of Rights emphatically declares that 'In all criminal prosecutions the accused shall have the compulsory process for the

attendance of witnesses in his favor, still we do not understand that there is anything in this general provision of the fundamental law that prohibits wholesome legislative regulation in the matter of procuring the attendance of witnesses by parties charged with crime, when, as in this case, it is proposed to throw upon the state the burden of the cost and expense to be incurred therein. Neither do we understand that this constitutional provision was designed to give to parties charged with crime carte blanche right, at the cost of the state, to have any and all parties whom they may choose to represent to be witnesses in their favor, summoned ad libitum without let or hindrance. To put such a construction on the organic law into actual practice would soon suffice to deplete the public treasury."

It was further said therein on page 194 of 31 Fla., on page 681 of 12 South.:

"For the proper dispatch of the public business of our courts, we think that it is contemplated also that these applications by parties accused of crime shall be seasonably made. The party accused should not be permitted unnecessarily to delay the dispatch of public business before the courts by delaying from day to day before presenting his application for the procurement of his witnesses, until his case is actually called for trial; but it should be promptly made at the earliest reasonably opportunity, in order that the witnesses may be served and their attendance procured before the party's case is called for trial in its order."

In the case of *Green v. State*, 17 Fla. 669, defendant's witnesses had been duly subpoenaed, but had failed to appear, and an attachment was asked to compel their attendance. Therefore it is not in point.

In the Constitutions of a number of other states we find similar provisions to those in the Constitution of this state in regard to the right of a defendant in a criminal prosecution against him to compulsory process for witnesses in his behalf. We have given these provisions a careful consideration, as well as the statutes based thereon, which vary more or less in the different states, and also the decisions of the different courts construing the constitutional provisions and statutes. Among other authorities examined by us we would refer to the following as being instructive: *State v. Waters*, 39 Me. 54; *State v. Yetzer*, 97 Iowa, 423, 66 N. W. 737; *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814, *Smith v. State*, 118 Ga. 61, 44 S. E. 817; *West v. State*, 1 Wis. 209, text 231 et seq.; *State ex rel. v. Grimes*, 7 Wash. 445, text 449, 35 Pac. 361; *State ex rel. Carraher v. Graves*, 13 Wash. 485, 43 Pac. 376; *Graham v. State*, 50 Ark. 161, 6 S. W. 721; *Adkins v. Com.*, 98 Ky. 539, 33 S. W. 948, 22 L. R. A. 108; *Davis v. Com. (Ky.)* 77 S. W. 1101; *Ex parte Marmaduke*, 91 Mo. 228, 4 S. W. 91, 60 Am. Rep. 250; *State v. Berkley*, 92 Mo. 41, 4 S. W. 24; *Neyland v. State*, 13 Tex. App. 536;

Edmondson v. State, 43 Tex. 230; *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305; *State v. Adam*, 40 La. Ann. 745, 5 South. 30; *State v. Nathaniel*, 52 La. Ann. 558, 26 South. 1008; *State v. Nix*, 111 La. 812, 35 South. 917; *State v. Fairfax*, 107 La. 624, 31 South. 1011; *Martin v. State*, 125 Ala. 64, 28 South. 92; *People ex rel. Dean v. Commissioners of Grand County*, 7 Colo. 190, 2 Pac. 912. These authorities are by no means in entire harmony, the reasoning and conclusions therein being conflicting; but we cite them all for the discussion they contain of the question now under consideration, without adopting the reasoning used or the conclusions reached therein.

In line with the language used by this court in *Jenkins v. State*, 31 Fla. 190, text 193, 12 South. 680, 681, already quoted by us, we are of the opinion that, while the two constitutional provisions relied upon are absolutely mandatory and binding, yet, where it has already been made to appear to the court that defendant is insolvent, and one of the requested witnesses has already been ordered subpoenaed upon defendant's insolvency affidavit, and no showing is made to the court as to whether or not he has been served, or as to what defendant expects to prove by the other witness, and no excuse or reason given for the delay in making the application, no error was committed by the trial court in refusing defendant's application. In other words, where the state has made ample provision for having defendant's witnesses subpoenaed at the expense of the county, upon a proper compliance with the statutory requirements, where defendant is insolvent, he cannot as a matter of right demand that witnesses be subpoenaed, without compliance with those requirements. He cannot be permitted to assume the double role of prince and pauper, of Dr. Jekyll and Mr. Hyde, in the same case. As was said in *State ex rel. Carraher v. Graves*, 13 Wash. 485, text 487, 43 Pac. 376, 377: "It is clear that the defendant is only entitled to have necessary and material witnesses subpoenaed for him at the expense of the state or county, and he cannot be held to have the right to decide upon the materiality of the testimony that he expects from the witnesses desired. The decision of this question must rest with the court, and in such cases no subpoenas should be issued in behalf of a defendant to compel the attendance of witnesses without an order of the court having been obtained." Upon this question the entire case of *State v. Nathaniel*, 52 La. Ann. 558, 26 South. 1008, is most instructive. We quote the following language therefrom:

"The state of Louisiana has chosen to allow a defendant in a criminal case compulsory process for the obtention of six witnesses, without charge, and has imposed conditions with respect to the further enjoyment of that particular privilege. He may obtain such process for additional witnesses, provided he

is willing and able to bear the expense. But in any case he is bound to apply for the process in due time, and to the proper authority, and, if he has exhausted his privilege, should tender the amount necessary to defray the expense of bringing in the additional witnesses, and a failure in either of these particulars is a lack of due diligence."

We also refer to Rice's Evidence, § 188; Abbott's Trial Brief, Criminal Causes (2d Ed.) 195; 1 Bishop's New Crim. Proc. § 959b.

It follows that the second assignment must fail.

The third assignment is that "the court erred in overruling the motion of the defendant for a continuance at the fall term of 1905."

This motion was based upon the following affidavit:

"Before me personally came J. T. Pittman, defendant in above-stated case, who, being duly sworn, says that he cannot safely go to trial at this term of the court on account of the absence of C. A. Douglass and W. D. Locke. That the said named persons are material witnesses. That both of said witnesses reside in the state of Florida, C. A. Douglass in Holmes county and W. D. Locke in Walton county, and subpoena in this case has been issued for said witnesses, and the sheriff has been unable to serve them; and that the sheriff returns that he has been unable to find them and deponent avers that said Locke resides in the county of Walton in the state of Florida as aforesaid. That the witnesses are absent without the consent of this defendant, either directly or indirectly given. That he expects to procure the attendance of all of them by the next term of this court. That this application is made in good faith, and justice may be done, and not for the purpose of delay. That the witness C. A. Douglass above named, who resides in the state of Florida, is temporarily beyond the city of Pensacola; that such quarantine regulations now exist on account of yellow fever that no person is allowed to leave that point or travel through that to any other point in the state of Florida, unless they first undergo six days of detention in a camp prepared for that purpose. That he expects to prove by said witnesses that the note alleged to have been forged by the defendant was not forged by him, said defendant, but that same was actually signed by C. L. Douglass. That the defendant has no other witnesses by whom he can prove same facts.

"J. T. Pittman.

"Sworn to and subscribed to before me Oct. 17, 1905.

"W. H. Brett, Jr., Clerk Circuit Court."

In passing upon this assignment we are confronted with the settled principle in this court that:

In criminal, as well as in civil, cases, an application for a continuance is addressed to the sound judicial discretion of the trial court, and the denial of such a motion will

not be reversed by an appellate court, unless there has been a palpable abuse of this judicial discretion, which must be clearly and affirmatively made to appear in the bill of exceptions; the rule being that motions for a continuance in criminal cases are to be even more closely scanned than in civil cases, because of the greater temptation to delay. Clements v. State (decided here at this term) 40 South. 432, and numerous authorities therein cited.

In passing upon the first assignment we found that defendant had filed an affidavit on the 9th day of October, 1905, in which it was recited that he expected to be able to prove by C. A. Douglass, W. R. Stanley, W. D. Locke, and J. M. Holliday that each of said witnesses was present when the note in question was executed and saw C. L. Douglass execute the same. In the affidavit for continuance it is recited that defendant had no other witnesses than C. A. Douglass and W. D. Locke by whom he could prove the fact that C. L. Douglass signed the note. How can the contradictory statements contained in these two affidavits be reconciled? Moreover, later on in the proceedings, we find that Miles C. Pittman testified on behalf of the defendant to the effect that he was the brother of defendant, and that he (the witness) was present when the note alleged to be forged was executed, and that he (the witness) signed the name of C. L. Douglass thereto with his own hand, at the request and by the authority of the said Douglass; that he (M. C. Pittman) also signed the note as a subscribing witness; and also that he signed the name of L. E. Moore thereto as a witness at the request of said Moore. We also found that the motion and affidavit for continuance were filed on the 17th day of October, but that the transcript does not affirmatively show when the same was called to the attention of the court, or when the ruling was made thereon. If defendant waited from the 17th to the 24th day of October before invoking any ruling of the court on the motion, then he failed to show that diligence which should have been manifested. If, on the other hand, the ruling was had on the 17th, or prior to the 24th, when the case was called for trial, he should have shown further diligence and made additional efforts to secure the attendance of the missing witnesses, or to have fully accounted for their absence, after every effort to procure their presence had been exhausted by him. In several respects the affidavit is vague, ambiguous, and uncertain, failing to come up to the necessary requirements. See the authorities cited in Clements v. State, supra, and also Melbourne v. State (decided here at the present term) 40 South. 189.

The third assignment must fall with the first and second.

The fourth and fifth are identical; each being assignments that "the court erred in admitting in evidence the paper called the

'Trust Receipt,' offered on the part of the state."

All that defendant says in his brief in support of these assignments is that:

"Two assignments upon this subject are made, because the court seems to have made two different ruling admitting the paper objected to. There are two different series of objections to the paper:

"First, irrelevancy and that the paper was prematurely offered, etc.

"Second, that alterations and additions had been made in and to the paper since it was alleged to have been signed by the defendant. It will be noted that the paper was the first thing offered in evidence. It was irrelevant in that it tended to show the uttering of the instrument about which defendant was indicted at another time and to another person than those charged in the indictment. The indictment charged the uttering of the paper to one J. S. Utley November 26, 1904; but the instrument offered and admitted in evidence tended to show another and distinct uttering, totally disconnected with Utley, and at a different time, to wit, in August, 1904.

"This, I think, was an error. The evidence should be excluded. I yield the point upon this assignment that, so far as alterations are concerned, the explanation of them by the witness Utley probably obviated that objection."

We feel that we would be justified in treating these two assignments as practically abandoned because not argued. See *Hoodless v. Jernigan*, 48 Fla. 213, 35 South. 656, and authorities there cited; *Thomas v. State*, 47 Fla. 99, 36 South. 161; *Schley v. State*, 48 Fla. 53, 37 South. 518; *Jackson v. State*, 49 Fla. 3, 38 South. 599.

However, we turn to the bill of exceptions and find that the paper in question was a receipt given by the defendant to the Virginia-Carolina Chemical Company for certain notes and accounts, therein described, which were intrusted to defendant by said company for collection for the company, and, among the notes specified therein, is one for \$46 of C. L. Douglass. At the time the paper was first offered, the defendant objected thereto at that stage of the proceedings, upon the ground "that it was irrelevant to the issue; that the instrument forged should be first shown; that the paper was irrelevant until they had first exhibited the paper which the indictment charged to be forged." Thereupon the court asked the state attorney if he expected to correct the paper, to which he replied that he did, whereupon the court overruled the objection. Later on defendant renewed his objection, and made the further additional objection "that the paper offered is not the paper signed by the defendant, or in the condition that it was in when the defendant signed it; that these alterations and additions which have been made give it a different force and effect from the paper as signed by Pittman." This objection was

also overruled. These are the only objections we find in the bill of exceptions which were made by defendant to the introduction of the "trust receipt" in evidence.

It is absolutely settled here that this court cannot consider any grounds of objections to the admissibility of evidence, except such as were made in the court below; the plaintiff in error being confined to the specific grounds of objection made by him in the trial court. *Markey v. State*, 47 Fla. 38, 37 South. 53; *Hoodless v. Jernigan*, 48 Fla. 213, 35 South. 656, and authorities therein cited; *Schley v. State*, 48 Fla. 53, 37 South. 518; *Mugge v. Jackson* (Fla.) 39 South. 157; *Caldwell v. State* (Fla.) 39 South. 188; *Supreme Lodge Knights of Pythias v. Lipscomb* (Fla.) 39 South. 637.

The defendant having abandoned his additional objection to the introduction of the receipt, which objection we copied in full above, is confined here to his objections that the paper was prematurely offered, not being admissible at that stage of the proceedings, and that it was irrelevant. The court admitted the paper upon the promise of the state attorney to properly connect it by other evidence with the alleged forged paper. The trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court where clearly abused. *Roberson v. State*, 40 Fla. 509, 24 South. 474; *Brown v. State*, 40 Fla. 459, 25 South. 63; *McCoggle v. State*, 41 Fla. 525, 26 South. 734. Also see 1 *Thompson's Trials* § 344. If evidence apparently incompetent only because its relevancy is not apparent, or because it is not the best evidence, is offered, the court may, in the exercise of its discretion, receive it conditionally, if counsel gives assurance that he will supply the necessary foundation afterward. *Abbott's Trial Brief, Criminal Causes* (2d Ed.) 310. If, however, such evidence is so conditionally received, and the necessary connecting evidence is not introduced, so as to show the relevancy of the admitted evidence, the court should exclude it on its own motion. *Jenkins v. State*, 35 Fla. 737, 18 South. 182, 48 Am. St. Rep. 267.

If in the opinion of defendant this paper was improperly admitted in evidence, whether for failure to connect it with the forged instrument, or for any other cause, he could have moved at any time after the admission to strike it out. *Dickens v. State*, (Fla.) 38 South. 909; *Caldwell v. State* (Fla.) 39 South. 188. However, no such motion was made, and, in our opinion, other evidence was introduced connecting the receipt with the instrument alleged to have been forged. The remaining objection interposed by the defendant to the introduction of the receipt is that "it was irrelevant to the issue." In passing upon this ground of objection it is sufficient to say that it is also settled law in this court that general objections to evi-

dence proposed, without stating the precise grounds of objections, are vague and nugatory, and are without weight before an appellate court, unless the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances, when a general objection thereto is sufficient. Kirby v. State, 44 Fla. 81, 32 South. 836; Hoodless v. Jernigan, 46 Fla. 213, 35 South. 656; Thomas v. Williamson (decided here at the present term) 40 South. 831; Williams v. State, 45 Fla. 128, 34 South. 279. Evidence of circumstances tending to connect the accused with the commission of the alleged crime, even though inconclusive, is properly admitted. Schley v. State, 48 Fla. 53, 37 South. 518.

These two errors are not well assigned.

The sixth assignment is abandoned.

The seventh assignment is that "the court erred in permitting the witness J. S. Utley, for the state, to testify as to the handwriting of the defendant, J. T. Pittman."

The eighth assignment is that "the court erred in permitting J. S. Utley as witness for the state to testify as to his knowledge and belief to a letter said to have been written by the defendant."

These assignments may be considered together.

The only argument made by defendant in support of these assignments is that it was not claimed or shown that the witness was an expert on the subject of handwriting, and that he did not show that he was sufficiently acquainted with the handwriting of the defendant to testify as a nonexpert witness. To this contention we cannot agree. The witness was not testifying as an expert in handwriting, but to the fact that he had seen defendant sign his name on different occasions, and that he thought he was familiar with defendant's signature. This qualified the witness to testify as to the signature of defendant and to give his opinion concerning the same. Thalheim v. State, 38 Fla. 169, 20 South. 988; Wooldridge v. State, 49 Fla. 107, 38 South. 3, and authorities cited therein. No error is made to appear here.

The ninth assignment is that "the court erred in overruling objections of the defendant to the admission of letters supposed to have been written by J. T. Pittman and C. E. Pittman, as to each and every of said letters."

All that defendant says in his brief concerning this assignment is that "the same argument made upon the seventh and eighth assignments is applicable here."

This being true, it would seem that this assignment should fall with the seventh and eighth assignments, since we found that they could not be sustained. Suffice it to say that a careful examination of the bill of exceptions upon this assignment does not disclose any error upon the part of the trial court in admitting the letters in question, especially as against the objections urged by defend-

ant, so we content ourselves with what we have said in disposing of the last two preceding assignments.

The tenth assignment is that "the court erred in admitting in evidence a contract between one C. E. Pittman and the Virginia-Carolina Chemical Company."

The evidence shows that the business conducted by defendant was in the name of C. E. Pittman, his wife, but that defendant was the manager thereof, and signed C. E. Pittman's name to correspondence and business papers. We have already found that the witness J. S. Utley had sufficiently qualified himself as to his familiarity and acquaintance with the signature of defendant to testify concerning the same, and we find that the witness further testified that he was familiar with the handwriting of the defendant in general, and that the signature of C. E. Pittman to the contract in question was in the handwriting of defendant. This assignment must go to keep company with the foregoing nine.

The eleventh to the twentieth assignments, inclusive, are based upon the admission in evidence of other instruments in writing, which were claimed to be forged and of proof that defendant had the same in his possession. No detailed discussion of these assignments, in our opinion, is necessary. We refer to the case of Langford v. State, 33 Fla. 233, 14 South. 815, the first and second headnotes of which are as follows:

"(1) On the trial of an accused for uttering an instrument having on it forged indorsements, knowing at the time that they were forged, and with an intent to defraud and injure, the utterance by the defendant near the same time, but previously, of other notes with forged indorsements, and his possession and attempting to negotiate subsequently, but near the same time, another note with forged indorsements on it, and a guaranty to one of the makers thereof with forged signatures, are admissible as evidence that defendant knew, when he uttered the instrument described in the information, that the indorsements were forged, and of a criminal intent in uttering the same.

"(2) Evidence that the accused had, at the time of uttering the forged instrument described in the information, knowledge that other forged instruments testified to have been uttered by him or to have been in his possession and used by him were forgeries, is not necessary to entitle the consideration of the latter by the jury."

Also, see Smith v. State, 29 Fla. 408, text 421, 10 South. 894; Roberson v. State, 40 Fla. 509, 24 South. 474; Wallace v. State, 41 Fla. 547, 26 South. 713; Kirby v. State, 44 Fla. 81, 32 South. 836; Baldwin v. State, 46 Fla. 115, 35 South. 220; Wooldridge v. State, 49 Fla. 137, 38 South. 3; 19 Cyc. 1419.

The fact that defendant was under indictment for the forgery of some of the instruments so admitted in evidence could not ef-

fect their admissibility in evidence. We find that the state made no attempt to show that indictments were pending against defendant for the forgery of any of these instruments so admitted in evidence; this information being furnished by defendant's counsel, and was admitted by the state attorney because defendant offered to make proof of the fact.

The twenty-first assignment is abandoned.

The twenty-second assignment is that "the court erred in requiring J. T. Pittman to answer questions of the state attorney about sending to Virginia-Carolina Chemical Company notes embraced in the trust receipt."

It is settled in this court that, for the purpose of discrediting a witness, a wide range of cross-examination is permitted as a matter of right in regard to his motives, interest, or animus as connected with the cause or the parties thereto, upon which matters he may be contradicted by other evidence, and this rule applies to the cross-examination of a defendant when he voluntarily offers himself as a witness, to the same extent and with like limitations as to other witnesses. *Wallace v. State*, 41 Fla. 547, text 575, 26 South. 713, 722; *Bryan v. State*, 41 Fla. 643, 26 South. 1022; *Squires v. State*, 42 Fla. 251, 27 South. 864; *Stewart v. State*, 42 Fla. 591, 28 South. 815; *Fields v. State*, 46 Fla. 84, 35 South. 185. As was said in *Eldridge v. State*, 27 Fla. 162, 9 South. 448: "The motives, interest, or animus of a witness are not collateral matters, and these may be shown and considered by the jury in estimating the credibility of a witness, and as to such matters he may be contradicted." Also, see *Alford v. State*, 47 Fla. 1, 36 South. 436.

As was said in *Eatman v. State*, 48 Fla. 21, text 33, 37 South. 576, 577: "The court permitted the state to interrogate the defendant as to matters tending to show the fraudulent conversion of collections of money made by the defendant in the course of his employment by the Doty & Stowe Company other than and prior to that alleged to have been embezzled in this case. This testimony was admissible, but only for the purpose of proving or illustrating the intent of the defendant in committing the alleged act of embezzlement for which he was being tried." Also, see *Thalheim v. State*, 38 Fla. 169, 20 South. 938, and *Wallace v. State*, 41 Fla. 547, 26 South. 713, and authorities cited therein; *Baldwin v. State*, 46 Fla. 115, 35 South. 220. Also, see *Goode v. State* (Fla.) 39 South. 461, and authorities therein cited for a general discussion of admitting testimony of other crimes than that with which a defendant stands charged, or of testimony tending to prove other and similar crimes.

In the light of these authorities, we are of the opinion that no error was committed in overruling the objections of defendant to the questions propounded to him by the state on his cross-examination and requiring him to answer the same.

The twenty-third, twenty-fourth, twenty-fifth, and twenty-sixth assignments are submitted upon the same argument; the first three relating to the overruling of objections to questions propounded by the state to defendant on his cross-examination, and the twenty-sixth assignment being based upon the refusal of the court to strike out the "testimony of all notes about which defendant had testified."

We have carefully considered all of these assignments, as well as the argument in support thereof, and are of the opinion that what we have just said in treating of the twenty-second assignment applies with equal force to these assignments. Defendant in his brief contends, in support of the twenty-third assignment, that the testimony sought to be elicited from the defendant "was wholly immaterial and irrelevant," and says that the other assignments "are submitted upon the same argument," referring also to the argument made in support of the eleventh assignment. It is unnecessary for us to repeat what we said about general objections to evidence in disposing of the fourth and fifth assignments. The authorities there cited are equally applicable here. We also refer to the authorities cited in treating of the eleventh assignment. We find that the court did strike out all the testimony concerning a number of notes, which are specified in the bill of exceptions, about which defendant had testified. Defendant has not pointed out to us why the testimony concerning the other notes should have been stricken out or informed us wherein the refusal of the court so to do was prejudicial to him.

The twenty-seventh assignment is abandoned.

The twenty-eighth to the thirty-second assignments, inclusive, are based upon the refusal of the court to give certain specified charges requested by defendant. We see no useful purpose to be accomplished in setting forth these charges. Suffice it to say that we have given all of them a careful examination, with the exception of the one referred to in the thirtieth assignment, as to which defendant admits that the record does not clearly show what the charge was, in which admission we fully concur, and the one referred to in the thirty-second assignment, and we are of the opinion that no error has been made to appear to us in the refusal of any of these charges. Such propositions of law as were correctly stated therein seem to have been fully covered by the charges already given by the court. We fail to find any exception noted to the refusal to give special charge No. 5, which forms the basis for the thirty-second assignment. Therefore we cannot consider it. See *English v. State*, 31 Fla. 340, 12 South. 689; *Shepherd v. State*, 36 Fla. 374, 18 South. 773; *Parnell v. State*, 47 Fla. 90, 36 South. 165.

This brings us to the last assignment,

which is the thirty-third, and is based upon the overruling of the defendant's motion for a new trial.

We have already considered all the grounds of this motion in passing upon the other assignments, except those which question the sufficiency of the evidence to support the verdict and charge that the verdict was contrary to law. We see no occasion to set forth the evidence. We have given it a most careful examination, and, while there is much conflict therein, we are of the opinion that there was sufficient evidence to support the verdict. See 19 Cyc. 1411 to 1426, inclusive, treating of evidence in prosecutions for forging and uttering. *Carver v. People*, 39 Mich. 786; 19 Cyc. 1389; *Rex v. Shukard*, Russell and Ryan, Crown Cases, 200, which last three authorities were cited to us by defendant. We fail to find wherein the verdict is contrary either to the law or the evidence, and therefore we must refuse to disturb it. See *McNish v. State*, 47 Fla. 69, 36 South. 176. The language of Chief Justice Anderson, in *Carter v. Bennett*, 4 Fla. 283, text 356, quoted by us in *Walker v. Lee* (decided here at the present term) 40 South. 881, is especially applicable.

The judgment must be affirmed, and it is so ordered, at the cost of Holmes county; the insolvency of the defendant having been satisfactorily shown.

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

WILSON v. JOHNSON et al.

(Supreme Court of Florida, Division A. May 22, 1906.)

1. TRIAL—OBJECTIONS TO EVIDENCE.

Objections interposed to the introduction in evidence of a written instrument, which do not appear upon the face thereof, but would have to be proved by extraneous evidence, should be overruled.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 216, 217.]

2. APPEAL—REVIEW—INTRODUCTION OF EVIDENCE.

The trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court where clearly abused.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3851.]

3. TRIAL—EVIDENCE—MOTION TO STRIKE.

A motion to strike out evidence that has been introduced in a cause must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself. Where evidence has been introduced by a party, whether plaintiff or defendant, that in itself is pertinent, relevant, legal, and proper so far as it goes, but which, in the conception of the opposite party, falls short, for the want of proof of other necessary facts, the proper practice for such party is to ask

for appropriate instructions from the court to the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 228-240.]

4. EJECTMENT—EVIDENCE.

If the plaintiff, in an action of ejectment, claims title by descent, it is sufficient for him, in the first instance, to prove his heirship, and that the ancestor under whom he claims was the person last seised of the lands in controversy.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 284.]

5. TRIAL—INTRODUCTION OF EVIDENCE—DISCRETION OF COURT.

After either or both parties have rested, the admission or exclusion of further evidence is in the discretion of the judge, and this discretion extends to evidence offered during and after the argument, and even after the cause has been submitted to the jury; but an exception may be taken, and if the ruling be an abuse of discretion relief may be had from an appellate court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 166; vol. 3, Cent. Dig. Appeal and Error, § 3851.]

6. APPEAL—REVIEW—DISCRETION OF COURT—CONTINUANCE.

An application for a postponement or a continuance is addressed to the sound judicial discretion of the trial court, and the ruling of the trial court either granting or denying such application will not be reversed by an appellate court, unless an abuse of this discretion is clearly shown.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3837.]

7. TRIAL—DISCRETION.

Courts of justice exist for the administration and furtherance of justice, and in the conduct of trials, generally, much must be left to the discretion of the trial judge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 37.]

8. ADVERSE POSSESSION—EVIDENCE.

A stranger in possession of lands is presumed to hold under the owner, and the burden of proof is on him to show that the owner knew his possession to be hostile, or that it was so open and notorious as to raise a presumption of such notice.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 656, 668.]

9. APPEAL—HARMLESS ERROR.

When the peremptory charge was properly given, any remarks made by the trial judge in the presence of the jury are harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4134.]

(Syllabus by the Court.)

Error to Circuit Court, Columbia County; J. B. Wall, Acting Judge in place of B. H. Palmer, Judge.

Action by Richard Johnson and Essie Johnson against Thomas Wilson. From judgment for plaintiffs, defendant brings error. Affirmed.

M. O. Jordan, for plaintiff in error. M. M. Scarborough, Jr., and Roberson & Small, for defendants in error.

SHACKLEFORD, C. J. The defendants in error brought an action of ejectment against the plaintiff in error in the circuit court for Columbia county, which resulted in a ver-

dict and judgment for the plaintiffs, from which the defendant seeks relief here.

This is the second time this case has been here. See *Johnson v. Wilson*, 48 Fla. 76, 37 South. 179.

The first assignment is as follows: "The court respectively erred in admitting severally in evidence the deed from A. J. T. Wright and O. A. Caldwell to Richard Johnson, Sr., without proof of title in or possession of the land described therein by said parties at or near the time of said conveyances respectively."

The bill of exceptions discloses that the two deeds objected to constituted the first evidence introduced by plaintiff.

As we said in *Thomas v. Williamson* (decided here at the present term) 40 South. 831: "Objections interposed to the introduction in evidence of a written instrument, which do not appear upon the face thereof, but would have to be proved by extraneous evidence, should be overruled." Also, see to the same effect *Hoodless v. Jernigan* (also decided here at the present term) 41 South. 194, wherein we also said that "it is also settled law in this court that the trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court where clearly abused." See, also, *Pittman v. State* (decided here at the present term) 41 South. 385, and authorities therein cited. This error is not well assigned.

The second assignment is that "the court respectively erred in severally refusing to strike from the evidence said deeds upon motion of defendant, upon defendant's ground, as stated, that no title or possession was shown in said Wright or said Caldwell to make such legal title appear in them as would drive defendant to proof of title on his part; said motion having been made after plaintiffs had rested their case."

We are of the opinion that no error was committed by the trial court in overruling this motion. As we said in *Walker v. Lee* (decided here at the present term) 40 South. 881: "A motion to strike out evidence that has been introduced in a cause must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself. Where evidence has been introduced by a party, whether plaintiff or defendant, that in itself is pertinent, relevant, legal, and proper so far as it goes, but which, in the conception of the opposite party, falls short, for the want of proof of other necessary facts, the proper practice for such party is to ask for appropriate instructions from the court to the jury." Also, see the authorities therein cited. The instruments so sought to be stricken had not been received conditionally, upon the promise of the plaintiffs to supply the necessary connecting evidence. *Pittman v. State*, supra, and authorities cited therein.

However, there is still another reason why the motion should not have been granted. The evidence introduced on behalf of the plaintiffs was to the effect that Richard Johnson, Sr., the grantee in the two deeds, moved upon and resided upon the land in question with his children during the latter part of the Civil War and after the close thereof, one witness testifying in the years 1865, 1866, 1867, and "along there," when the shops of the railroad company, for which Richard Johnson, Sr., worked as fireman on an engine, were moved from Lake City to Jacksonville, and he followed the shops and moved to Jacksonville also, where he died "some time after the war," the date not being given; that his wife had died about the beginning of the war; that they had three children, Richard, Jr., Liddy, who married and died, leaving one child, Essie, and Anderson, who died during boyhood. Richard Johnson, Jr., and Essie Johnson were the plaintiffs who instituted the action of ejectment, claiming title to the land in question as the heirs of Richard Johnson, Sr. As laid down in *Warvelle's Ejectment*, § 233: "It would seem, further, that, in plaintiff claims by descent, it is sufficient for him, in the first instance, to prove his heirship, and that the ancestor under whom he claims was the person last seised of the lands in controversy." Supporting this proposition, see *Jones v. Bland*, 112 Pa. 176, 2 Atl. 541; *Weaver v. Rush*, 62 Ark. 51, 34 S. W. 256. Also, see, 15 Cyc. 38.

The third assignment is as follows: "The court erred in granting a continuance for three days on motion of the plaintiffs to obtain the testimony of a witness from Jacksonville to supply plaintiff's failure to prove that the husband of Lydia Johnson was dead, or that she was not married, after plaintiffs had rested their case, and the defendant had moved the court to instruct the jury to find a verdict for the defendant upon the ground stated by defendant that the testimony of the plaintiffs had shown that Lydia Johnson was married and Essie Johnson was a child of said marriage, and the father was not made a party plaintiff or cause shown why he was not made a party, whereby counsel for defendant and defendant were put to great expense."

We find from the transcript that, after plaintiffs had rested their case, and the defendant had unsuccessfully moved to strike out from the evidence the two deeds, which ruling formed the basis for the second assignment, he then moved the court to direct the jury to find a verdict for the defendant upon the following grounds:

"First. The plaintiffs failed to show any title or possession in the respective grantors of Richard Johnson, deceased.

"Second. There was no evidence identifying the plaintiffs as the children of Richard Johnson, deceased.

"Third. That the evidence on the part of

the plaintiffs showed that Lydia Johnson had married before she died, leaving a husband, the father of the plaintiff, Essie Johnson, and that he was not joined as a plaintiff, and that this suit could not be maintained by the plaintiffs alone."

The transcript further shows the following proceedings:

"But the said judge refused to grant the said motion, and announced that the plaintiffs would be entitled to a two-thirds undivided interest in said property, and, if the defendant did not submit any evidence, that he would so instruct the jury to find as their verdict.

"And thereupon the plaintiffs, by their attorneys, announced that they had anticipated that the defendant would make this point, and had expected a witness from Jacksonville to come in on the train from there, but that said witness did not come, and then and there moved the said judge to grant them a continuance for the purpose of producing said witness and obtaining testimony to show why the father of the plaintiff Essie Johnson was not made a coplaintiff.

"To the granting of which motion the defendant did then and there object, upon the grounds that the plaintiffs having announced they were ready to go into the trial of the cause which was called for trial, and having rested their case, it would be unfair and contrary to law to grant said motion.

"Second. That it would put him to great expense, as his attorneys resided in Jacksonville, and he would have to pay their expenses in Lake City or their fares going to and returning again from Jacksonville.

"But the said judge did then and there overrule the said objections and granted said motion, and continued the further trial of said cause to Friday, November 3, 1905, at 10 o'clock a. m.

"To, which ruling and decision of said judge the defendant by his attorneys did then and there except."

"After either or both parties have rested, the admission or exclusion of further evidence is in the discretion of the judge, and this discretion extends to evidence offered during and after the argument, and even after the cause has been submitted to the jury; but an exception may be taken, and if the ruling be an abuse of discretion relief may be had." *Abbott's Trial Brief, Civil Jury Trials* (2d Ed.) 123. Also, see *Hoey v. Fletcher*, 39 Fla. 325, 22 South. 716; *Robinson v. State* (Fla.) 39 South. 465, and authorities therein cited. It is also settled law here that an application for a postponement or a continuance is directed to the sound judicial discretion of the trial court, and the ruling of the trial court either granting or denying such application will not be reversed by an appellate court, unless an abuse of this discretion is clearly shown. *Supreme Lodge Knights of Pythias v. Lipscomb* (Fla.) 39 South. 637; *Peacock v. Feast-*

er (Fla.) 40 South. 74; *Olements v. State* (decided here at the present term) 40 South. 432. Courts of justice exist for the administration and furtherance of justice, and in the conduct of trials, generally, much must necessarily be left to the discretion of the trial judge.

We fail to find wherein it is disclosed by the bill of exceptions that Essie Johnson's father survived her mother, or that he was living at the time of the trial. However, be that as it may, we find no error on the part of the trial judge in denying the motion of the defendant to instruct the jury to return a verdict in his favor, or in granting the application of the plaintiffs for a continuance of the cause for three days.

The fourth and fifth assignments may be considered together, and are as follows:

"Fourth. The court erred in refusing to admit in evidence, on the part of the defendant, the power of attorney from Richard Johnson to Kate Barnes, and the deed from Richard Johnson, by Kate Barnes, attorney in fact, and Essie Johnson to R. R. Robinson.

"Fifth. The judge of said court erred, while refusing to admit said papers in evidence, in announcing before the jury that he thought the adverse possession of the defendant was shown sufficiently to preclude the defendant's right to have said papers admitted in evidence."

The additional evidence introduced by the plaintiffs, when the trial of the case was resumed, after the adjournment, was to the effect that Essie Johnson's mother was never married; that the defendant, some five years before this trial was had, had stated to Kate Barnes, the cousin of Essie Johnson, who went to Lake City to look after the land in question and found the defendant living on it, that he had taken care of it and was keeping it up for the heirs of Richard Johnson, Sr., and at that time defendant did not claim it; that Kate Barnes told defendant if he would come to Jacksonville she would have the plaintiffs deed him a part of the land, including the house he was living in, for taking care of the property; that defendant did go to Jacksonville, but refused to accept the deed which had been prepared, saying that it embraced too little land, became very angry, and said he would get him a lawyer, and returned to Lake City and went back upon the land; that all this happened before the deed to R. R. Robinson was made.

This is practically all the testimony as to the adverse holding of the land by defendant, and, even taken in connection with his sworn plea of not guilty, it may be doubtful whether or not a sufficient showing of defendant's adverse holding or possession was made so as to make the principle enunciated by this court in *Coogler v. Rogers*, 25 Fla. 853, 7 South. 391, applicable. We refer especially to the first three headnotes. If the defendant had offered to connect his possession with the Robinson title, and had an-

nounced to the court that he offered the power of attorney to Barnes and the deed to Robinson as the foundation of his defense, then the instruments in question would have been admissible in evidence. However, no such showing was made, and defendant offered no evidence of any kind save the two instruments which were rejected. The testimony of Kate Barnes to the effect that defendant stated and admitted to her that he did not claim the land, but was holding it for the Johnson heirs, was uncontradicted and must be taken as true. This conversation between defendant and Kate Barnes took place, according to her testimony, about five years before the trial, at which she testified, which was had at the fall term, 1905, of said court, while the action of ejectment against defendant was originally instituted in September, 1901, therefore within a short time after the conversation. According, then, to defendant's own admissions, he was not holding adversely to the Johnson heirs until after his return from Jacksonville to Lake City, and from that time on he must be deemed a mere trespasser in possession and therefore precluded from setting up an outstanding title in a third person to defeat the title of plaintiffs to support his own. See the able opinion of Mr. Justice Coleman, in *Lucy v. Tennessee & C. R. Co.*, 92 Ala. 246, 8 South. 806. This being true, the trial judge was right in refusing to admit the two proffered instruments in evidence, and, as the peremptory charge was properly given, any remarks by the court in the presence of the jury were harmless.

The sixth, seventh, and eighth assignments are as follows:

"Sixth. There was no evidence to show that Richard Johnson, Sr., ever was in possession of the property purporting to be conveyed by Caldwell to R. Johnson, Sr.

"Seventh. There was no basis in the evidence for an instruction by the court to the jury to find a verdict for plaintiffs.

"Eighth. The court erred in instructing the jury to find a verdict for the plaintiffs."

We have already practically disposed of these assignments in treating the others. Suffice it to say that no error has been made to appear to us.

The judgment must be affirmed, at the cost of the plaintiff in error, and it is so ordered.

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

FLOURNOY v. MUNSON BROS. CO.
(Supreme Court of Florida, Division A. May 22, 1906.)

1. PLEADING—TIME FOR FILING.

While section 1031 of the Revised Statutes of 1892 requires replications to be filed at the

rule day next succeeding that upon which the plea shall have been filed, unless a term of court intervenes, in which event the issues must be made up by the first day thereof, it does not inhibit the plaintiff from filing the replication at any time after the plea is filed, and it could be filed on the same day the plea was filed, if plaintiff elected so to do.

2. TRIAL—TIME FOR TRIAL—CONDITION OF PLEADINGS.

Rule 33 of the rules of circuit court in common-law actions (14 Fla. 14) provides that, where a rule day occurs in term, and such rule day is the day upon which the defendant is held to file his plea or demurrer to the declaration, any issue of fact arising upon such plea shall not be heard during that term, unless by consent of parties; but it has no applicability to pleas which have been filed prior to the beginning of the term, and it expressly confers upon the court the power to hear and dispose of any demurrer which is interposed during the term, within its discretion.

3. SAME—DUTY OF PARTIES TO BE PRESENT.

It is the duty of parties litigant and their attorneys, having business before the court, to be present during the term. When a defendant had due notice that a demurrer interposed by plaintiff to his pleas would be called up for hearing on a day during the term, it was his duty, as well as that of his counsel, to be present in court at the time appointed for such hearing. Where such demurrer is heard and overruled by the court, though defendant and his counsel are not present, and plaintiff, subsequent to the overruling of his demurrer, files a replication to defendant's pleas, the court can proceed to trial of the cause, and will not be held in error for so doing, in the absence of any showing of surprise or other excuse on the part of the absent party.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 11, 35½, 39.]

(Syllabus by the Court.)

Error to Circuit Court, Holmes County; Francis B. Carter, Judge.

Action by Munson Bros. Company against J. F. Flournoy. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Wm. W. Flournoy, for plaintiff in error.

SHACKLEFORD, C. J. This is an action of assumpsit instituted by defendant in error against plaintiff in error in the circuit court for Holmes county. The defendant filed his amended pleas on the 13th day of October, 1905, and on the 16th day plaintiff filed a demurrer thereto, having given notice to defendant's counsel, dated the 14th day, that the same would be called up for argument at Bonifay, the county site of Holmes county, on the 19th day of said month, or as soon thereafter as counsel could be heard. The fall term of the circuit court for Holmes county convened on the 16th day of said month, and on the 20th day the court made an order, in open court, overruling plaintiff's demurrer; the defendant not appearing. On the 21st day of October plaintiff joined issue upon defendant's pleas, and on the 27th day the case came on for trial, the defendant not appearing, which resulted in a verdict and judgment for plaintiff. On the 3d day of November, 1905, the defendant filed a motion:

to vacate the judgment and stay the execution upon the grounds:

"That the issues of fact in said cause were not made upon, or by, the 16th day of October, 1905, the said date being the first day of the fall term of said court for the year 1905, and that by reason of the absence of a joinder of issues by the first day of said term the issues of fact in said cause were not, in accordance with the rules of said court and the statutes of Florida in such cases made and provided, triable at said term of said court.

"(2) That said defendant did not consent to the trying of the issues of fact in said cause at the term of the court beginning October 16, 1905."

On the 7th day of November the court made an order denying the motion, reciting therein that the term of court at which the judgment was rendered had adjourned sine die October 27, 1905.

Defendant sued out a writ of error to this judgment, returnable to the present term. Three errors are assigned, which are as follows:

"(1) The judgment of the court in said cause is erroneous.

"(2) The court at the time of entering the judgment in said cause was without jurisdiction so to do.

"(3) The court erred in its judgment upon defendant's motion to vacate judgment and stay execution."

These assignments may conveniently be treated together, since they really present but one question for our decision.

Plaintiff in error strenuously argues that the circuit court was without jurisdiction to try the case or to enter any judgment therein, basing his contention upon section 1031 of the Revised Statutes of 1892 and rule 33 of the rules of circuit court in common-law actions, found on page 14 of said rules, published in 14 Fla.; said section and rule being as follows:

"Sec. 1031. Time for filing replication. —Replications shall be filed at the rule day next succeeding that upon which the plea shall have been filed; but all issues shall be made up by the first day of the next succeeding term, and within such period from the filing of the plea, and as to the filing of the replication and other pleadings, as may be provided for by the rules of court existing, or which may be adopted."

"Rule 33. In case a rule day shall occur during a term, like proceedings may be had in the matter of entering defaults, and judgments by defaults, in the clerk's office as upon other rule days. Where a rule day occurs in term, and such rule day is the day upon which the defendant is held to file his plea or demurrer to the declaration, any issue of fact arising upon such plea shall not be

heard during that term, unless by consent of parties. If, however, a demurrer is interposed by either party in term, such demurrer may be heard and disposed of during the term, in the discretion of the court."

We cannot agree to this contention. The statute which we have just quoted relates to the time for filing replications, allowing the plaintiff until the rule day next succeeding that upon which the plea shall have been filed in which to file his replication, unless a term of court intervenes, in which event the issues must be made up by the first day thereof. It does not inhibit the plaintiff from filing the replication at any time after the plea is filed, and it could be filed on the same day the plea was filed, if plaintiff elected so to do. We also fail to see wherein the rule upon which plaintiff in error relies supports his contention. The demurrer in the instant case was filed on the first day of the term, and the rule expressly confers upon the court the power to hear and dispose of the same during the term, in its discretion. The pleas had been filed prior to the beginning of the term. Therefore the rule is not applicable as to such pleas.

It was the duty of parties litigant and their attorneys, having business before the court, to be present during the term. In the instant case defendant had due notice that the demurrer would be called up for hearing on a day during the term, but he did not see fit to attend. As a matter of fact, the demurrer was decided adversely to plaintiff on the 20th day of October, and the case was not called for trial until the 27th day, one week thereafter, and still defendant was not present in court. See 21 Ency. Pl. & Pr. 971; *Chapman v. Chicago & Northwestern Railway Company*, 26 Wis. 295, text 307, 7 Am. Rep. 81; *Rizzoli v. Kelley*, 68 N. H. 3, 44 Atl. 64. Also, see *Wilson v. Johnson* (decided here at the present term), 41 South. 395, as to the discretion necessarily vested in the trial judges as to the conduct of trials generally. We would also refer to 21 Ency. of Pl. & Pr. 975.

No showing is made in the transcript that plaintiff in error was taken by surprise at the action of the court, or that it was contrary to the established practice in such court, upon which he had a right to rely. 3 Ency. of Pl. & Pr. 802. On the contrary, he stands strictly on his legal rights as he conceives them to exist.

No error has been made to appear to us. Therefore the judgment must be affirmed, at the cost of the plaintiff in error, and it is so ordered.

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ. concur in the opinion.

BOWDEN v. JACKSONVILLE ELECTRIC CO.(Supreme Court of Florida, Division A.
June 5, 1906.)**1. ADMINISTRATOR — APPOINTMENT — DECEASED MINOR.**

An administrator may be appointed to administer upon the estate of a deceased minor. [Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 4, 21.]

2. DEATH — WRONGFUL DEATH—ACTION BY ADMINISTRATOR.

An administrator of the estate of a deceased minor, under the provisions of sections 2342 and 2343 of the Revised Statutes of 1892, may recover damages for the death of his intestate when such death was caused by the wrongful act, negligence, carelessness, or default of a corporation or its agents when acting as such, and such minor leaves neither widow nor minor child or children, nor any person or persons dependent on him for a support.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 38.]

3. ADMINISTRATORS—ACTION BY—PLEADING.

An allegation in a declaration that "W. G. B. was duly appointed as administrator of the estate of said R. B., deceased," is equivalent to an allegation that such administrator was appointed according to law.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1815.]

4. SAME—GRANT OF LETTERS.

Under section 17 of article 5 of the Constitution one county judge has general power to grant letters of administration, and, as such letters of administration can lawfully be granted on the estate of a deceased minor, an allegation in a declaration that a named person was duly appointed as administrator of the estate of a named deceased minor is a sufficient allegation of the granting of such letters; the regularity of the granting thereof not being subject to collateral attack.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1815.]

(Syllabus by the Court.)

Error to Circuit Court, Duval County; Rhodon M. Call, Judge.

Action by Wallace G. Bowden, as administrator of Reuben Bowden, against the Jacksonville Electric Company. Judgment for defendant, and plaintiff brings error. Reversed.

Bryan & Bryan, for plaintiff in error. J. E. Hartridge, for defendant in error.

WHITFIELD, J. The plaintiff in error, as administrator, brought an action in the circuit court for Duval county to recover damages for the death of Reuben Bowden, alleged to have been caused by the wrongful act of the defendant in error. The declaration contains six counts, and alleges that Reuben Bowden on August 25, 1904, died from injuries received while a passenger on one of defendant's street cars by the careless and negligent operation of said cars by defendant, "and that the said Reuben Bowden died leaving neither widow nor minor child or children, nor any person or persons

dependent upon him, the said Reuben Bowden, for a support; that the said Wallace G. Bowden, plaintiff, was on, to wit, August 30, 1904, duly appointed as administrator of the estate of said Reuben Bowden, deceased." A demurrer to the declaration was overruled, and the defendant pleaded to each of the six counts: (1) Not guilty; (2) the death of the said Reuben Bowden was caused solely by his own negligence, and not otherwise; (3) that Reuben Bowden, deceased, of whom the said Wallace G. Bowden claims to be administrator, was, at the time of his death, an infant under 21 years of age, and that there is no authority under the laws of the state of Florida for the appointment of an administrator of a minor. Issue was joined on the first and second pleas. The third plea was demurred to on the grounds (1) that it presents no defense to the plaintiff's cause of action; (2) the appointment as administrator is valid. This demurrer to the third plea was overruled. The plaintiff refused to plead further, refused to join issue on the third plea, and elected to stand on his demurrer to the third plea. Thereupon the court rendered final judgment on the demurrer for the defendant. The plaintiff took writ of error, and assigns as errors (1) the overruling of plaintiff's demurrer to the defendant's third plea; (2) the entering of judgment for the defendant and against the plaintiff.

The question presented for determination is whether there is authority under the laws of this state for the appointment of an administrator of a minor. There are decisions holding the appointment of an administrator of the estate of a deceased minor unnecessary under given circumstances (see *Hargroves' Adm'r v. Thompson*, 31 Miss. 211; *Lynch v. Rotan*, 39 Ill. 14), but no authority is produced denying the power of a proper court to grant letters of administration on the estate of a deceased minor. On the contrary, there are a number of cases to be found in which the administrators of the estates of deceased minors have been recognized. See *Jones v. Dexter*, 8 Fla. 276; *Barrett v. Provincher*, 39 Neb. 773, 58 N. W. 292; *City of Horton v. Trompeter*, 53 Kan. 150, 35 Pac. 1106; *Wheeler, Adm'r, v. St. Joseph & W. Ry. Co.*, 31 Kan. 640, 3 Pac. 297; *Union Pacific Ry. Co. v. Dundon*, 37 Kan. 1, 14 Pac. 501; *City of Chicago v. Scholten*, 75 Ill. 468; 18 Cyc. 63; 1 *Woerner's American Law of Administration* (2d Ed.) § 201; 11 *Amer. & Eng. Ency. Law* 744; *Chicago & Alton R. R. Co. v. Logue, Adm'r*, 47 Ill. App. 292; *Estate of Livermore*, 132 Cal. 99, 64 Pac. 113, 84 Am. St. Rep. 37; *Lawrence v. Birney*, 40 Iowa, 377; *Kennedy v. Ryall, Adm'r*, 67 N. Y. 379. See, also, extended note to *Blood v. Kane* (N. Y.) 15 L. R. A. 490.

A minor may acquire property and may be charged with obligations for which his estate would be liable—for example, for those imposed on him by law, for neces-

saries, and for certain torts and other obligations known to the law—and these obligations, as well as property rights belonging to the minor, after his death are enforced ordinarily through an administrator or executor. See *George & Ratcliffe v. Dawson's Guardian*, 18 Mo. 407; *Cobb v. Brown, Spear's Eq.* (S. C.) 584; 16 Amer. & Eng. Ency. Law (2d Ed.) 273 et seq.; *Shropshire v. Burns, Adm'r*, 46 Ala. 108.

The sections of the Revised Statutes of 1892 under which this action is brought are:

"Sec. 2342. Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, carelessness, negligence or default of any agent of any corporation, acting in his capacity of agent of such corporation, and the act, negligence, carelessness or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then and in every such case the person or persons who, or corporation which would have been liable in damages, if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under circumstances as would make it in law amount to a felony.

"Sec. 2343. Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there is neither widow nor husband surviving the deceased, then the minor child or children may maintain an action; and where there is neither widow nor husband, nor minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support; and where there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed. Any action instituted under this article by or in behalf of a person or persons under twenty-one years of age shall be brought by and in the name of a next friend."

This statute gives a right of action upon the death of any person under the conditions named in the act, and provides that in the absence of a widow or husband, minor child or children, and person or persons dependent on such person killed for support, "then the action may be maintained by an administrator or an executor, as the case may be, of the person so killed." In the case of *Florida Cent. & P. R. Co. v. Foxworth*, 41 Fla. 1, text 70, 25 South. 338, 79 Am. St. Rep. 149, this court in discussing this statute said: "On no account does an action fail for want of a person to sue." And the right of the administrator of the estate of a deceased

minor to recover under this statute has been recognized in this state. See *Louisville & N. R. Co. v. Jones*, 45 Fla. 407, 34 South. 246; *Louisville & N. R. Co. v. Jones* (Fla.) 39 South. 485; *Callison v. Brake*, 129 Fed. 196, 63 C. O. A. 354; *Florida Cent. & P. R. Co. v. Sullivan*, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410. See, also, *Russell, Adm'r, v. Windsor Steamboat Co.*, 128 N. C. 961, 36 S. E. 191; *Schleiger v. Northern Terminal Co.*, 43 Or. 4, 72 Pac. 324.

The declaration alleges that "Wallace G. Bowden was duly appointed as administrator of the estate of said Reuben Bowden, deceased." "Duly appointed" means appointed according to law. See *Clements v. State*, (Fla.) 40 South. 432; 3 Words & Phrases Judicially Defined, 2260; *Rockwell v. Merwin*, 45 N. Y. 166.

The county judge under section 17 of article 5 of the Constitution has general power to grant letters of administration, and, as such letters of administration can lawfully be granted on the estate of a deceased minor, the allegation of the appointment of the administrator is a sufficient allegation of the granting of the letters of administration; the regularity of such granting not being subject to collateral attack. *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Driggs v. Abbott*, 27 Vt. 580, 65 Am. Dec. 214; *Robinson v. Epping*, 24 Fla. 237, 4 South. 812.

The judgment is reversed at the cost of the defendant in error, and the cause is remanded, with directions to sustain the demurrer to the third plea and for further proceedings according to law.

SHACKLEFORD, C. J., and COCKRELL, J., concur.

TAYLOR, HOOKER, and PARKHILL, JJ., concur in the opinion.

PETTIT v. COACHMAN et al.

(Supreme Court of Florida, Division A.
June 5, 1906.)

1. FRAUDULENT CONVEYANCES—DEED TO WIFE—CONSIDERATION.

A deed of conveyance of land from the husband to the wife is not a voluntary deed when the wife has relinquished her right of dower in other lands and agreed to relinquish her right of dower in still other lands belonging to the husband, in consideration of the conveyance.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 200.]

2. SAME—CONVEYANCE TO WIFE—FAILURE TO RECORD.

A deed of conveyance of land from the husband to the wife conveys the title to the wife, and, when the conveyance is not voluntary, the mere failure to record the deed does not render it void as to a simple creditor of the husband whose claim is not in excess of the value of the land remaining to the husband subject to execution, in the absence of fraud or other inequitable circumstances.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 485-492.]

3. SAME—CONVEYANCE TO WIFE—LIABILITY FOR HUSBAND'S DEBTS.

Where the husband has conveyed land to the wife by deed upon proper, bona fide, and valuable consideration, such land is not subject to sale under an execution issued against the husband in an action brought after the deed of conveyance was recorded.

4. QUIETING TITLE—CLOUD ON TITLE.

Where a conveyance of land has been made by deed from the husband to the wife upon a valuable and bona fide consideration not named in the deed, and the land has been sold under execution against the husband issued in an action brought after the record of the deed of conveyance, such sale is a cloud upon the title of the wife, which equity may remove.

(Syllabus by the Court.)

Appeal from Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Bill by Collions I. Pettit against S. S. Coachman and S. A. Pettit. Decree for defendants, and plaintiff appeals. Reversed and remanded.

F. M. SImonton and E. B. Drumwright, for appellant. Gunby & Gibbons, for appellees.

WHITFIELD, J. On May 19, 1904, the appellant, Collions I. Pettit, a married woman, filed in the circuit court for Hillsborough county a bill in chancery against S. S. Coachman and S. A. Pettit, husband of the appellant. The bill alleges that on June 10, 1903, the defendant S. S. Coachman began a suit in the circuit court of Hillsborough county against S. A. Pettit and recovered judgment thereon by default on September 4th following, said judgment being for the sum of \$204.21 and costs; that thereafter certain real estate described in the bill was advertised for sale under execution by the sheriff of Hillsborough county, and on October 5, 1903, sold; that defendant S. S. Coachman was the purchaser at said sale, paying for the said lands the small sum of \$100, which was credited upon his said judgment; that a large portion of said real estate sold and purchased by said defendant, the description being given, was and is the separate property of complainant, and not that of her husband; that said tract of land was acquired by complainant's husband in the year 1883 by homestead; that subsequently, on the 2d day of August, 1893, he conveyed the said property directly to complainant as shown by a copy of the deed annexed and made a part of the bill; that the consideration of said deed as expressed on the face thereof was \$1, but that, in fact, the said conveyance was made in fulfillment of a promise on the part of the said S. A. Pettit, complainant's husband, to convey real property to her in return for complainant's joining the said S. A. Pettit in the deeds to several described tracts of land theretofore made; that these several tracts of land were valuable, and that complainant would not have joined her husband in the execution of deeds to the same but for his express promise that he would convey to her the said land which he did convey

as aforesaid; that the complainant further entered into an agreement with her said husband for the said lands conveyed to her as aforesaid, that he might do as he liked with the remainder of his said property, and that complainant would join in the execution of all deeds without protest or additional compensation or consideration; that at the time of making her the said deed her husband had other property, real and personal, far in excess of all of his liabilities; that while it is true that even at that time her husband had transactions with the said defendant S. S. Coachman the accounts between them were mutual and unbalanced, and remained so until the year 1898, when complainant's husband gave the said S. S. Coachman his note for the balance due, and it was upon this note that the said S. S. Coachman obtained his judgment as aforesaid; that complainant was not familiar with the formalities required for the transfer of title to real property, and that she considered the said deed given her by her husband as aforesaid perfect, and conveyed to her the legal title, and that her husband intended to give such effect to his deed; that complainant intrusted the registry of said deed to her husband, S. A. Pettit, but that through neglect the said deed was not recorded until March 21, 1903; that the said deed was recorded long before the defendant S. S. Coachman began suit against complainant's husband; that said defendant S. S. Coachman knew as a matter of fact, and was chargeable with knowledge as a matter of law, with the complainant's rights and equities in the premises; that as to complainant's property the said S. S. Coachman was not a bona fide purchaser at the said execution sale; that his action therein was a fraud upon the rights of complainant; that at the time of the levy of said execution on and sale of complainant's property as aforesaid complainant was not in the county of Hillsborough, but in the county of Lee, state of Florida; that complainant was in no way a party to the said suit of S. S. Coachman against her said husband; although she knew of the said sale as a matter of fact, she was then financially wholly unable to employ counsel to protect her interests, and that it is only now that she is able to assert her rights by an appeal to this court; that the sale of her said property was wholly void as to complainant; that at the time of the said sale she held both the legal and equitable title thereto, and that the said sale in no way affects the title of complainant to the said property, yet complainant says the said sale of complainant's land and the sheriff's deed thereto made to the defendant S. S. Coachman cast a cloud upon the title of complainant to the said property, and render the land of far less value for purpose of sale; that said lands are wild and uncultivated. The prayers are that the said sale of complainant's land be decreed to be null and void

and of no effect, and that the said deed executed by the sheriff of Hillsborough county to S. S. Coachman be declared null and void, and in no way transferring any right, title, or interest in the said property of complainant to S. S. Coachman, and that all doubts as to and clouds upon the title of complainant be cleared away, and complainant's title thereto be declared perfect, and for general relief. The oath to the answer was expressly waived in the bill.

The defendant S. S. Coachman answered, in substance, as follows: He admits that he instituted his suit against S. A. Pettit and recovered judgment as alleged, and admits that the property described in the bill of the complainant was levied upon, advertised, and sold as alleged. He denies that the real estate claimed by the complainant was her separate property; denies that there was any consideration for the execution of the deed from S. A. Pettit to his wife, the complainant; avers that, prior to the time of obtaining the judgment referred to, the said S. A. Pettit and the said complainant had abandoned said property as a homestead; and denies that the defendant S. A. Pettit, the husband of complainant, had any real or personal property in excess of his liabilities at the time the so-called deed was made from Pettit to his wife. But he avers that the said defendant S. A. Pettit was at the time insolvent and unable to pay his debts; that at the time of the execution of said so-called deed from Pettit to his wife the complainant well knew that the defendant Pettit was indebted to this defendant and was unable to pay the same; that the deed under which the complainant claims said property was in the possession of the complainant as alleged from the year 1893 until March, 1903, and was never recorded until March, 1903, and that this defendant had no knowledge, either directly or constructively, of said deed at the time he took the note from the defendant Pettit upon which he obtained the judgment, nor did this defendant have any knowledge, either personal or constructive, until the same was filed for record; that he did not know that said deed had ever been recorded until the bill in this cause was filed; that he had no knowledge, and has no knowledge, of any antecedent promise made by the defendant Pettit to the complainant, and did not have any knowledge that the complainant claimed any right, title, or interest in and to any part of the property described in the complainant's bill until the said bill of complaint in this cause was filed.

A general replication was filed on March 3d, and on the same day a special master was appointed to take the testimony. Upon hearing on the pleadings, testimony, and report of the master, the court found for the defendants, and the bill of complaint was dismissed. The complainant took an appeal to the present term of this court, and as-

signs as errors that the court erred (1) in decreeing the equities to be with the defendant; (2) in finding that the complainant's bill should be dismissed; (3) in finding that the complainant was not entitled to the relief as prayed for in the bill of complaint.

The admissions of the answer and the testimony show in substance that S. A. Pettit acquired 160 acres of land in 1883, as a homestead from the United States government; that he conveyed to different parties between the years 1885 and 1888 several parcels of the land aggregating 26 acres, for 15 acres of which he received \$350, the other 11 acres being donated to a railroad and for school purposes, the whole 26 acres being valued at about \$405; that before his wife would sign the conveyances of these several parcels of the land the husband, in consideration of the wife joining in such conveyances, promised to convey to the wife about 50 acres of the land for a home; that for said 50 acres the wife promised also to join in conveying the remainder of the land; that the husband executed and delivered to the wife a deed dated August 2, 1893, to about 50 acres of the land, the consideration recited in the deed being \$1, and the value of the land at the time of the conveyance being \$500; that the deed was delivered to the wife, and was not recorded till March 21, 1903; that the value of the remainder of the land was about \$800; that the land was abandoned as a homestead before the deed to the wife was made, by the husband and wife removing to another county; that about 1892, after the homestead was abandoned, the husband became indebted to S. S. Coachman, one of the defendants, and finally gave a note for the amount found due in 1898; that "when the suit came up Mr. Coachman wanted to take this land, and then he [the husband] had the deed recorded to keep Mr. Coachman from taking the whole thing"; that the deed was recorded March 21, 1903; that action on the note was begun June 10, 1903, and judgment by default was recovered September 4, 1903, for \$204.21 and \$19 costs; that under the execution issued on such judgment the land claimed by the wife, together with other land, was sold by the sheriff to S. S. Coachman on October 5, 1903, for \$100; that in 1893 the husband, in addition to the land above mentioned, owned about \$200 worth of personal property; that the land in controversy is wild land.

The conveyance in this case from the husband to the wife was not strictly a voluntary conveyance; for it is shown without contradiction that the wife relinquished her right of dower in other lands the husband had conveyed, in consideration of the promise of her husband to make this conveyance to the wife, and that as a further consideration the wife agreed to relinquish her right to other lands of the husband. *Nalle v. Lively*, 15 Fla. 130; *Rivers v. Rivers*, 38 Fla. 65, 20 South. 807. The deed from the husband to

the wife conveyed the title to the wife. See chapter 5147, p. 85, Acts 1903; *Waterman v. Higgins*, 28 Fla. 600, 10 South. 97; *Clafin v. Ambrose*, 37 Fla. 78, 19 South. 628; *Hill v. Meinhard*, 39 Fla. 111, 21 South. 805; *American Freehold Land & Mortgage Co. v. Maxwell*, 39 Fla. 489, 22 South. 751.

The indebtedness of the husband to Coachman was contracted in 1892, and the conveyance to the wife was executed in 1893; but it appears that after the husband made the conveyances in which the wife joined, and also the conveyance to the wife, the land remaining to him subject to execution was worth about \$800, and the amount of the judgment recovered on his indebtedness was \$204.21 and costs. Therefore, in the absence of any other showing of indebtedness or any showing of actual fraud or other circumstances, it cannot be said that the mere failure to record the deed from the husband to the wife rendered the deed invalid as to the simple creditor, S. S. Coachman, who brought his action several months after the deed was recorded. See *Hill v. Meinhard*, 39 Fla. 111, 21 South. 805. It is clear from the showing here made that the deed was not a voluntary one; and, as it was recorded before the creditor brought his action or acquired a judgment or other lien, the facts of this case give the creditor no equities superior to the rights of the complainant. The legal title of the complainant was not affected by the judgment obtained against her husband, and the sale under the execution against the husband cast a cloud upon the title, which equity may remove.

The decree is reversed, at the cost of the appellees, and the cause is remanded, with directions that a decree for the complainant be entered in conformity with the prayer of the bill.

SHACKLEFORD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

DAVIS v. STATE.

(Supreme Court of Alabama. June 14, 1906.)

GAMING—OFFENSES—PUBLIC PLACE—WHAT CONSTITUTES.

Accused, with others, bet on a game played with cards in the daytime within 15 steps of a public highway. The game and betting were seen by witnesses while in the road. *Held*, that the game and betting was in a public place, within the statute, though the game and betting might have been seen only by careful observers traveling along the road.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 174.]

Appeal from Circuit Court, Dale County; A. A. Evans, Judge.

"To be officially reported."

Charlie Davis was convicted of gaming, and he appeals. Affirmed.

This was a charge of betting or playing a game of cards in a public place. The defendant requested the following written charges, which were refused by the court: "(1) The jury must not convict because the defendant could be seen from the road. The card playing and betting must be seen to constitute the offense, and if the defendant, in betting at cards, could not be seen on an ordinary observation from the public road, then they must find for the defendant. (2) The playing and betting at cards must have been of such character and under such circumstances as to be seen on ordinary observation from the public road before the jury can convict the defendant. (3) The jury must believe beyond a reasonable doubt that the defendant was betting and, that the defendant could be seen playing at cards on reasonable observation from the public road."

H. L. Martin, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. The testimony on behalf of the state tended to show that defendant, with others, bet on a game played with cards in the daytime within 15 steps of a public road, and that they could be and were seen by the witnesses, while in the public road, who testified to these facts. The testimony in behalf of defendant tended to show that he, and those with him, were not playing any game, that there was no betting, and that, if they had been playing, it could not have been seen from the public road.

One of the essential elements of the offense necessary to be established to the satisfaction of the jury by that degree of proof required in criminal cases, it is apparent, is whether the place as testified to by the state's witnesses was a public one. The charges refused to defendant proceed upon the theory that it was not, if the game and betting on it could not be seen by ordinary observation from the public road. In other words, although the game and betting may have been seen by a careful observer traveling along the road, and not seen by one less observant, the place would not be a public one. We do not think this is the law. The rule is that any playing with cards, etc., in or sufficiently near a highway for the playing to be seen therefore, is within the statute. *Franklin v. State*, 91 Ala. 23, 8 South. 678, and cases there cited.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

WESTERN UNION TELEGRAPH CO. v. WHITSON.

(Supreme Court of Alabama. June 6, 1906.)

1. TELEGRAPHS AND TELEPHONES—NONDELIVERY OF MESSAGE—COMPLAINT—AFFIRMATIVE DEFENSE.

A complaint in an action against a telegraph company for the nondelivery of a message is not defective for failing to allege that the sendee lived, did business, or was to be found within the free delivery limits of the telegraph office at the point of destination; for, if the contract provided for delivery only within the free delivery limits, that was a defensive matter, because being an exception to the obligation to deliver messages to the sendees.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 54.]

2. SAME—BURDEN OF PROOF.

Where a sender of a telegram, acting for the sendee, contracted for its delivery within established free delivery limits, the sendee, suing for nondelivery, has the burden of proving that his residence or place of business was within the established limits.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 61.]

3. SAME—DELIVERY TO AGENT OF SENDER—EVIDENCE OF AGENCY—ADMISSIBILITY.

Where, in an action against a telegraph company for the nondelivery of a message, it was shown that the message was delivered to the sendee's 11 year old son, evidence that the son had often been sent by the sendee to mail letters at the depot in the city in which he lived, which fact was known to the messenger of the company, was inadmissible as showing that the son was the sendee's agent to receive the telegram.

4. SAME—OBLIGATION TO DELIVER.

It is the duty of a telegraph company to deliver a message to the sendee, if he can be found by the exercise of reasonable diligence; and, if it is unable to make a personal delivery, it is its duty to deliver the message to his authorized agent.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 29.]

5. SAME—WHAT CONSTITUTES DELIVERY.

A delivery of a telegram to the 11 year old son of the sendee, while at play with other boys near his home, is as a matter of law no delivery to the sendee.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 29.]

6. APPEAL—HARMLESS ERROR—REFUSAL TO GIVE INSTRUCTIONS.

Where the court on the undisputed facts could have given an affirmative charge in favor of plaintiff, it was not error to refuse instructions requested by defendant.

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

"To be officially reported."

Action by W. H. Whitson against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action by appellee against appellant. The third count in the complaint was charged out at the request of the defendant. The first and second counts were in the following words: Count 1: "The plaintiff claims of the defendant the sum of \$1,500 as damages for the breach of a contract made by plaintiff, through his agent, J. H. Willing-

ham, of Berry, Ala., and the defendant on the 12th day of January, 1906, by the terms of which the defendant undertook to transmit from Berry, Ala., to Northport, Ala., the following message: 'Jan. 12, 1905. To W. H. Whitson, Northport, Ala. Your mother died this morning. Will bury her tomorrow. J. H. Willingham.' And the plaintiff avers that at the time of making said contract the defendant was engaged in the business of transmitting and delivering telegraphic message for hire, and that he paid the defendant the charges for sending said message from Berry, Ala., and delivering the same at Northport, Ala., and plaintiff avers that said contract was broken by the defendant in this: That it negligently and carelessly failed to deliver at Northport, Ala., said message to the plaintiff. And plaintiff avers that, had the message been delivered to him within a reasonable time, he could have reached the place where his mother was lying dead in time to have seen her before burial, and in time to have been present at her burial; and plaintiff further avers that on account of the defendant's negligence and carelessness in not delivering said message plaintiff was prevented from being present at his mother's funeral and of again seeing her before her burial, on account of which plaintiff suffered great injury to his feelings and mental anguish, to the damage of the plaintiff in the sum of \$1,500. Hence this suit." Count 2: "The plaintiff claims of the defendant the sum of \$1,500 damages, for that on, to wit, the 12th day of January, 1906, the plaintiff, through his agent, J. H. Willingham, of Berry, Ala., delivered to defendant's agent for transmission and delivery from Berry, Ala., to plaintiff at Northport, Ala., a message in words and figures substantially as follows: 'Jan. 12, 1905. To W. H. Whitson, Northport, Ala. Your mother died this morning. Will bury her tomorrow. J. H. Willingham.' And defendant contracted and undertook for a certain sum of money, which plaintiff's agent then and there paid to defendant, to deliver said message to plaintiff at Northport, Ala. The plaintiff avers that the defendant was engaged in the business of transmitting telegraphic messages for hire between said two places. And the plaintiff further avers that the defendant broke said contract in this: That it negligently and carelessly failed to deliver at Northport, Ala., said message to the plaintiff; that, had said message been delivered to the plaintiff within a reasonable time, he could have reached the place where his mother was lying dead in time to have seen her before burial and in time to have been present at her burial; and that by reason of defendant's negligent failure to deliver said message the plaintiff was prevented from being present at his mother's funeral and of seeing her before her burial, on account of which plaintiff suffered great injury to his feelings and mental anguish, to the

damage of the plaintiff in the sum of \$1,500. Hence this suit."

The defendant demurred to counts 1 and 2 on several grounds, and the demurrer was overruled. The only insistence made on appeal is that the court erred in overruling demurrer No. 1 to counts 1 and 2. This ground of demurrer is in the following language: "It is not alleged or shown that plaintiff lived, did business, or was to have been found within the free delivery limits of defendant's Northport office; not is it shown that plaintiff or his said alleged agent contracted with defendant for the delivery of said message beyond the free delivery limits of defendant's Northport office." The defendant offered to show by its operator at Northport that Willie Whitson was often sent by his father to mail letters at the depot in Northport, at which defendant's receiving office was located, and that this fact was known to the messenger of defendant's company. On objection by plaintiff, this evidence is excluded. The defendant's evidence further tended to show that the messenger to whom its operator delivered the message carried the message to the front gate of plaintiff's home, and at the gate delivered it to Willie Whitson, who told the messenger that his father was expected home that night, and the messenger said to Willie to take the message and carry it in to the house and give it to his mother, and the boy replied, "Go ahead," he would attend to that. The evidence also tended to show that the operator of defendant attempted to deliver the message by repeating it to the place where the sendee was supposed to be at the time of its reception. The evidence of the plaintiff tended to support the allegations of the complaint, and to show that Willie Whitson was a boy about 10 years old, and that the message was given him while he and other small boys were at play in the yard of a neighbor near sendee's home, and that it was not received by his father until about 10 days later, while the wife of the sendee was at her home, a few steps away from the neighbor's house where the boy was at play.

The following written charges requested by the defendant were refused: Charge 7 was the general affirmative charge; 8, the affirmative charge as to first count; 9, the affirmative charge as to second count. Charge 6: "Under the evidence in this case, the young boy, Willie Whitson, never was the agent of the defendant company." Charge 10: "In this case no significance attaches, as a matter of law, to the fact, if it be a fact, that the young boy stood, when the message was delivered to him, at the gate of an adjoining yard rather than at the gate of his own home." Charge 11: "The only question for the jury to decide in this case is whether or not the delivery of the telegram to Willie Whitson was the exercise of due care for its delivery; and it can make

no difference whether such delivery was made at the gate of Mr. Whitson's house, or at the gate of Mr. Medlin's house." There was judgment for appellee in the sum of \$200.

George H. Fearons and Henry Fitts, for appellant. Foster & Oliver and Fleetwood Rice, for appellee.

TYSON, J. Only one ground of the demurrer assigned to the several counts of the complaint is insisted on here. It is the one assailing the sufficiency of the averment of the counts for the failure to allege that the addressee of the message lived, did business, and was to be found within the free delivery limits of the defendant's office to which it was transmitted for delivery. If such was a term of the contract between the sender, as the plaintiff's agent, and the company, that was a matter of defense. It is in the nature of an exception to the general obligation or duty imposed upon the defendant company to transmit and deliver messages received by it to the addressee, and if the company has established a free delivery limit, and a regulation with respect to delivery of messages to persons outside of it, this is defensive matter. And doubtless, where this defense is set up and it is shown that the sender, acting for the sendee, contracted with reference to an established free delivery limit, the burden would be upon the sendee where he is the plaintiff, as it is upon the sender when he is complaining, of proving that the residence or business place of the addressee is within the established limits. This is in substance what was held on this point in *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 518, 7 South. 419, 18 Am. St. Rep. 148, where the defense was invoked by special pleas. See, also, *Western Union Tel. Co. v. Merrill* (Ala.) 39 South. 121.

The testimony offered by defendant, and excluded on motion, had no tendency whatever to show that plaintiff's son was his agent to receive the telegram for him. There was, therefore, no error in this ruling. It is undoubtedly the law that it was the duty of the defendant to deliver the message to the plaintiff if he could be found by the exercise of reasonable diligence. If unable to make a personal delivery, it was its duty to deliver the message to his authorized agent. Whether the defendant would have discharged its duty in this respect by delivering it to plaintiff's wife, who was at home, instead of leaving it with his 11 year old son, is not presented. *Crowell on the Law Relating to Electricity*, §§ 414, 415; *Joyce on Electric Law*, §§ 743, 744; 27 Am. & Eng. Ency. Law (2d Ed.) p. 1027. However this may be, we feel no hesitancy in holding that, as matter of law, it did not discharge its duty with respect to the delivery of the message by leaving it with plaintiff's child under the circumstances shown by the testimony. In other words, we hold that defendant's messenger

was guilty of negligence, as matter of law, by leaving the message with the boy; that his act in doing so was not a delivery at all. The court on the undisputed testimony might well have given the affirmative charge for plaintiff upon the first and second counts of the complaint, had it been requested. This being true, and the third count having been charged out at the request of the defendant, it follows that there was no error in refusing the several written charges requested by defendant. *Bienville Water Supply Co. v. City of Mobile*, 125 Ala. 178, 27 South. 781, and cases there cited.

Affirmed.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

CAMPBELL et al. v. SHELBY COUNTY.

(Supreme Court of Alabama. May 9, 1906.)

1. EVIDENCE—JUDICIAL KNOWLEDGE—REPEAL OF STATUTE.

The court knows judicially of the repeal of a statute by the Constitution.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 36, 37.]

2. APPEAL—REPEAL OF STATUTE PENDING APPEAL—MOOT CASE—DISMISSAL.

Where a statute on which the rights of the parties depend is repealed, an appeal from a decree in the cause, even though taken prior to the repeal, will not be entertained; there being no longer an existing actual controversy between the parties.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3122; vol. 2, Cent. Dig. Appeal and Error, §§ 63, 64, 69.]

3. SAME—COSTS.

An appeal in a cause which has become a moot case will not be entertained merely for the purpose of ascertaining who is liable for the costs.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 79, 823.]

Appeal from Chancery Court, Shelby County; R. B. Kelly, Chancellor.

"Not officially reported."

Bill by Shelby county against John A. Campbell and others. From the decree, defendants appeal. Appeal dismissed.

Martin & Bouldin, for appellants. Cecil Browne and Dryer & Webb, for appellee.

TYSON, J. The bill in this cause was filed for injunctive relief against certain persons named and designated in the act of the General Assembly approved March 5, 1901, as a board of courthouse commissioners of Shelby county, to prevent the performance by them of certain acts and doings authorized by the legislative act referred to, upon the ground that the law is unconstitutional, and therefore void. Acts 1900-01, p. 2531. We judicially know that this act was repealed by the Constitution of 1901, which went into effect on the 28th day of November of that year. It is true the bill was filed and this appeal prosecuted before the repeal. But this is of no moment as affecting the question whether

this court will entertain the appeal. And this it will not do, because there is no longer an existing, actual controversy between the parties and substantial rights to be determined. "The cause, in short, has become a moot case. There is no occasion or necessity for a judgment here, and no end to be accomplished by any judgment we might render; and we therefore decline to consider the case as now presented on its original merits." Nor will we do so merely for the purpose of ascertaining who is liable for the cost. *State ex rel. Case v. Lyons* (Ala.) 39 South. 214, and cases there cited.

Appeal dismissed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

BROWNE, Mayor, et al. v. STATE ex rel. GUNN.

(Supreme Court of Alabama. May 9, 1906.)

1. MANDAMUS—REPEALED STATUTE.

Mandamus will not lie to compel the discharge of duties imposed by a statute which has been repealed.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 37.]

2. APPEAL—MOOT CASE—DISMISSAL.

An appeal from a decree in a proceeding for mandamus, issued under an act becoming inoperative pending the proceeding, will be dismissed.

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

"Not officially reported."

Mandamus by the state, on the relation of J. H. Gunn, against William B. Browne, mayor, etc., and others. From the decree, respondents appeal. Appeal dismissed.

Cecil Browne and E. H. Dryer, for appellants.

TYSON, J. The petition in this case is for a writ of mandamus to compel the respondents therein named to discharge certain duties imposed upon them by the act of the Legislature approved February 9, 1899, and the amendatory act thereof approved February 20, 1899. Acts 1898-99, pp. 744, 1123. It was presented to Hon. John Pelham, as judge of the Seventh judicial circuit, and on the 1st day of May, 1902, he issued a rule nisi to the respondents, commanding them to appear at a term of the circuit court to be next held in and for Shelby county, there and then to show cause why the writ of mandamus should not issue as prayed. It is from this order that this appeal is prosecuted.

By the express provision of Act Feb. 9, 1899 (Acts 1898-99, p. 751) § 23, that act is null and void unless the election provided for by it is called and held within four years from its approval. This limitation expired on the 8th day of February, 1903. The act now being functus, cannot, of course, support a proceeding for a mandamus. *Hall v. Steele*,

82 Ala. 562, 2 South. 650; *Comer v. Bankhead*, 70 Ala. 136; *Ex parte Tillman*, 93 Ala. 101, 9 South. 527. This being true, the appeal must be dismissed upon the authority of the cases of *State ex rel. Case v. Lyons* (Ala.) 89 South. 214, and *Campbell v. Shelby County* (Ala.) 41 South. 407.

Appeal dismissed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

CAMPBELL et al. v. SHELBY COUNTY.
(Supreme Court of Alabama. May 9, 1906.)

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

"Not officially reported."

Bill by Shelby county against John A. Campbell and others. From the decree, defendants appeal. Appeal dismissed.

Martin & Bouldin, for appellants. Cecil Browne and Dyer & Webb, for appellee.

TYSON, J. This case is dismissed, on the authority of *Campbell v. Shelby County* (at this term of the court) 41 South. 407.

AUSTIN et al. v. JONES.
(Supreme Court of Alabama. April 28, 1906.)

1. ESTOPPEL—EQUITABLE ESTOPPEL—ACQUIESCENCE IN ACTS OF OTHERS.

A widow, without any authority from a minor daughter, fraudulently brought about a judicial sale of land in which the daughter had an interest, and the consideration given by the purchaser was a house and lot. The sale was not made until after the daughter reached her majority, and subsequently she resided with her mother in the house conveyed by the purchaser, and seven years after the sale she sued to have the conveyance set aside. *Held* that, in the absence of any showing that the daughter knew at the time she went into the occupancy of the house that there was a mortgage upon it which rendered it inadequate consideration, or that she knew that one acting for her as guardian had joined in a conveyance of the land, or that she had any knowledge of a conveyance of the land in which she had an interest to a third person and of the fact that he had made valuable improvements upon the same, or that the purchaser at judicial sale relied upon her silence and occupancy of the house, she was not estopped.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 128-135.]

2. JUDICIAL SALES—SETTING ASIDE—RETURN OF CONSIDERATION.

In order to enable one having an interest in land to sue to set aside a judicial sale thereof as fraudulent as to her, it was not necessary for her to return or offer to return any of the consideration, where it did not appear that she herself received anything of substantial value.

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

"Not officially reported."

Suit by Annie Lou Jones against Charles H. Austin and others. From a decree in fa-

vor of complainant, defendants appeal. Affirmed.

D. W. Speake, for appellants. E. W. Godbey, for appellee.

DOWDELL, J. The appellee, Annie Lou Jones, filed her bill in the court below in January, 1901, to have set aside and declared null and void as to her an alleged fraudulent transfer of 80 acres of land, in which she held a half interest subject to her mother's dower rights, which transfer was made to appellant Chas. H. Austin under color of a proceeding in the city court of Decatur, commenced by the filing of a bill, December 4, 1890, on which a decree of sale was rendered three days latter, but under which, with subsequent modifications of the decree, a sale was not had until April, 1894, over three years afterwards. The bill also prays that Chas. H. Austin and his grantees be charged with complainant's interest in the rents and profits, and that the lands, which are alleged to be incapable of equitable division without a sale, be sold for division between the complainant and such of the defendants as may be found entitled to the remaining interests. The court below granted the relief prayed for, and the defendants Austin and his grantees, Clark & Pepper, take this appeal.

The bill avers that the appellee, Annie Lou Jones, is a daughter of Emily P. Jones and the sister of Frank N. Jones, both of whom are made parties defendant, and the appellee and Frank N. Jones are the only children and heirs at law of Thomas P. Jones, deceased, who at the time of his death (1877) was seised and possessed of 80 acres of land in question, residing thereon. The proceeding which is sought to be set aside by the bill, and which the bill alleges was carried through entirely without the knowledge or consent of the appellee, was commenced during her infancy, and carried to a decree of sale within three days after the filing of the bill. The sale was not actually made, however, until several years later, shortly after appellee had reached her majority, but still without her knowledge and during her absence from the county. It is shown that the bill upon which this proceeding was founded was filed in the name of appellee, Annie Lou Jones, and her brother, Frank N. Jones, both infants at the time, no next friend, however, intervening, and made parties defendant their mother, Emily P. Jones, and Silas P. Ryan, who was alleged to have been appointed as guardian of said Annie Lou and Frank Jones a few weeks before the filing of the bill. The bill averred the death of complainants' father, leaving a homestead of 160 acres (including the 80 acres here involved); that there had been no administration on his estate, and that none was necessary; that after his death the homestead had been continuously occupied by their mother and themselves up to about three years before the filing of the bill, when she removed therefrom

to make a living and educate complainants; that the rents from the property were insignificant, and that, said Frank N. Jones having lost his right hand in an accident a few months previously, the necessities of subsistence and education required the sale of these lands; that the legal title had descended to said complainants incumbered by the "homestead and dower rights of their mother, the said Emily P. Jones, during her life"; that said mother has "In equal degree the right to enjoy the use and income from said lands with complainants during her life." And the bill prays a sale by the register for the benefit of the complainants, their mother to be paid out of the proceeds the value of her life estate to be ascertained by the register upon a reference. A mere nominal defense was made to this bill, an answer being filed the next day by Emily P. Jones and Silas P. Ryan, as guardian, admitting all the averments in the bill, which answer, while purporting to be signed by another attorney, was in its body in the handwriting of the same attorney who drew the bill. On the same day that this answer was filed oral testimony, purporting to have been taken by consent of these solicitors for both sides, was taken in brief and meager form, whereby it appears that one witness testified that the condition of the lands was bad, could not be rented for over \$75 per year, and that it would be to the interest of the complainants to have the lands sold, which testimony was "adopted" by another witness. Then on the same day a note of submission was filed, and a decree rendered by the court, holding that the complainants were entitled to relief, and ordering a sale of the land by the register, the proceeds to be held subject to the further orders of the court at its next term. No sale was had under this decree for over three years, during which time it was modified so as to allow the guardian to sell at private sale, for cash or on time, the sale to be approved by the register and reported to the court. On April 10, 1894, a report of sale was filed by said Ryan, guardian, and the same read and confirmed. This report set out a sale of 40 acres to one Davis, not here questioned, and the sale of 80 acres, or the half of a certain quarter section, to said Chas. H. Austin "at and for the sum of \$800, payment of which has been made as follows: The said Chas. H. Austin and his wife, M. A. Austin, deeds and conveys, by proper deed of conveyance, to the said Annie Lou, Frank N., and Emily P. Jones the following described real estate," going on to describe a lot in Decatur, Ala. That Emily P. Jones joined with "the undersigned" S. P. Ryan in making the deed to the 80 acres to Austin. That "as a further consideration for the conveyance of said land the said Chas. H. Austin has sold and delivered to the said Emily P. Jones, Annie Lou Jones, and Frank Jones the various articles of personal property useful to said parties, of the value of \$188.23, and

further executed his notes, of date April, 1894, payable six and twelve months after the date thereof, in the sum of \$61.75 and \$100, respectively." The bill goes on to aver that the solicitors who assumed to represent complainant and her brother in the city court proceedings were employed by their mother, whose interests were adverse; that the land in question was not the homestead of said Emily P. Jones, she having abandoned it several years previously and having joined in the conveyance to Austin; that appellee's brother had not lost one of his hands; that Ryan was induced to qualify as guardian solely for the purpose of rushing this proceeding through the court, and that he never performed any other guardianship function; that the defense made to said proceeding by the mother and the guardian was merely ostensible, and guided by the same solicitors who filed the bill; that the said guardian never received nor disbursed any funds. It is further averred that the lands thus transferred in exchange to Austin were unincumbered, but that the house and lot transferred in exchange by Austin and wife as above set forth was mortgaged for about \$800, and was afterwards bought in under a foreclosure proceeding for the amount due on the mortgage, and that the complainant, nor her guardian for her, had ever received any personal property or money from this transaction, and, the mortgage having absorbed the house and lot, complainant had obtained nothing of value from this proceeding by which her property had been swept from her without her knowledge or consent; that by reason of the unfounded statements in the bill and their admission in the collusive answer the court was misled as to the homestead character of the lands and the necessity for a sale; that the court was further misled and imposed upon in that the fact that the said house and lot were incumbered was nowhere disclosed to the court, otherwise the court would never have sanctioned the said exchange; that all of Austin's negotiations for this 80 acres of land were carried on with appellee's mother, who had no other resources than this 80 acres and another unproductive tract of 40 acres, worth about \$200, together with the scanty wages of the minor brother for manual labor; that the 80 acres thus obtained by Austin had an annual rental value of \$50, while the New Decatur lot had a rental value of \$10 to \$12 per month, incumbered with a yearly interest charge of \$64, as well as insurance and taxes; that at the time of this transaction appellee was away from home at school, and knew nothing of it, and was, besides, entirely inexperienced and quite ignorant of business affairs; that upon her return a few months later she lived with her mother and brother in the house for some time, having nowhere else to go, and being subject to her mother's behests; that she was without legal advice or a knowledge of her right until a short time before filing this bill:

that she was ignorant of the fact that said Ryan had as her guardian attempted to convey her interest in said land to Austin until shortly before filing the bill; that she was ignorant of the existence of the mortgage on the transferred house and lot until threats of foreclosure were made in 1897; that the notes for \$100 and \$61.25 were executed by Austin to her mother individually, and that the \$188.25 of personal property mentioned in the report of sale consisted of secondhand furniture, odds and ends, of less value than the amount named; that her mother was an easy mark for imposture, and had traded off one of Austin's notes for a valueless patent right, and that in the transaction attacked she had been imposed upon by Austin, and that appellee had never herself received any thing of value from Austin; that Austin was in possession of the lands from the time of sale to 1895, and Lawson Pepper since that time. This is substantially the case made by the bill. The appellants demurred to the bill, assigning some 18 grounds, all of which were overruled by the court. As the only points insisted upon in argument by the appellants as involving error are raised by the answer and pleas filed by them to the bill, it is not necessary to set out the demurrers.

The answer as amended denies that Emily P. Jones was inveigled into the trade with Austin, and avers that she solicited and induced the bargain, and that in the transaction she was acting for herself and on behalf of the appellee and her brother; that Mrs. Jones was informed as to the existence of the mortgage upon the New Decatur lot, and assumed the payment of the same; that the said mother and appellee and her brother went into the possession and enjoyment of the house and lot and personal property, and occupied the house for over three years; that the proceeds of said notes were used by Mrs. Jones for the benefit of herself and said children; that none of these things have been returned to said Austin, nor offered to be returned; that at the time of the conveyance to Austin by Ryan and Mrs. Jones in April, 1894, the appellee was 21 years of age, and that within six months thereafter she was informed of the transfer, and two years later of the existence of a claim of some sort on the New Decatur property, and, further, that her mother and brother were paying the interest on the claim; that the deed made by Austin and wife disclosed the fact of the mortgage; that this deed was delivered to appellee's mother for the benefit of herself and children, and has been continuously in the possession of the family ever since, and that a cursory examination of the deed would have revealed to appellee the facts complained of; that seven years elapsed from the time appellee might have had this information up to the time the bill was filed; that the lands were in poor condition when Austin took possession; that he fenced and improved it, and after being in posses-

sion for a year conveyed the same by warranty deed for a valuable consideration to Pepper, who had made substantial improvements thereon; that no complaint had been made to Austin by appellee in regard to said transaction, nor anything done by her, until the filing of the bill, after allowing the lot to be taken under foreclosure and waiting until the right of redemption had expired; that, if appellee had ever had any right to ask a rescission or annulment of the proceeding, she had forfeited it by her long delay. The appellants incorporated in their answer two special pleas, which were set down for hearing on their sufficiency, and by the court held insufficient, which ruling is assigned as error. These pleas are as follows: "(1) That at the time of the conveyance of the lands involved in this suit to Chas. H. Austin by Emily P. Jones the complainant in this suit was of full age; that soon thereafter, during the year 1894, she was informed by her mother, the said Emily P. Jones, that said lands had been sold to said Chas. H. Austin by her, and that the consideration therefor in part was the household furniture heretofore mentioned, and the house and lot in the town of New Decatur, Ala.; that the complainant, being in possession of such information, went into the enjoyment and joint occupancy of said property, with said Emily P. Jones, and continued therein for the space of 3 or more years without expressing any dissent or dissatisfaction to the said Chas. H. Austin or his grantee; that no proceedings were instituted by the complainant to annul or cancel said deed of conveyance until July 29, 1901, more than seven years after the date of said transaction; that no return or offer to return any portion of said consideration paid by Chas. H. Austin for the land involved in this suit has been made by the complainant, or any one for her; that within about 18 months after the purchase of said lands by Chas. H. Austin he sold and conveyed the same to Lawson Pepper, one of the defendants herein, for a valuable consideration, and without any notice on the part of said Lawson Pepper of the rights of said complainant; and that the said Lawson Pepper, in ignorance of the rights of said complainant, has erected valuable and permanent improvements upon said lands. (2) For further plea in this behalf these defendants say that the lands involved in this suit constituted the homestead of the said Thomas P. Jones, Emily P. Jones, Annie Lou Jones, and Frank Jones at the time of his death, and that they were in the actual possession thereof as such homestead; that the said Thomas P. Jones died in the year 1877, leaving surviving him his widow, Emily P. Jones, and his minor children, the complainant in this suit and her brother Frank N. Jones; that no dower in said lands or any part thereof has been assigned to said widow, the said Emily P., and that at the time of his death, nor since his death, did or has said Emily P.

Jones owned any separate estate at all, or any interest in any lands, except her dower interest in the said lands owned by the said Thomas P. at the time of his death; that the deed executed by the said Emily P. to the said Chas. H. Austin conveyed to him all her rights, interest, and claim in and to the land involved in this suit, and that under said deed he entered into the possession thereof; and that his alliance, the said Lawson Pepper, is now in possession of said lands, claiming and holding such possession and ownership thereof under the deed executed to him by the said Chas. H. Austin."

The evidence submitted by the appellee, complainant in the court below, supported the substantial averments of the bill as to the facts as hereinabove set out, and we see no reason to disturb the finding of the court below as to the facts, which was favorable to the complainant; a decree being rendered granting the relief prayed for, and ordering the lands to be sold and the proceeds brought into court to await further orders in respect to the confirmation of said sale and the distribution of the money. The chancellor, in his opinion accompanying the decree, as to the respective rights of the parties upon such distribution, makes the following statement: "The only right acquired by Austin was the dower right of Mrs. Jones, and his vendee will be protected accordingly by the decree of the court. The complainant is entitled to a decree condemning the land to sale (as it cannot be equitably divided without a sale) and awarding her one-half of the proceeds remaining after a deduction from them of the value of her mother's life estate in one-third of the proceeds of the whole, and to a decree for one-third of the rents against Austin and Pepper, respectively, according to the time they occupied the land."

It will be noticed that the first plea does not deny that the conveyance was made to Austin without complainant's knowledge, consent, or authority; and while it avers that complainant soon thereafter was informed by her mother of the sale of the lands to Austin in consideration of the furniture, etc., and the house and lot in New Decatur, and being possessed of this information she went into the enjoyment and joint occupancy of the said property, and continued therein for three or more years, without expressing any dissent or dissatisfaction to said Austin or his grantee, it is nowhere averred that this was done with knowledge of the existence of the mortgage upon said house and lot, or with knowledge that Ryan, acting for her as guardian, had joined in the conveyance of the lands to Austin. Nor is it averred that she had any knowledge of the subsequent sale to Pepper and his erection of "valuable and permanent improvements upon said lands." The ruling of the court below on this plea was without error. Knowledge of the acts in question must have been brought home to one before he can be held to have ratified

them or even acquiesced in them. The plea can hardly be said to show acquiescence even. "Ratification" and "acquiescence" are not synonyms. The latter is but testimony to be considered in determining the factum vel non of the former. It is only when such silence or acquiescence becomes the basis, or authority, on which another parts with something valuable, or incurs a liability, that the doctrine applies. The doctrine is that in such case the party is estopped to assert the truth, because its assertion would work a fraud on him whose conduct had been influenced by such silence or acquiescence." *Moore v. Robinson*, 62 Ala. 537, 546. And on page 547 of the same case we quote: "Acquiescence is not necessarily ratification, though evidence tending to prove it. To acquiesce is to forbear opposition or complaint. To ratify is to make valid, to confirm. We frequently acquiesce without approving." The plea falls to aver that Austin relied upon appellee's silence, and her occupancy of the property, when he entered upon the farm lands exchanged therefor, or that Pepper was placing any reliance thereupon, or, in fact, that the appellee was looked to, considered, or consulted in the matter at all, and certainly the evidence fails to intimate any thing of the kind. Surely appellee could not have acquiesced in the acts of S. P. Ryan without being informed as to them, and it is not averred in the plea that her mother was acting either as the authorized or assumed agent of the appellee in making said transfer, and in the absence of some such relation of principal and agent, express or assumed, there was nothing for appellee to ratify. The plea avers that appellant had not returned or offered to return any of the property or effects. This was not incumbent upon her, as she was not shown to have herself received any thing of substantial value from Austin.

We find no error in the record, and the decree appealed from will be affirmed.

Affirmed.

HARALSON, ANDERSON, and DENSON, JJ., concur.

MARX v. ELY.

(Supreme Court of Alabama. May 15, 1906.)

1. FRAUDS, STATUTE OF—SUFFICIENCY OF MEMORANDUM.

An instrument reciting that the one by whom it was signed guarantied to a certain other person the indebtedness of a certain decedent, and reciting that the signer was to receive a certain per cent. of the amount collected in consideration of the guaranty, was not obnoxious to Code 1896, § 2152, requiring all promises to answer for the debt of another to be evidenced by a memorandum expressing the consideration and subscribed by the party to be charged.

2. EVIDENCE—BEST EVIDENCE—WRITINGS—PRELIMINARIES TO ADMISSION OF SECONDARY EVIDENCE.

There was no error in excluding exhibits attached to a deposition, which were copies,

where it did not appear that the originals could not have been obtained.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 600.]

3. GUARANTY—ACTION—ISSUES.

In an action on guaranty, questions as to fraud or misrepresentation could not be raised in the absence of a plea thereof.

4. TRIAL—INSTRUCTIONS.

In an action on a contract whereby defendant guarantied the payment to plaintiff of an indebtedness of a decedent, a requested instruction that if plaintiff accepted a certain sum of money in settlement of his claim "by and without the consent of the defendant" was properly refused as unintelligible.

5. GUARANTY—DISCHARGE OF GUARANTOR.

Where defendant guarantied to plaintiff the payment of an indebtedness of a decedent, the acceptance by plaintiff of a portion of the claim as a payment thereon with knowledge and consent of defendant did not discharge defendant.

6. SAME—REMEDIES OF CREDITOR—CONDITIONS PRECEDENT.

Where defendant guarantied the payment of an indebtedness of a decedent, it was not requisite to the creditor's right to recover to show that the estate of the decedent had been adjudged insolvent.

Appeal from Circuit Court, Marengo County; John C. Anderson, Judge.

"Not officially reported."

Action by M. Ely against J. Marx. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The guaranty sued on in this case was in the following words: "I hereby guarantee to M. Ely, the indebtedness of Ralph Smith, deceased, for about \$63.70. I am to receive 25 per cent. of the amount collected in consideration of this guarantee. This May 7, 1901. [Signed] J. Marx." To the complaint defendant filed a number of pleas, among them plea 12. The defendant avers that the guaranty sued on is invalid and nonenforceable, in that it is obnoxious to subdivision 3 of section 2152 of the Code of Alabama of 1896.

The defendant requested the following charges, which the court refused: "If the jury believe from the evidence that Marx guarantied to M. Ely the indebtedness of the said Ralph Smith to the amount of \$63.70 upon representation made by said Ely that said Smith owed him that amount, and if said Smith did not in fact owe said Ely said amount of \$63.70, but only owed said Ely the sum of \$50, the jury should find a verdict for defendant." Charge A: "If the jury believe that there was no debt of \$63.70, then Ely cannot recover, and you should render a verdict for the defendant." Charge B: "If the jury believe that there was a misrepresentation of the amount due by Smith to Ely, you should render a verdict for the defendant." Charge D: "If the jury believe that Ely accepted \$12.50, paid him by Williams, then he discharges Marx and the defendant is entitled to a verdict." Charge E: "If the jury believe that M. Ely accepted \$12.50 in full payment of the debt, he thereby

released Marx, then you should render a verdict for defendant." Charge F: "If the jury believe from the evidence that he accepted \$12.50, he thereby released Marx from his debt, then you should render a verdict for defendant." Charge 3: "If the jury believe from the evidence that M. Ely accepted \$12.50 in settlement of his claim against the estate of Ralph Smith by and without the consent of the defendant Marx, this operates to discharge said Marx, as guarantor, and the jury could find a verdict in favor of the defendant." Charge 5: "The court charges the jury that there is no evidence in this case to show the estate of Ralph Smith, deceased, was adjudged to the insolvent by any proceedings of the probate court of Marengo county, Ala., and the jury should find their verdict in favor of the defendant." Charge 6: "There is no evidence in this case that the estate of Ralph Smith was insolvent, and the jury must find their verdict in favor of the defendant."

Abrahams & Simon, for appellant. Edward J. Gilder, for appellee.

DOWDELL, J. The guaranty sued on was in writing signed by the defendant and expressed the consideration. This was a compliance with section 2152 of the Code of 1896, and the demurrer to the defendant's plea No. 12 was therefore properly sustained. *Bolling v. Munchus*, 65 Ala. 561.

There was no error in excluding, on the plaintiff's motion, the exhibits attached to the deposition of the witness Williams. These exhibits were copies, the originals of which were the best evidence, and it was not shown that such originals could not have been obtained and produced in evidence.

There was no plea, setting up the defense of fraud or misrepresentation, and no such issue in the case. Consequently written charges No. 4, A, and B, predicated on the theory of misrepresentation and fraud, were properly refused.

Charge No. 3, if for no other reason, was properly refused as being unintelligible. This charge says if Ely accepted \$12.50 in settlement of his claim "by and without the consent of the defendant"; that is, with and without the consent of the defendant. If he did it with the consent of the defendant, then it would not operate to discharge the defendant from his liability.

Charge No. 6 was an invasion of the province of the jury. Moreover, there was evidence tending to show that the estate of Ralph Smith was insolvent.

The acceptance by the plaintiff of \$12.50 from Williams, merely as a payment on the note, would not operate to discharge the defendant, Marx, from his liability as grantor. Charge D was, therefore, properly refused.

There was evidence from which the jury might infer that the acceptance by the plaintiff of the \$12.50 was with the knowledge

and consent of the defendant, and, if so, such acceptance would not have discharged the defendant from the liability to the plaintiff on the guaranty. Charge E, requested by the defendant, was therefore misleading and was properly refused.

It was not necessary to the plaintiff's right of recovery to prove that the estate of Ralph Smith had been adjudged insolvent. Charge No. 5, requested by the defendant, was properly refused.

Charge F is vague and uncertain, and for this reason, if no other, was properly refused. Affirmed.

WEAKLEY, O. J., and HARALSON and DENSON, JJ., concur.

SIMS v. STATE.

(Supreme Court of Alabama. May 17, 1906.)

1. RAPE—INTERCOURSE WITH GIRL UNDER FOURTEEN—INDICTMENT—SUFFICIENCY.

Under Code 1896, § 5447, making carnal knowledge of a girl under 14 a felony, and section 5448, making carnal knowledge of a girl over 10 years and under 14 a misdemeanor, an indictment charging carnal knowledge of a girl under 14 is uncertain as to the crime charged and insufficient to support a conviction.

2. CRIMINAL LAW—FORMER JEOPARDY—INSUFFICIENT INDICTMENT.

Jeopardy does not arise on an indictment insufficient to support a conviction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 312.]

3. JUDGES—SUPERNUMERARY JUDGE—VALIDITY OF STATUTE.

The act creating the office of supernumerary judge is constitutional.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Judges, § 47.]

4. INDICTMENT—QUASHING—GROUNDS.

Under Code 1896, § 5629, declaring that no objection can be taken to an indictment on any ground going to the formation of the grand jury, except that the jurors were not drawn in the presence of the officers designated by law, the failure of the jury commissioners to take the special oath required by section 4977 is not cause for quashing the indictment.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 481.]

5. JURY—QUASHING VENIRE—GROUNDS—FAILURE OF JURY COMMISSIONERS TO TAKE OATH.

Failure of the jury commissioners to take the special oath prescribed by Code 1896, § 4997, is no ground for quashing the special venire, in the absence of any charge of fraud in the drawing.

6. RAPE—CARNAL KNOWLEDGE OF INFANT—EVIDENCE.

In a prosecution for carnally knowing or abusing a female under 10 years of age, it was not error to permit the mother of the child to testify that the child seemed excited and looked as if she had been crying.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 66.]

7. CRIMINAL LAW—EVIDENCE—RELEVANCY.

In a prosecution for carnally knowing or abusing a female under 10 years of age, in which the place of the alleged crime was undisputed, evidence that the mud at this place

was like the mud on defendant's trousers was admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 768.]

8. SAME—ATTEMPT TO BRIBE WITNESS.

In a prosecution for crime, evidence that defendant's father tried to get witness to offer a witness for the state money to leave the vicinity was not admissible, without proof that defendant procured, knew of, or consented to his father's action.

9. SAME.

In a prosecution for carnally knowing or abusing a female under 10 years of age, testimony that a short time before the alleged offense defendant cursed and abused witness and struck her with a stick of wood was irrelevant and prejudicial.

10. WITNESSES—REDIRECT EXAMINATION

Where, in a criminal prosecution, defendant showed by cross-examination of one of the state's witnesses that on the night after the alleged offense witness left the state and was gone a month, it was permissible for the state on redirect examination to show why the witness went away.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1000-1002.]

11. CRIMINAL LAW—TRIAL—PUNISHMENT OF WITNESS FOR CONTEMPT.

It is the right and duty of the court to maintain its dignity, preserve an orderly procedure, and punish offenses against it, and the action of a witness in becoming voluntarily intoxicated and appearing on the witness stand with a bottle of liquor in his pocket is offensive both to the order and dignity of the court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1534.]

12. SAME—APPEAL—EXCEPTIONS TO CHARGE.

When an exception is taken to a part of the oral charge, the part excepted to must be bad as a whole, or the exception is unavailing.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2025.]

13. SAME—TRIAL—INSTRUCTIONS.

It is not error to refuse requested charges which have been substantially given.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

14. SAME.

Charges incorrectly stating the evidence are properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1979-1987.]

15. SAME—ARGUMENTATIVE INSTRUCTIONS.

In a prosecution for carnally knowing or abusing a female under 10 years of age, a requested instruction that evidence that the private parts of prosecutrix looked as if they had been pinched was not direct evidence that they had been injured, and that the testimony of prosecutrix that her private parts were not injured was direct and entitled to more weight, was argumentative and properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1959, 1960.]

16. RAPE—CARNAL ABUSE OF INFANT.

In a prosecution for carnally knowing or abusing a female under the age of 10, instructions that if the jury believed that defendant attempted to have intercourse with prosecutrix, and there was an injury, however slight, to her sexual organs, or abuse of them, though there was no penetration, defendant was guilty, were proper.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 7.]

Appeal from Circuit Court, Walker County; A. H. Alston, Judge.

"To be officially reported."

Walter Sims was convicted of crime, and appeals. Reversed and remanded.

The defendant was indicted for carnal knowledge or abuse in attempting to carnally know a girl under 10 years of age. To the indictment, after certain preliminary motions had been made, and considered and overruled by the court, the substance of which sufficiently appear in the opinion, the defendant interposed the following plea: "Comes the defendant, and for plea to the indictment in this cause says that he has been put upon trial heretofore, on, to wit, the 19th day of March, 1905, in the circuit court of Walker county, on a good and sufficient indictment, in words and figures as follows: 'State of Alabama, Walker County: Circuit Court, Spring Term, 1905. The grand jury of said county charge that before the finding of this indictment Walter Sims did carnally know, or abuse in the attempt to carnally know, Ida Fowler, a girl under the age of fourteen years, against the peace and dignity of the state of Alabama'—together with the indorsements thereon. And the foregoing indictment was for the same offense on which he is now being tried, and that on said trial on said indictment the defendant says that the jury had been impaneled and sworn, and that evidence had been introduced by the state, and the jury had been charged with his trial, and without his consent and without any pressing necessity said jury was discharged without rendering a verdict. Wherefore defendant says that he ought not be put on trial and in jeopardy again for this same offense. Wherefore asks that he be discharged from said cause." Duly verified. The solicitor demurred to this plea: "(1) Because said plea shows that the indictment set out therein is for a different offense to that charged against the defendant in this cause. (2) Because the plea shows that the indictment set out therein is void. (3) Because said plea fails to show that the defendant has been placed in jeopardy for the commission of the crime now charged against him in the indictment in this case." The court sustained the demurrer. The other facts necessary to an understanding of the opinion sufficiently appear therein.

The state requested the court to give the following written charges, which request the court granted: "(1) I charge you, gentlemen of the jury, that if you believe from all the evidence and beyond all reasonable doubt that the defendant attempted to have carnal knowledge with Ida Fowler, and at the time defendant attempted to have carnal knowledge with her, she was under the age of 10 years of age, and that there was an injury, though slight, to her sexual organs, caused by the defendant in his attempt to have carnal knowledge with Ida Fowler, then you should find the defendant guilty. (2) I charge you, gentlemen of the jury, that if you

believe beyond a reasonable doubt, after considering all of the evidence in this case, that any part of the sexual organs of Ida Fowler were abused by the defendant in an attempt to have sexual intercourse with Ida Fowler, and that Ida Fowler at that time was under 10 years of age, then you should convict the defendant. (3) I charge you, gentlemen, that it is not necessary that there should be an actual penetration of the sexual organs of Ida Fowler by the defendant in his attempt to have carnal knowledge of Ida Fowler; but if you believe beyond a reasonable doubt, after weighing and considering all the evidence in this case, that the defendant attempted to have carnal knowledge with Ida Fowler, and in such attempt he abused or injured the inner or outer part of Ida Fowler's sexual organs, then you should convict the defendant."

The defendant requested the court to give the following written charges, which the court refused: "(13) The court charges the jury that in this case the evidence of the state shows that the only signs on the sexual organs of Ida Fowler were that her private parts looked a little red, and this evidence alone would not justify you in convicting the defendant. (14) The court charges the jury that the only evidence in this case of injury to the sexual organs of Ida Fowler is that her private parts looked a little red, and this is not sufficient to support a conviction under this indictment" "(22) I charge you, gentlemen, that the evidence on the part of the state that the private parts of Ida Fowler looked red like they had been pinched is not direct evidence that the sexual organs of Ida Fowler had been injured, and that the evidence of Ida Fowler herself that her sexual organs were not injured is direct evidence, and is entitled to more weight."

There was a conviction and sentence to the penitentiary for a period of 10 years.

McCullom & Leith, Gray & Coleman, and James J. Ray, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The demurrer to the defendant's plea of former jeopardy was properly sustained. The indictment set out in this plea, on which it is alleged that the former jeopardy is predicated, shows on its face that it was insufficient to support a judgment of conviction. In *Oakley v. State*, 135 Ala. 15, 33 South. 23, it was said of a similar indictment that it was bad because it did not charge whether the person assaulted was over or under 10 years of age, and therefore failed to show whether the defendant was charged under section 5447 of the Code of 1896 as for a felony, or under section 5448 of the Code of 1896 as for a misdemeanor. Jeopardy will not arise on an indictment insufficient in law to support a judgment of conviction.

The act creating the office of supernumer-

any judge was held in *Whatley v. State* (Ala.) 39 South. 1014, not to be unconstitutional.

Therefore the objection of the defendant based on the supposed unconstitutionality of the act was without merit.

The motion to quash the indictment contained five grounds, but we need only refer to the fifth ground, as this was the only one attempted to be proven. In support of this ground, the defendant introduced in evidence a copy of the oath of office and the dueling oath taken and subscribed by one of the commissioners. This was all, except a statement that no other oath was on file in the office of the probate judge; the theory of the defendant being, and such is the insistence in argument, that the oath required by section 4977 of the Code of 1896 was not taken by the commissioners. If it be conceded that there was an omission or failure on the part of the commissioners to take the prescribed oath, this would furnish no sufficient ground for quashing the indictment. Section 5269, Cr. Code 1896. See *Spraggins v. State*, 139 Ala. 93, 35 South. 1000. The motion to quash the indictment was properly overruled.

A similar motion was made to quash the special venire; that is, that the jury commissioners failed to take the oath prescribed in section 4977. The same evidence was offered that was offered on the motion to quash the indictment. The regular jurors forming a part of the special venire were drawn by the jury commissioners, no fraud is charged in the drawing, and the commissioners are the officers designated by law, and whose duty it is, to draw the juries for the term of the court. We cannot see that a failure to take the prescribed oath should invalidate a subsequent act regularly done in the performance of a duty required by statute. The purpose of the oath prescribed is to impress and enjoin upon the commissioners the faithful performance of their duty in drawing juries, and it is not pretended that the commissioners did not faithfully perform their duty. There was no error in overruling the motion. See *Spraggins v. State*, supra; section 4997, Cr. Code 1896.

There was no error in permitting Mrs. Fowler, the mother of the child alleged to have been assaulted, to testify as to the time of the alleged assault, although the date fixed by the witness was different from that fixed by the child, who had previously testified in the case. The jury might have found that the child was mistaken in the time she fixed. There was no pretense that there was but the one assault. Nor was there any error in permitting Mrs. Fowler to testify, against the objection of the defendant, that Ida Fowler, the girl alleged to have been assaulted, seemed excited and looked like she had been crying. On this point the cases of *Gassenheimer v. State*, 52 Ala. 317, and *Johnson v. State*, 17 Ala. 623, have been departed from in the later cases of *Hainsworth v. State*, 136 Ala.

13, 34 South. 203, and *Tagert v. State* (Ala.) 39 South 293..

The place of the alleged crime was undisputed, and it was competent to prove that mud on the trousers of the defendant corresponded with the mud at the place where the offense was said to have been committed. It was a circumstance, however slight, proper for the consideration of the jury as tending to show that the defendant had been at the alleged place; and to this end it was permissible for the witness to testify that the mud on the defendant's pants resembled the mud at the place of the alleged crime.

The court, against the objection of the defendant, permitted the witness F. W. Walker to testify that J. W. Sims, the father of the defendant, tried to get the witness to offer the state's witness Morgan \$50 to leave Cordova; the purpose being to get this witness away, so that he might not testify in the case. It was not shown that this was done by the procurement of the defendant, or with his knowledge or consent. In this ruling the trial court was in error.

We fail to see any relevancy in the testimony of the witness Mrs. Brazil as to the defendant's cursing and abusing her and striking her with a stick of wood, a short while before the time that it was said the offense charged in the indictment was committed. Such evidence, it could well be said, might have a tendency to create a prejudice in the minds of the jury against the defendant. There was no connection between the offense charged and the treatment by the defendant of the witness as testified to. This evidence should not have been admitted. *Fonville v. State*, 91 Ala. 39, 8 South. 688.

The defendant, on the cross-examination of the state's witness Morgan, having called for statements by the witness that the witness on the night after the alleged offense was committed ran away from Cordova and went to Louisiana, where he was gone a month and was brought back by the sheriff, it was permissible for the state to show on redirect examination of this witness why he went away.

It is the right and duty of the court in the administration of the law to maintain its dignity, and to this end exercise its power to preserve an orderly procedure, and to punish for an offense against it. For a witness who has been summoned to testify in a case in court to voluntarily put himself under the influence of liquor, and to have in his pocket a bottle of whisky when he goes on the witness stand to testify, is offensive both to the order and dignity of the court. The court's action toward the witness Davis was within its discretionary power, and there was nothing in it prejudicial to the rights of the defendant.

When an exception is taken to a part of the oral charge of the court, the portion so ex-

cepted to must be had as a whole; else the exception is unavailing.

Written charges 2 and 3, refused to the defendant, find substantial duplicates in several of the many charges given by the court at the defendant's request, and for this reason, if no other, were properly refused.

Charges 13 and 14, refused to the defendant, incorrectly stated the evidence. There was evidence by Mrs. Fowler that the private parts of Ida were not only red, as if they had been pinched, but appeared to be bruised. The father of the child testified that her private parts looked like they had been "masked." These charges were, therefore, properly refused.

Charge 22 was misleading and otherwise faulty, and was properly refused. Charge 23 was the general affirmative charge to find for the defendant. There was evidence tending to support the indictment, and the charge was properly refused.

There was no error in giving written charges 1, 2, and 3, requested by the state. These charges correctly stated the law. For the errors pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

HARRIS v. STATE.

(Supreme Court of Alabama. May 19, 1906.)

HABEAS CORPUS—ARREST UNDER REQUISITION WARRANT—IDENTITY OF PERSON ARRESTED—EVIDENCE—SUFFICIENCY.

On an application for a writ of habeas corpus for the discharge of petitioner from the custody of an officer holding him under a warrant issued by the Governor of the state on a requisition from the Governor of Tennessee, the petitioner testified that he was not the person mentioned in the requisition and extradition papers under which he was restrained by an officer from Tennessee, and that he had not been in Tennessee since 1903. He did not otherwise deny the charge for which he was being extradited. The officer from Tennessee testified to the identity of the petitioner and that he had been seen in Tennessee in 1905. *Held*, that the court did not err in refusing to discharge petitioner.

Appeal from Criminal Court, Jefferson County; D. A. Greene, Judge.

"Not officially reported."

Application by Phelan Harris for a writ of habeas corpus for his discharge from the custody of an officer holding petitioner on a warrant issued by the Governor of the state on a requisition from the Governor of another state. From an order refusing to discharge the petitioner, he appeals. *Affirmed*.

Charles Denegre, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The appeal in this case is prosecuted from an order of the judge of the criminal court of Jefferson county refus-

ing to discharge the appellant on a writ of habeas corpus. The appellant was arrested and held in custody by an officer of the law on a warrant issued by the Governor of the state of Alabama on a requisition from the Governor of the state of Tennessee. The only question presented is a question of the identity of the petitioner for the writ with the person named in the warrant.

The petitioner, testifying in his own behalf, stated that he was not the party or person mentioned in the requisition and extradition papers, under which he was restrained of his liberty by the said J. T. Hunn as an officer from the state of Tennessee, and that he had not been in the state of Tennessee since March or April, 1903. The said J. T. Hunn testified to the identity of the petitioner, and, furthermore, that he had seen him in Memphis, Tenn., in March, 1905. It will be observed that the petitioner did not deny the accusation or charge for which he was being extradited, except as above set out. The only question, therefore, was one of identity of person, and on the above evidence, as set forth, the court refused to discharge the petitioner; and we are not prepared to say that the court committed any error. The order appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

POSEY v. GAMBLE et al.

(Supreme Court of Alabama. May 19, 1906.)

1. JUDGMENT—RES JUDICATA.

One of two defendants in an action for conversion, they having filed a joint plea of not guilty, is unaffected by a judgment in a former action by plaintiff against the other defendant, adjudging the title to be in plaintiff.

2. SALES—PROPERTY HELD ADVERSELY BY ANOTHER.

A sale of personalty by one claiming title to it is void as against one at the time holding it adversely.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 23.]

3. TROVER—DAMAGES.

The highest market price between the time of the conversion and the trial may be awarded as damages in an action of trover.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 260-272.]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

"Not officially reported."

Action by Octavia G. Posey against J. C. Gamble and another. From an adverse judgment, plaintiff appeals. Reversed and remanded.

This was an action against the appellees in trover and conversion, claiming damages for the conversion of two cows, one calf, and eight head of hogs. The defendants interposed jointly the plea of the general issue

To the plea of O. L. Gamble the plaintiff filed the following replication: "That the title to the property, so far as O. L. Gamble is concerned, has already been adjudicated by this court at the last term thereof. A copy of said judgment is hereto attached marked 'Exhibit A,' and made a part hereof, and the property involved in his suit is a part of the property sued for in, and recovered for in, said judgment, and the title to this property was adjudicated to be in this plaintiff by said judgment. A copy of the summons and complaint is hereto attached marked 'Exhibit B,' and made a part hereof, and plaintiff avers that the title to the property involved in this suit was involved in said suit, and said judgment determined and adjudicated the title to be in this plaintiff to the property involved in this suit." Exhibits A and B are set out, and show a suit for damages for the conversion of two cows, one calf, and eight head of hogs. The plaintiff is of the same name as appellant here. The defendants are G. McDuff Gamble and O. L. Gamble. The judgment entry shows a finding by the jury for the plaintiff as against the defendant O. L. Gamble and the judgment of the court rendered thereon. Defendant Gamble filed demurrers to the replication, which were overruled.

The plaintiff requested the following charges, which the court refused: Charge 2: "I charge you that if you believe the evidence in this case your verdict will be in favor of the plaintiff as against the defendant O. L. Gamble, and if you are further reasonably satisfied from the evidence in this case that the title to the property involved in this suit was in the plaintiff at the time J. C. Gamble purchased the property from O. L. Gamble, then your verdict should be for the plaintiff as against both of the defendants." Charge 3: "I charge you that the defendant J. C. Gamble, in buying the property from the defendant O. L. Gamble, got no better title than O. L. Gamble had, and that, if O. L. Gamble did not have any title at the time he sold the property to J. C. Gamble, then J. C. Gamble would have no title, and if the title was in this plaintiff she would be entitled to a verdict against both defendants." Charge 5: "I charge you that in assessing the value of the cotton, if you find for the plaintiff, you will be authorized to assess the property at the highest market value proven any time since the time of the conversion under the count in trover." Charge 9: "The court charges the jury that if you are reasonably satisfied from the evidence that J. C. Gamble purchased the property in controversy from O. L. Gamble while it was in the possession of plaintiff, and that plaintiff was claiming the title to the property at that time, the purchase conveyed no title to J. C. Gamble; and if you are further reasonably satisfied from the evidence that the title of defendant J. C. Gamble is based on such purchase, you should find the issue in favor of the plaintiff as against J. C. Gamble." Charge 12: The court

charges the jury that if you are reasonably satisfied from the evidence that, at the time the property in question in this case was taken by defendant O. L. Gamble, plaintiff was in possession of the property, claiming it as hers, and that defendant J. C. Gamble had bought said property from defendant O. L. Gamble while it was so in plaintiff's possession and claimed by her, and O. L. Gamble took the property from plaintiff's possession in pursuance of said sale by him to said J. C. Gamble, and it was delivered by him to said J. C. Gamble in pursuance of such sale, then the sale to J. C. Gamble was champertous and void, and J. C. Gamble got no title to the property, and your verdict should be for the plaintiff."

The evidence tended to show on the part of the plaintiff that the property sued for was plaintiff's property; that it was in her lot, and she was claiming title to it; and that while she was away O. L. Gamble sold same to J. C. Gamble, went to the plaintiff's lot, took the property therefrom, and delivered it to J. C. Gamble, who refused to redeliver to plaintiff, and in whose possession the property was at the time this suit was begun. O. L. Gamble claimed to have bought the property from his father before the sale by him to J. C. Gamble. There was a motion for new trial, based on the refusal of the court to give certain charges and on the failure of the verdict to properly find the facts. There was judgment for defendant.

D. H. Riddle, for appellant. George A. Sorrell and T. I. Bulger, for appellees.

DOWDELL, J. This is an action of trover and conversion. To the complaint the defendants filed a joint plea of not guilty. The plaintiff filed a special replication to this plea as to the defendant O. L. Gamble. On this state of the pleading, as made by the parties, issues were joined. On the undisputed evidence in the case, under the issues as made up, the plaintiff was entitled to the general charge requested in writing against the defendant O. L. Gamble. The defendant J. C. Gamble was a stranger to the former suit set up in plaintiff's special replication, and his rights were therefore unaffected by that proceeding. The issue under which this defendant's rights were to be determined in the case was that raised by the plea of not guilty filed to the complaint. On this issue his right in the premises, not being concluded by the adjudication in the former suit between the plaintiff and the defendant O. L. Gamble, must be determined on the evidence in this trial; and, the evidence being in conflict as to the title, the question becomes one for the jury, and the court, therefore, properly refused the general charge requested by the plaintiff as to the defendant J. C. Gamble.

The doctrine that the conveyance by one claiming title to property which is held adversely by another is void as to such adverse

holder is too well settled to call for citation of authorities. If the title to the property in question was in the plaintiff at the time of the sale and delivery of it by the defendant O. L. Gamble to the defendant J. C. Gamble, then the plaintiff was entitled to recover as to both defendants. Charges requested by the plaintiff predicated on these facts were proper charges.

The measure of damages in actions of trover and conversion, where the property is not restored to the owner, is the market value of the property at the time of the conversion, and the jury may assess the highest market value at any time from the date of the conversion to the time of the trial. 4 Mayfield's Dig. subd. 13, p. 908, § 215 et seq. The fifth charge requested by the plaintiff correctly stated the law and should have been given.

What we have said sufficiently points out the errors committed in the refusal of charges requested by the plaintiff, without dealing with them in detail, and will sufficiently serve as a guide on another trial of the case. For the errors indicated the judgment will be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

PENSACOLA, A. & W. R. CO. v. BIG SANDY IRON CO. et al.

(Supreme Court of Alabama. May 17, 1906.)

APPEAL AND ERROR—RECORD—ORGANIZATION OF TRIAL COURT.

Where the record fails to show the organization of the trial court, the appeal will be dismissed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2282, 2283.]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

"To be officially reported."

Action between the Pensacola, Alabama & Western Railroad Company and the Big Sandy Iron Company and others. From a judgment in favor of the iron company and others, the railroad company appeals. Appeal dismissed.

Pitts & Pitts, for appellant. Augustus Benners and W. P. McCrossin, for appellees.

DENSON, J. It cannot be gainsaid that, "since this court acts on the transcript alone, the latter must show all the facts essential to vest the court with jurisdiction to hear the cause." Therefore it must affirmatively appear in the transcript that there was a properly organized trial court by which a lawful judgment could be rendered. *McPherson v. Wiggins* (Ala.; April 28, 1906) 40 South. 961; 2 Ency. of Pl. & Pr. p. 265, (3), and authorities in note 2; 2 Cyc. p. 1033 (11), and authorities in notes 17 and 18. This record fails to show the organization of

the trial court, and the appeal must be dismissed.

Appeal dismissed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

BIG SANDY IRON CO. v. PENSACOLA, A. & W. R. CO.

(Supreme Court of Alabama. May 17, 1906.)

Appeal from Chancery Court, Tuscaloosa County; Alfred H. Benners, Chancellor.

"Not officially reported."

Action between the Big Sandy Iron Company and the Pensacola, Alabama & Western Railroad Company. From a decree in favor of the railroad company, the iron company appeals. Appeal dismissed.

Smith & Smith and W. P. McCrossin, for appellant. Pitts & Pitts, for appellee.

DOWDELL, J. The transcript fails to show any organization of the court, and on the authority of *McPherson v. Wiggins* (Ala.) 40 South. 961, and the case of *Pensacola, Alabama & Western R. Co. v. Big Sandy Iron Co.* (decided at the present term) *supra*, the appeal is dismissed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

PELHAM v. MILLER et al.

(Supreme Court of Alabama. May 17, 1906.)

COURTS—JURISDICTION—JURISDICTION OF PERSON—WAIVER.

Where, after an action of ejectment had been transferred from the law and equity court of a county to the circuit court pursuant to an invalid act, defendant took no exception to the denial of the motion to discontinue the cause and strike it from the docket, but filed a plea of not guilty after the overruling of a demurrer to the complaint and proceeded to trial, the circuit court had jurisdiction to enter judgment; it having jurisdiction of subject-matter, and defendant submitting himself to its jurisdiction.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 147-151.]

Appeal from Circuit Court, Walker County; A. H. Alston, Judge.

"Not officially reported."

Ejectment by Mary Miller and others against John Pelham. From a judgment for plaintiffs, defendant appeals. Affirmed.

Ledbeater & Johnson and W. C. Davidson, for appellant. Bankhead & Bankhead, for appellees.

SIMPSON, J. This was an action of ejectment (statutory), commenced in the Walker county law and equity court, and afterwards transferred to the circuit court of Walker county under an act which attempted to repeal the original act establishing said law and equity court, but which act

was afterwards declared unconstitutional. *Norvell v. State* (Ala.) 39 South. 357. After the case was removed into the circuit court, a judgment by default was taken against the defendant (appellant), and on motion in said court by said defendant said judgment by default was set aside and the case restored to the docket. Subsequently, when the case came up for trial in the circuit court, the defendant interposed a motion to discontinue said cause and strike it from the docket, which motion was overruled by the court. It does not appear that any exception was taken to this action of the court, but the defendant filed a demurrer to the complaint, which was overruled. The defendant then filed the plea of "not guilty" and proceeded to trial. The jury returned a verdict for the plaintiff, and judgment was rendered thereon.

The appellant contends that the circuit court had no jurisdiction to try the case, because the act which attempted to abolish the law and equity court, and transfer cases therein pending to the circuit court, has been declared unconstitutional. The court holds that, as the circuit court has jurisdiction of the subject-matter of the suit, the defendant waived his rights and submitted himself to the jurisdiction of the court in this case. 2 Ency. Pl. & Pr. p. 639; *Byrd v. McDaniel*, 26 Ala. 582, 585; *Gager v. Gordon*, 29 Ala. 341, 344; *Aderhold v. Mayor, etc., of Anniston*, 99 Ala. 521, 523, 12 South. 472; *Ex parte Rice*, 102 Ala. 671, 675, 15 South. 450.

This being the only point insisted on by appellant, the judgment of the court is affirmed.

TYSON, ANDERSON, and DENSON, JJ., concur.

McCONNELL v. ADAIR.

(Supreme Court of Alabama. May 17, 1906.)

1. TRIAL—INSTRUCTIONS—FORM AND REQUISITES.

In an action for rent, where there was no controversy in regard to the renting and the amount of rent to be paid and the only controversy was in regard to the defense set up by the defendant, an instruction that if the jury do not believe the evidence they must find for the defendant was erroneous, as confused and misleading.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 569-576.]

2. LANDLORD AND TENANT—ACTION FOR RENT—INSTRUCTIONS.

In an action against a sublessee for rent, in which the defendant set up his right to compensation on account of interruption of his business by the tearing down and rebuilding of a wall, an instruction that, if the plaintiff paid the principal lessee a sum for the privilege of making the wall, this was evidence of damage to the party in possession was erroneous.

Appeal from Circuit Court, Walker County; A. A. Coleman, Judge.

"To be officially reported."

Action by L. L. McConnell against J. E. Adair. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Lacy & Lacy and J. A. Mitchell, for appellant. Ray, Leith & Shepherd and Acuff & McCullon, for appellee.

SIMPSON, J. This was an action for rent due under a written contract, in which judgment was rendered in favor of the defendant, and the assignments of error are to certain charges given by the court and to the action of the court in overruling a motion for a new trial.

The first assignment of error is to the giving, on request of the defendant, of the written charge: "If the jury do not believe the evidence in this case, they must find for the defendant." This is a charge which has been considered by this court several times in different lights. In *A. G. S. R. Co. v. McAlpine*, 80 Ala. 73, the evidence was without conflict that the mare had been killed by the railroad, and the question before the jury was whether the defendant had sustained its contention that the killing was without negligence, in regard to which the burden was on the defendant. The court had given the general charge in favor of the defendant, and this court said that it was proper for the court to charge the jury, on request by plaintiff, that if, "under the facts and circumstances shown in evidence, they did not believe the evidence offered by the defendant tending to acquit itself of negligence, then a verdict may be found as to the mare for the plaintiff." In the case of *Segars v. State*, 86 Ala. 59, 5 South. 558, the only witness on the part of the state was impeached by contradictory statements, and this court held that it was proper to give the charge that, "If the jury have a reasonable doubt" of the truth of the statements of said witness, they cannot convict, because "the jury are not authorized to find the defendant guilty on the evidence of a single witness upon whose testimony the question of guilt depends, if they have a reasonable doubt of the truth of his statements." In the case of *Selbold v. Rogers*, 110 Ala. 438, 18 South. 312, the *McAlpine* Case was followed, without argument, in an action of trover, as "the burden was on the plaintiff to make out his case by proof, and, if the evidence he offered in that behalf was not to be believed by the jury, there was a failure of proof entitling the defendant to a verdict. This last case came up for review and was modified in the case of *Koch v. State*, 115 Ala. 99, 22 South. 471; this court holding that in that case such a charge was properly refused, saying: "The charge is obscure, its meaning difficult to interpret, and it was calculated to confuse and mislead the jury,"—and going on to say that, as the evidence was in conflict, "the instruction predicated the finding of the defendant

not guilty, upon the disbelief by the jury of the defendant's own evidence, as well as that offered by the state. Such a charge is not in keeping with the well-established procedure for the proper determination of the issues in a cause in which a party always invites the jury to believe and avouches the truth of the evidence he introduces. He may not, therefore, in an instruction he asks, predicate a verdict in his favor upon a disbelief by the jury of his own evidence." Page 105 of 115 Ala., page 473 of 22 South.

In the case now under consideration, there was no controversy in regard to the testimony of the plaintiff in regard to the renting and the amount of rent which was agreed to be paid. The only controversy was in regard to the defense set up by the defendant, to wit, that he was entitled to compensation on account of the interruption of his business by the tearing down of the wall and rebuilding it. A charge like this would be meaningless in this case, as it would require the jury to find for the defendant, only in case they disbelieved all the evidence, upon which both parties agreed, about the renting. If it was intended to be limited to that evidence in which there was a conflict, then the entire defense would be swept away, leaving the rent contract alone and entitling the plaintiff to a verdict. It was error, then, to give such charge in this case, and there are few cases in which it is proper at all.

The court erred in giving the jury charge No. 8: "If the jury believe from the evidence in this case that the plaintiff paid Griffin \$50 for the privilege of making the walls, this is evidence of damage to the party in possession." This is not a proper way to prove damage to the defendant. The court could not say what the reasons were which induced Griffin to receive or the lessor to pay \$50 for the permission to build the wall. That could not furnish any criterion as to what damage was done to the defendant, who was in possession as sublessee under Griffin.

It is unnecessary to pass on the overruling of the motion for a new trial. The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and ANDERSON, JJ., concur.

SOUTHERN RY. CO. v. WEBB.

(Supreme Court of Alabama. May 10, 1906.)

1. CARRIERS—SHIPMENT OF LIVE STOCK—Loss—LIABILITY OF CARRIER.

Where a consignor directed the agent of a railway company in writing to ship hogs to

consignees named, and a bill of lading was furnished to the consignor, naming the persons designated by the consignor as consignees, and there was no change in the contract, but the hogs were not delivered to the consignees, but to third parties, the carrier is liable for their value.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 918, 964.]

2. TRIAL—VERDICT—CONFORMITY TO PLEADING.

In an action for the loss of hogs shipped, where the verdict awarded damages slightly in excess of the amount claimed in the complaint, the excess will be referred to interest.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

"Not officially reported."

Action by L. T. Webb against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Humes & Speake, for appellant. Virgil Bouldin, for appellee.

SIMPSON, J. This was a suit for damages on account of the failure of the Southern Railway Company to deliver certain hogs, which were shipped from Paint Rock, Ala., to the consignee at Atlanta, Ga. This case was before this court on a former appeal, and the principles of law which govern it were then fully laid down. The evidence shows, without conflict, that the consignor directed the agent of the railway company at Paint Rock in writing to ship the hogs to Askew & Mixon at Atlanta, and a bill of lading was furnished to said consignor, naming said Askew & Mixon as the consignees. There is no evidence to show any change in the contract, and it is uncontroverted that said hogs were not delivered to said Askew & Mixon at Atlanta, but were delivered to the Brady Union Stockyards.

There was no error in the giving of the general charge in favor of the plaintiff, as requested in writing. Southern Railway Co. v. Webb (Ala.) 39 South. 262.

We cannot say that the amount of the verdict was so excessive as to justify this court in saying that the trial court should have granted a new trial. The matters going to make up the amount of the damages were for the jury to consider. Although the amount of damages is slightly in excess of the amount claimed in the complaint, the former decisions of this court authorize the reference of that to interest. McWhorter v. Standifer, 2 Port. 519; Elliott v. Smith & Co., 1 Ala. 74; Kennedy & Merritt v. Young, 25 Ala. 563.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

PORTER v. STATE.

(Supreme Court of Alabama. May 8, 1906.)

1. CRIMINAL LAW—APPEAL—RIGHT TO REVIEW.

Where the merits of a case are not passed upon on an appeal, and the case is dismissed on account of the failure of some technical requirement, the party may prosecute a second appeal within the time prescribed by law.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2571.]

2. JURY—MOTION TO QUASH VENIRE.

A motion to quash the venire in a criminal case was in time, where it was after the defendant announced that he was ready for trial before anything had been done to commence the trial.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 544.]

3. SAME—IMPANELING—JURY LIST.

Where the list of regular jurors for the week served on the defendant in a murder case showed that certain names had been drawn, but an unsigned indorsement showed that they were not summoned, not having been found in the county, a motion to quash the venire was properly overruled.

Anderson and Denson, JJ., dissenting.

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

"To be officially reported."

George H. Porter was convicted of murder in the second degree, and appeals. Affirmed.

Defendant was indicted for murder in the first degree, and after announcing ready for trial, but before the trial was actually entered upon, he moved to quash the venire upon the ground that the venire contained the name of certain jurors who were drawn for that week, but who were not summoned, and upon the further ground that the venire served upon him was not signed by the sheriff of the county. The evidence showed that among the list of regular jurors served upon the defendant as having been drawn and summoned for that week appeared the names of William Walton, T. J. Davis, and William O. Davis. The indorsement of the sheriff on the venire showed that the persons whose names appeared on the regular venire had been drawn and summoned, except William Walton, T. J. Davis, and William O. Davis. The return showed that these three persons were not summoned, not having been found in the county. This return and indorsement were not signed by any one. The court overruled the motion to quash the venire and put the defendant to trial upon the venire that had been served upon him. He was convicted for murder in the second degree, and appealed.

Brown & Leper and J. W. A. Smith, for appellant. Massey Wilson, Atty. Gen., and Borden H. Burr, for the State.

SIMPSON, J. The defendant was convicted of the offense of murder in the second degree. The case was formerly before this court, and the appeal dismissed, because of the failure of the transcript to show the

judgment of the court below. It is insisted by the appellee that the dismissal of the appeal is conclusive against the right of the appellant to prosecute this second appeal to this court.

While there are some authorities to the effect that when an appeal has been dismissed the party cannot take a second appeal, in most of those cases the facts were that the appellant himself voluntarily dismissed his appeal. Without subscribing to the correctness of those cases, even to that extent, we think that the great weight of authority, which we think, also, is in consonance with the analogies of the law, sustains the proposition that where the merits of the case are not passed upon, and the case was dismissed on account of the failure of some technical requirement, the party may prosecute a second appeal within the time prescribed by law. 2 Ency. Pl. & Pr. p. 357; Groendyke v. Musgrave (Iowa) 99 N. W. 144; Robinson v. Arkansas L. & T. Co. (Ark.) 81 S. W. 609; Evans v. State Bank, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917.

The motion to quash the venire was made in time. Although the defendant had announced that he was ready for trial, yet nothing had been done to commence the trial. The motion to quash the venire was properly overruled. Although the three names mentioned were on the list, yet the memorandum, on the same paper, to the effect that those parties were not found, was a sufficient notice that those names were not included in the list from which the jury was to be selected. This was a clear, explicit notice that the names were not included in the venire, and, while it is not commended as a proper practice, yet "the defendant and his counsel were not misled thereby." The objection is technical, but not meritorious. Cole v. State, 105 Ala. 80, 16 South. 762.

The copy of the venire served upon the defendant is not required to be signed by the sheriff.

There being no error in the record, the judgment of the court is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON, TYSON, and DOWDELL, JJ., concur. ANDERSON and DENSON, JJ., dissent, on the ground that the defect in the copy of the venire was substantial.

NEAREN v. FARROW.

(Supreme Court of Alabama. May 8, 1906.)

EXECUTION—SALE—SETTING ASIDE—MOTION BY PURCHASER.

Where one purchased from an attachment defendant, after issuance of the attachment, and before the venditioni exponas, and afterwards purchased at the sale by the sheriff while an exemption claim and contest were pending, and the exemption claim was afterwards dismissed in pursuance of a compromise between the plaintiff and defendant, the purchaser, on

being substituted for defendant as the sole movant therefor, is not entitled to have the sale and venditioni exponas set aside.

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

"To be officially reported."

Attachment proceedings by L. P. Nearen against W. T. Lawson. From a judgment granting a motion to set aside a sale under the attachment, in which Thomas L. Farrow was substituted for defendant as sole movant, plaintiff appeals. Reversed and rendered.

Street & Isbell, for appellant. John A. Lusk, for appellee.

SIMPSON, J. This appeal is taken from a judgment of the circuit court granting a motion to set aside a sale made under attachment and venditioni exponas. The facts as shown by the record are that on December 23, 1903, said appellant sued out an attachment against certain real estate of W. T. Lawson, defendant in attachment. The attachment was levied December 28, 1903, and judgment rendered and venditioni exponas ordered April 22, 1904; service having been had by publication, as the defendant was a nonresident. The venditioni exponas was issued May 5, 1904, and a writ of fieri facias issued at the same time. A return was made August 30, 1904, showing that the lands were sold on June 13, 1904, at which sale the firm of Farrow, Bain & Co. (of which firm the appellee, Farrow, was a member) are reported as purchasers, and the return goes on to state: "The purchasers failed to pay the purchase money; and, there being a claim of exemptions filed, I have for the above reason failed to make deed to the purchasers." The claim of exemptions was filed May 24, 1904, and contest of same filed May 27, 1904. This claim and contest remained on the docket until October 13, 1905, when it was dismissed on a written authority signed by said Lawson dated September 23, 1904, and it was in proof that it was in consequence of a compromise by which plaintiff paid defendant Lawson \$25.

So this claim and contest were on the docket at the time of the sale, but settled and dismissed for a consideration thereafter. On the 17th day of September, 1904, the motion was filed by Lawson to vacate the levy of the attachment and execution and set aside the sale, alleging that the sale was not perfected, as shown by the return; that after the levy, and before the sale was completed, the exemption and contest were filed; also that the lands levied on and sold, or attempted to be sold, had been procured by defendant under the homestead laws of the United States, his patent dating July 2, 1904, and the debt in question having been contracted November 14, 1903. On October 14, 1905, said motion being called for trial, and the plaintiff, Nearen, presenting Lawson's release of his claim of exemptions and asking that the motion be dismissed, said

Thomas L. Farrow appeared and asked to be made a party movant to said motion, which was granted, over the objection of said Nearen; the record stating that said Farrow, "purchaser from W. T. Lawson," makes himself a party. The record goes on to state that it was shown to the court that said lands were entered by Lawson under act of Congress of May 20, 1862 (12 Stat. 392, c. 75), to procure homesteads, etc.; that final proof was made July 9, 1903, and patent issued July 2, 1904; also that on February 15, 1904, said Lawson had sold and conveyed said lands to said Farrow, who has been in possession ever since, all of which was objected to. But the court struck out the name of W. T. Lawson, and substituted therefor that of Farrow, and granted the motion, as shown by the judgment entry in the record dated October 21, 1905, from which this appeal is taken.

From these facts it will be noticed, first, that Farrow purchased from Lawson, after the issuance of the attachment, and before the venditioni exponas, and before the filing of the exemption claim; second, that subsequently, and while the exemption claim and contest was pending Farrow purchased at the sale made by the sheriff; third, that said Farrow is the only party now seeking to vacate the sale. So the only result which would follow from the granting of the motion would be to relieve Farrow from paying the purchase money, which he agreed to pay by bidding at the sale with full knowledge of all the facts. He bought the land with notice of the attachment lien on it, and then seems to have made the effort to perfect his title by purchasing under the execution and also by paying to have the exemption claim dismissed, and then to have concluded that by reason of the prohibition by section 2293, Rev. St. U. S. [U. S. Comp. St. 1901, p. 1398], of the sale of the lands of a homesteader for a debt contracted before the issuance of his patent, he had made a mistake in becoming a purchaser at the sale, because he already had a better title than he could get at that sale.

When to all this there is added the fact that this motion was commenced in the name of Lawson alone, and that he was stricken from the record as movant and the said Farrow made sole party movant, thus making an entire change of parties, we cannot see how the appellee could have any standing in court to claim a vacation of the sale. The right of amendment is limited by the rule that there cannot be "an entire change of parties," plaintiff or defendant. 4 Mayfield's Dig. p. 448, § 164. The movant, at any rate, did not bring himself within the principles of law which authorize a vacation of a judicial sale. *Nuckols v. Mahone*, 15 Ala. 212; *Goodbar v. Daniel*, 88 Ala. 583, 7 South. 254, 16 Am. St. Rep. 76; *Thomas v. Glazener*, 90 Ala. 537, 8 South. 153, 24 Am. St. Rep. 830; *McLaughlin v. Bradford*, 82 Ala. 431, 2 South. 515; *Sheffey v. Davis*, 60 Ala. 548.

The judgment of the court is reversed, and a judgment will be here rendered dismissing the motion.

Reversed and rendered.

WEAKLEY, C. J., and TYSON, and ANDERSON, JJ., concur.

STALLINGS et al. v. GILBREATH.

(Supreme Court of Alabama. April 28, 1906.)

1. APPEAL—RECORD—BILL OF EXCEPTIONS.

That the rulings on a motion for discontinuance may be reviewed on appeal, the motion, or at least the grounds thereof, and an exception to the ruling, must be presented by a bill of exceptions.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2363.]

2. JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.

A judgment on a claim of exemptions in favor of the execution defendant is conclusive in an action for wrongful seizure under the execution.

3. APPEAL—HARMLESS ERROR—TRIAL.

Where the plaintiff is entitled to the general affirmative charge on a proper issue, and the verdict is in his favor on that issue, error in respect to that issue is without injury.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4033.]

4. JUSTICES OF THE PEACE—LIABILITY—EXECUTION—WRONGFUL LEVY.

Where a constable was told by a justice of the peace to levy on goods, and was influenced thereby and made a wrongful levy, the justice was liable as a joint tort-feasor, whether he was acting in the capacity of justice of the peace or not.

5. SHERIFFS AND CONSTABLES—LIABILITY—SALE OF EXEMPT PROPERTY.

In an action for the wrongful levy of an execution, where the property sued for was the property of plaintiff, its sale after the filing, but before the trial, of an exemption claim, was conversion by the officer and all others who aided, assisted, or encouraged him in making the sale.

6. JUSTICES OF THE PEACE—LIABILITY—LEVY OF EXECUTION—EXEMPT PROPERTY.

Where a justice of the peace instructed a constable as to his duty to sell property levied on, the justice is liable for the wrongful sale only if the constable was influenced by the instructions.

7. EXECUTION—WRONGFUL EXECUTION—ACTS CONSTITUTING.

Persons authorizing an officer to make a wrongful execution, but having nothing to do with the levy or seizure, are not liable as trespassers.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 1384.]

8. TROVER AND CONVERSION—ACTS CONSTITUTING CONVERSION.

Persons who participate in the sale of property wrongfully levied on, though they are not liable as trespassers are guilty of conversion.

Appeal from Circuit Court, Marshall County, W. W. Haralson, Judge.

"To be officially reported."

Action by J. W. Gilbreath against Will Stallings and others. From a judgment in favor of plaintiff, defendants appeal. Reversed and remanded.

This was an action against Will Stallings upon his official bond as marshal and ex officio constable for damages for the wrongful levy upon goods belonging to the plaintiff. E. O. McCord and J. T. Hamrick were made parties defendant as joint tort-feasors. The evidence necessary to an understanding of the opinion is sufficiently stated therein.

The defendant requested the following written charges, which were refused: "(1) The court charges the jury that if they believe the evidence they cannot find the issues against defendant McCord on the count in trespass. (2) The court charges the jury that if they believe the evidence they cannot find the issues against defendant Hamrick on the count in trespass. (3) The court charges the jury that if they believe the evidence they cannot find the issues against defendant McCord on the count in conversion. (4) The court charges the jury that if they believe the evidence they cannot find the issues against the defendant Hamrick on the count in conversion. (5) The court charges the jury that if they believe the evidence they cannot find the issues in favor of the plaintiff on the count in conversion. (6) The court charges the jury that if they believe the evidence they cannot find the issues in favor of the plaintiff on the count in trespass. (7) The court charges the jury that, unless they are convinced to a reasonable certainty that all of the defendants and each of them are guilty of the wrong complained of, they must find the issues in favor of the defendants. (8) The court charges the jury that before they can, under the evidence, find the issues in favor of the plaintiff, they must be satisfied to a reasonable certainty that the defendants are jointly liable for the wrongs complained of in each count in the complaint. (9) The court charges the jury that if they find, under the evidence, that either or any of the defendants are not guilty of the wrong complained of, they must find the issues in favor of the defendants. (10) The court charges the jury that before they can, under the evidence, find a joint verdict in favor of the plaintiff and against the defendants, they must be reasonably satisfied that the wrongs complained of were jointly committed."

The plaintiff requested the following written charges, which were given: "(1) The court charges that the law presumes that a person in possession of property claiming it as his own is its owner, and any one who asserts the contrary must prove it by evidence which convinces the jury to a reasonable certainty. (2) If the property sued for was the property of the plaintiff, then the sale of the property after the filing of the claim of exemptions before the trial of the exemption claim would be conversion of the property by the officer and by all the others who aided, assisted, or encouraged the officer in making the sale. (3) The court charges the jury that if Biddle loaned Gilbreath \$50, with the un-

derstanding that Gilbreath should pay him one-half of the profits in place of interest, then this did not constitute a partnership, and in that event your verdict must be for the plaintiff, and his damages are the value of the property sued for, with interest down to the time of the trial. (4) The court charges the jury that, if Hamrick instructed Stallings to sell the property after the filing of the claim of exemptions, then he was acting outside the duties of his office as justice of the peace, and, if the property sued for was the property of the plaintiff, then your verdict must be for the plaintiff against Mr. Hamrick. (5) The court charges the jury that, unless the defendants have proven to a reasonable certainty that W. S. Biddle was a partner with plaintiff, then you must find for the plaintiff. (6) If Stallings wrongfully converted the property sued for, then Hamrick would be equally liable if, when the replevy bond was given, he said to Stallings, 'Now you got a bond, so go ahead and sell the goods,' or words to that effect; and if, influenced thereby, Stallings went ahead and converted the plaintiff's property by selling the same, then your verdict should be against Hamrick also. (7) The court charges the jury that if Gilbreath was in possession of the property sued for, claiming it as his own, at the time of the levy, this is *prima facie* proof of his title; and if defendant insists that any one else owned said property, or any part thereof, or any interest therein, the burden is on the defendant to prove the fact to a reasonable certainty."

E. O. McCord, for appellants. Street & Isbell, for appellee.

ANDERSON, J. In order that the rulings of the trial court may be revised upon an appeal upon a motion for a discontinuance, the motion, or at least the grounds thereof, and an exception to the ruling, should be presented by bill of exceptions. The bill of exceptions in the case at bar does not set out the motion or the grounds thereof, and we must presume that the action of the court was justified by the facts presented on the motion. *Mock v. Walker*, 42 Ala. 668; *Masterson v. Gibson*, 56 Ala. 56; *Jarman v. McMahan's Adm'r*, 37 Ala. 431.

It appears that the goods in question were seized while in the possession of the plaintiff by Will Stallings. While there is no plea of justification in the record, the defendants were permitted, without objection, to defend under an execution levied by said Stallings on the goods in question in favor of R. J. Riddle, receiver, against J. W. Gilbreath and W. S. Biddle, and sought to defeat the plaintiff's recovery upon the idea that he could not maintain the suit, as it was not his individual property, but belonged to a firm of which he was a member. The evidence also shows that after the levy was made the plaintiff, Gilbreath, lodged a claim of exemptions with Stallings to the property levied

on. The plaintiff in execution contested this claim, which resulted favorably to the said Gilbreath, the plaintiff in this action. The judgment rendered on the contest, and from which it does not appear an appeal was taken, was conclusive on the plaintiffs to the execution as well as these defendants, who are endeavoring to justify themselves upon the theory that the property levied on was not the individual property of Gilbreath and was subject to the execution. This conclusion eliminates all questions upon the charges and evidence, questioning the plaintiff's right to recover against Will Stallings, as the plaintiff was entitled to the general affirmative charge against him; and, this being true, any error that may have been committed by the trial court in respect to this issue was error without injury.

The only remaining issue is whether or not one or both of the other defendants were joint tort-feasors with the defendant Stallings, and we need consider only the assignments of error relating to this question, upon which there was a conflict in the evidence. There was no error in sustaining an objection to the statement of Hamrick, that "his entire connection with the case was that of justice of the peace." Stallings testified that he (Hamrick) told him to levy on the goods, and if he was influenced thereby, Hamrick was a joint tort-feasor, whether he was acting in the capacity of justice of the peace or not.

There was no error in permitting the plaintiff to introduce the list of goods. It was made by Coleman in his presence, and he knew it to be correct.

Charges 1, 3, 5, and 7, requested by defendants, are embraced in the discussion of the title of the plaintiff, and there was no error in their refusal.

There was no error in giving charge 2, requested by the plaintiff.

Charge 4, requested by the plaintiff, should have been refused. Hamrick may have simply instructed Stallings as to his duty to sell, or may have instructed him absolutely to sell, yet he would not be a tort-feasor, unless Stallings was actuated by such instructions in making the sale, and which fact is ignored in the charge. There was a conflict in the evidence as to Hamrick and McCord's connection with the conversion of the property, and the jury could infer from this charge that Hamrick was liable for the instructions he gave the constable, though said instructions did not influence him in making the sale.

There was no error in giving charge 6, requested by the plaintiff. It covers the point attempted in charge 4, and contains the very feature that renders charge 4 bad because of the omission.

There was no evidence whatever that McCord and Hamrick had anything to do with the levy or seizure of the property, and they could not have been joint trespassers. There was evidence that Hamrick advised

Stallings that it was his opinion that he had the right as marshal to make the levy, but that was not sufficient to make him a trespasser. *Hammon v. Fisher*, 2 Grant, Cas. (Pa.) 330. The trial court erred in refusing charges 1 and 2, requested by the defendants.

While McCord and Hamrick were not liable under the count for trespass, there was evidence from which the jury could have inferred that they aided, directed, or participated in the sale, which was wrongful, and which amounted to a conversion, and the trial court properly refused charges 3 and 4, requested by defendants.

For the errors heretofore mentioned, the judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

MAYHALL v. EDDLEMAN.

(Supreme Court of Alabama. May 17, 1906.)

APPEAL AND ERROR—RECORD—MATTERS TO BE SHOWN—ORGANIZATION OF TRIAL COURT.

Where the record on appeal does not disclose the organization of the trial court, the appeal will be dismissed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2283.]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

"Not officially reported."

Action between W. H. Mayhall and H. S. Eddleman. From a judgment in favor of Eddleman, Mayhall appeals. Appeal dismissed.

M. F. Parker, for appellant. W. T. L. Cofer, for appellee.

HARALSON, J. The record does not disclose the organization of the court, without which this court has no jurisdiction of the cause, and it must be dismissed. *McPherson v. Wiggins* (at present term) 40 South. 961. Appeal dismissed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

HOGE v. SOUTHERN RY. CO.

(Supreme Court of Alabama. April 28, 1906.)

1. RAILROADS—INJURIES TO ANIMALS ON TRACK—EVIDENCE.

In an action against a railroad for the killing of mules, evidence that a horse was killed at the same time was inadmissible.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1599.]

2. SAME.

In an action against a railroad for the killing of mules, evidence as to their speed in their lifetime was properly excluded, and if an inquiry as to the speed of the mules in running was proper at all, it would necessarily be limited to the time of the accident.

3. SAME—QUESTION FOR JURY.

In an action against a railroad for the killing of mules, the question of the engineer's negligence held one for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1627, 1637.]

Appeal from City Court of Gadsden; John H. Disque, Judge.

"To be officially reported."

Action by J. F. Hoge against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Culll & Martin, for appellant. Burnett, Hood & Murphree, for appellee.

HARALSON, J. There was no error in the ruling of the court in not allowing the plaintiff to go into the question of the striking of a horse or mare, at the same time the mules were struck. That evidence does not appear to have been material to the issue as to the negligence of defendant's servants in killing the mules.

The question as to the speed of the plaintiff's mules in their lifetime, was properly disallowed. The conditions affecting speed are too many, such as the condition of the soil, the age and physical condition of the mules, etc., to allow that inquiry at an indefinite time and place. If an inquiry as to the speed of the mules in running, was proper at all, it would necessarily be limited to the time of the accident.

The facts on the present trial were not materially different from those developed in the former trial. 37 South. 439, 141 Ala. 351.

In *L. & N. R. R. Co. v. Kelton*, 112 Ala. 536, 21 South. 819, referring to *Jones' Case*, 71 Ala. 487, it was said: "That a railroad company injuring stock by the running of its train in the nighttime at such rapid rate of speed that it is impossible, by the use of ordinary means and appliances, to stop the train and prevent the injury, within the distance in which the stock upon the track could be seen by the aid of the headlight, was guilty of negligence, which, if it caused the injury, entitled the owner to recover. That decision has been followed in several cases" (naming them).

It is also well settled, that if the engineer is competent and is keeping a proper lookout, and cannot see an approaching animal on or in dangerous proximity to the track, and it comes suddenly thereon, so close to the train that the engineer cannot stop in time to prevent the accident, the company is not liable for the injury done to the animal. *Central of Georgia R. R. Co. v. Stark*, 126 Ala. 367, 28 South. 411. Here, the evidence showed that the track at the point of the accident, was straight for more than a half mile beyond where the mules were knocked off; that the train was running 25 or 30 miles an hour; that the night was dark and rainy; and the train could not have been stopped, as the engineer stated, under 100

yards; that the mules were within 12 or 15 feet of the track when he first saw them, and running towards it. He did not think they ran down the track after getting on it over 50 yards; he did not think they ran down track 50 yards, could not tell exactly how far they ran, and could not have stopped the train before striking them; that he did all he had time to do, put on brakes and blew the whistle, but did not ring the bell or reverse the engine; but that he did everything that was necessary to do; that the engine was in good order, and he had a good headlight, obscured some by the rain, but could not see a mule 35 or 40 yards.

The evidence on the other trial and in this one, has been carefully examined. On the other trial, it was shown that the engineer was keeping a careful lookout. On this trial, there is no evidence that he was keeping such a lookout, nor is it shown that the engineer reversed or attempted to reverse the engine. On these conditions, the question of negligence *vel non*, should have been submitted to the jury, and the court erred in giving the general affirmative charge for defendant. *C. of G. R. R. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006; *Southern Ry. Co. v. Shirley*, 128 Ala. 595, 29 South. 687.

Reversed and remanded.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

MADDOX v. MADDOX et al.

(Supreme Court of Alabama. May 31, 1906.)

1. EXCEPTIONS, BILL OF—SETTLEMENT—SIGNING—RECITAL.

The concluding paragraph of a bill of exceptions, "And now comes the plaintiff, and in term time tenders the foregoing as his bill of exceptions, and asks that the same be signed, which is accordingly done," shows that the tender and the signing of the bill were contemporaneous and in term time.

2. LANDLORD AND TENANT—LIEN—ENFORCEMENT—LIABILITY OF THIRD PERSONS.

In an action for conversion of cotton seed on which plaintiff had a landlord's lien, the evidence showed that defendant was running a gin, and that the tenant carried bales of cotton there to be ginned, and left the seed with defendant and mixed with a pile of defendant's seed in his building. Defendant did not claim to be a purchaser of the seed. *Held*, that the seed was subject to the landlord's lien; only bona fide purchasers for value without notice being protected.

Appeal from Circuit Court, Coffee County; John P. Hubbard, Judge.

"To be officially reported."

Action by J. J. Maddox against W. O. Maddox and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This was an action by appellant against appellees for the conversion by them of 55 bushels of cotton seed upon which it is claimed appellant had a lien as landlord. The evidence tended to show that the ap-

pellant rented land to one Crowley and made him certain advances, all of which have not been paid; that this was for the year 1902; that there was \$54 still due him from Crowley on the said rent and advances; that during that fall W. C. Maddox, a member of appellee firm, brought a load of Crowley's cotton seed to Elba, sold them, and left the money at a certain place there for plaintiff; that plaintiff received this money, and a few days afterwards plaintiff told defendant not to bother, sell, or handle any of Crowley's crop or cotton seed. The evidence tended further to show that appellees were running a gin, and that Crowley carried two bales of cotton there to be ginned, and left the seed with appellees and mixed with a pile of appellee's seed in appellee's building. The price of seed was shown. The charge given for appellee to which exception was reserved is set out in the opinion. The concluding paragraph in the bill of exceptions is as follows: "And now comes the plaintiff, and in term time tenders the foregoing as his bill of exceptions, and asks that the same be signed, which is accordingly done."

H. L. Martin, for appellant. J. F. Sanders and Riley & Wilkerson, for appellees.

WEAKLEY, C. J. We construe the concluding paragraph of the bill of exceptions as showing that the bill was signed in term time. It is not open to the construction that it was tendered in term time and signed at a time not known. The reasonable interpretation of the language is that the tendering and the signing of the bill were contemporaneous. The motion to strike must therefore be denied.

The only insistence for appellant is that the circuit court erred in giving the following charge at the request of the defendants: "The court charges the jury that if the seed were intermixed with the seed of the defendants by Crowley, the owner of the seed, and that he was not acting for the defendants, and that defendants knew nothing of the mixing, you must find for the defendants." In view of the tendencies of the evidence, this charge should not have been given. The defendants did not claim to be purchasers. If the cotton seed, charged with a lien, went into their possession, they were mere volunteers, and the property was still charged with the lien in favor of the landlord. *Scaife v. Stovall*, 67 Ala. 237; *Foxworth v. Brown Brothers*, 120 Ala. 59, 24 South. 1. It is only bona fide purchasers for value without notice of the lien, or of facts that, if followed up, would lead to notice, that are protected. *Andrews Mfg. Co. v. Porter*, 112 Ala. 381, 20 South. 475. If the defendants obtained and enjoyed the benefit of the cotton seed, to the destruction of plaintiff's lien, and were not innocent purchasers for value without notice, then it is but just that they should be liable to plaintiff in an amount not exceeding the

reasonable value of the property, with interest, and not exceeding the indebtedness for the security of which the lien existed. Their liability would not depend upon actual knowledge of the act of the tenant in placing the seed on their pile at the gin, but would rest upon the ground that they obtained and enjoyed the benefit of property on which plaintiff had a prior charge or lien, to the destruction of such lien and to the plaintiff's consequent injury.

Reversed and remanded.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

HUGHES v. STATE.

(Supreme Court of Alabama. June 13, 1906.)
WEAPONS—PRESENTING WEAPON AT ANOTHER
—INDICTMENT—SUFFICIENCY.

An indictment alleging that accused unlawfully presented a firearm at a person named sufficiently charges the presenting of a firearm, without other words of description.

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

"Not officially reported."

Harvey Hughes was convicted of unlawfully presenting a firearm, and he appeals. Affirmed.

The indictment in this case was in the following words: "The grand jury of said county charged that before the finding of this indictment Harvey Hughes unlawfully presented a firearm at J. M. Rogers, against the peace and dignity of the state of Alabama." The defendant demurred for the following reasons: "It fails to allege the character of the firearm used. It fails to allege that the character of the firearm used by defendant was unknown to the grand jury. It fails to allege the character of the firearm used by defendant, or that the kind of firearm presented by the defendant was unknown to the grand jury. Said indictment is insufficient in law and charges no offense. Said indictment is insufficient, in that it fails to charge the defendant with presenting a firearm of like kind to that designated in the statute." The court overruled these demurrers, and the defendant, being convicted, presents this action of the court as error of record.

R. D. Crawford, for appellant. Massey Wilson, Atty. Gen., for the State.

WEAKLEY, C. J. In *Elmore v. State*, 140 Ala. 184, 37 South. 156, it was held that an indictment charging a defendant with presenting at another a gun, pistol, or other firearm was good. Since the averments were in the alternative, and under familiar principles each alternative averment must have been sufficient to support the indictment, the case necessarily ruled that it was sufficient to charge the presenting of a firearm, without other words of description. Upon the au-

thority of that case it must be here held that no error was committed in overruling the demurrer to the indictment.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

WESTERN RY. OF ALABAMA v. MITCHELL.

(Supreme Court of Alabama. June 14, 1906.)

1. RAILROADS—INJURIES TO ANIMALS—ACTION—PLEADING—COMPLAINT—SUFFICIENCY.

In an action against a railroad, a count of the complaint claiming damages for the killing of mules by the negligence of defendant in running a train of cars or locomotive on defendant's track was not demurrable on the ground that it assumed as a matter of law that the running of a train of cars or locomotive was negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1551.]

2. SAME.

A count alleging that defendant was on a certain date engaged in the operation of a railroad and of locomotives and cars in a specified county, and that one of the agents of defendant in charge of a locomotive negligently operated it between certain stations and by reason thereof ran said locomotive against two mules, was sufficiently specific as to the place of the accident, and otherwise good as against a demurrer on the ground that the count failed to allege with sufficient certainty what servants were guilty of negligence, and on the ground that it failed to allege with sufficient certainty that the servants were guilty of negligence.

3. SAME.

A count alleging that defendant was engaged in operating a railroad, and so negligently conducted its business that a locomotive ran against two mules and caused their death, was sufficient as against a demurrer on the ground that the count failed to show what locomotive inflicted the injury, that it failed to show by whom the engine was operated, and that it failed to show with sufficient certainty that the alleged negligence proximately contributed to the injury.

4. APPEAL—HARMLESS ERROR—RULINGS ON DEMURRERS.

Any error in sustaining demurrers to special pleas was harmless, where the facts alleged therein were available under the general issue.

5. RAILROADS—INJURIES TO ANIMALS—ACTION—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

In an action against a railroad for the killing of animals, a showing that a train was running in the nighttime with a headlight not having sufficient capacity to illuminate the track so that the engineer might perceive obstructions for a distance within which the train could be stopped showed negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1482.]

6. SAME.

Where a locomotive engineer drove his train forward at the rate of 40 or 50 miles an hour, though he saw a fog bank ahead of the train at a considerable distance before reaching it, and after entering the bank animals on the track were killed, though he could not have seen the animals in time after entering the fog bank, he was guilty of gross negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1484-1488.]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"To be officially reported."

Action by John D. Mitchell against the Western Railway of Alabama. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action for damages, brought by appellee against appellant for the negligent killing of two mules. The complaint contains five counts, and is in the following language: "(1) Plaintiff claims of the defendant \$500 as damages for the negligent killing, by an engine, locomotive, or car of the defendant, of two mules, property of the plaintiff, on, to wit, May 1, 1903, at a place on the track of the defendant between Scott and Merritt Station, about one-half mile from said Scott Station, in Montgomery county, Ala. (2) Plaintiff further claims of the defendant \$500 as damages, for that the defendant, through its agents or servants in charge of one of its engines, on, to wit, April 21, 1903, at a place on the track of defendant between Scott and Merritt Station, in Montgomery county, Ala., negligently ran said engine against two mules of the plaintiffs, thereby causing their death, to the damage of plaintiff as aforesaid. (3) Plaintiff further claims of the defendant the sum of \$500 as damages for the killing of two mules, the property of the plaintiff, by the negligence of the defendant in running a train of cars or locomotive on the track of defendant, on, to wit, April 21, 1903, at a place between Scott and Merritt Station, in Montgomery county, Ala. (4) Plaintiff further claims of the defendant the sum of \$500 as damages, and plaintiff avers that the defendant was on, to wit, April 21, 1903, engaged in the operation of a railroad and of locomotives and cars thereon in the county of Montgomery, and one of the agents, servant, or employes of the defendant in charge of a locomotive so negligently operated such locomotive on said road between Scott and Merritt Station, in said county, and by reason thereof then and there ran said locomotive against two mules, the property of the plaintiff, thereby causing the death of said mules, to the damage of plaintiff as aforesaid. (5) Plaintiff further claims of the defendant \$500 as damages, for that the defendant on, to wit, April 21, 1903, was engaged in operating a railroad in the county of Montgomery, Ala., on which said road it operated engines, locomotives, and cars; that on, to wit, said day and date, in the county of Montgomery, Ala., and at a place on the track of the defendant between Scott and Merritt Station, in said county, it so negligently conducted its said business that a locomotive of the defendant ran against two mules, the property of the plaintiff, and caused their death, to the damage of the plaintiff as aforesaid."

The defendants interposed the following

demurrers to these counts. To the first count: "Because it fails to show with sufficient certainty who, if any one, was guilty of the alleged negligence; because it assumes that an engine, locomotive, or car could of itself be negligent; because it fails to show whether it was an engine, locomotive, or car that was negligent." To the second count: "Because it fails to show that the said agent, servant, or employe who is alleged to have been guilty of negligence was at the time acting within the scope or range of his employment." To counts 1 and 2 separately: "Because they fail to show negligence on the part of any one for whom the defendant would be liable." To the third count: "Because it fails to show negligence on the part of any one for whose act the defendant would be liable; because it fails to show with sufficient certainty that the defendant was guilty of any negligence; because it assumes as a matter of law that the running of a train of cars or locomotives is negligence." To the fourth count: "Because it fails to aver with sufficient certainty what servants or employes of the defendant are guilty of negligence; because it fails to aver with sufficient certainty that said servants or employes were guilty of negligence; because it fails to aver with sufficient certainty where said injury occurred." To count 5: "Because it fails to show or aver what engine, locomotive, or car, or what train of cars, inflicted the injury complained of; because it fails to show or aver by whom said engine, locomotive, or car was operated at the time of the injury, but alleges that it was done by the defendant, which is alleged to be a corporation, and could not, without the assistance of some person, operate said locomotive, engine, or car; because it fails to show with sufficient certainty that the alleged negligence proximately contributed to or caused the injury complained of." The demurrers to count 1 were sustained, and demurrers to counts 2, 3, 4, and 5 were overruled.

The defendant filed the following pleas: (1) The general issue. (2) That the engineer of said train was keeping a proper lookout and discovered the animals as soon as he could; that after he discovered them he used all the means known to skillful engineers, such as reversing the engine and applying the brakes, to prevent injuring them. (3) "And for further answer to the complaint, the defendant says that the engineer in charge of the train which killed the plaintiff's animals was keeping a diligent lookout ahead of his engine, and discovered said animals as soon as it was practicable for him to do so, and as soon as he perceived them on the track he used all the means within his power known to skillful engineers, such as applying the brakes and reversing the engine, in order to stop the train." (4) That the engineer in charge of the train

which killed plaintiff's animals was keeping a diligent lookout ahead of his engine, and discovered said animals as soon as it was practicable for him to do so, and as soon as he perceived them on the track he sounded the cattle alarm and used all the means within his power known to skillful engineers, such as applying brakes and reversing his engine, in order to stop the train. (5) That said animals came suddenly upon defendant's railroad track upon the left hand thereof, and so close to the engine or train that the engineer could not stop in time to prevent injuring them.

Plaintiff demurred to plea 2 as follows: "It presents nothing but the general issue. It fails to aver that the engine or locomotive which killed the mules was properly equipped. It fails to aver that the engineer sounded the cattle alarm or gave other warning of his approach before the accident. It fails to aver that he did his duty after the discovery of danger to the mules. It fails to aver that the engineer was keeping a proper lookout. It fails to aver that the engineer did anything to frighten the mules off the track. It fails to deny negligence on the part of defendant's agents, servants, or employees in charge of the engine. It fails to aver that the engineer used due diligence to discover the peril of the mules. It fails to aver that the engineer was keeping diligent and proper lookout for the animals." To the third, fourth, and fifth pleas of defendant plaintiff demurred, and assigned separately all the grounds assigned to plea 2, and the following additional grounds: "It fails to aver that the engine was properly equipped. It fails to aver that defendant's engineer sounded the cattle alarm or gave other warning of his approach. It fails to aver that he was running the train at such a rate of speed that he could have stopped the same in time to prevent injury when the animals were first discovered on the track. It fails to aver that the mules suddenly ran upon the track in front of the engine. It shows on its face that the mules were on the track and that the engineer, when he discovered them, was running his engine at such a rate of speed as to have been unable to stop the same. It fails to aver that at the time of the discovery of the peril to plaintiff's mules the engineer was running the engine with due care. It presents nothing but the general issue." These demurrers were sustained, and issue was joined on the general issue.

The evidence showed the killing of the mules by one of defendant's trains on its track between two stations in Montgomery county, together with the value of the mules. The evidence for the defendant tended to show that the mules were killed by train No. 97, which is a limited mail train carrying two mail cars and two coaches, equipped with all modern improvements and having the best known headlight. The engine and

train were managed by a proper complement of men. The engineer was shown to have been of 32 years' experience in operating a locomotive. The engineer testified: That there was a strip of smoke extending across the track beyond which he could not see, and that just before he reached this strip of smoke he was sitting on the box looking ahead down the track. The headlight enabled him to see an object 400 yards ahead of him. That as he passed the strip of smoke he saw the mules coming up the bank onto the track right at the end of a trestle, and that as soon as he saw them he blew the cattle alarm, applied the brakes, and reversed the engine. When he first saw them they were about 200 feet away, and the train was running 40 or 50 miles per hour, and it was impossible to stop the train going at that rate of speed within that distance. "With the headlight I had, I could see an object the size of a mule or cow far enough ahead of me to have stopped the train running at that rate of speed before hitting the object."

In his oral charge to the jury the court said: "There is one other proposition in the case. The contention of the defendant is that there was a wall of fog or smoke. Witnesses spoke of it as smoke, and then they said it may have been fog, and then said it may have been fog or smoke. They do not know. Anyhow, the proposition is that there was a wall of fog or smoke hanging over the creek where the railroad crossed it, and that so obscured the engineer's sight down and along the railroad as that he could not see the mules in time to prevent injury to them. I state the law of that situation to be as follows: If there was this wall of smoke or fog hanging there over the railroad track, obscuring the view of the engineer, and it could have been discovered in time to warn the engineer in order that he might approach it with caution, and he failed to do it—failed to approach it with caution, in order to avoid possible injury to what might have been beyond it—and he failed to do it, then that would not be the exercise of due care and caution, and as a necessary consequence, or probably a better statement of the same proposition, if seeing the wall of fog or smoke there across the road, beyond which with the use of the lamps he had he could not see, he dashed on through it without regard to the consequences to what might be on the other side, then in that case the railroad would be responsible in my judgment, and I so charge you to be the law in this case." The defendant excepted to the above portion of the court's oral charge.

The defendant then requested the court in writing to give the following charges, which the court refused: "(1) If the jury believe all the evidence in this case, they must find for the defendant. (2) Under the evidence in this case no duty devolved on the engineer to check the speed of his train on account

of the strip of smoke or fog testified to by McWaters under the circumstances testified to by him. (3) If the jury believe from the evidence in this case that the engineer in charge of the engine and train which killed the plaintiff's mules was prevented from seeing said animals in time to stop the train and prevent the injury on account of a narrow strip of smoke or fog which had settled on defendant's track between the approaching engine and train and said mules, and that as soon as said engineer did or could by due diligence have discovered said animals on or near said track he did discover them and used all the means in his power known to skillful engineers, such as applying brakes and reversing the engine, in order to stop said train, they must find for the defendant. (4) There was no negligence in running the train at the rate of speed shown by the evidence in this case. (5) If the jury believe from the evidence that the engineer was keeping a diligent lookout ahead of his engine, and that he was prevented by a strip of smoke or fog from seeing the said animals until within about two hundred feet of them, and that he then blew his whistle, reversed his engine, applied his brakes, and did everything known to skillful engineers to prevent the injury, they must find for the defendant. (6) If the jury believe from the evidence that the engineer was prevented from seeing the animals by a strip of smoke or fog until it was too late for him to prevent injuring the animals by the use of all means known to skillful engineers, such as reversing his engine, applying the brakes, and blowing his whistle, they must find for the defendant. (7) The court charges the jury that under all the evidence in this case the engineer in charge of the engine was not guilty of negligence in stopping or slackening the speed of his train before he reached the smoke or fog across the track. (8) The court charges the jury that under all the evidence in this case there was no duty on the engineer in charge of the engine to discover the animals killed until he had passed the obstruction to his view caused by the smoke or fog across the track. (9) It makes no difference how the animals traveled on the track, whether they walked or ran, or whether they were on the track at all before they were struck, if the engineer could not have seen them by keeping a vigilant lookout until he was so near them that it was impossible for him to prevent killing them: and if this be true, the defendant is not liable.

George P. Harrison, for appellant. Hill, Hill & Whiting, for appellee.

WEAKLEY, C. J. The third count of the complaint is good. *E. T., Va. & Ga. R. Co. v. Carliss*, 77 Ala. 443. It is not open to the criticism that it assumes the running of any train of cars or locomotive upon the defendant's track would be negligence. Fairly construed, the meaning is the same as if

it had alleged that the plaintiff's mules were killed by reason of the negligence of the defendant in and about the running of its train, etc.

The fourth count was sufficiently specific as to the place of the accident, and was otherwise good. The *Carliss* Case, *supra*, relied on by appellant to support the proposition that the averment in the fourth count of the locus is not definite enough, was decided under a statute which has been repealed by its omission from the Code.

The demurrer to the fifth count was properly overruled. The count is as full and specific as many that have been sustained by this court. *Central of Ga. Ry. Co. v. Edmondson*, 135 Ala. 338, 33 South. 430, and cases there cited. The count avers that the negligence of the defendant in the manner specified caused the death of the mules, and thus shows the causal connection between the negligence and the injury.

The special pleas, to which demurrers were sustained, alleged only such facts as were available under the general issue, and hence the defendant suffered no injury in any event from the rulings on demurrer. *L. & N. R. Co. v. Hall*, 131 Ala. 161, 32 South. 603. Furthermore, the defendant actually introduced under the general issue the evidence that would have been admissible and that it would doubtless have offered under the special pleas.

The general rule is settled in this state that it is per se negligence as a matter of law for a railroad company to run its trains in the nighttime with a headlight not having sufficient capacity to cast light upon the track so that the engineer may perceive obstructions for the distance within which the train can be stopped. Inasmuch as animals may run at large, and therefore may at any time appear in dangerous proximity to the track, those operating trains must be on the lookout so as to discover animals in positions of peril, and must be likewise diligent to avert injury to them when their peril becomes apparent. When a bank or wall of fog or strip of smoke appears ahead of the train and across the track, hiding from view objects that may be beyond it on or near the track, common prudence should suggest to the engineer that he do not plunge heedlessly on, with undiminished speed, reckless of consequences, but that he secure control of the train, and proceed with caution and care commensurate with the danger, until the usual conditions are restored. Whether any particular rate of speed is negligent must depend upon the conditions and circumstances under which the train is operated. "When anything in the surrounding conditions suggests care in the operation of a railroad train to avoid perils and dangers to others, the higher the duty increases to observe it." *B. M. R. Co. v. Harris*, 98 Ala. 334, 13 South. 377. It was admitted by the engineer that he continued to drive

his train forward at the rate of forty or fifty miles an hour, with no effort to check the speed, as if no unusual condition existed, although he saw the fog bank at a considerable distance before reaching it, and must have known that if nothing was done to diminish the speed it would be impossible to avert injury to stock, should any be on or near the track beyond the obstruction. This was not due care. It was gross negligence. *A. G. S. R. R. Co. v. Jones*, 71 Ala. 487; *Central R. R. & Bank Co. v. Ingram*, 98 Ala. 395, 12 South. 801; *Ala. Midland Ry. Co. v. McGill*, 121 Ala. 230, 25 South. 731, 77 Am. St. Rep. 52.

The portion of the court's general charge to which an exception was reserved was in harmony with these views. The defendant was not entitled to the general charge, and all the other charges requested by the defendant were properly refused, because they ignored the duty of the engineer to check the speed of the train, or asserted that it was sufficient to excuse the defendant if the engineer could not have seen the animals by keeping a vigilant lookout until he was so near them that it was impossible to prevent killing them, without reference to his preceding negligence in approaching and entering the fog bank at the speed and under the circumstances shown.

The verdict was neither unsupported by, nor was it against the weight of the evidence, and hence no error was committed in denying the motion for a new trial.

There is no error in the record.
Affirmed.

TYSON, DOWDELL, and SIMPSON, JJ., concur.

(117 La.)

Nos. 16,030, 16,154.

In re JONES.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 26, 1906.)

APPEAL—DEATH OF APPELLANT—DISMISSAL—COSTS.

Where, pending an appeal from a judgment of interdiction, the appellant interdict dies, the suit abates, and the appeal must be dismissed. In such a case no judgment can be rendered, and each party must pay his own costs.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1846, 1847.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durleve King, Judge.

In the matter of the interdiction of H. R. Jones. From a judgment of interdiction, she appeals. Dismissed.

See 41 South. 89.

Johnston Armstrong, William Winans Wall, and Charles Schneidan, for appellant. Carroll & Carroll, Meyer Solomon Drefus, and Richardson & Soulé, for appellees.

LAND, J. Mrs. H. R. Jones was interdicted by judgment of the district court, from which she took a suspensive appeal to the Supreme Court. An appeal was also taken by her from the judgment homologating the account of the curator pro tem.

The death of the appellant pending the argument of the case in this court has been suggested, and a motion filed to dismiss the appeal. The motion must prevail. See *In re Lambert*, 115 La. 460, 39 South. 447.

The suit having abated, no judgment can be rendered therein, and each party must pay his own costs.

It is therefore ordered that the appeals herein taken be dismissed.

(117 La.)

No. 15,690.

PAYNE & JOUBERT v. BOWIE LUMBER CO., Limited.

(Supreme Court of Louisiana. June 4, 1906.)

1. SALE — GUARANTY — COMPLIANCE WITH TERMS.

Where a mechanical apparatus is guarantied, on a certain condition, the condition must be complied with in order to enforce the guaranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 793-796.]

2. SAME—ACTION FOR PRICE—DEFENSES.

When the contractee has operated a mechanical plant long enough to test it, and has made specific demands, all of which have been complied with, and has finally expressed a willingness to settle the account of the contractor, provided the latter complies with a demand arising out of another transaction, with different parties, objections, urged on the trial of the suit for the price of the plant, that it had not been completed according to contract, are not entitled to favorable consideration.

(Syllabus by the Court.)

Appeal from Twentieth Judicial District Court, Parish of Lafourche; Louis P. Callouet, Judge.

Action by Payne & Joubert against the Bowie Lumber Company, Limited. Judgment for plaintiffs, and defendant appeals. Affirmed.

Howell & Martin, for appellant. Henry Laurence Lazarus, for appellees.

MONROE, J. Plaintiff sues for a balance of \$1,937.01, alleged to be due on a contract for the erection of four steam kilns, for drying lumber, and for a balance of \$781.60, due on open account for merchandise sold. Defendant admits that it owes the balance claimed on open account, but denies that the contract sued on has been executed, and, by way of reconvention, sets up a claim for damages, to the amount of \$2,808.40, alleged to have been sustained by reason of its non-execution.

The facts, as we find them from the record, are as follows:

In October, 1901, the parties hereto en-

tered into a contract, containing, among others, the following stipulations, to wit:

"Payne & Joubert * * * agree with the Bowie Lumber Company, Limited., to furnish them four Globe steam kilns, of the circulating system, * * * to be as per specifications appended below, * * * to furnish all the iron-work necessary to make the kilns complete, on the inside, of the best material and workmanship. * * * The apparatus to consist of headers, corrugated pipe rests, trucks No. 2 [and here follow further details]; to make the kilns complete, on the inside, in first class workmanship manner. * * * It is understood that Payne & Joubert will furnish the Bowie Lumber Company, Limited, a competent man to superintend putting up the apparatus, at \$3 a day, railroad fare, to, and from, New Orleans, and board, if they should want a man to superintend putting up said apparatus. It is further understood that Payne & Joubert will furnish competent pipe fitters, to install the apparatus in the buildings, at the regular price of pipe fitters per day, their board and railroad fare, * * * final payment to be made on these kilns after same have been fully constructed, tested and in working order. * * * It is agreed * * * that, if any items are not enumerated in the above-written contract which are necessary to the full operation of the above-named apparatus of these kilns, * * * the parties, of the first part [Payne & Joubert] are to supply the same at their cost.

"Guaranty: Payne & Joubert guaranty these kilns to dry as much one-inch cypress lumber in twenty four hours as any other kilns constructed on the circulating plan. It is understood that the Bowie Lumber Company, Limited, is to carry the temperature and operate the kilns as Payne & Joubert or their representative may direct, and to carry 80 pounds of steam pressure on the kilns."

The kilns were assumed to be in working order, and the defendant began operating them in February, 1902 (probably before the middle of the month), and, on February 21st, plaintiff wrote to defendant's representative; in part, as follows:

"What is the status of our contract with you, now, on the new kiln which you have lately started up? Have you tested it sufficiently to your satisfaction so that we may collect the outstanding indebtedness on the same?"

To this, defendant, through Mr. Wigginton, its secretary-treasurer and manager, replied:

"We have not tested the kilns sufficiently as yet to know if they will give satisfaction, but expect to make some little changes which will have the effect of getting better service out of them, and we think, by the end of next week, we will be in a position to give you a decisive answer. The writer expects to see Mr. Downman [the president of the company] within the next few days and talk the matter over with him and endeavor to reach some conclusion at an early date, so that we will be in a position to make you a final settlement after proper deductions have been made, for freight allowance to Bowie, faultily constructed track, lighter rails than contract called for, missing fish plates and bolts, and iron washers for outside of building, instead of wooden ones as put in by your men."

Letters were then exchanged, on February 24th and 26th, in which each of the parties expressed the belief that a pleasant settlement "would soon be effected." Thereafter, it appears that the defendant become dis-

satisfied with the valves which controlled the steam pressure (and the temperature) at the kilns, and the plaintiff agreed to supply others, and, on April 7th, plaintiff wrote:

"We have your favor of the 4th, containing information regarding * * * valves, for which we thank you. It is our intention to forward your letter to the factory in substantiation of the claim which we have put in that they should take them back. Referring to the * * * valves which we agreed to furnish you in place of these, we beg to advise that they were shipped from the factory * * * on March 28th, and we expect to receive them daily. * * * We believe that, after you will have received these new valves, we will have satisfied every claim that you have made on us previous to the settling of your account. We therefore inclose a complete statement of your account, as it now stands on our books, with credit memoranda covering every item as specified by your Mr. Wigginton to our Mr. Joubert. The inclosed credits are as follows [here follow a number of credits, and statement of balance due—\$2,720.39, after which, the writer proceeds]. We believe that the balance which is obtained, after allowing all your claims, is due in accordance with your books; the only amount in dispute being an item of \$164 for curtain doors, which matter we will take up, direct, with Mr. Downman."

To this letter, defendant replied next day (April 8th):

"Yours of the 7th received with inclosed credit memoranda, which we find to be correct, as per the memorandum given your Mr. Joubert in New Orleans. We are glad to know that you expect to ship the * * * valves to us shortly, as the ones we have on now are certainly giving us a great of trouble, to say nothing of the damage that has been caused to our stock on account of their defective working. With this valve matter settled, we believe the only question between us is the matter of curtain doors, and, as you say in your letter you will take it up with Mr. Downman, direct, we will await his instructions before sending you check to cover balance. I will take this matter up with Mr. Downman as requested."

The valves referred to in this correspondence were duly furnished, and no question as to their sufficiency is raised in this suit. The curtain doors were doors to be made of canvass and covered with asbestos, which defendant wanted (instead of doors of some other material) for the openings in the kiln buildings; but, as plaintiff's contract required them to furnish only that which was necessary to make the kilns complete "on the inside," they were under no obligation to furnish them. It was, perhaps, after the letter last above quoted was written that a conference took place, in the office of Mr. Downman, at which were present Messrs. Downman, Wigginton, Graham, Dallas, Joubert, and De Pass. Downman and Dallas occupied, respectively, the same relations to the Iberia Cypress Company, Limited, as Downman and Wigginton occupied to the defendant company. Graham was in defendant's employ. Joubert is one of the plaintiffs, and De Pass was and is plaintiffs' engineer, under whose directions the kilns here in question, as also a kiln for the Iberia Cypress Company, Limited, had been put up,

and, whilst one of the purposes of the conference, no doubt, was to discuss the business between plaintiffs and defendant (otherwise Wigginton's presence would have been superfluous), it is, nevertheless, a fact that the burning question of the moment was the business between plaintiffs and the Iberia Company. Joubert and De Pass testify that Downman and Wigginton expressed themselves as pretty well satisfied with the Bowie kilns, and that Downman admitted, in effect, that they had not been properly operated. Downman and Wigginton deny the expressions and admissions attributed to them, and say that the purpose of the meeting was to make some arrangement "about getting these kilns adjusted and working properly." Downman says, in his testimony:

"I may have made the statement that the kilns could be made all right, but I never gave any expression or idea that the kilns were all right or satisfactory."

Wigginton says:

"They were after us for a settlement. Mr. Joubert and myself, a few days previous to that, had gotten together and fixed up our accounts, as far as our books agreed together, and I told him that the kilns were not giving us proper results, and Mr. De Pass arranged to go out there and see if something could not be done to relieve the situation; so that, a few days after, he did go out to Bowie and took some measurements there to put ventilators in the dry ends of the kilns, thinking that would make them work properly. It was my impression, at the time, that the moist air was hanging around the dry ends of the kilns, having no outlet to it, thereby absorbing itself into the lumber instead of escaping out of the buildings. Q. Well, did you at that meeting express satisfaction with the working of these kilns? A. No, sir."

Dallas testifies that he stated his troubles (with the Iberia kiln), and that Wigginton stated his (with the Bowie kilns), and that he does not remember that either Wigginton or Downman expressed satisfaction, or that either of them said that the Bowie kilns dried one-inch lumber satisfactorily. Graham, the only other person who was present, appears not to have been within reach, and was not examined as a witness. It is a fact beyond dispute that plaintiffs did put ventilators in the dry ends of the kilns shortly after this conference, a fact which indicates, upon the one hand, that the kilns had not been absolutely accepted, as the result of the conference, and, upon the other, that Wigginton, at least, must have found the cause of complaint, whatever it may have been that was suggested by him, after writing the letter of April 8th, since, in that letter, he states distinctly that the matter of the valves being arranged there was nothing between plaintiffs and the settlement of the balance of their account, save the question of the "curtain door." It seems to us, therefore, that the idea of the conference was that, whilst the Bowie kilns were fairly up to the requirements of the contract, it was

thought advisable that plaintiffs should examine them and give them a finishing touch, and that this idea subsequently materialized in the form of additional ventilators; and this view of the matter is confirmed by two circumstances, viz.: (1) That, as a fact, there had never been a uniform pressure of 80 pounds of steam maintained upon the pipes in the kiln, which pressure was required as a condition of plaintiffs' guaranty (the evidence showing that the pressure varied from 100 to 30 pounds, during each period of 24 hours); and (2) that on April 26th (after the conference, and, as we infer, after the ventilators were put in), Mr. Downman, as president of the Iberia Cypress Company, Limited, wrote plaintiffs as follows, to wit:

"Referring to contract which your firm made with us to put up kilns and lumber stacks at our mill located in New Iberia, La., I beg to now make demand upon you for the sum of \$3,000 to cover the loss of time, expense, and damage done us by the insufficiency of the work put in by you, and the unnecessary and extraordinary delays caused by your dilatory methods of doing business. I would like for you to hand me your check for above amount, and *we will come to a speedy settlement of any account that may be due you, there or elsewhere, by our companies.*" (Italics by the court).

It appears, therefore, that, as a last word, the defendant was withholding settlement of the claim for putting up the Bowie kilns as a club, or lever, with which to force a satisfactory settlement of the difference between plaintiffs and the Iberia Company with regard to kilns and stackers contracted for with that concern. It is true that there has been a great deal of complaint (from defendant's customers) about the condition of the lumber turned out by its kilns, but, as it is conceded that the kilns have never been operated in accordance with the terms of plaintiffs' guaranty, we must presume that the trouble lies in the method of operating them rather than in the kilns themselves. It is also true that the engineer, who has charge of the engines which supply the steam for the kilns, testifies that, with 100 pounds pressure, he is unable to obtain the proper temperature in kiln No. 1.

But we find it remarkable that, in that state of affairs, defendant, after operating the kilns for two months, or more, should not have mentioned that circumstance in the letter of April 8th, or in the conference, of a later date, and that, on April 26th, the president of the company should have expressed a willingness to make a speedy settlement of the account for putting up the kilns, provided the matter of the Iberia Company should be settled.

In fact, we search the record in vain for any demand upon the plaintiffs with regard to the kilns in question (save the unfounded demand for curtain doors) that has not been complied with. Upon the other hand, defendant promptly made the first payment of \$2,000 called for by the contract, and made

the second payment, of \$2,500, in cash, when it might have given its 60-day note for the amount, or, if the contract had not been complied with up to that time, might have withheld the payment entirely, and we are inclined to think that this litigation would not have arisen but for the confusing of the business transactions of one corporation with those of another.

For the reasons thus assigned, the judgment appealed from (whereby the plaintiffs are awarded the amount claimed by them, and the demand of the defendant is rejected) is affirmed, at the cost of the defendant and appellant.

(117 La.)

No. 16,074.

STATE v. COOK et al.

(Supreme Court of Louisiana. June 4, 1906.)

1. CRIMINAL LAW — VERDICT—RECOMMENDATION TO MERCY.

Where the defendant was found guilty of manslaughter and recommended by the jury to the mercy of the court, such a recommendation is no qualification of the verdict, and must be considered as mere surplusage.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2108.]

2. HOMICIDE—SENTENCE.

The quantum of punishment in such a case is confided to the sound discretion of the trial judge, and cannot be deemed excessive when within the limitation prescribed by law.

3. SAME—MANSLAUGHTER.

In all trials for murder, the judge is required to charge the jury that they may find a verdict of manslaughter, and homicide by poisoning forms no exception to the general rule.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 650-654.]

4. CRIMINAL LAW—INSTRUCTIONS.

Special charges are properly refused when covered by the general charge or where their omission therefrom is favorable to the defendant. The bill of exceptions should contain such a recital of facts as to show the materiality and pertinency of requested special charges.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011; vol. 15, Cent. Dig. Criminal Law, §§ 3161, 3165.]

5. SAME—APPEAL—REVIEW.

Objections to letters admitted in evidence, cannot be considered when they are not annexed to a bill of exceptions or included in the transcript of appeal. Non constat that their admission worked prejudice to the accused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2831-2833.]

(Syllabus by the Court.)

Appeal from Seventh Judicial District Court, Parish of Richland; William Jefferson Gray, Judge.

Manford Cook and Bettie E. White were indicted for murder, and from a conviction of manslaughter, White appeals. Affirmed.

Levy & Todd, David Todd, and Cherobusco Newton, for appellant. Walter Gulon, Atty. Gen., and John R. McIntosh, Dist. Atty. (Lewis Gulon and George Wesley Smith, of counsel), for the State.

LAND, J. On April 15, 1905, the grand jury of Richland parish returned a true bill for murder against the defendants.

At the November term following a severance was ordered by the court on the motion of the state. Both of the defendants excepted.

On November 23, 1905, a motion for change of venue was made by counsel for Mrs. White. This motion was tried and overruled, and defendants excepted.

The case against Mrs. White was tried, and the result was a mistrial.

At the March term of court in 1906, Mrs. White was again tried, and the jury found her guilty of manslaughter, and asked for her the mercy of the court.

A motion for a new trial was overruled, and the court sentenced Mrs. White to imprisonment at hard labor for the term of 20 years. From this sentence defendant has appealed.

It appears from the record that the deceased, W. H. White, died from the effects of poison, and that his widow, Mrs. Bettie E. White, and her codefendant, Manford Cook, were charged with the commission of the crime.

Mrs. White's defense seems to have been that her husband was a constant user of morphine, strychnine, and other poisonous drugs, and that he came to his death by his own hands.

In considering the case, we will discuss the points in the order in which they are raised in defendants' brief.

No. 1.

The first objection is that the sentence is excessive, and not responsive to the verdict, which recommended the defendant to the mercy of the court. The jury had nothing to do with the quantum of punishment, and the sentence did not exceed the maximum penalty prescribed by law in such cases.

The recommendation to the mercy of the court was no qualification of the verdict, and was mere surplusage. *State v. Bradley*, 6 La. Ann. 555; *State v. O'Brien*, 22 La. Ann. 27; *State v. Rosa*, 26 La. Ann. 75.

No. 2.

The defendant excepted to the following charge given by the judge to the jury:

"In all cases, where the charge of murder is preferred, the jury, can, under the law, return a verdict for manslaughter."

The argument is that the defendant was charged with murdering by poisoning, and that the offense necessarily implied premeditation and excluded the passion which is the essential element of manslaughter. Hence, the jury should have been charged that they could find the defendant guilty or not guilty of murder, and that they could not find her guilty of manslaughter.

The charge was in strict conformity with the provisions of section 785 of the Revised Statutes of 1870, and its omission would have been a fatal error. *State v. Brown*, 40 La. Ann. 725, 4 South. 897; *State v. Clark*, 46 La. Ann. 704, 15 South. 83; *State v. Jones*, 46 La. Ann. 1395, 16 South. 369; *State v. Thomas*, 50 La. Ann. 148, 23 South. 250.

No. 8.

After the judge had given his charge in writing to the jury, counsel for defendant requested the following special charges:

"That it must be shown to the satisfaction of the jury in such case: First, * * * That the accused administered the poison herself; or, second, * * * that she procured another to administer it; or, third, * * * that the accused stood by and advised, abetted, or induced another to administer it; or, fourth, * * * that she procured and placed the poison where the deceased could get it with intent that the deceased should take it."

The court refused to give the special charges requested for the reason that they were fully and amply covered by the general charge.

The written charge contains all the usual instructions given on murder trials.

The jury was told that in order to convict the defendant of murder the evidence should satisfy their minds beyond a reasonable doubt that the deceased was killed by the defendant, "willfully and with premeditation and deliberation."

In a subsequent part of the charge the judge said:

"In order to convict the defendant of the crime of murder, in the event that you find that William H. White was killed, it is not necessary to show that defendant actually administered the poison, but it would be sufficient if it should show that the defendant was present and aiding and abetting another to commit the offense. In such event, she would be as guilty under the law as the person who did administer the poison. Or, if you should find that the defendant entered into an agreement or conspiracy to take the life of the deceased, and pursuant to that intent and according to the common design, one of the persons took his life, the defendant, though not present, would be as guilty under the law as if she had taken his life."

The first and third subdivisions of the special charges are clearly embraced in the general charge. The fourth subdivision is included in the general proposition that the defendant herself killed the deceased. If not, the general charge was more favorable to the defendant than the requested special charge "that she procured and placed the poison where the deceased could get it with

the intent that the deceased should take it."

The second subdivision, "that she procured another" to administer the poison, is fairly embraced in the general charge relative to an agreement or conspiracy "to take the life of the defendant."

Both of these requested charges imply that the defendant may be convicted of murder by poisoning, though absent at the time when the poison was administered or taken, while the general charge instructs the jury to convict in such a case on satisfactory proof of "an agreement or conspiracy" to take the life of the defendant.

Hence, if these two requested special charges are not embraced in the general charge, there is no error shown to the prejudice of the defendant as their omission increased the chances of her acquittal.

While our statutes forbid the trial judge "to give any opinion as to what facts have been proved or disproved" (Rev. St. § 991), he is not required to charge abstract propositions of law. The defendant was either present or absent when the poison was administered to her husband or was taken by him.

If she was present, the second and fourth special charges presented purely abstract propositions of law which had nothing to do with the case, and if she was absent, the first and third special charges were inapplicable.

The bill contains no recital of facts tending to show that the special charges were pertinent to any particular phase of the evidence.

The ruling of the trial judge, if not correct, worked no prejudice to the defendant.

No. 4.

The state offered in evidence two letters purporting to have been written by the defendant, which were admitted over the objections of her counsel, who reserved a bill of exception to the ruling of the court.

The two letters referred to are not annexed to the bill of exceptions, and are not to be found in the transcript. We have no means, therefore, of determining the materiality of the contents of said letters. Non constat that their admission worked prejudice to the defendant. *State v. Farrier*, 114 La. 579, 38 South. 460.

There are other bills of exception in the record, which are not noticed in the brief of counsel for defendant, and are therefore presumed to have been abandoned. On their face, they seem to be without merit.

Judgment affirmed.

(117 La.)

No. 16,034.

WOOD v. NEW ORLEANS RY. & LIGHT CO.(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 18, 1906.)**STREET RAILROADS—COLLISION WITH HOSE CART.**

Collision between a fire hose carriage going to a fire and a street car. Upon the facts, the car is found not to have been negligent, and the defendant company not liable.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Henry M. Wood against the New Orleans Railway & Light Company. Judgment for plaintiffs, and defendant appeals. Reversed and suit dismissed.

Harry Hinckley Hall, for appellant. John Joseph Reilley and St. Clair Adams, for appellees.

PROVOSTY, J. St. Philip and Royal streets cross each other at right angles, and are narrow streets. At 2 o'clock in the night, one of the electric cars of the defendant company was going up Royal, and a fire hose carriage, on which plaintiff was riding, was going to a fire at full gallop along St. Philip street. The car ran into the hose carriage at the intersection of the two streets, and injured plaintiff.

Defendant denies that the car was negligent, and pleads the contributory negligence of the hose carriage.

The learned counsel for plaintiff argue that the hose carriage was not guilty of contributory negligence, inasmuch as the apparatus of the fire department of the city is given, by state statute and by city ordinance, the right of way over the highways and streets. But that question could come up only in the event the car were found to have been negligent, and we have reached the conclusion that it was not.

The negligence of the car is sought to be deduced, as follows: That it is a fact known to everybody in the city of New Orleans that a hose carriage follows in the wake of every fire engine going to a fire; that, in the present instance, a fire engine had just passed this crossing, about 150 feet ahead of the hose carriage, and that the motorman must have seen the engine, and known that the hose carriage was close behind; that the gongs both of the engine and the hose carriage—large, loud-sounding, 14-inch, rotary gongs—were being rung continuously; and that, in the stillness of the night, these gongs, which ordinarily can be heard a distance of several squares, must have been heard by the motorman.

We must say that it is strange the motorman should not have seen this engine, unless, indeed, the distance between it and the hose carriage was greater than would appear from the evidence; and that it is even more strange

that he should not have heard the gong of the hose carriage, unless the witnesses are mistaken in saying that it was being rung. But his positive testimony is that such was the fact, and he is corroborated by the testimony of a witness who sat on the front seat of the car, and who says that he was in a position to have seen the engine if it had passed a short distance ahead of the hose carriage, and that he did not see it, and that he did not hear the gongs.

Though improbable, it may be that the engine was not emitting sparks when it traversed the street, and that it could not otherwise be seen in the night, and it may be that the noises of the clattering engine and hose carriage, and of their noisy gongs, were drowned by the closer noises of the moving car and of its gong, which was being sounded all the time.

We should hesitate the more to set aside the verdict of the jury, if it were not that we cannot but believe that, if this motorman had either seen this engine or heard the gong of the hose carriage, he would have been prompted by his sense of self-preservation, if by nothing else, to take all due precautions. As the event proved, he came very near being seriously hurt—the vestibule or the car was crushed in, and he pinned in the wreckage.

Assuming that this engine was not seen, and the gong of the hose carriage not heard, by the motorman, there is nothing left in the case from which negligence on the part of defendant could be predicated. The motorman had duly taken off his power, and had the car well under control, for approaching the crossing, as is demonstrated by the fact that the car came to a full stop within its own length.

Judgment set aside and suit dismissed.

(117 La.)

No. 16,064.

STATE v. FREDDY.(Supreme Court of Louisiana. May 7, 1906.
Rehearing Denied June 18, 1906.)**1. INCEST—ESSENTIALS.**

The concurrence of both parties is not essential to incest.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Incest, § 6.]

2. WITNESSES—CRIMINAL CASES—COMPULSORY ATTENDANCE.

Where the accused has made the required oath, he is entitled to summon witnesses beyond the statutory six, as matter of right.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 2-4.]

3. WITNESSES—KNOWLEDGE—PART OF CONVERSATION.

A witness need not have heard the entire conversation, but may testify to the part he has heard.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 85.]

Land, J., dissenting.

(Syllabus by the Court.)

Appeal from Seventh Judicial District Court, Parish of Richland; William Jefferson Gray, Judge.

J. H. Freddy was convicted of crime, and appeals. Reversed.

Ellis & McGregor, for appellant. Walter Guion, Atty. Gen., and John R. McIntosh, Dist. Atty. (Lewis Guion, of counsel), for the State.

PROVOSTY, J. Defendant was convicted of incest, and sentenced to 20 years at hard labor. The accusation is that he had sexual intercourse with his daughter without her consent.

His first reliance is upon the refusal of the court to charge that consent of both parties is essential to incest.

The question thus raised is presented to this court for the first time. It was not considered in the case of *State v. De Hart*, 109 La. 570, 33 South. 605.

For the definition of our crimes, we are referred by the act of 1805 to the common law of England, as it existed at that date; but incest was not a crime cognizable at common law in 1805 (*State v. Smith*, 30 La. Ann. 846); and hence our statute making it a crime must be interpreted unaided by the light of the common law. It is Act No. 78 of 1884, p. 101, and reads as follows:

"An act to define the crime of incest and provide for the punishment thereof.

"Whoever shall hereafter knowingly intermarry, or cohabit without marriage, being within the degrees of consanguinity within which marriage is prohibited by articles 94 and 95 of the Revised Civil Code of the state of Louisiana, shall be deemed guilty of the crime of incest."

The question to be considered is whether the word "cohabit," as used in this statute, implies, or not, the concurrent will of the parties.

Summarized, the argument of the learned counsel for defendant is that whether we read this statute in the light of the definition of the word "cohabit," or in the light of the motives underlying its enactment, or in the light of numerous decisions of the courts of sister states, interpreting similar statutes, we are bound to understand it as requiring the consent of both parties. That the definition of cohabit, both by the dictionaries and the courts, is "to dwell together as husband and wife," which describes a relation implying the consent of both parties. That the motive of the statute is twofold: To guard against degenerate offspring, and to avoid the scandalous spectacle of persons so nearly related holding themselves out to the world as husband and wife; and that neither of these things is possible unless both parties are consenting. That the following decisions hold that the consent of both parties is an essential element of incest, to wit: *People v. Jenness*, 5 Mich. 305, 321; *De Groat v. People*, 39 Mich. 124; *People v. Burwell*, 106 Mich.

27, 63 N. W. 986; *People v. Skutt*, 96 Mich. 449, 56 N. W. 11; *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321; *State v. Eding*, 141 Mo. 283, 42 S. W. 935; *State v. Jarvis*, 20 Or. 457, 26 Pac. 302, 23 Am. St. Rep. 141; *Noble v. State*, 22 Ohio, 545; *State v. Thomas*, 53 Iowa, 214, 4 N. W. 908; *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691; *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; and *State v. Fritts*, 48 Ark. 66, 2 S. W. 256.

As illustrative of the meaning of the word "cohabit," the learned counsel cite the decision of the Supreme Court of the United States in the case of *Cannon v. United States*, 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561, where, interpreting the statute against polygamy, the court said that:

"The offense of cohabiting with more than one woman is committed by a man who so associates with two women as to hold them out to the world as his wives, and it is not essential to the commission of the crime that he should have had sexual intercourse with either of them."

From this, the learned counsel deduce the conclusion that sexual intercourse is not essential to incest; but that the crime is committed by the parties if, without any act of sexual intercourse, they merely hold themselves out to the world as living together as husband and wife.

We are not impressed by this argument. The etymological meaning of the word "cohabit" is simply "to dwell together." The acquired meaning varies, necessarily, with the connection in which the word is used. In the present statute, we think the meaning is simply that of sexual intercourse, as in our laws upon marriage and legitimacy. The statute and these laws may be said to be kindred legislation; the statute merely, as it were, adding the sanction of punishment to the prohibitions contained in these laws against the union of persons within the prohibited degrees of relationship.

When the statute makes use of the expression "shall intermarry, or cohabit without marriage," it uses the word cohabit in the same sense as do the articles 188 and 189, Rev. Civ. Code, when they speak of the possibility of the husband's "cohabiting" with his wife. These articles do not use the word in the sense of the possibility of the husband's "dwelling with his wife," or of the possibility of his "holding her out to the world as his wife," but simply of the possibility of his having access to her. *Tate v. Penne*, 7 Mart. (N. S.) 548-555.

Article 111 of the Code provides that a marriage celebrated without the free consent of both parties may be annulled, provided the parties have not "freely and without constraint cohabited together after recovering their liberty."

Commenting on the corresponding article of the Code Napoleon, which, unlike ours, requires that the cohabitation shall have lasted six months, Marcadé says:

"Tact ratification results, according to terms of article 181, from a cohabitation continued during six months after the recovery of liberty, or after the discovery of the error. It could not be found in any other circumstances whatever. Thus, the pregnancy of the woman, even if occurring after the discovery of the error, or after the recovery of liberty, would be inefficacious. For this pregnancy simply proves that there has been cohabitation; whereas, it is not any kind of cohabitation that the law requires, but one that has continued for six months."

Thus, the great commentator uses the word "cohabitation" in the sense of congress. And our article 111 manifestly uses it in the same sense. No one could doubt that a marriage would be ratified by the voluntary cohabitation of the parties in the sense of sexual intercourse, irrespective of any dwelling together.

So far as concerns the underlying motives of the statute, we need not go elaborately into them. Suffice it that we know that the statute has been dictated by the moral sense of the community, to which the sexual intercourse of persons within the prohibited degrees is abhorrent. Beyond the ascertainment of the existence of this moral sense, and that it was it that dictated the statute, we see no use in going. Beyond that point, the question ceases to be one of law, or of the interpretation of statutes, and degenerates into one purely of sociology. The inquiring student, however, who wishes to know why such unions are deemed unnatural, and why they are offensive to the moral sense of modern society, will find the matter fully discussed in connection with the laws that fix the degrees of relationship within which marriage is prohibited. The French commentators are copious on the subject, and Montesquieu, *Esprit des Loix*, book 26, c. 15, is interesting. The sexual intercourse within the prohibited degrees is just as offensive to the moral sense of the community if accomplished by force or fraud as if accomplished by consent, and, hence, is as much within the spirit of the statute in the one case as in the other.

Coming to the decisions of the courts of other states interpreting statutes on the subject of incest, we note, first of all, that these decisions can be of assistance only in so far as the reasoning by which they are supported is applicable to our statute. In other words, incest not being a common-law crime, these decisions have no common-law authority. As observed by Mr. Wharton, in speaking of incest: "From the reason that the subject is generally absorbed by statute, no decision of its common-law character is to be cited." *Crim. L.* (7th Ed.) § 2669a. If we consult these decisions, however, we find them to be fairly divided. See *A. & E. E. of Law*, vol. 16, p. 135. To the list there given may be added the recent cases of *Davis v. People* (Ill.) 68 N. E. 540, and *People v. Stratton* (Cal.) 75 Pac. 166—both

well-reasoned decisions, and against the necessity of consent.

The decisions on the affirmative side of the question are all based upon the phrase "with each other," found in the statutes they interpret, from which, it is thought, there arises an implication of the necessity of concurrent consent. Those words are not found in our statute. Though, it must be confessed, an implication of the necessity of concurrence results just as strongly from the single word "cohabit," since the cohabitation cannot but be "with each other." But the aim of the statute is to prevent the unnatural sexual intercourse, and this intercourse exists none the less if accomplished against the will of one of the parties, and the act is none the less incest because it happens also to be rape.

The defendant presented the following motion duly sworn to:

"Defendant in this case now moves the court for a subpoena for Mrs. Tom Johnson residing in this parish. Represents that he has already six witnesses summoned on his part, but now finds that the said Mrs. Johnson is a material and important witness on his behalf, shows that he expects to prove by said Mrs. Johnson that the general character of the prosecuting witness in this case is very bad and corrupt, and that, if the testimony of this witness is submitted to the jury, he believes that they will give very little, if any, weight to the testimony of said prosecuting witness."

The court denied the motion for the following reasons:

"By the Court: The application was refused for the following reasons, to wit: Defendant has already summoned the number of witnesses allowed by law, and for the further reason that in the opinion of the court the application and affidavit was insufficient and the evidence inadmissible."

The learned judge does not say wherein this application is insufficient, and for our part we are unable to see why it should have been considered so. It seems to conform with Act No. 67 of 1894, p. 78. What is expected to be proved by the witness is stated, and also why and how the same is material, and the application is sworn to. True, it does not say how far the witness resides from the courthouse, but it does say that she resides in the parish, and Richland is not a very large parish, and the parish seat is in the center; and, moreover, the Attorney General says in his brief that the witness resided only 10 or 12 miles from the courthouse. Distance, therefore, offered no good reason for refusing the application. As a matter of fact, there proved to be abundant time to get the witness. The motion was offered on Monday morning, and the defense did not close its evidence until Tuesday afternoon. The motion did not call for a postponement of the trial.

The impeachment of the prosecuting witness, the main, if not the only, witness against him, was very important to the ac-

cused, and evidence as to the general character of the prosecuting witness was certainly not inadmissible. *State v. Guy*, 106 La. 8, 30 South. 268.

Because the defendant had already summoned six witnesses was good reason for making the application, but surely no reason for refusing it. The statute says that the party "shall not be allowed to summon more than six witnesses, unless" the showing is made. This can only mean that, where the showing is made, the right to the summons follows as a matter of course. In all cases where the application is in due form, perhaps the safer rule for our brethren of the district bench would be to grant it; and to put off the consideration of its timeliness until application comes for postponement or suspension of the trial to await the arrival of the witness or the returns of the sheriff. It can then be known with more certainty whether there was or not time to secure the presence of the witness, and whether therefore the application was timely. We will add that we are not to be understood as saying that the showing in this case was sufficient for a postponement of the trial, but simply for ordering the subpoena to issue.

On this ground the judgment will have to be set aside, and the case remanded.

The next objection is to the ruling permitting a witness to testify to a conversation of which he had heard only a part. The ruling was correct. *State v. Allen*, 111 La. 154, 35 South. 495; *State v. Daniels*, 49 La. Ann. 967, 22 South. 415; *State v. Vallery*, 47 La. Ann. 182, 16 South. 745, 49 Am. St. Rep. 363; *Elliott on Evidence*, § 241, note 174; *A. & E. E. of L.* vol. 1, p. 722; 16 Cyc. 1037, note 14.

The next objection is stated differently by counsel and the judge, and this court must accept the statement the judge. The statement of counsel is that the prosecuting witness and other witnesses for the state having testified that the defendant had always been unreasonably severe with the prosecuting witness, his daughter, the defendant was denied the right to testify to the reason why he had been thus severe. The statement of the judge is that this matter of the severity of the defendant was brought out by the defendant himself on the cross-examination of the state's witnesses, and that it was an irrelevant matter. Under these circumstances, the ruling was correct. The defendant cannot cross-examine the state's witnesses as to irrelevant matters, for the purpose of afterwards contradicting them, or for the purpose of opening the door to testimony on such irrelevant matters. That is a plain proposition.

The misunderstanding between the judge and counsel in regard to the giving of a written charge is not likely to occur again, and hence need not be gone into.

Judgment is set aside, and case remanded for trial.

LAND, J., dissents from the ruling on point of defendant's legal right to summon the witness during the trial, but otherwise concurs in the opinion.

(117 La.)

No. 15,854.

STATE ex rel. ARKANSAS SOUTHERN R. CO. et al. v. KNOWLES et al.

(Supreme Court of Louisiana. May 21, 1906. Rehearing Denied June 22, 1906.)

1. TAXATION — RAILROAD AID TAX — COLLECTION.

Where, under article 242 of the Constitution of 1879, and Act No. 35, p. 44, of 1886, and Act No. 153, p. 191, of 1894, upon the petition of property taxpayers, and agreeably to the promulgated result of a special election, a tax of five mills is levied, for 10 years, in aid of the construction of a railroad, such tax is to be collected each year, during the term thus fixed by the petition and election, upon the basis of the assessment of each year.

2. MUNICIPAL CORPORATIONS—AID TO RAILROADS—ELECTION—PETITION.

Under article 242 of the Constitution of 1879 and Act No. 35, p. 44, of 1886, and Act No. 153, p. 191, of 1894, the petition of the property taxpayers calling for an election upon the question of a tax in aid of the construction of a railroad need not specify the amount to be raised, the law mentioned being, in that respect, complied with when the petition designates a rate, or percentage, and a period, of taxation within the limits fixed by it, and such rate or percentage receives the requisite votes at the election.

(Syllabus by the Court.)

Appeal from Fourth Judicial District Court, Parish of Lincoln; Robert Brooks Dawkins, Judge.

Application by the state, on the relation of the Arkansas Southern Railroad Company and others, for a writ of mandamus to George Knowles, assessor, and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Holstead & Atkinson, for appellants police jury and interveners. Andrew Augustus Gunby, for appellees.

Statement.

MONROE, J. It appears from the record in this case that in December, 1897, agreeably to article 242 of the Constitution of 1879, and to Act No. 35, p. 44, of 1886, and Act No. 153, p. 191, of 1894, the taxpayers of the parish of Lincoln voted a special, annual tax of five mills, for 10 years, on the assessed valuation of the property of the parish, in aid of the construction of a railroad; it being stipulated, in the petition calling for the election, that the tax should be levied and collected in the same manner as other taxes assessed in the parish, and paid over to the railroad company, or its assigns, or successors, whenever the road should have been completed to the town of Ruston. The result of the election was promulgated by the police jury in January, 1898,

at which time, also, that body ordered that the tax should be levied, for 10 years, whenever the railroad should have been completed, and put in operation, from Junction City to Ruston, and, the road having been so completed and put in operation in December, 1899, the police jury, in January, 1900, and in the same months of the years 1901, 1902, 1903, 1904, 1905, levied the tax for those years, respectively, with the other taxes of the parish. In July, 1905, however, an ordinance was passed relieving the taxes for the year, with the exception of the railroad tax, and repealing the ordinance which had been adopted in January, in so far as it conflicted with the ordinance thus, subsequently, adopted, and the assessor, assuming, apparently, that the prior ordinance had been entirely repealed, and failing and refusing to extend the railroad tax on his rolls, the assignees of the tax, with whom is joined the railroad company to which it was voted, bring this suit to compel him, by mandamus, to do so, praying, also, for certain relief under the writ as against the sheriff and the police jury. The sheriff answers that he has always been ready to collect any taxes that are assessed, but the assessor and the police jury, appearing together, after setting up certain defenses which have not been insisted on in this court, for answer, say that the petition of the taxpayers and the ordinance levying the tax do not specify the amount of money to be raised, and hence that no tax was, or could have been, legally voted or levied; that, if any tax was legally voted, the aggregate amount to which relators are entitled is to be ascertained by multiplying the proceeds of the tax as predicated on the assessment for the year 1897 by the number of years during which such tax was to be levied, and, upon that basis, that relators would be entitled to \$19,373.60, in addition to what they have already received, which amount can be realized, as they allege, from a tax of 1.62 mills per annum during the remaining years of the taxing period, even assuming that the assessments should not be increased. And, in this defense, the respondents are joined by certain citizens and taxpayers of the parish, who have intervened for that purpose.

It is admitted that interveners paid the tax in question without contest up to the date of the filing of this suit; that the assessment of the parish of Lincoln for 1897 was \$1,373,465, and that for 1905 it was \$2,390,979; that the total amount of the railroad tax, levied, assessed, collected, and paid over, for the years 1900, 1901, 1902, 1903, 1904, was \$44,299.69; that the railroad was completed to Ruston in December, 1899, and, shortly afterward, to the southern boundary of the parish, and is now being extended southward, from Winnfield, in the parish of Winn; and that its construction and operation have "been of immense benefit and advantage to the property holders of Lincoln Parish," in

which parish the population, capital, and values have largely increased within the past five years. It is further admitted that the Alexandria, Junction City & Shreveport Railroad Company, to which the tax was originally voted, consolidated with, and assigned its interest therein to, the Arkansas Southern Railroad Company; that the company last named, which is incorporated under the laws of Louisiana, built the railroad, "as specified in the petition of taxpayers and ordinance of the police jury"; that the tax was levied and collected in the name of the company up to the year 1905; and that said company has assigned its right thereto to its correlators in this suit, the evidence showing that the assignment was made for value received.

The learned judge a quo, in a well-considered opinion, reached the conclusion that the ordinance adopted by the police jury in January, 1905, had not been repealed by the later ordinance, in so far as the levy of the railroad tax for the year 1905 was concerned, and that the sheriff had not refused to collect such tax, and hence that there was no reason for issuing a mandamus against either of those parties, and he, accordingly, dismissed the proceedings as against them, made the writ peremptory as against the assessor, and rejected the demands of the interveners. From this judgment, the police jury and the interveners have appealed, and relators have answered, praying that the judgment be amended by ordering the police jury to levy the tax for the remaining years of the taxing period.

Opinion.

Article 242 of the Constitution of 1879 authorized the enactment of laws for the levying of special taxes, upon the vote of the taxpayers, in aid of public improvement or railway enterprises, provided that such taxes should not exceed the rate of five mills per annum, nor extend for a longer period than ten years. Act No. 35, p. 44, of 1886, being an act to carry into effect the article thus mentioned, contains the following, among other, provisions, to wit:

"Section 1. * * * That, whenever one third of the property tax payers * * * shall petition the police jury to levy a special tax in aid of any railway company or corporation, organized under the laws of this state, the said police jury shall order a special election to be held for that purpose and submit to the property tax payers * * * the rate of taxation and the purpose for which it is intended. * * *

"Sec. 2. * * * That the petition mentioned in section 1 of this act shall be in writing, shall designate the railway company, or corporation, and the percentage of the tax to be levied each year, and the number of years, not exceeding ten, during which it shall be levied. * * *

"Sec. 4. * * * That if a majority in number and in value of the property tax payers * * * shall vote in favor of such levy of said special tax, then the police jury, for, and on behalf of, the parish, * * * shall immediately pass an ordinance levying such tax, and

for such time as may have been specified in said petition, and shall designate the year in which such tax shall first be levied and collected. * * *

"Sec. 6. * * * That the police jury * * * shall, when the vote is in favor of the levy of such taxes, levy and collect, annually, in addition to other taxes, a tax upon all taxable property * * * sufficient to pay the amount specified to be paid in such petition, and said police jury shall have the same power to enforce and collect any special tax that may be authorized by such election as is, or may be, conferred by law upon them for the collection of other taxes, which taxes, so collected, shall, from time to time, as the same are collected, be paid to the railway company or corporation named in such petition, or to such person, or persons, or partnership, or other company or corporation, to which the same may have been assigned.

"Sec. 7. * * * That the right to receive the whole or any portion of such taxes may be assigned and transferred by such railway company, or corporation to any person or partnership, or other company or corporation, and such person, partnership, or other company or corporation shall have the same right to enforce the collection and payment of such taxes as such railway company or corporation would have had if such assignment had not been made. * * *

Act No. 153, p. 191, of 1894, merely extends the provisions of the act of 1886, which relate to elections in parishes, cities, and towns, to "parish wards." The petition of the taxpayers in the instant case prays that an election be ordered pursuant to the statutes above mentioned, and the vote of the property taxpayers be taken on "the question of levying a five mill tax, for 10 years, on the assessed valuation of the property of Lincoln parish, in aid, and to aid, the Alexandria * * * Railway Company in building a railroad * * * and to levy an annual tax of five mills per annum on the dollar of the assessed valuation of all the property in Lincoln parish, in each year, for a period of 10 years, in aid of said railroad as aforesaid. Said tax, so levied, to be collected as other taxes assessed in Lincoln parish, and the same paid over direct to the railroad company or its assigns or successors. The said tax to be levied and collected when said railroad has been constructed or completed to the town of Ruston, in said parish, and the same paid over as aforesaid to the said company."

Whether the taxpayers could legally have voted and bound themselves, or the property in the parish, for an amount, payable in 10 annual installments equal to the proceeds of a five mill tax to have been levied for 10 years upon the basis of the assessment of 1897, is a question which seems to us to present very serious practical difficulties, and one which need not be answered, since it is plain that, what, in point of fact, the property taxpayers of Lincoln parish did, was to vote the entire proceeds of a five mill tax, to be collected annually during 10 years, in the same manner as the taxes of the parish, and this they were authorized to do by the law,

both constitutional and statutory, and, having done, must abide by. It may be remarked in this connection that the other parties interested in the matter evidently believed, and acted in the belief, that the entire proceeds of the tax had been voted, since relators, as late as 1903, in consideration of the assignment of the tax to them, released the railroad company from, and assumed, in its stead, obligations amounting to over \$80,000. The learned counsel for the respondent seem to rely for the support of their position upon the decision of this court in the case of *Bennett v. Police Jury*, 113 La. 68, 36 South. 891. But that was a case, arising under article 232 of the Constitution of 1898, and Act No. 131, p. 31, of that year, in which it appeared that a special tax had been voted for the purchase of grounds and the building of a schoolhouse, and in which it was held that, under the statute mentioned, it was essential that the petition of the taxpayers should have stated the amount proposed to be realized, each year, from the tax. After calling attention to several points of differences between the two cases, and after quoting section 2, of Act No. 131, p. 191, of 1898, and the corresponding section (2) of Act No. 35, p. 44, of 1886, the judge *quo*, in his able opinion, says:

"As will be seen by reference to these two sections, the act of 1898 requires that the amount of each year's tax to be levied be set forth in the petition, while, in the act of 1886, it is the percentage of the tax to be levied each year that is required to be set forth in the petition. * * * Percentage and amount are not equivalent words, but percentage and rate are, in many instances, convertible terms. The taxpayers who voted the special tax in favor of the Alexandria * * * Railway Company evidently understood the word 'percentage' to mean 'rate,' for, in their petition, they set forth the rate that should be annually collected."

We concur in this view, and may add that, if it should be said that the words "percentage of the tax to be levied each year," as used in the act of 1886, mean the "proportion of the tax of five mills which is authorized by law, and hence that the petition in the instant case should have designated the proportion of that tax intended to be levied, the answer is that the petition so designates the whole of the five mills, and that such designation is strictly within the meaning of both the statute and the Constitution. We also concur with our learned Brother in the opinion that the ordinance of January, 1905, in so far as it levies the tax here in question, is not repealed by the ordinance adopted in July of that year, and, as the police jury had complied, so far as it could, at that time, with section 4 of the act of 1886, by levying the tax, for the whole period, immediately after the taxpayers had voted in favor of such tax, and had complied with section 6 of that act, by making the annual levy for the year 1905, there is no immediate duty now resting on it, the performance of which can be enforced

by mandamus. There are some other points presented, which, however, in view of the conclusions reached, we find it unnecessary to decide.

Judgment affirmed.

NICHOLLS, J., takes no part, not having been present when the case was argued.

(117 La.)

No. 16,104.

In re BAURENS.

STATE v. BAURENS.

(Supreme Court of Louisiana. May 21, 1906.
Rehearing Denied June 18, 1906.)

1. HUSBAND AND WIFE—FAILURE OF HUSBAND TO SUPPORT.

It is the duty of the husband and father to provide for the support of his wife and minor children, in necessitous circumstances, at the matrimonial domicile, and that obligation is not discharged, if, by reason of his cruel treatment, the wife is compelled to find shelter, with her minor children, at the residence of her father, in a neighboring parish; nor does any change of venue, as to the offense of neglecting to provide, etc., as denounced by Act No. 34, p. 42, of 1902, result from those conditions.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 11, 124.]

2. SAME—CRIMINAL OFFENSE.

Act No. 34, p. 42, of 1902, contemplates that a man shall, at all times, provide for the support of his wife and minor children, in necessitous circumstances, and his neglect to do so, during a period of time not covered by a conviction already secured under that act, is a distinct offense as to which the plea of autre fois convict predicated on such conviction is not good.

3. CRIMINAL LAW—APPEAL—REVIEW.

This court is without authority, whether in the exercise of its supervisory jurisdiction or otherwise, to review the findings of an inferior court, in a criminal prosecution, upon a question of fact, and hence will not undertake such review, where, in a prosecution under Act No. 34, p. 42, of 1902, the trial judge has found that "the circumstances and financial ability" of the defendant are such as to warrant his being condemned to pay a certain amount for the support of his wife and child.

4. HUSBAND AND WIFE—SUPPORT OF WIFE—CRIMINAL PROSECUTION.

The pendency, on appeal, of an action by the husband for separation from bed and board, can have no effect in the matter of the execution of a sentence imposed on the husband, in a criminal prosecution, for neglect to provide for the support of his wife, and a fortiori is this true, where, by the judgment appealed from, the demand for separation was rejected.

(Syllabus by the Court.)

Application by Jean Marie Baurens for writs of certiorari and prohibition, to review conviction of failing to support his wife. Dismissed.

Francis Rivers Richardson, for relator.
Respondent judge, pro se.

Statement of the Case.

MONROE, J. Relator invokes the supervisory jurisdiction of this court, on the ground that the judgment of which he

complains is unappealable, and that he is, otherwise, without remedy. And he alleges, in substance, that he was charged before the district court for the parish of St. Bernard, under Act No. 34, p. 42, of 1902, with failure to provide for his wife and child; that he (1) pleaded to the jurisdiction of the court, on the ground that his wife and child reside in the parish of Orleans, which parish was, therefore, the situs of the alleged offense, and that the plea was overruled; that he then (2) presented a plea of autre fois convict, on the ground that he had previously been convicted of the same offense and had complied with the sentence imposed on him, which was also overruled; that he was then tried and convicted, and was sentenced to pay \$20 per month for the support of his wife and child and to furnish bond to secure compliance with the sentence (3) though it was shown on the trial that he was, and is, earning but \$15 a month, together with the use of a house to reside in and the provisions required by him; and that (4) he "thereupon" filed a motion in arrest of judgment, alleging that his conviction should be set aside, on the ground that he had sued his wife for separation from bed and board, for abandonment, and that she had been summoned and condemned to return to the matrimonial domicile, and that it had been shown that he was willing there to receive and support her, according to his means, and that she had failed and refused to return, but that the motion had been overruled, wherefore he prays for the writs of certiorari and prohibition, etc.

It appears from the return of the trial judge, and the record made part thereof, that the matrimonial domicile is in the parish of St. Bernard, but that relator's wife had been compelled by the cruelty of her husband to find shelter, with her child, at the residence of her father, in the parish of Orleans; that relator had been convicted, in 1904, of failing to provide for their support and sentenced to pay \$20 per month, in that behalf, for one year, and that he had complied with the sentence, but that he had been charged with, thereafter, failing to make such provision, and "that the only fact which is the same in both cases is her [the wife's] reason for not returning to her husband," which is, the cruel treatment received by her at his hands, prior to her being forced to leave her home; that, in substance, relator is in receipt of an income sufficient to warrant the sentence imposed; and that, in the suit for separation, there has been rendered a final judgment, rejecting relator's demand, from which an appeal is now pending in this (Supreme) Court.

Opinion.

1. It is the duty of the husband and father to provide for the support of his wife

and minor children, in necessitous circumstances, at the matrimonial domicile, and that obligation is not discharged if, by reason of his cruel treatment, the wife is compelled to find shelter, with her minor children, at the house of her father in a neighboring parish, nor does any change of venue, as to the offense of neglecting to provide, etc., denounced by Act No. 34, p. 42, of 1902, result from that circumstance.

2. Act No. 34, p. 42, of 1902, in denouncing as an offense, the neglect of a person to provide for the support of his wife and minor children, in necessitous circumstances, and in providing the penalty of a fine not exceeding \$100, or imprisonment not exceeding one year, or both, and in further providing "that, before trial (with the consent of the defendant) or after conviction, instead of imposing the punishment hereinbefore provided, or, in addition thereto, the court, in its discretion, having regard to the circumstances and financial ability of the defendant, shall have power to pass an order, which shall be subject to change by it, from time to time, as circumstances may require, directing the defendant to pay a certain sum weekly for the space of one year, to the wife, and to release the defendant from custody, on probation, for the space of one year, upon his entering into a recognizance, with or without surety, in such sum as the court shall direct," contemplates that a man shall, at all times, provide for the support of his wife and minor children, in necessitous circumstances. And his neglect to do so, during a period of time not covered by a conviction already secured, is a distinct offense to which the plea of *autre fois* convict, predicated upon the prior conviction, is not good.

3. This court is without authority, whether in the exercise of its supervisory jurisdiction, or otherwise, to review the findings of an inferior court, in a criminal prosecution, upon a question of fact, and hence will not undertake such review, where, in the prosecution under Act No. 34, p. 42, of 1902, the trial judge has found that the "circumstances and financial ability of the defendant" are such as to warrant his being condemned to pay a certain amount for the support of his wife and minor child.

4. The pendency, on appeal, of an action, by the husband, for separation from bed and board, can have no effect in the matter of the execution of a sentence imposed on him in a criminal prosecution for neglect to provide for the support of his wife, and, *a fortiori*, is this true, when, by the judgment appealed from, the demand for separation was rejected.

For these reasons, it is ordered, adjudged, and decreed that the preliminary orders herein made be rescinded, and that relators demand be rejected, and this proceeding dismissed, at his costs.

(117 La.)

No. 16,028.

RAILROAD LANDS CO., Limited, v. CITY OF SHREVEPORT.

(Supreme Court of Louisiana. June 4, 1906.)

1. PUBLIC LANDS—GRANT BY FEDERAL GOVERNMENT—RATIFICATION BY STATE.

A grant by the federal government of land that had passed to the state under the swamp land grants of 1849 and 1850 may be ratified and confirmed by the state.

2. SAME—RAILROAD AID GRANT.

Where such subsequent grant is made to the state herself, in aid of a railroad, and the state accepts the grant, and in her turn, grants the land to a railroad company, such action on her part operates as a consent to the subsequent grant—a ratification and confirmation of it.

3. SAME—SWAMP LAND GRANTS.

Where, owing to such subsequent grant, the General Land Department has refused to confirm the land to the state under the swamp land grants, and the state has, nevertheless, issued a patent for the land, as of land belonging to her under the swamp land grants, and such patent comes in opposition to the title under the subsequent grant, the latter will prevail.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by the Railroad Lands Company, Limited, against the city of Shreveport. Judgment for plaintiff. Defendant appeals. Affirmed.

Ruffin Golson Pleasant, City Atty., for appellant. Wise, Randolph & Rendall, for appellee.

PROVOSTY, J. The property involved in this suit is the same that was involved in the suit of Railroad Company v. Tibbs, 112 La. 51, 36 South. 223, except that a part has been expropriated and is now represented by \$40,000 in cash in the hands of the clerk of court.

In 1856, for aiding in the construction of a railroad from the Texas line to the Mississippi river, through the towns of Greenwood, Shreveport, and Monroe, Congress granted to the state certain lands along the line of the railroad. The Secretary of the Interior certified to the state a list of these lands, and, by act of March 11th, the state accepted same, and granted same to the Vicksburg, Shreveport & Texas Railroad Company, the author of plaintiff's title. Among these lands was the land in controversy. Long afterwards, in 1888, the Governor of the state, executed and filed in the General Land Office a deed reconveying the land in controversy to the United States, and at the same time claimed same under the swamp and overflowed land grants of 1849 and 1850. The claim was contested by the railroad company, and was rejected; the Land Department ruling that, having accepted the land under the railroad grant, the state could not claim it as swamp—a ruling in line with the decision of the Supreme Court of the United States in the case of Rogers Locomotive Works v. Amer-

Ican Emigrant Company, 104 U. S. 559, 17 Sup. Ct. 183, 41 L. Ed. 552. The state then brought suit to recover back all the lands granted to the railroad company, on the ground that the company had not earned them, having failed to fulfill the conditions of the grant. The case (*State v. Railroad Co.*) is reported at page 981 of 44 La. Ann., page 865 of 11 South. The suit was dismissed; the court holding that the grant had been made by Congress and not by the state; that in accepting the lands from Congress, and transmitting them to the railroad company, the state had acted merely as an agent, or instrumentality, of Congress; that Congress had been the real donor; and that non constat that Congress was not satisfied with the manner in which the company had fulfilled the conditions of the grant.

Notwithstanding these repulses, the state, in 1892, proceeded to deal with the property as hers, and issued a patent to the city of Shreveport, and it is on that patent the city of Shreveport relies in this suit. The plaintiff holds the title of the railroad company.

The learned counsel for the city of Shreveport does not undertake to differentiate this case from that of *Rogers Locomotive Works*, but merely contends, on the authority of *State v. Railroad Company*, supra, that the state, in accepting the lands under the railroad grant of 1856, and in granting them, in her turn, to the railroad company, was not acting in her own name, or for herself, but merely as an agent, and that, inasmuch as her principal had no title, she did not, by her acts as agent, convey any.

We cannot accept that view. This land was included specifically in the railroad grant, and, even though acting as a mere agent, yet, the state must be held to have expressly consented to this grant and thereby ratified and confirmed it. It has often been held that the states may ratify and confirm subsequent grants by the federal government of lands that had passed to them under the acts of 1849 and 1850. *Am. & Eng. Ency.* vol. 26, p. 350.

The title of the railroad company, which plaintiff holds, has been recognized in the two cases of *State v. Railroad*, and *Railroad v. Tibbs*, supra, and several other decisions of this court, and is apparently good.

Judgment affirmed.

LAND, J., recused.

(117 La.)

No. 16,029.

CITY OF SHREVEPORT v. MARKS et al.
(Supreme Court of Louisiana. June 4, 1906.)
PETITORY ACTION—DEFENSES.

Proof of an outstanding title better than plaintiff's, is a good defense to a petitory action.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Real Actions, § 23.]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by the city of Shreveport against Cade Marks and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Ruffin Golson Pleasant, City Atty. (Milton O. Elstner, of counsel), for appellant. William Pike Hall, Edgar Williamson Sutherland, and Albert H. Leonard (D. T. Land and Wise, Randolph & Rendall, of counsel), for appellees.

PROVOSTY, J. This is a petitory action, and the land in controversy is the same as that involved in the suit of *Railroad Lands Company v. City of Shreveport* (this day decided) 41 South. 443. In that suit it was held that the city of Shreveport had no title, whereas the Railroad Lands Company had a title which had been repeatedly recognized and was apparently good. Defendants rely upon their possession, and also plead this outstanding title in a third person against plaintiff's demand. The latter defense is good. The suit is petitory, and a petitory action is defeated by the proof of an outstanding title better than plaintiff's.

Judgment affirmed.

LAND, J., Recused.

(117 La.)

No. 16,053.

STATE v. C. O. HARTWELL CO., Limited.
(Supreme Court of Louisiana. June 4, 1906.)

1. LICENSES—PERSONS LIABLE—"CONTRACTOR WHO EMPLOYS ASSISTANTS."

Quoad work executed by a corporation for other persons through "contracts" made with those persons by the corporation, the latter is liable for a license tax, as a "contractor who employs assistants," though the work done be mechanical in character.

2. SAME—LIABILITIES—ATTORNEY'S FEES AND INTEREST.

The decision of the Supreme Court in *State v. Comptoir National*, 51 La. Ann. 1272, 26 South. 91, as to the effect of the changing by the officers of the taxing department of the original construction of a license law, upon parties who had on or before such change inquired of such officers whether under the law they owed a license, and been informed that they did not, does not extend in favor of parties who had made no such inquiries and received no such answer, but who by reason of such original construction had simply not been called upon for a license.

The utmost extent of that condition of things would be to relieve such parties from the payment of interest and attorney's fees from and after a judicial demand for a license.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by the state against C. O. Hartwell Company, Limited, to collect a license fee. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

Gilbert Louis Dupré, Jr., and Edward Rightor, for appellant John Fitzpatrick. McCaleb, McCaleb & Leopold, for appellee.

NICHOLLS, J. The statement of facts in the case and the issues involved contained in the brief on behalf of the state (appellant) are as follows:

The state of Louisiana proceeded against the C. C. Hartwell Company, Limited, under section 14 of Act No. 171, p. 415, of 1898, as amended by Act No. 103, p. 160, of 1900, to collect a license from it for the years 1901-1905, inclusive, alleging that it is a contractor or mechanic who employs assistance; that its annual gross receipts from the said business exceed \$20,000; that it had obtained no license from the state of Louisiana, to conduct this business for any year; and that there was due to the state of Louisiana from the said corporation the sum of \$120 for each year, with interest at the rate of 2 per cent. a month on each amount, from the 1st of March each year, respectively, and as attorneys' fees, 10 per cent. on the whole principal and interest.

Defendant, answering, denies that it is a contractor; claims exemption from license tax under articles No. 229 of the Constitution of 1898, as one engaged in a mechanical pursuit; and urges that, if it is a contractor, the state, under the "doctrine of contemporaneous construction," is now estopped from claiming the said licenses.

By agreement of counsel, it was admitted that the C. C. Hartwell Company, Limited, was incorporated in the year 1904; that, if subject at all, it owed license to the state only for the years 1904 and 1905; and that its purposes of incorporation, as set forth in its charter, are as follows:

"Manufacturing of lighting fixtures, contracting and dealing in sanitary plumbing, electric installments and supplies, steam heating," etc.

It was further admitted, subject to objection by the state, that the said corporation is the successor of "Hartwell & Co.," a partnership which had carried on business in this city since the year 1879; that a license as a retail dealer had been paid by this partnership during all of these years; that no demand had been made upon it for a license as a contractor; that the tax collector had issued the said license without opposition; and that others similarly engaged had paid a retail dealer's license.

The court, without passing on the objection, or going into the merits of the case, rendered a judgment in favor of the defendant on the ground that this was a proceeding for an additional license, and that the rule laid down in the case of *State v. Chess, Checkers & Whist Club* (No. 15,984 of the Supreme Court docket) 40 South. 528, was fatal to the plaintiff's demand. The questions before the court, relative to their importance, are:

(1) Is the state here proceeding for an additional license?

(2) If no, does article No. 229 of the Constitution of 898 exempt the defendant from the license taxes?

(3) If no, is the defendant protected in the present action, by the doctrine of contemporaneous construction?

(4) Quantum?

Counsel for the state say:

The claim made by the defendant that it is engaged in a mechanical pursuit, and is therefore exempt from a license, under article 229 of the Constitution of 898, is clearly unfounded. The court has decided upon many occasions that the only persons protected by this article of the Constitution are mechanics or laborers who work with their own hands. It has gone further and decided that an act levying a license upon persons engaged in mechanical pursuits, unless working continuously with their hands, is not unconstitutional. In *Tax Collector v. Conner*, 42 La. Ann. 789, 7 South. 690, this court said:

"Taking the phrase engaged in a mechanical pursuit, according to these definitions, and it is clear that the framers of the constitutional articles intended to relieve from license those persons who are engaged from day to day in the performance of manual labor in mechanical or agricultural pursuits, and that the master builder and contractors who employ others to do the work which they merely superintend should, like other professional men, pay the license tax." (Italics ours.)

See, also, *State v. McNally*, 45 La. Ann. 45, 12 South. 117; *City v. O'Neill*, 43 La. Ann. 1182, 10 South. 245.

It must likewise be remembered here that the state is not proceeding against C. C. Hartwell, an individual, but against the C. C. Hartwell Company, Limited, a corporation, and, a fortiori, it is a fact that the Constitution of this state never intended to exempt a corporation in such a pursuit from the license tax.

Defendants state their position as follows:

The principle contention of the state is that defendant is a contractor and a mechanic employing assistance, and as such liable for a separate and additional license on its business, under the provisions of section 14, of Act 171, p. 415, of 1898, which imposes a license only "upon master builders, stevedores, bill posters or tacking contractors and mechanics who employ assistance." It is plain from the evidence that defendant is neither a master builder, a stevedore, a bill poster, nor a tacking contractor, and it is attempted to hold it as a mechanic who employs assistance as a contractor.

The term "contractor," according to the idea of the license act, is of uncertain significance. Every person engaged in business may be called a contractor. The retailer, the wholesaler, the insurer, the pawnbroker, the manufacturer, the mechanic—all these are contractors. This will hardly be denied. The tax collector claims, however, that, if the license imposed on a retailer or other business specially designated in the license act is less than that imposed upon contrac-

tors in general, we must disregard the special designation and classification, and by applying a general designation obtain higher license. This proposition is neither just nor reasonable. We think the term "contractor" was put in by the Legislature to cover cases not specially covered under the previous sections of the law, or in cases where no exemption from license taxation could be allowed.

However, it cannot be held as a mechanic who employs assistance in any event. Assuming therefore that it is engaged in a mechanical pursuit, that is to say, that it employs mechanics or journeymen plumbers to install the fixtures sold by it, then it is exempt under article 229 of the Constitution, which specially exempts from its provisions "those engaged in mechanical, agricultural, horticultural and mining pursuits."

Right here it is well to note that the terms of article 229 is not as contended for by the state. The exemption accorded is not in favor of mechanics, agriculturists, or farmers and miners, but "those engaged in a mechanical, agricultural and mechanical pursuit," which necessarily included corporations.

There is therefore no difference between a person who is engaged in a mechanical pursuit and a corporation so engaged, as the article applies to both persons and corporations.

Article 229 of the Constitution of 1898 declares that:

"All persons, associations of persons and corporations pursuing any trade, profession, business or calling, may be rendered liable to such tax (a license tax) except clerks, laborers, clergymen and school teachers, those engaged in mechanical, agricultural and mining pursuits."

The license tax demanded is claimed under the fourteenth section of Act No. 171, p. 415, of 1898, as amended by Act No. 103, p. 180, of 1900.

Section 14 of Act No. 171, p. 415, of 1898, divides into 13 classes for the purposes of a license tax, "for the business and hereinafter named," to wit:

"For every individual or company carrying on the profession or business agency, for steamboats, draying, trucking, keeping cabs, carriages, hacks or horses for hire, undertakers, owners or lessees of toll bridges and ferries, master builders, stevedores, bill posting or tacking, contractors and mechanics who employ assistants."

The provisions of the amendment of 1900 to the act have no bearing on the issues involved in this case and need not be recited. The tax is claimed not from Hartwell, individually, but from the "corporation" known as the "Hartwell Company, Limited."

That corporation is shown to be engaged in a "mechanical pursuit, and in the conduct of its business to take contracts for mechanical work. The mechanical work done by the corporation is necessarily done by and through its agents and employes. It cannot

of itself and as an "entity" act, independently of such agents and employes, as a "mechanic" as an individual does who himself does work.

The mechanical work done by a corporation may, however, be done either for its own account or for the account of others; that is to say, the work done may result in the production of a thing belonging either to the corporation itself or to the person or corporation for whom it is done. If for another person, that work can be done through "contracts" made by the corporation with that person. It may therefore well be a "contractor" for mechanical work. If done for itself the thing produced by the work is either held in ownership for its own use or held to be sold or transferred to some other person; that is to say, as a dealer in the thing produced.

In the case of *Roy v. Schuff* (La.) 24 South. 788, the municipal authorities of the town of Mansura sought to compel the defendant to pay a license tax as a peddler; that is, substantially, as a dealer or trader in the products of a farm which he was engaged in selling. He resisted the tax on the ground that he was a "farmer," and as such engaged in "agricultural pursuits"; that he was therefore exempted from paying a license. Whether he himself as a farmer did any physical work on the farm does not appear.

The court held that the exemption covered both the farmer and the sale by the farmer of that which the industry produced. In *City of New Orleans v. Bayley*, 35 La. Ann. 545, the defendant was a plasterer who worked with his own hands, and who, when executing a larger "contract" than he could conveniently do himself, employed others to "assist" him. The court held that he was engaged in a mechanical pursuit, "that the employment of assistants in his occupation did not alter the nature of his occupation," and that the Constitution exempted "those engaged in mechanical pursuits" from the payment of licenses upon their trades. In that particular case the state tax under which the license was claimed imposed a "license upon mechanics who employed assistants," and the town ordinance following the law imposed a license tax upon every individual carrying on the business of a "mechanic who employed assistants."

The court said that the superior law having already prohibited that kind of business from being taxed, the Legislature, and still less the town, had no authority to impose the license.

The case referred to differs from the present one, in that the question was raised in the other case as to Schuff's liability to a tax for selling or dealing with the products of the farm, while in this case there is no issue as to whether Hartwell & Co. were liable as dealers, as they had paid a license as such.

The question here is not whether the cor-

poration was liable as a "dealer," but as a "contractor," or "mechanic who employed assistants."

In *Theobalds v. Connor*, 42 La. Ann. 787, 7 South. 689, the defendant was an "individual," not a "corporation." He claimed exemption under article 206 of the Constitution of 1879, which exempted "persons engaged in mechanical pursuits."

Defendant contended that so much of section 12 of Act No. 101, p. 182, of 1886, as authorized the collection of an annual license from "every individual carrying on the business of master builder or mechanic who employs assistance" was uncircumstantial. It appeared from the evidence that the defendant was a brick mason, but had not followed the manual duties of that occupation for many years; that he made contracts for the erection and construction of brick edifices, the building of which he supervised, while the mechanical labor of laying the bricks was performed by employes of his own or those of the person for whom the contract was taken; that he was also a manufacturer of brick and made contracts to place them in the walls of buildings at a fixed price per thousand; that in such case he employed bricklayers to do the mechanical part of the work, and he superintended the construction of the building; that he had been a contractor for the brickwork of many buildings for 15 years, but he had not performed any regular manual labor in laying bricks in the erection of the buildings. He had contracted for the brickwork or supervised or superintended it in all the cases referred to. He had occasionally laid bricks in order to exhibit his own skill or to direct others. The court held that he was a contractor or master mechanic or builder who employed other persons to do the work which he superintended. Unlike Bayley, he did not work at his trade with his own hands. Those whom he employed did the work with their hands, and he superintended them merely.

Comparing the statute and the articles of the Constitution, the court said the language justified the distinction which the statute had made. It justified a license tax being imposed on such persons as pursue any of the professions, businesses, or callings which are enumerated therein, and the exemption from such tax of those who are engaged as clerks, or laborers, and those engaged in mechanical pursuits, etc. It might be that a master builder or contractor who employed workmen or assistants might be liable to the license tax, and at the same time a clerk, laborer, or one engaged in a mechanical or agricultural pursuit who employed other laborers or mechanics to assist him, was exempt therefrom.

The question turned upon the character of the avocation or employment, and not upon the fact of assistants being employed; that a "mechanic," according to Worcester, was one employed in mechanical or manual

labor, and "mechanical" was defined to be "employment in manual labor"; that, taking the phrase "engaged in manual pursuits" according to those definitions, it was clear that the framers of the Constitution intended to relieve from license those persons who were engaged from day to day in the performance of manual labor, in mechanical or agricultural pursuits; and that the master builder and contractors who employed men to do the work which they merely superintended should, like other professional men, pay the license tax.

In the case of *City of New Orleans v. Langman & Son*, 43 La. Ann. 1180, 10 South. 244, and *City v. O'Neill*, 43 La. Ann. 1182, 10 South. 245, the defendants were sued as individuals, not as corporations. They were sued for a license as being master builders. The defendants resisted on the ground that they were exempt "as engaged in a mechanical pursuit." In the case of *Langman* it was shown that he individually performed manual labor from first to last in the construction of the buildings contracted for. The court held him to be exempt from the license tax, but in the *O'Neill* case it adjudged the defendants liable, as the evidence did not disclose that they had worked at their trade with their own hands.

In *State v. Dielenschneider*, 44 La. Ann. 1116, 11 South. 823, the defendant was sued as an individual for a license tax as being a "barber." He resisted on the ground that he was engaged in a mechanical pursuit, within the meaning of the Constitution. The court held that the labor of a barber was mechanical and declared him exempt. It is evident that he himself worked as a barber.

The only mechanical work performed by the defendant in this case for its own account was the manufacturing of gas fixtures which it held for sale; the other mechanical work being work for other persons by means of contracts between those persons and the corporation. The license claimed of the defendant is by reason of their status as "contractors" who employ assistants. Quoad the work executed by it for other persons, we think it is liable for a license, for the years 1904 and 1905, though such work was mechanical in character. We think the license claimed was not an increased license on an occupation already licensed, but a license upon a separate and distinct occupation from that of a dealer.

We cannot recognize as well founded the claim of the defendant advanced upon the authority of the decision of this court in *State v. Comptoir National*, 51 La. Ann. 1272, 26 South. 91, that the license demanded of it could not be exacted, for the reason that, under the construction of the statute by the officers of the taxing department which had been adopted contemporaneously with its enactment, no such license could be called for, and none had been made until, by a changed construction of the law, demand had been made upon it for such a license.

The officers of the tax department had never been called upon by defendant to declare whether such a license was due by it and informed that it was not. The contemporaneous construction of the law, so far as defendant was concerned, went no further than that no demand for a license had been made upon it or others similarly situated. The utmost effect of such a condition of things would be to relieve defendant from the payment of interest and penalties until from and after judicial demand.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the state of Louisiana do have and recover judgment against the defendant for a license of \$60 for each of the years 1904 and 1905, as a contractor who employed assistants, together with 2 per cent. per month interest on each of said amounts from judicial demand until paid, and 10 per cent. on the whole principal and interest as attorney's fees.

(117 La.)

No. 15,862.

DAY et al. v. BAILEY et al.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 22, 1906.)

INJUNCTION—ANCILLARY INJUNCTION.

An ancillary injunction necessarily falls with the main suit.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 392.]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas Moore Burns, Judge.

Action by William G. Day and others against M. A. Bailey and others. Judgment for defendants, and plaintiffs appeal. Dismissed.

See 41 South. 223.

Gustave Lemle and Joseph Quintero Gowland, for appellants. Benjamin Moore Miller, for appellees.

On the Merits.

PROVOSTY, J. Plaintiff brought suit, coupled with an ancillary injunction. By an interlocutory judgment the injunction was dissolved, and plaintiff appealed, and perfected the appeal. Later, the suit was tried on the merits, and was dismissed, and plaintiff appealed. In this court, defendant moved to dismiss both appeals, because of informalities. The court found the first appeal, that from the judgment dissolving the injunction, had been regular, and as a consequence overruled the motion to dismiss as to it, but found, on the contrary, that the other appeal, that from the judgment on the merits, was informal, and as a consequence dismissed it. The ancillary injunction comes now to be considered on the merits, and, since the suit to which it was ancillary has been dismissed, there can be done but one thing, and that is dismiss the present appeal, which has now nothing to rest on.

Appeal dismissed.

LINCOLN COUNTY v. CITY OF BROOKHAVEN.

(Supreme Court of Mississippi. July 6, 1906.)

HIGHWAYS—TAXES—COUNTY ROAD FUND AND MUNICIPAL STREET FUND—RIGHTS OF CITY AND COUNTY.

Under Ann. Code 1892, § 3931, providing that taxes levied by a county for road purposes and collected on property within a municipality, the streets of which are worked at the expense of the municipal treasury, or by municipal authority, shall be equally divided between the county road fund and the municipal street fund, a municipality, the streets whereof were worked exclusively by the municipal authority, was entitled to one-half of the tax levied by the county for road purposes, although no special tax was levied by the municipality for the purpose of working its streets; the expense thereof being provided for by commutation tax or by moneys coming into the municipal treasury from various other sources.

Appeal from Chancery Court, Lincoln County; Robt. B. Mayes, Chancellor.

Suit by the city of Brookhaven against Lincoln county, brought by agreement in the chancery court for the purpose of recovering from the county one-half of the tax levied by the county for road purposes. Decree for complainant and defendant appeals. Affirmed.

The county of Lincoln began to work its public roads in the year 1897 by contract under chapter 16, p. 17, of the Laws of 1897, having adopted by ordinance of the board of supervisors that portion of the law relative to the working of public roads. The county levied a tax of one mill on all taxable property in the county to be used for the purpose of working its public roads. The city of Brookhaven is a municipal corporation governed by the Code chapter on municipalities, and its streets are worked by municipal authority, though no special tax is levied for this purpose, the expense of working the streets being provided by commutation tax, or by moneys coming into the municipal treasury from various other sources. The appellant contended that, since no special tax is levied by the municipality for the purpose of working its streets, the streets of the municipality are not worked by "municipal authority," and therefore the city of Brookhaven is not entitled to one-half of the tax collected by the county on the property within the municipality.

A. C. & J. W. McNair, Brennan & Hannah, and T. Brady, Jr., for appellant. P. Z. Jones and Green & Green, for appellee.

CALHOON, J. The case of McComb City v. Pike County, 86 Miss. 647, 38 South. 721, has no relevancy to this. This court, on the record before it in this proceeding, is under no necessity, as it was in that case, to interpret the obscure meaning of sections 6, 7, c. 119, pp. 154, 155, of the Laws of 1900. That statute is not concerned with the present litigation, because section 11 (page 156) of it provides that it is not in force until adopted by the board of supervisors of the

county desiring it, and this has not been done in Lincoln county. The statutes controlling in this record are Ann. Code 1892, §§ 2939, 3931, and Acts 1897, pp. 17-20, c. 16, §§ 1-12, 14. Under section 2939, Brookhaven was a "separate road district." Section 3931 has this clause: "The taxes so collected on property within a municipality, the streets of which are worked at the expense of the municipal treasury, or worked by municipal authority, shall be equally divided between the county road fund and the municipal street fund." It is perfectly manifest here that the streets of Brookhaven were worked by, and exclusively by, the municipal authority, and it was therefore entitled to the division of the funds it asks for.

Affirmed.

REWIS v. WILLIAMSON et al.

(Supreme Court of Florida, Division B. May 29, 1906.)

1. VENDOR AND PURCHASER—VENDOR'S LIEN.

The definitions of a vendor's lien contained in *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272, and *Wooten v. Bellinger*, 17 Fla. 289, cited and applied in this case.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 615, 663.]

2. SAME—SUBSEQUENT SALE BY PURCHASER.

Where R. files a bill against W. and B. to foreclose a vendor's lien on land sold by R. to W., and it appears that W. owes R. \$160 as a part of the purchase money, and B. purchases the land from W., knowing at the time that W. owes R. the above purchase money, and R. has a vendor's lien for the purchase money, where it does not appear that R. has waived his vendor's lien, by taking other security or otherwise, B. takes the property subject to the vendor's lien of R.

(Syllabus by the Court.)

Appeal from Circuit Court, Baker County; James T. Wills, Judge.

Bill by W. R. Rewis against W. O. P. Williamson and others. Decree for defendants, and complainant appeals. Reversed and remanded.

L. E. Wade, for appellant. Geo. U. Walker, for appellees.

HOCKER, J. On the 25th of July, 1903, W. R. Rewis filed his bill of complaint in the circuit court of Baker county against W. O. P. Williamson, Leannah Williamson, his wife, and J. W. Bell, in which he alleged, in substance, that on the 28th of March, 1898, he sold and conveyed by deed to W. O. P. Williamson, for the sum of \$300, 60 acres of land in Baker county, describing it, upon which \$140 was paid, and that Williamson gave complainant his promissory note for \$160, the balance of the purchase money, complainant reserving a vendor's lien upon the land for said balance; that said note was lost, and on March 19, 1902, Williamson gave complainant another note in lieu of the lost one. It is alleged that this note is attached to the bill as an exhibit, but we do not find

It so attached in the record. It is contained (page 23) in the testimony, and is as follows:

"\$160.00. Baxter, Fla. March 19th, 1902.

"One day after date I promise to pay to the order of W. R. Rewis the sum of one hundred and sixty dollars, for value received, at eight per cent. per annum, until paid in full. This note is given as part of the purchase money yet due to said W. R. Rewis on lot two (2) section thirty-three (33), township one (1) north of range twenty-one (21) east. Witness my hand and seal, this day and year above written. This note given to re-establish a certain note given four years ago which has been lost by the part W. R. Rewis.

"[Signed] W. C. P. Williamson. [Seal.]

"Witnessed by us:

"W. H. Altman,

"Berry Raulerson."

The bill alleges that on the 7th of May, 1901, Williamson and his wife mortgaged the land to the appellee J. W. Bell to secure the payment of moneys due for supplies furnished and to be furnished for the year 1901, fully making known to Bell at the time the nature of complainant's claim on said land, and that there was due complainant a balance of \$160 for purchase money, and that complainant had a vendor's lien therefor, and that Bell accepted the mortgage subject thereto; that on the 25th of February, 1902, Bell surrendered his note and mortgage to Williamson; and that Williamson and wife made a deed to Bell to said lands for an apparent consideration of \$306.20, being in part the money secured by the mortgage. The mortgage and deed are made exhibits to the bill. The bill alleges that, at the time of the delivery of the deed by Williamson and wife, Bell was informed that the \$160 balance of purchase money was due complainant, and that the deed was made subject thereto; that on the same day that the deed was executed Bell executed to Williamson a paper showing that the said deed was a mortgage to secure the payment of money, on the 3d of January, 1903, and, upon payment thereof or a greater part thereof, he would reconvey the land to Williamson; that, before and at the time said deed was executed and delivered to Bell, he was informed in the presence of witnesses of the said lien of complainant; and that Bell accepted the deed subject thereto. The bill alleges that complainant's vendor's lien is superior to that of Bell, and, prays, among other things, that the land be subjected to the payment of the sum of \$160 and interest, for an accounting, for process, for general relief, etc. A decree pro confesso was entered against Williamson and wife, and the appellee J. W. Bell answered the bill. In the answer Bell denies all the allegations of the bill, "save and except as the same, if any, are admitted" by it; "that he knows no more about

the transaction between complainant and said Williamson, at the time it occurred, and from then to the time he purchased the land from the latter, than what the records in the office of the circuit clerk of said county showed"; that he was never told of the lien of Bell by any one; that, "aside from knowing that Williamson owed a balance of about \$160 on account of the sale of said land, said Bell says he knows nothing except what the law charged him with knowing by the public records of said county at any time prior to his dealings with said Williamson. Said Bell further says that from his knowledge of how matters in regard to said land stood between complainant and said Williamson before and up to the time he dealt with the latter, about said land, he believed that Williamson owed complainant about \$160, and that the latter held Williamson's ordinary note for the same, without any reference to any lien of any kind on said land." The answer denies that the deed of the land he took from Williamson was in effect a mortgage, and contains some other matters in regard to the possession of the land, which we think it unnecessary to mention, as not bearing upon the real issue in controversy. Replication was filed to this answer and testimony taken. Upon final hearing a decree was entered dismissing the bill as to J. W. Bell. Afterwards a rehearing was denied, and again, on a further hearing, a decree was entered dismissing the bill at the cost of the complainant Rewis, from each of which decrees Rewis entered an appeal to this court, and assigns error upon each of them.

We do not think it necessary to indulge in an extended discussion of the evidence, because upon what we regard as the material points in this case there is no conflict between the parties, viz.: That Williamson owes Rewis a balance of \$160 for the purchase of the land in controversy, with interest, and that Bell knew of this indebtedness when he took the mortgage and deed of the land. The answer of Bell admits this, but undertakes to defend his title against Rewis, on the ground that he did not know that Rewis had a vendor's lien on the land or claimed one, and that there was nothing of record which advised him of such a lien. The answer therefore admits every fact essential in equity to constitute a vendor's lien, and the defense is rested on the absence from the record of the evidence of a lien.

This court, in *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272, has thus defined a vendor's lien: "A vendor's lien is that lien which in equity is implied to belong to a vendor for the unpaid purchase price of land sold by him, where he has not taken any other lien or security for the same, beyond the personal obligation of the purchaser. Such lien is not the result of any agreement between vendor and vendee, but is simply an equity raised by the courts for the benefit of the former, by whom it will be enforced

or denied between parties, as the exigencies of each particular case may seem to require." See the authorities cited in the opinion.

As to the agreement between Rewis and Williamson, it does not appear here that it was ever put into the form of a written security or lien, as was the case in *McKeown v. Collins*, 38 Fla. 276, 21 South. 103. The note given by Williamson at the time, according to the answer, was nothing more than an ordinary promissory note, and there is nothing in the record to show the contrary. The original note was lost, and the one dated March 19, 1902, was given to re-establish the lost note, and certainly does not tend to create in and of itself a statutory or equitable lien on the land. The agreement between Rewis and Williamson seems to have been verbal and was a mere recognition of the existence of the lien which equity creates, under the circumstances, in favor of the vendor. The note does not even do this. It simply states that it was given for purchase money. We can find nothing from the record showing that this note was intended to create a statutory lien, or that Rewis by any act, deed, or word ever waived his vendor's lien.

The only other question to be considered is: Did Bell have such notice of the lien of Rewis for the balance of the purchase money of the land, when he (Bell) took the mortgage and deed from Williamson, as will be binding upon him in equity? The contention of Bell seems to be that, because there was nothing on the record to show such a lien, therefore he was not affected by it, although he admits in the answer that he was informed there was then a balance of about \$160 due Rewis. We also think the evidence shows he had this information.

In the case of *Wooten v. Bellinger*, 17 Fla. 289, text 301, this court, after showing the rule to be different in some other courts, held that "the rule in this state, however, has been announced to the effect that a vendor has a lien for unpaid purchase money of real estate (somewhat like unto that of an unrecorded mortgage), subject to be defeated by the intervention of creditors or purchasers without notice, or is waived by taking other security"—citing *Bradford v. Martin*, 2 Fla. 473; *Woods v. Bailey*, 3 Fla. 41. In discussing what constitutes notice to a purchaser in such a case, the Supreme Court of Vermont, in the case of *Manly v. Slason*, opinion rendered by Redfield, J., 21 Vt. 271, 278, 52 Am. Dec. 60, says: "Indeed, Ormsbee admits, in his answer, that he expected some portion of the purchase money remained unpaid, but how much, and how it was secured, he did not know. This is just that kind of notice which should have put him upon inquiry." The headnote of the case states the doctrine of the vendor's lien in these words: "The vendor of real estate has a lien upon the estate for the payment of the purchase money, as against all persons except bona fide purchasers, without notice of its

nonpayment." The discussion of the doctrine of vendor's lien by Judge Redfield is instructive, and is in line with that of our court. *Story's Eq. Jur.* (11th Ed.) § 1225-1228; *Moore v. Worthy*, 56 Ala. 163, text 164; 29 Am. & Eng. Ency. Law (2d Ed.) pp. 753, 754, 755, and notes. We are of the opinion, guided by these authorities, that Bell took the deed and mortgage of the real estate in controversy, with notice of Rewis' vendor's lien, and that he cannot be regarded as an innocent or bona fide purchaser without notice.

We are of opinion that the decrees appealed from are erroneous, and they are therefore reversed, at the cost of appellee, and the cause is remanded, with directions for such further proceedings as may be in accordance with law.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

DUNAWAY et al. v. FERST et al.

(Supreme Court of Florida, Division A. June 5, 1906.)

1. EXECUTION—AFFIDAVIT OF CLAIMANT—DEFECTS.

An affidavit, in a claim proceeding involving \$500, filed in the circuit court, is a proceeding in that court, even though it is made before a justice of the peace and bears the caption "In Court of Justices of Peace, State of Florida, Alachua County, Twentieth District."

2. APPEAL—PRESUMPTIONS.

In the absence of a bill of exceptions, proper evidence of essential facts in pais will be presumed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3673.]

3. SAME—OBJECTIONS NOT MADE BELOW.

Objections to the form of the oath administered to the jury should be timely made. It is too late when made for the first time in the appellate court.

(Syllabus by the Court.)

Error to Circuit Court, Alachua County; James T. Willis, Judge.

Action by Aaron Ferst and others, partners as M. Ferst's Sons & Co., against Ada Dunaway. Judgment for plaintiffs. From a levy of execution, Ada Dunaway, as claimant, with William Sutherland and M. G. Knight as sureties, filed an affidavit of claim. Judgment for plaintiffs in execution, and claimants bring error. Affirmed.

W. S. Broome, for plaintiffs in error. Carter & Layton, for defendants in error.

COCKRELL, J. Mrs. Ada Dunaway filed in the circuit court for Alachua county her affidavit claiming as her own certain personalty levied upon by the sheriff as the property of one D. A. Dunaway by virtue of an execution in favor of M. Ferst's Sons & Co. The affidavit was made before a justice of the peace. It is objected here that the

proceeding was one before the justice court and could not therefore be the basis of a proceeding in the circuit court, but the objection is fruitless. While the caption of the affidavit reads "In Court of Justice of Peace, State of Florida, Alachua County, Twentieth District," and there is nothing on the fact of the affidavit itself to show that it was intended to be filed in the circuit court, yet it is clear that the meaning, if meaning it had, was merely to show the affidavit was made within the territorial jurisdiction of the justice of the peace. The penalty of the claim bond fixed by the sheriff is more than \$500, clearly showing that an amount greater than the jurisdiction of the justice's court was involved.

The transcript of the record shows that at a term of the circuit court held November 18, 1905, "came the parties and submitted said cause upon the issues joined between them to a jury," and that the jury found the issues for the plaintiff and against the claimant and fixed the value of the property at \$228, being exactly the same valuation as that fixed by the sheriff when he took the claim bond.

The mere failure of the record to show a return to the clerk's office of the writ does not vitiate the judgment as to which every presumption is to be indulged. The evidence at the trial is not before us, but it is to be presumed that the sheriff was in attendance at the court, and that his testimony and the writ in his possession were part of the "evidence which the jury heard." If proper evidence of essential facts was not before the court, any right of review has been lost by a failure to preserve the error in the record.

Any objection to the oath administered to the jury should have been made at the time it is administered. An objection made for the first time in the appellate court comes too late. *Seymour v. Purnell*, 23 Fla. 232, 2 South. 312; *Jacksonville, T. & K. W. Ry. Co. v. Neff*, 28 Fla. 373, text 386, 9 South. 653.

The judgment entered upon the verdict may not be in approved form in all respects, and it may be incorrect to speak of the money part as being for "damages," but we fail to find in the objections urged here such substantial error therein as to call for a reversal, and it is affirmed.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR, HOOKER, and PARKHILL, JJ., concur in the opinion.

ULLMAN et al. v. LOCKHART.

(Supreme Court of Florida. June 11, 1906.)
FRAUDULENT CONVEYANCES — MORTGAGE — CONSIDERATION — VALIDITY.

Where a party, indebted to divers persons, makes a note for a large sum secured by mortgage to her sister, who at the time is wholly

without means to loan any money, and such note and mortgage are without any consideration whatever, and are transferred and assigned by the mortgagee, without any consideration, to a third party for foreclosure, who is at the time a trusted employe of the mortgagor, and who is fully cognizant of the fact that the execution of the note and mortgage and their transfer to him for foreclosure in his name were not bona fide, but devised and concocted for the express purpose of defrauding the bona fide creditors of the mortgagor, such mortgage and note is a fraud in fact upon the creditors generally of the mortgagor, and is utterly null and void as to such creditors, and, being designed in fraud, it made no difference whether the mortgagor was at the time of its execution solvent or insolvent.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 186-190.]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Marion County; William S. Bullock, Judge.

Bill by John F. Lockhart against Adolph Ullman and L. S. Heilbron, partners under the firm name of Ullman & Co. Decree for complainant, and defendants appeal. Reversed and remanded.

W. K. Zewadski, for appellants.

TAYLOR, J. The appellee, Lockhart, filed his bill in equity in the circuit court of Marion county against C. P. McGrath, the appellants Ullman & Co., D. Sachs & Sons, and Einstein Bros., for the foreclosure of a mortgage covering the life estate of the mortgagor, C. P. McGrath, in certain lots in the city of Ocala in Marion county; said mortgage being made by said C. P. McGrath to one M. J. Terrell to secure a note for \$1,000, and said note and mortgage being alleged to have been transferred and assigned before maturity by M. J. Terrell to said Lockhart. The bill alleged that the defendants Ullman & Co. and D. Sachs & Sons had, subsequently to the execution and record of said mortgage, recovered judgments in the circuit court of Marion county against the mortgagor, C. P. McGrath, the executions to enforce which judgments had been levied upon the said mortgaged property, and that C. P. McGrath had, subsequently to the execution and record of complainant's mortgage, executed a subsequent mortgage upon said property to the defendants Einstein Bros.; that said judgments and said subsequent mortgage to Einstein Bros. were junior and subordinate to the mortgage of complainant. The bill prayed for foreclosure, for injunction to restrain the sale of the property under said alleged junior judgments, and that a receiver be appointed to take charge of the property and to collect the rents therefrom to be applied to the payment of said mortgage.

The defendants D. Sachs & Sons answered the bill denying that C. P. McGrath was in fact ever indebted to M. J. Terrell in the sum of \$1,000 or any other sum, and deny that said note and mortgage was assigned to the complainant before maturity, and deny

that said note and mortgage was assigned by M. J. Terrell to complainant for a bona fide or valuable consideration, and allege that the purported indebtedness secured by said mortgage never in fact existed, but was simulated as part of a conspiracy on the part of McGrath, Terrell, and complainant to defraud, hinder, and delay the creditors of McGrath in the collection of their just claims; that the indebtedness to them on which they recovered judgment against McGrath existed long prior to the execution of said mortgage; that the said McGrath was insolvent at the time said mortgage was made which was known to said Terrell at that time; that the life estate in said property covered by said mortgage was substantially all of the property of said McGrath that was subject to her debts; that the complainant knew these facts; and that, if he paid anything to Terrell for such mortgage, he did so with knowledge of the fact that it had been contrived to defraud, hinder, and delay creditors.

The defendants Ullman & Co. separately answered the bill, in which they deny the bona fides of the mortgage from C. P. McGrath to M. J. Terrell, and allege that the mortgagor and mortgagee are sisters, and that M. J. Terrell is poor and without property or means, and that she did not have at the time, and never had, \$1,000 to let her sister have as a loan, and that said note and mortgage was a mere pretense contrived to defraud and defeat the creditors of McGrath. Said answer further, "upon information, avers the facts to be that the said Candace P. McGrath is wholly solvent and able to respond to any and all demands that are against her; but she is hiding and secreting her property with the view of defeating the payment of her debts, and that the giving of this mortgage was only a pretense, and not a bona fide transaction"; that the complainant Lockhart has for a long period been an employé of said C. P. McGrath, and was such at the time of said assignment of said mortgage to him, and was financially unable to take up or purchase said mortgage, and that said pretended assignment of said mortgage to him was part of the conspiracy to defraud, hinder, and delay the creditors of McGrath.

The cause was referred to a master who took and reported a voluminous amount of evidence. At the final hearing upon the bill, answers, and evidence reported, the judge made and filed the following findings of fact:

"This cause is before me on final hearing. It is a bill to foreclose a mortgage by the assignee of the mortgagee. The mortgagor admits the allegation of the bill in so far as it is material. The mortgage is dated November 21, 1903, due July 1, 1904. Bill alleges that it was given to secure a past-due debt. The mortgage covers certain real estate to

which the mortgagor owns only a life estate. In addition to the lands the mortgage 'transfers and assigns all the rents and profits * * * that may accrue, * * * and the rents and profits received * * * shall be credited on the note.'

"The parties defendant are mortgagor and certain judgment creditors. The bill alleges the existing indebtedness and the giving of the mortgage and the note and its assignment and the assignment of the rents and profits, all before maturity of the note, for a valuable consideration, and that the complainant is the 'actual' owner and holder. That complainant had not collected any part of the rents and had been unable to collect the same, but for what reason is not known. By an amendment to the bill two judgment creditors and a second mortgagee are made parties defendant, and it is charged against the judgment creditors that they have levied executions on mortgaged lands and will sell unless restrained. On motion of the complainant a receiver is appointed to collect the rents and profits.

"It is alleged that the security is insufficient and prays for a restraining order against the judgment creditors, and for the establishment of the mortgage as a prior lien, and that the status of the liens claimed be determined, and a plan of distribution of proceeds in case of sale of mortgaged premises.

"Separate answers are filed by the defendants. On the part of Sachs & Sons, they deny the existence of the debt for which the mortgage was given, or that it was transferred before maturity or for a valuable consideration; charge a conspiracy between mortgagor, mortgagee, and the complainant to delay, hinder, and defraud the creditors of the mortgagor, they being also creditors; charge that the debt for which the judgment was obtained was created prior to the making of the mortgage, that the mortgagors' failing financial condition was known to the mortgagee and to the complainant at the time of the transactions; and charge that the defendant in execution is insolvent.

"Ullman & Co. set up their debt and admit the record shows the existence of the mortgage mentioned in complaint. They neither admit or deny its transfer, and on information and belief charge a conspiracy between the mortgagor and mortgagee to defraud the creditors of the defendant in execution by encumbering the property. Avers that the mortgagor is solvent, but is secreting her property; that, since the making of the mortgage, the complainant has joined in and become a party to defraud the creditors; and that he was not financially able to take up and pay off the mortgage.

"Einstein Bros. answer and admit that they have a mortgage, and give its date and amount; neither admit or deny that complainants' mortgage is superior.

"To these answers general replications are filed, and in this state of the pleading the testimony was taken and is now submitted.

"From the pleading and the testimony these facts are found:

"(1) Candace P. McGrath executed the mortgage and note, and as between the complainant and the said Candace P. McGrath the same is good and creates a lien on the lots of lands therein mentioned. That at the time of the execution of the note and mortgage Candace P. McGrath was insolvent, and that fact was known to the assignee and to the complainant at the time of their transactions in relation thereto."

"(3) Mary J. Terrell is the sister of Mrs. Candace P. McGrath, and at the time of the execution of the note and mortgage was a poor woman and had not means to loan money.

"(4) That the complainant at the time of, long before, and after, the execution of the note and mortgage, was hireling of the said Candace P. McGrath, knew of her financial condition and of the claim of the defendants Sachs & Sons, and knew Mrs. Mary J. Terrell and her financial condition at that time.

"(5) That the indebtedness upon which the said judgments were obtained accrued long before the making of the note and mortgage.

"(6) That complainant knew that the security was inadequate and never undertook or tried to collect the rents prior to the judgment creditors moving to collect their debts against the property.

"(7) That complainant has never conferred with Mr. William Hocker, his solicitor of record, relative to his purchase of the note and mortgage, and the charge against him relative to his connection with the matter, nor answered the charge of combination and conspiracy to hinder, delay, and defraud the creditors of Mrs. McGrath.

"(8) The record shows, and the complainant's solicitor of record admits, that he got the note and mortgage from Mr. H. M. Hampton, the law clerk in the office of Mr. H. L. Anderson, the solicitor for the mortgagor, and that Mr. H. M. Hampton is also an attorney at law, and that Mr. Hampton prepared the bill of complaint, the notice for the appointment of the receiver, the order appointing the receiver, the affidavit for non-resident publication, the replication to the answers, the præcipe for a degree pro confesso, and that all of the pleading was so prepared by Mr. Hampton and taken to the solicitor of record, who signed the papers as solicitor for complainant.

"Mr. H. M. Hampton wrote the orders of reference, wrote them and brought them to the judge for signing; that the solicitor of record for the complaint has a typewriter and stenographer, and did have at the time this was done, in his law office, in Ocala, Fla. Mr. Hampton was and is in Ocala since the commencement of the suit and had

not testified or made any explanation of the matter.

"(9) That Mr. George A. Carmichael was the agent of the complainant who swore to the bill, and after the testimony was concluded, and on a special order of the court for the purpose of allowing him to testify, he still being in Ocala, he refused or omitted to take the stand, though the motion for the order states that he had knowledge of the facts."

"(11) The judgment creditors who are defendants claimed and the indebtedness to them was in existence before the giving of the mortgage; that D. Sachs & Sons have been injured by the giving of the mortgage, the complaint showing the mortgagor insolvent, and they averring the same. But the defendants Ullman & Co. having denied the insolvency of the mortgagor, have not shown any right to question the validity of the mortgage or to show they are injured thereby.

"(12) The receiver's report is correct, and the same is approved, and the amounts reported as expended by him are allowed, and his services will be decreed to be worth \$100.

"It is therefore considered and ordered that a decree will be now made in accordance with these findings, and the complainant have a decree against Mrs. Candace P. McGrath in the sum of \$1,000, with interest since the making of the note at the rate of 8 per cent. annum, and that she be decreed a mortgage lien as to the lot of lands in the mortgage, and attorney's fees at \$150, and that it be decreed to be superior lien as against Ullman & Co. and Einstein Bros. That, as against the defendants D. Sachs & Sons, the complainant has not sustained his bill of complaint, and the same as to them will be dismissed. That the cost of the proceeding as reported by the master be taxed against the defendant Candace P. McGrath.

"Ocala, Florida, June 22d, 1905.

"W. S. Bullock, Judge."

Upon this finding of facts from the proofs the court below rendered the following final decree:

"This cause coming on for final hearing was argued by the solicitors for the respective parties and taken by the court under consideration, and the court having this day filed an opinion and finding of fact and law, and having considered said cause, it is ordered, adjudged, considered, and decreed as follows, viz.:

"(1) That as against the defendants Candace P. McGrath, Adolph Ullman, and L. S. Heilbron, copartners under the firm name and style of Ullman & Co. and Einstein Bros. the complainant hath sustained his bill of complaint, and is entitled to a decree of this court.

"(2) That the complainant do have and recover of and from the defendant Candace P. McGrath the sum of \$1,000 for the principal of the said note and mortgage, together with the further sum of \$140 for interest

thereon to this date; and that said complainant do further have and recover as his reasonable solicitor's fees in this behalf the sum of \$150 as provided by said mortgage and the proof, together with the cost of these proceedings to be taxed by the clerk of this court. That, if said various sums of money be not paid by the said Candace P. McGrath within five days from this date, then in that event the mortgaged premises described be sold to satisfy and liquidate said amounts herein decreed, as hereinafter mentioned: Said complainant is hereby declared to have a mortgage lien to secure the payment of the above-mentioned sums of money on that certain tract or parcel of land located, lying, and being in Marion county, state of Florida, and described as lots one (1), two (2), and four (4) of block forty-two (42) of the old survey of Ocala. That in the event the above sums of money are not paid within five days from this date, as hereinbefore ordered, then that all the right, title, interest, and estate, claim and demand of the said Candace P. McGrath in and to said mortgaged premises be sold, after four consecutive weeks advertisement, in front of the courthouse door in Ocala, Marion county, Fla., during the legal hours of sale for the purpose of paying the amounts herein decreed to be due the complainant by the said defendant, Candace P. McGrath, which sale shall be at public auction to the highest and best bidder for cash. In case of said property being sold as hereinbefore decreed, the said Candace P. McGrath, the said Ullman & Co., and the said Einstein Bros., all and each of them, are barred and foreclosed of, in and to all equity of redemption to said mortgaged property. That in event the said amounts herein decreed to be paid are not paid within the time hereinbefore specified, Lanier Robertson be and is hereby appointed as special master in chancery to make said sale and execute this decree, with directions to report the same, together with his proceedings, to the court; and that out of the funds derived from said sale be paid (1) the costs, charges, and expenses of these proceedings, (2) the sum of \$150 to the complainant or his solicitor for his solicitor's fees in the foreclosure of this mortgage, (3) the sum of \$1,140, being the principal and interest herein decreed to be due the complainant by the defendant Candace P. McGrath; and, if any balance remain, he report the same to this court, together with his report of the proceedings had by him hereunder.

"(3) That the mortgage lien of the complainant is hereby declared to be superior in dignity and effect to the mortgage given by Candace P. McGrath to Einstein Bros., as alleged in the bill of complaint, and also superior in dignity and effect to the judgment of the defendants Ullman & Co., as mentioned and alleged in the bill of complaint; that as against the judgment of Morris D. Sachs and Edward

Sachs and Sam Hass, as copartners under the firm name and style of D. Sachs & Sons, this court is of the opinion, from the pleadings and proofs, that the mortgage note and the mortgage given to secure the same by Candace P. McGrath to Mary J. Terrell was fraudulent, and without consideration, and for the express purpose of hindering and delaying said creditors of the said McGrath from collection of a just claim of theirs against her; and that said mortgage has that effect. Wherefore said bill of complaint is dismissed as to the said D. Sachs & Sons.

"(4) It is further ordered that the master's report of cost before him be and the same is hereby allowed. It is further ordered that the report of the receiver be and the same is hereby allowed, and that his bill for expenses be and the same are approved and allowed, and that he receive the sum of \$100 for his services to this date; and that he continue as such receiver until the further order of this court; with directions to proceed in the management of the said property as he has been heretofore doing, if in his judgment it is practicable, with the further directions to take steps at once to collect the amount due for rents by the delinquent tenants or to dispossess them from the premises; and, further, that he serve notices on them or either of them to show cause why they or either of them should not be held in contempt of this court for failure to pay the rent due.

"Done at Chambers in Ocala, Florida, this July 22d, 1905."

From this decree the complainant entered his appeal to this court, but said appeal seems to have been abandoned. The defendants Ullman & Co., C. P. McGrath, and Einstein Bros. also entered their appeal from said decree, but the said appeal has been abandoned by all the defendants except Ullman & Co., who alone assign errors and present the case on briefs. The court below, after finding that the mortgage sought to be foreclosed was a fraud in fact upon the rights of the creditors of C. P. McGrath, and that the pretended debt to M. J. Terrell secured thereby was a sham, fraud, and pretense, and without any real bona fide existence, and that the complainant Lockhart, as assignee of the mortgage, knew it to be such, and was a party to the fraud, holds that said mortgage, notwithstanding these facts, was a superior lien to the judgment of Ullman & Co. that was based upon an indebtedness existing prior to the execution of such mortgage, because the said Ullman & Co. in their answer to the bill alleged that C. P. McGrath was solvent and able to pay her debts, but was covering up and secreting her property to hinder, delay, and defraud her creditors. This was error. According to the findings of facts by the judge below from the proofs, the mortgage from C. P. McGrath to M. J. Terrell was a fraud in fact upon the creditors generally of C. P. McGrath, and was utterly null and void as to such creditors, and, being designed in fraud,

it made no difference, so far as the creditors Ullman & Co. were concerned, whether she was at the time solvent or insolvent. *McKeown v. Allen*, 87 Fla. 490, 20 South. 556. The bill should have been dismissed as to both of the judgment creditors D. Sachs & Sons, and Ullman & Co., and also as to the junior mortgagees, Einstein Bros.

The decree appealed from is, therefore, hereby reversed at the cost of the appellee John F. Lockhart, and the cause remanded with directions for such further proceedings as may be in consonance with equity, and not inconsistent with this opinion.

SHACKLEFORD, C. J., and COCKRELL, WHITEFIELD, and PARKHILL, JJ., concur.

HOCKER, J., disqualified.

ETONIAH CANAL & DRAINAGE CO. v. HUSBAND et al.

(Supreme Court of Florida, Division B. June 5, 1906.)

1. SALES—ACTION FOR PRICE—PARTIES LIABLE.

Where L. & Son, partners, had contracted with E. C. & D. Company, a corporation, to furnish a dredge boat and do certain dredging and canal work, to be paid for by the corporation by the square yard, in which contract the dredge was pledged to the E. C. & D. Company to secure the faithful execution of the work, and there are no other circumstances showing that E. C. & D. Company became liable for the debts of L. & Son, neither the fact that the company kept agents on the dredge to look after its interests, nor that it paid claims against the dredge to prevent its being stopped from work by legal process, and to prevent liens on its works, renders the company liable to a firm of merchants for goods sold by them on a credit to L. & Son while the latter were working the dredge under the contract.

2. SAME.

The law applicable to this case is settled in the case of *Daytona Bridge Company v. Bond*, 38 South 445, 47 Fla. 186.

(Syllabus by the Court.)

Error to Circuit Court, Putnam County; James T. Wills, Judge.

Action by O. C. Husband and O. G. Husband, under the name of Husband Bros., against the Etoniah Canal & Drainage Company. Judgment for plaintiffs, and defendant brings error. Reversed.

S. J. Hilburn, for plaintiff in error.

HOCKER, J. The defendants in error, hereinafter called the plaintiffs, brought an action of assumpsit in the circuit court of Putnam county, against the plaintiff in error, hereinafter called the defendant, and on the 14th of October, 1905, obtained a judgment against it for \$166.90 and interest and costs, from which a writ of error was taken by the defendant to this court.

The declaration contains five counts: (1) For money payable for goods, wares, etc.;

(2) for work done and materials furnished, etc.; (3) for money paid by the plaintiffs, etc.; (4) for money received, etc.; (5) for money found to be due, etc.—and claimed \$500 damages. The defendant pleaded never indebted, and nonassumpsit. Issue was joined and trial had at the October term, 1905, resulting in a verdict for the plaintiffs, and the judgment aforesaid.

A motion for a new trial was made containing the following grounds:

"(1) Because the verdict of the jury is contrary to the law.

"(2) Because the verdict of the jury is contrary to the evidence.

"(3) Because there is no evidence to support the verdict.

"(4) Because the court erred in giving the charges or instructions to the jury, as prepared and requested by the plaintiffs' attorneys.

"(5) Because the court erred in charging the jury as set forth in the first charge, as prepared and requested by the plaintiffs' attorneys.

"(6) Because the court erred in giving to the jury the second charge as prepared and requested by plaintiffs' attorneys.

"(7) Because the court erred in giving to the jury the third charge as prepared and requested by plaintiffs' attorneys.

"(8) Because the court erred in giving to the jury the ninth charge as prepared and requested by the plaintiffs' attorneys.

"(9) Because the court erred in giving to the jury the eleventh charge as prepared and requested by plaintiffs' attorneys.

"(10) For other errors appearing in the trial of the case, to which attention will be called."

This motion was denied, to which ruling the defendant excepted, and was allowed 60 days to settle a bill of exceptions.

The assignments of error are as follows:

"(1) The court erred in charging or instructing the jury as requested by the plaintiffs' attorneys.

"(2) The court erred in giving instructions or charges to the jury No. 1, as requested by plaintiffs' attorneys.

"(3) Said circuit court erred in giving to the jury charge No. 2, as requested by the plaintiffs' attorneys.

"(4) The said circuit court erred in giving instructions or charges to the jury No. 8, as prepared and requested by the plaintiffs' attorneys.

"(5) The said circuit court erred in giving instructions or charges to the jury No. 11, as prepared and requested by the plaintiffs' attorneys.

"(6) The said circuit court erred in charging the jury as follows: (1) 'The court charges you that if you find from the evidence in this case that plaintiffs, Messrs. Husband Bros., sold certain goods, wares, and merchandise to D. D. Lehman, believing him to be the legal agent or representative of defendant,

the Etoniah Canal & Drainage Company, and upon the strength and credit of said company, and that said Lehman represented to plaintiffs that he would pay them as money was furnished to him by said company with which to pay, and that said company, or its legal representatives, stood by silently with knowledge of such facts, and by its assent held out said Lehman as its lawful representative, in the performance of its work, and that plaintiffs furnished said goods, from which defendant company received and derived the use, benefit, and profit thereof, knowing that said goods would not be or had not been paid for, then, and in that case, the court instructs you that the defendant company would be legally estopped from denying its liability to plaintiffs, and the law would imply a legal responsibility on the part of the defendant to pay plaintiffs, and, if you find such to be the facts in the case, it would be your duty to find for the plaintiff and assess his damages accordingly.' To the giving of which charge the said defendant, the Etoniah Canal & Drainage Company, by its attorneys, then and there excepted.

"(7) The said circuit court erred in charging the jury as follows: (2) 'The court charges you, as the law, that an "express contract" is one entered into by and between the parties, the terms whereof is formally agreed and assented to, in express terms by the parties themselves. An "implied contract" is one where, from all the facts and circumstances surrounding the parties to a given business transaction, the law would imply and enforce a legal and binding responsibility upon the parties to discharge and perform such duties as they would be called upon and required by law to perform had the same state of facts been expressly agreed upon by the parties thereto. And the law will imply of a person to do or perform a duty which, from the facts and circumstances of a transaction, he is legally bound or required to do'—to the giving of which charge the defendant, the Etoniah Canal & Drainage Company, by its attorneys, then and there excepted.

"(8) The said circuit court erred in charging the jury as follows: (9) 'The court instructs you that it is not necessary for the plaintiff to prove an express promise on the part of defendant to pay. If you find that plaintiffs sold certain goods, wares, and merchandise, received in behalf of the defendant, with the knowledge and consent of defendant, and from which it derived the use, benefit, and profit, and which goods have not been paid for, and if you are further satisfied, all the surrounding circumstances considered, that there was implied on the part of the defendant a legal responsibility or liability to pay for such goods, then, in that event, you should find for the plaintiff and assess his damages accordingly'—to the giving of which charge the said defendant, the Etoniah Canal &

Drainage Company, by its attorney, then and there excepted.

"(9) The said court erred in charging the jury as follows: (11) 'If you find from the evidence in this case that the account in question was stated and rendered by plaintiffs to the defendant or its lawful representative, and that the previous dealings between the parties would imply an obligation on the part of the defendant to pay said account, and that said defendant did not within a reasonable time thereafter deny or dispute said account, the court charges you that this would imply a legal promise or contract on his part to pay same, and, if you so find, it would be your duty to render a verdict in the behalf of the plaintiff and assess his damages accordingly'—to the giving of which charge said defendant, the Etoniah Canal & Drainage Company, by its attorney, then and there excepted.

"(10) The said circuit court erred in overruling the motion of said defendant, the Etoniah Canal & Drainage Company, for a new trial in said cause.

"(11) Said circuit court erred in not granting the motion of defendant, the Etoniah Canal & Drainage Company, to set aside the verdict of the jury and grant the defendant a new trial.

"(12) Said court erred in entering judgment, which was entered in said cause against the defendant, the Etoniah Canal & Drainage Company."

The main facts, briefly stated, are that the Etoniah Canal & Drainage Company contracted with D. D. Lehman & Son to do dredging work, with the view of rendering available certain prairie lands in Putnam county, agreeing to pay for the work by the square yard. During the progress of the work Lehman & Son bought supplies and groceries of the plaintiffs from time to time and paid for them. Lehman & Son pledged the dredge they used to the Etoniah Canal & Drainage Company as a security for the performance of the contract. Lehman & Son owed one Houck \$1,000 on the dredge, and also owed a bank in Brookston, Ind., which had a claim on the dredge for \$3,000. It seems that the drainage company knew nothing of these claims when the dredge was pledged to it by Lehman & Son. The bank and Houck threatened to seize the dredge, and the drainage company was compelled to pay their claims in order to keep the dredge at work. Lehman & Son having failed to comply with their contract, a new contract was entered into between the drainage company on the one part, and Houck and Lehman on the other, which gave Houck authority to carry out the contract if Lehman failed to do so. In this contract the dredge was again pledged to the Etoniah Drainage Company for the faithful performance of the contract. Some time about April, 1900, Lehman having failed to comply with his contract, Houck took possession of the

dredge. At that time the balance due from Lehman & Son to the plaintiffs, for which this suit was brought, existed. We are unable to discover from the evidence the slightest testimony that the Etoniah Canal & Drainage Company ever became liable for the debt. The goods were bought by Lehman & Son, and the credit was given to them by the plaintiffs. All the previous purchases of goods from the plaintiffs by Lehman & Son had been paid for by the latter. D. D. Lehman expressly says that he bought these goods himself, and that no one authorized, ordered, or directed him to buy them; that no one had any interest in the dredge boat except himself, only he owed some on the dredge; that he was paid for his work by the drainage company up to the time when a controversy arose between him and the drainage company about the work.

O. G. Husband testified that he ran a store account with D. D. Lehman from July, 1899, to the last of May, 1900; that it was paid regularly up to the 1st of each month up to April 1, 1900, and the account sued for is the April and May account, 1900. He says he presented this account to the defendant, but does not say when he presented it, or that the defendant ever admitted its liability; nor does he testify to any circumstance showing liability on the part of the Etoniah Canal & Drainage Company. The mere fact that the drainage company kept agents on the dredge to see that the work was done according to contract does not show that it was liable for the debts of Lehman. Good business principles required this. The fact that they paid claims against the dredge, in order to prevent litigation and delay, does not show that they were responsible generally for all of Lehman's debts. We do not care to swell this opinion by giving all the details of the testimony, but content ourselves with saying we have given it all careful consideration and can find therein no substantial facts which authorized the charges given at the request of the plaintiffs, or the verdict of the jury. The law applicable to this case is settled by this court in the case of *Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 South. 445.

The judgment is reversed at the cost of the defendants in error.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

OTIS et al. v. McCASKILL et al.

(Supreme Court of Florida, Division A. June 11, 1906.)

1. MORTGAGES—FORECLOSURE—ANSWER.

An answer to a foreclosure, setting up a partial failure of consideration, casts the burden of proof upon the complainant.

2. MORTGAGES—CONSIDERATION—FAILURE.

Where the consideration for a mortgage is the purchase price of a shingle mill, and contemporaneously the seller gives a bill of sale under seal describing the mill as one shingle mill complete, known as the "W. mill," with warranty of title, and which mill shortly thereafter had been inspected by the purchaser and was then complete, but at the time of the sale was broken up and scattered, and the mill delivered to the purchaser was incomplete in essential particulars, and the deficiency was promptly pointed out, there was error in denying the defense of partial failure of consideration.

3. MORTGAGES—CONSIDERATION—FAILURE.

When the consideration for a mortgage upon realty is the purchase price of personalty, partial failure of consideration may be pleaded in a suit to enforce the mortgage lien. The principal announced in *Reddick v. Mickler*, 2 South. 698, 23 Fla. 335, does not control.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1212.]

(Syllabus by the Court.)

Appeal from Circuit Court, Santa Rosa County; Frances B. Carter, Judge.

Bill by J. J. McCaskill and R. E. L. McCaskill, doing business as J. J. McCaskill & Co., against S. Otis and Frances E. Otis. Decree for complainants, and defendants appeal. Reversed.

S. Pasco, Jr., and Thos. F. West, for appellants. Maxwell & Reeves and Daniel Campbell & Son, for appellees.

COCKRELL, J. The appellees, as complainants, filed their bill in the circuit court for Santa Rosa county, to enforce a mortgage lien upon realty and a shingle mill situate in said county, alleging the precipitation of the indebtedness by the failure of the mortgagors, Otis and wife, to keep the property insured. The defendants answered, admitting the execution of the notes and mortgage to the complainants, but averring, in substance, that the consideration therefor was a part payment of the purchase price of a certain shingle mill, known as the "Wittich Mill," including engine and boiler made by Houston, Stanwood & Gamble, which complainants sold and agreed to deliver to defendants by January, 1903, at Mulat, Fla.; that the complainants made and delivered their bill of sale for one shingle mill complete, which bill of sale is made part of the answer; that complainants represented that said mill was a shingle mill complete, and that said representation was as to a material fact relied on and was the inducement for the purchase, and that the mill delivered was not complete, but lacked certain specified necessary and essential articles and things of which the complainants were promptly notified on delivery and called upon to make good the warranty and supply the missing portions, but had refused so to do; that the sum of \$756.57 will have to be expended to make the mill complete as warranted; and, further, that the defendants have been damaged in the sum of \$1,250 in the loss of the use of the shingle mill, which

sums they offer to set off, and pray that the bill of complainant be dismissed.

The bill of sale is as follows:

"Know all men by these presents, that we, J. J. McCaskill and Robert E. L. McCaskill, doing business under the firm name and style of J. J. McCaskill & Company, for and in consideration of the sum of fifteen hundred dollars (\$1,500) to us in hand paid by S. Otis, do hereby bargain, sell and deliver unto the said S. Otis, his heirs and assigns the following property, to wit: One (1) shingle mill complete, known as the 'Wittich Mill,' including engine and boilers made by Houston, Stanwood & Gamble, and we, the said J. J. McCaskill & Company, do hereby warrant that the said property is free from all liens of any kind, and that we have a good right to sell same, and hereby agree with the said Otis to defend the title to said property against the lawful claims of all persons whomsoever.

"Witness this our hands and seals this 28th day of November, A. D. 1902.

"J. J. McCaskill. [Seal.]

"R. E. L. McCaskill. [Seal.]

"J. J. McCaskill & Co. [Seal.]"

"Signed, sealed and delivered in the presence of:

"B. Colvin.

"Victoria George."

To this answer the general replication was filed, and testimony was taken before an examiner. Upon final hearing the court decreed for the complainants in accordance with their prayers, and from this decree the appeal is taken.

We are of the opinion there was error in the decree. The briefs for the respective parties are confined largely to the questions of the sufficiency of the evidence to support the court's findings and to the correct interpretation of the bill of sale, whether it be a warranty of the completeness of the mill, as a shingle mill, or a mere identification of the property sold.

Many objections were interposed to proffered testimony, upon the ground that it tended by parol to alter the effect of a sealed instrument, but we do not find that these objections were pressed upon the court or ruled upon. The evidence is too voluminous to be set out in detail, and there are contradictions in much of it, as to which, even though the circuit judge had before him only the report of the examiner and heard none of the witnesses, we give the benefit of the doubt to the appellees, yet there are certain salient facts which we deem sufficiently established to justify us in holding that the consideration operating upon the purchaser to induce the contract was that he was to get a shingle mill complete, and that the complainants who are seeking to take advantage of and enforce that contract in a court of equity are bound on their part to the extent of the failure. Moreover, we are not prepared to

hold that the complainants should have been permitted to avoid the effect of the sealed instrument by altering its meaning, in the absence of an amendment to their bill in its allegations and prayers looking to such course; but we are prepared to follow our former decisions in holding that the burden was upon them to overcome the defense of failure of consideration, and, to overcome the force and effect of the language used in the solemn instrument so executed by them, such burden must be clearly and specifically met, and as against this burden the evidence does not support them, even when assisted by the general finding of the circuit court.

It is shown that McCaskill & Co. had purchased a shingle mill from one Wittich; that Otis, who was familiar with the mill, and which he had seen shortly theretofore in the possession of Wittich as a shingle mill, having all the necessary machinery, opened up negotiations with McCaskill to buy the mill; that the mill, as purchased by McCaskill from Wittich, did not have all the necessary machinery, but that part of it was at Pensacola, while part was at Freeport some distance away; that Otis examined what was in Pensacola, some if it lying on a wharf and some on a schooner, but was intoxicated at the time, and did not examine that at Freeport, and had reason to believe that the portion of the mill at Freeport was considerable. An agreement was then reached. There was a short delay in preparing the necessary papers, which were finally drawn up by John Eagan, Esq., as attorney for both parties, and the bill of sale was executed under the hands and seals of the complainant on November 28, 1902. McCaskill admits that at one time, while Wittich owned the mill, it contained a shingle machine, and that such a machine is necessary to a complete shingle mill. We hold, then, that the consideration for the note and mortgage failed in part at least, and that such partial failure is open to the defendants under section 1072 of the Revised Statutes.

It may be that the court was misled by the principle announced in *Reddick v. Mickler*, 23 Fla. 335, 2 South. 698, and subsequent cases based thereon. This principle has not been invoked or touched upon in the briefs, and we do not feel therefore disposed to review those cases at length, but say merely that the doctrine there announced is a severe one, based upon technical rules of the common law as to real warranties, and not to be extended to embrace guaranties of personal property.

The decree is reversed for further proceedings not inconsistent with this opinion.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR, HOCKER, and PARKERHILL, JJ., concur in the opinion.

OUTLER v. STATE.

(Supreme Court of Alabama. June 14, 1906.)

1. HOMICIDE—EVIDENCE—SUFFICIENCY.

Where decedent and accused had a difficulty immediately prior to the killing, and accused, after getting possession of the pistol of decedent during the difficulty, shot him while deceased was retreating, accused was guilty of some degree of homicide.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 175.]

2. CRIMINAL LAW—TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, on a trial for homicide, the jury were authorized to find accused guilty independent of the testimony of a witness, whose testimony with respect to what occurred between decedent and accused prior to a scuffle between them over a pistol was uncorroborated, an instruction that, if the testimony of the witness or any part thereof was willfully false, the jury could disregard it and find accused not guilty, was misleading and properly refused.

3. SAME—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

An instruction, on a trial for homicide, directing the jury to look to the fact that the pistol used in killing decedent was his own weapon, and not the weapon of accused, in fixing the grade of the homicide, was properly refused, because argumentative.

4. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE—OMISSION OF EVIDENCE.

An instruction, on a trial for homicide, that if, at the time the fatal shot was fired, accused acted under the honest belief that he was in danger of life at the hands of deceased, a verdict of acquittal should be rendered, was properly refused, because omitting the proper postulation as to accused's freedom from fault in bringing on the difficulty.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 627, 628.]

5. CRIMINAL LAW—INSTRUCTIONS AS TO DUTY OF JURORS—REASONABLE DOUBT.

An instruction, on a trial for crime, directing an acquittal if any one of the jurors have a reasonable doubt as to accused's guilt, is erroneous and properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1940.]

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

"To be officially reported."

Elder Outler was convicted of murder in the second degree, and he appeals. Affirmed.

The evidence tended to show that defendant was at a well drawing water in the rear of Gordon Bros.' store, in Covington county, and deceased was on a wagon near the rear of said store. Defendant's wife came up to where deceased was, and asked him why he had cursed her child, whereupon he cursed her and told her he would slap her head off. Defendant asked him not to curse his wife, and deceased inquired of him, using an oath, what he had to do with it. Deceased was drinking. Defendant replied that he did not want deceased to be cursing his wife, and approached deceased, whereupon deceased drew a pistol. Defendant closed with deceased in a struggle over the pistol, wrenched the pistol out of deceased's hand, and, as deceased was stepping off sideways, asking defendant not to shoot, the defendant

fired three shots in rapid succession, two of them taking effect in deceased's left side and producing death. There was conflict in the testimony as to whether or not deceased was advancing on defendant when the first shot was fired. The defendant requested the court in writing to give the following charges, each of which the court separately refused: "(1a) If the guilt of the defendant is dependent on the testimony of Isaac Terry, and the jury believe from the evidence that the testimony of said Terry, or any part thereof, was willfully and maliciously false, then they can disregard his testimony in full, and must find the defendant not guilty." "(11) You may look to the fact, if you find it to be a fact from the evidence in the case, that the pistol used in killing the deceased was his own weapon, and not the pistol of the defendant, when you are fixing the grade of the homicide, if you should determine that the defendant was not absolutely guiltless." "(A) I charge you that if you believe from the evidence that at the time the fatal shot was fired the defendant acted under the honest belief that he was in danger of life or limb at the hands of deceased, then you should acquit him. (B) I charge you that, if you believe from the evidence that at the time the fatal shot was fired the appearances and surroundings were such as to generate in the mind of the defendant the honest belief that he was in danger of life or limb at the hands of the deceased, then you should acquit him. (C) I charge you that, if the defendant had a reasonable apprehension of great personal violence either to life or limb, he had a right to protect himself, even if, in order to do so, it necessitated the taking of the life of the deceased. (D) I charge you that, if you believe the evidence, you cannot convict the defendant of murder in the first degree. (E) I charge you that, if you believe the evidence, you cannot convict the defendant of murder in the second degree. (F) I charge you that, if you believe from the evidence that the defendant at the time of the fatal difficulty honestly believed from appearances and surroundings that the danger to his life or limb would have been increased had he retreated, then he was under no duty to retreat. (G) I charge you that, if you believe the evidence, you cannot convict the defendant." "(I) I charge you that, if either of you had a reasonable doubt as to the defendant's guilt, then it will be your duty to acquit him. (J) I charge you that, if either or any of you are not satisfied to a moral certainty of defendant's guilt, then you should acquit him."

W. H. Albritton and R. H. Jones, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. The defendant's conviction was not dependent upon the testimony of witness Terry. Indeed, under the testimony adduced through other witnesses, who saw the

shooting, the jury might well have found the defendant guilty. If it be true that defendant shot deceased while he was running, after getting possession of his pistol, no matter who was at fault in bringing on the difficulty in which the pistol was wrenched by defendant from the hands of the deceased, he could not be guiltless. It was with respect as to what occurred between deceased and defendant prior to the scuffle between them over the pistol that Terry's testimony was uncorroborated. Charge 1a, we think, was calculated to mislead the jury, if not otherwise bad. It is true that in *Jackson v. State*, 138 Ala. 22, 34 South. 188, we held that a charge, similar to this one in all respects except in that one, the willful and malicious falsity of the witness' testimony was predicated upon a material part of his testimony and should have been given. But in that case the conviction was dependent solely upon the witness' testimony with which the charge dealt.

Charge 11 was an argument. *Mathews v. State*, 100 Ala. 46, 14 South. 359, and cases there cited.

Charges A, B, C, and F were faulty, if not otherwise bad in omitting the proper postulation as to defendant's freedom from fault in bringing on the difficulty.

The defendant's guilt, as charged, under the evidence, was clearly for the determination of the jury. Charges D, E, and G were therefore properly refused.

Charges I and J made defendant's acquittal turn upon the finding of one juror.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

SEABOARD AIR LINE RY. et al. v. WRIGHT.

(Supreme Court of Alabama. June 6, 1906.)
1. RAILROADS—PRECAUTIONS AGAINST STOCK—CATTLE GUARDS—PLEADING—DEFENSES.

Where, in an action against a railroad company for injuries to plaintiff's crops by trespassing cattle, the complaint alleged that the stock gaps or cattle guards at the points where defendant's railroad entered plaintiff's field were, and had been at all times, wholly insufficient to prevent stock from passing over the same and entering such fields, a plea alleging that defendant maintained cattle guards at the point in question commonly known as the "Sheffield Metal Surface Standard Cattle Guard," which were in general use for like purposes by all or most of the railroad companies operating in the United States, etc., failing, however, to charge that they were reasonably sufficient to turn stock, was fatally defective.

Appeal from Circuit Court, St. Clair County; John Pelham, Judge.

"To be officially reported."

Action by James M. Wright against the Seaboard Air Line Railway Company and others. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Action by appellee against appellant under section 3480 of the Code of 1896 for damages to crops for want of proper cattle guards. Defendant filed, among others, plea No. 4, which is as follows: And for further answer to plaintiff's said complaint the said defendant says that prior to the said grievances alleged in the complaint the said defendant constructed and erected at the place or places upon the lands in said complaint mentioned, where the defendant's railroad enters and leaves the plaintiff's said lands, cattle guards of standard make, commonly known as the "Sheffield Metal Surface Standard Cattle Guard," and were then and there properly constructed and erected and thereafter properly maintained, and so properly constructed, erected, and maintained were at said place or places at the time of the grievance complained of in said complaint; and that said cattle guards are in generous use, for like purpose, by all or most of the railroad companies now and then engaged in the business of operating railroads in the state of Alabama, and neighboring states of the United States. And said defendant further avers that the only other cattle guards heretofore in use by said railroad company were and are what are known as the "Pit Cattle Guard," which were and are dangerous to the operation of trains on railroads and to the life and limb of passengers and employes upon said trains, whereas said standard cattle guard are not so dangerous, and for that reason said pit cattle guards have been generally discarded by companies operating well-regulated railroads, and were not used by this defendant upon its line of railroad and upon the lands mentioned in said complaint. And the said defendant avers that the cattle guards, so constructed and erected as aforesaid, were in good repair prior to and at the time of the alleged grievance." The plaintiff interposed demurrers to the fourth plea, because the matters and things alleged therein are impertinent and constitute no answer to plaintiff's complaint, and because the said plea fails to allege that the cattle guard so erected was sufficient to prevent the depredation of stock upon the lands and growing crops of plaintiff. This demurrer was sustained. There was judgment for plaintiff, and defendant appeals.

Tillman, Grub, Bradley & Morrow, for appellant. Smith & Herring, for appellee.

TYSON, J. This action was brought to recover damages suffered by plaintiff on account of injuries to his growing crop caused by stock depredating upon them. The gravamen of the complaint is the negligent failure of defendant, after demand, to erect and maintain guards, so as to prevent the stock from going into plaintiff's fields when his crops were growing. The averment is "that the stock gaps or cattle guards at the points where defendant's said railroad tract enters into plaintiff's said fields are and have been

all times wholly insufficient to prevent stock from passing over the same and entering into plaintiff's fields, etc. It is entirely clear that the action was brought for a violation of the duty created and imposed by section 3480 of the Code of 1896.

The fourth plea to which a demurrer was sustained neither traverses nor confesses and avoids the averments of the complaint. It contains no averment that the guards erected and maintained by defendant were reasonably sufficient for the purpose for which they were erected. Non constat, they may be wholly insufficient, as alleged in the complaint; and clearly, if they are, the fact that they are in use by all well-regulated railroads does not and cannot exempt the defendant from liability for a violation of the duty which it owed the plaintiff. We do not wish to be understood that, if the plea contained all the necessary averments to make it a good traverse, we would hold that the sustaining of a demurrer to it would be a reversible error. The matter, if properly pleaded as a defense, would be clearly admissible as evidence under the general issue.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

BRADFORD v. STATE.

(Supreme Court of Alabama. June 7, 1906.)

1. CRIMINAL LAW—EVIDENCE—RES GESTÆ—OTHER OFFENSES PART OF SAME TRANSACTION.

On a prosecution for the larceny of a locket, it was competent to prove that defendant was in prosecutor's room, and remained there while prosecutor was out, and that on returning to the room defendant was gone, and a pocketbook containing the locket and money was missing.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 807.]

2. SAME—SUBSEQUENT INCRIMINATING CIRCUMSTANCES—INTENT TO ESCAPE.

In a criminal case, it was proper to admit in evidence, as warranting an inference of a consciousness of guilt, a portion of a letter written by defendant to his mother to the effect that he knew that it was intended to send him to the penitentiary, but that it would not be done, as he intended to break jail.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 778-783.]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

"To be officially reported."

J. M. Bradford was convicted of larceny, and he appeals. Affirmed.

Defendant was indicted, tried, and convicted of the larceny of a gold locket of the value of \$50, the property of another. The evidence tended to show that the defendant was in the room of the person who lost the locket, and remained there while such person

was out, and that on returning to the room defendant was gone, and a pocketbook with the locket in it was missing. It was afterwards found where defendant told the police officer he had left his clothes that morning. The state asked the witness, after she had testified that she had a pocketbook on the dresser in her room with some money and the locket in it, what she missed from her room that morning. The defendant objected to the question. The court overruled the objection, and permitted the witness to answer: "When I left my room, there was a pocketbook with a locket and \$10 in money in it, and when I returned the pocketbook, money, and locket were missing. Defendant objected to this answer, and moved to exclude it, which was overruled, to which action the defendant excepted. When the defendant as a witness was being examined, the solicitor asked him on cross-examination if he did not write a certain letter, then shown him, to his mother. The defendant objected to this question, but the court overruled the objection, and instructed the witness to answer, and the defendant excepted. The witness admitted writing the letter, and the solicitor offered in evidence a portion of the letter, which is in words and figures as follows: "Montgomery, Ala., October 25, '05. My Dear Mother: I learned to-day that I was indicted, and now I know that they intend to railroad me to the penitentiary, if they can; but they won't, for I am going out of this jail, dead or alive, if I have to kill somebody to do it. If I get away safe, I'm going to South America, and I will write you when I get there. If I had anybody here to get me a file, I could get out of here at night, and no one would know it; but I don't know any one here, so can't get one. So I will have to take my only chance and fight for it." Defendant objected to the introduction of the letter. The court overruled the objection, and permitted the letter to go to the jury. The defendant was convicted, and sentenced to a term of two years in the penitentiary.

TYSON, J. The taking of the locket and money constituted the same transaction. It was therefore competent to prove the taking of both, although only the larceny of the locket was charged in the indictment. *Ray v. State*, 126 Ala. 9, 28 South. 634.

That portion of the letter written by the defendant, admitted in evidence, afforded an inference for the jury that it was inspired by a consciousness of guilt. There was no error in the ruling of the court on this point.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

COMMISSIONERS' COURT OF CHILTON
COUNTY v. STATE ex rel. SOUTHERN
RY. CO.

(Supreme Court of Alabama. June 5, 1906.)

1. APPEAL—RECORD—BILL OF EXCEPTIONS—
PLEADING—MOTION TO STRIKE.

A motion to strike a demurrer to the petition from the files, not being a pleading in the case nor a part of the record on appeal, could only be incorporated therein by a bill of exceptions.

2. SAME.

Where a demurrer was stricken from the files on motion, it was no longer a record of the trial court, and could only be brought into the record on appeal by bill of exceptions.

3. JUDGMENT—PLEADINGS TO SUSTAIN—DEFECTIVE PETITION.

Where a petition for mandamus was fatally defective, it was error for the court, on the striking of a demurrer thereto from the files, to enter an order granting the relief prayed.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 84-37.]

4. MANDAMUS—NATURE OF WRIT—SCOPE OF
RELIEF—COUNTY COMMISSIONERS—ALLOW-
ANCE OF CLAIMS.

Where a claim against a county was properly verified and presented to the commissioners' court for audit, mandamus was the proper remedy to compel the commissioners to act on the claim, as they were required to do by Code 1896, § 1416.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 211-216.]

5. COUNTIES—CLAIMS—COLLECTION—REME-
DIES.

Where a claim against a county is disallowed by the commissioners' court, the claimant's remedy is by action at law, as provided by Code 1896, § 13.

6. SAME—AUDIT—DISALLOWANCE—ENTRY ON
MINUTES.

Where a claim against a county was disallowed by the county commissioners, but the disallowance was not entered on the minutes of the court, the action of the commissioners was ineffectual as an audit of the claim.

7. SAME.

A claimant against a county filed a verified petition, showing the amount of its claim, etc., requesting its allowance, or, if it be disallowed, that an order of disallowance be entered on the minutes. The commissioners' court thereupon entered on the minutes an order reciting that on consideration of claimant's petition, on a date specified, the court was of the opinion that petitioner was not entitled to the relief sought, and it was therefore ordered and adjudged by the court that the petition be, and was thereby, denied. *Held*, that such order amounted to a proper audit and disallowance of the claim.

8. APPEAL—COUNTY COMMISSIONERS—CAPAC-
ITY OF PARTIES.

Where an appeal by the commissioners' court was taken in the name of the probate judge and the commissioners in their official capacity, the fact that their assignment of errors started with the words, "come the appellants," etc., did not render the same defective, as showing that the commissioners assigned error in their individual, instead of representative, capacity.

Appeal from Circuit Court, Chilton County; A. H. Alston, Judge.

Mandamus by the state, on the relation of the Southern Railway Company, against the commissioners' court of Chilton county. From an order granting the writ, commissioners appeal. Reversed and rendered.

This was a petition addressed to the circuit court of Chilton county, seeking to require the judge of probate of Chilton county, as chairman of the commissioners' court, and the commissioners' court of said county, to pass upon and allow or refuse a claim presented to it by the Southern Railway Company for a sum of money alleged to have been overpaid as taxes by said railroad. It seems from the facts in the record that this claim was presented to the predecessors of the present appellants, and rejected; but no minute of the action of the court was entered upon the minute books, and the claim was lost. Afterwards a substantial copy of the claim, together with the facts relied on why it should be paid, duly verified by affidavit, was presented to the present appellants. It seems no order was indorsed upon the claim denying it, but the following order in reference to the claim was entered upon the minutes of the commissioners' court: "Upon consideration of the petition of the Southern Railway Company, filed by A. S. Lyman, its agent and attorney, on the 28th day of July, 1905, it is the opinion of the court that the petition was not entitled to the relief sought in said petition. It is therefore ordered and adjudged by the court that the same be, and is hereby, denied." The petition sought a mandamus to compel action by the commissioners' court to properly audit, and either pass or deny, said claim. There were a number of motions, demurrers, and other pleadings, not necessary to be here set out, as they were not properly presented for review in this court. Mandamus was awarded, and from this order this appeal is taken.

Smith & Middleton, for appellant. Pettus, Jeffries & Pettus, for appellee.

TYSON, J. It appears from the judgment entry that respondents' demurrer to the petition was, on motion, stricken from the files. This motion, while appearing in the transcript as a part of the record of the trial court, is not incorporated in the bill of exceptions. It was not a pleading in the cause (*Meyer v. Block*, 139 Ala. 174, 35 South. 705), and therefore not properly a part of the record of the court below, and cannot be looked to or considered by us for the purpose of determining whether properly or improperly granted. *Jones v. Anniston*, 138 Ala. 199, 35 South. 112, and cases there cited. Speaking to this point, it was said in *Randall v. Wadsworth*, 130 Ala. 638, 31 South. 555: "The second assignment is based on the ruling of the court on motion to strike certain pleadings. Rulings on motions to strike can be presented for review on appeal only by bill of exceptions. Motions of this character are usually oral, and form no part of the record as pleadings proper, and, although reduced to writing and copied into the record, cannot be considered as forming any part of the proceedings constituting the record proper in the

court below." In *Spraggins v. State*, 139 Ala. 102, 35 South, 1000, it also said: "Pleadings and the rulings thereon should be shown by the record, and, when a motion to strike pleadings is ruled on, a bill of exceptions is proper to show the motion and that an exception was reserved to the ruling; but at the same time the record proper should show that a judgment was rendered by the court." In *Forbes v. Rogers* (Ala.) 38 South. 643, this language is used: "The action of the trial judge in striking pleas will not be reviewed by this court, when the bill of exceptions fails to set out the motion." Quotations from other cases might be indulged in, but these will suffice. See, also, *Lynn v. Bean*, 141 Ala. 236, 37 South. 515; *Hooper v. State*, 141 Ala. 111, 37 South. 662. Furthermore, after the demurrer was stricken from the files, it was no longer a part of the record of the court below, and could only be brought back into the record by being incorporated in the bill of exceptions; and, although in the transcript as a part of the record of that court, it is improperly there for our consideration on this appeal. *Muller v. Ocala F. & M. Works* (Fla.) 38 South. 64; *Elliott on Appellate Pro.* § 816; 3 *Ency. Pl. Pr.* pp. 400, 401. So, then, we have not the demurrer on the motion before us upon which the trial judge acted. His ruling on the motion is therefore not revisable.

After the demurrer was stricken and the declination of respondents to plead further, upon motion of relator its petition for the writ of mandamus was granted, and the writ awarded. We apprehend that it will not be gainsaid that this was error, if upon the facts alleged in the petition it appears that the relief should not have been granted. In this respect, if the facts alleged do not authorize the award of the writ, there can be no difference from a case where the complaint fails to state a substantial cause of action. In such cases it is the established rule of this court, whether a defense be interposed or not, to annul the judgment for want of jurisdiction. In other words, such a complaint will not support a judgment. *Trott v. Birmingham Ry. Light & P. Co.* (Ala.) 39 South. 716; *Linam v. Jones*, 134 Ala. 570, 579, 33 South. 343, and cases there collected. It is entirely clear that the relator's right to the writ sought is, and must be, predicated upon the fact that the respondents, who compose the court of county commissioners of Chilton county, as such officers, have refused to audit the claim presented to that tribunal as required by section 1416 of the Code of 1896. Clearly a writ cannot be obtained for the purpose of collecting the claim, whether audited or not. If the claim was properly verified and presented, and the court refused to audit it—that is, refused to allow or disallow it—then mandamus to compel it to audit it is clearly the remedy. *Scarborough v. Watson*, 140 Ala. 349, 37 South. 281. But, if the court audit the claim by disallowing it,

the remedy is by an action at law against the county. Section 13, Code 1896; *Scarborough v. Watson*, supra. It appears from the averments of the petition that the claim was presented to the respondents' predecessors in office, and that it was disallowed by the court, which disallowance was indorsed upon it, but not entered upon the minutes of the court. Upon the authority of *Crenshaw Co. v. Sikes*, 113 Ala. 626, 21 South. 135, this action of the commissioners' court was wholly ineffectual as an audit of the claim under the statute, and amounted to no action by that court upon the claim.

On the 28th day of July, 1905, this relator filed in the commissioners' court its verified petition, showing the amount of its claim and the facts out of which the supposed liability of the county arose, as fully, and perhaps more so, as did the claim originally presented, asking that court, among other things, to consider the claim, allow it, with accrued interest, or, if disallowed, to cause an order showing the disallowance to be entered upon its minutes. In response thereto the court entered upon the minute the following order, to wit: "Upon consideration of the petition of the Southern Railway Company, filed by E. S. Lyman, its agent and attorney, on the 28th day of July, 1905, it is the opinion of the court that the petitioner is not entitled to the relief sought in said petition. It is therefore ordered and adjudged by the court that the same be, and is hereby, denied." It seems to us so obvious that this order of the court was a disallowance of the claim that it needs no further comment. It cannot by any sort of construction be limited in its effect and operation as a denial merely of the other prayer contained in the petition. It is an unqualified denial of all the relief sought by the petitioner, and was therefore ex necessitate a disallowance of the claim presented in and by it for audit.

What we have said is conclusive against the right of the relator to the relief it seeks; but it may not be amiss, before concluding, to call attention to the fact that the averments of the petition do not show that the taxes paid by it to the county, made the basis of the claim presented, were paid under legal compulsion. *Sou. Ry. Co. v. Mayor and Aldermen of Florence*, 141 Ala. 493, 37 South. 844. However, we need not and do not put the decision on this point.

The point is made by the appellee that the assignments of error are by the appellants as individuals. It is conceded that the appeal was properly taken in the name of the probate judge and commissioners in their official capacity. This being true, the respondents as officers are the appellants, and as appellants they assign the errors; the language employed being, "Come the appellants," etc. The point is, we think, too technical.

The judgment appealed from will be re-

versed, and one will be here rendered denying and dismissing the petition.
Reversed and rendered.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

COMMISSIONERS' COURT OF CHILTON COUNTY v. STATE ex rel. MOBILE & O. R. CO.

(Supreme Court of Alabama. June 7, 1906.)

Appeal from Circuit Court, Chilton County; A. H. Alston, Judge.

"Not officially reported."

Mandamus by the state, on the relation of the Mobile & Ohio Railroad Company, against the commissioners' court of Chilton county. From a judgment granting the relief prayed, respondents appeal. Reversed and rendered.

Smith & Middleton, for appellant. Pettus, Jeffries & Pettus, for appellee.

SIMPSON, J. On the authority of the case of Commissioners' Court of Chilton County v. State of Alabama ex rel. So. Ry. Co. (Ala.) 41 South. 463, the judgment of the court in this case is reversed, and one will here be rendered denying and dismissing the petition.

Reversed and rendered.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

ETHERIDGE BROS. et al. v. SWANN-ABRAMS HAT CO. et al.

(Supreme Court of Alabama. June 7, 1906.)

CREDITORS' SUIT—DISCOVERY OF ASSETS—PARTIES—NATURE OF CLAIMS.

Under Code 1896, § 819, providing that a judgment creditor, or a creditor without lien or judgment, may file a bill for the discovery of assets, and section 820, authorizing any number of creditors to join as complainants in such a bill, the fact that the claims of some of complainants contain a waiver of exemptions does not render it beyond the power of the court to grant the relief prayed.

Appeal from Chancery Court, Conecuh County; W. L. Parks, Chancellor.

"To be officially reported."

Action by the Swann-Abrams Hat Company and others against Etheridge Bros. and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Hamilton & Crumpton, for appellants. James F. Jones, for appellees.

SIMPSON, J. The bill in this case was filed by appellees (complainants) against appellants, alleging that the defendants were indebted to complainants severally, in various amounts by accounts and notes, some of the latter containing waiver of exemptions. The bill alleges that the defendants have

no property subject to legal process, but have large sums of money and other property, unknown to complainants, which they are concealing, etc., and prays for the ascertainment of the amount due each of said complainants, and that judgment or decrees be rendered for the amounts so found to be due, and that defendants be required, under oath, to disclose all property, real, personal, and mixed, including choses in action, owned by them, etc. The appeal is from the decree overruling demurrers and the motion to dismiss for want of equity.

Section 819, Code of 1896, provides that a judgment creditor, "or a creditor without lien or judgment," may file a bill for the discovery of assets. Section 820 authorizes any number of creditors to join as complainants in such a bill. *McKissack v. Voorhees, Muller & Co.*, 119 Ala. 101, 24 South. 523. The bill is mainly for the discovery of assets, and the fact that some of the claims contain waiver of exemptions does not render the claims so incongruous as to render it beyond the power of a court of equity to grant the relief prayed, as the court can so mold the decree as to meet the requirements of the law. Similar proceedings under these statutes have been frequently sustained by this court. *M. & Fla. Ry. v. McKenzie*, 85 Ala. 546, 5 South. 322; *Sweetzer, P. & Co. v. Buchanan*, 94 Ala. 574, 10 South. 552; *Drennen v. Ala. Nat. Bank*, 117 Ala. 320, 28 South. 71; *Sorrell v. Vance*, 102 Ala. 207, 14 South. 738; *Kinney v. Reeves (Ala.)* 39 South. 29.

The decree of the court is affirmed.

TYSON, ANDERSON, and DENSON, JJ., concur.

SPIRA et al. v. STATE et al.

(Supreme Court of Alabama. June 7, 1906.)

LICENSES—CORPORATIONS PAYING LICENSE TAX—PRIVILEGE TAX ON CORPORATE FRANCHISE.

Under Code 1896, § 4122, subd. 7, imposing a license tax on breweries, and subdivision 55, imposing a privilege tax on corporations, but providing that corporations otherwise specifically required to pay a license tax shall not be required to pay a privilege tax, a corporation engaged in the brewing business and paying the brewers' license tax is nevertheless liable to the corporation privilege tax.

Appeal from Chancery Court, Mobile County; Thos. H. Smith, Chancellor.

"To be officially reported."

Action by the state of Alabama and others against A. H. Spira, as receiver, and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Stevens & Lyons, for appellants. R. H. & N. R. Clarke, for appellees.

SIMPSON, J. The Mobile Brewery, an Alabama corporation, being in the hands of appellant, A. H. Spira, as receiver, the tax

commissioner of Mobile county, presented a bill for certain license taxes claimed to be due by said corporation to the state and county, and commissions and fees due the tax commissioner, and the appeal is from the decree allowing said claim. The contention arises on the construction of section 4122 of the Code of 1896, and particularly subdivisions 7 and 55. The appellant claims that, having paid the license tax required of a brewer under subdivision 7, the corporation was not liable to pay the privilege tax required by subdivision 55, because that subdivision makes an exception in favor of corporations "otherwise specifically required to pay a license tax"; and he places some stress upon the fact that the expression "license tax" is used in the exception, and the expression "privilege tax" in the requirement of said subdivision 55, his contention being that said corporation, having been required to pay the license tax, as a brewer, cannot be required to pay the privilege tax required of all corporations, according to the amount of their capital stock.

From an examination of the various statutes on kindred subjects, we do not think that the Legislature had in mind any marked distinction between a license tax and a privilege tax, but it seems to have used the terms interchangeably. However that may be, it is clear that the interpretation of subdivision 55 is that corporations were to pay a privilege tax proportioned to the amount of their capital stock, and not according to the nature of the business in which they engaged, and that tax was for the privilege of exercising their corporate franchise. When the incorporators have taken the necessary steps, and paid the privilege tax required, they have simply acquired the right to act in their corporate capacity in the state, and stand upon an equal footing with individuals or partnerships in the state, with the right to engage in any lawful business within their charter powers, upon the same terms as individuals or partnerships. If the intention had been to exempt a corporation from paying this privilege tax, on account of having paid the license tax for a particular line of business, the language used would have been to the effect that a corporation engaging in a particular line of business requiring a license, and paying the license required for that line of business, shall not be required to pay the privilege tax herein required, or it would simply relieve all corporations from paying any license tax on business or occupation, which would be contrary to the entire spirit of our laws, if not to constitutional provisions. It would be permitting a corporation to engage in a business requiring a license, on terms different from those allowed to individuals, and it would allow a corporation, by engaging in some line of business requiring a small license tax, to evade entirely the requirements of the law

that it shall pay privilege tax in proportion to its capital stock.

It is true, as remarked by the counsel for appellant, that this last consideration should not cause the court to place a wrong construction on the law; but it is a consideration which may be legitimately looked to in arriving at a proper determination as to the legislative intent. In addition to all this, the language of the exception, "Corporations * * * not otherwise specifically required to pay a license tax," shows clearly that the intention was to except only those corporations in regard to which there was some particular specific provision of law, fixing the license or privilege tax to be paid by that particular corporation, and has no reference at all to the license taxes provided by the general law to be paid by all persons and corporations who engage in a particular line of business. *Troy Fertilizer Co. v. State*, 134 Ala. 333, 32 South. 618.

The decree of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

SANDERS v. STATE.

(Supreme Court of Alabama. June 14, 1906.)

1. CRIMINAL LAW—APPEAL—EXCEPTIONS, BILL OF—TIME OF FILING—RECORD ENTRIES.

The record on appeal showed that on July 17th an adjourned term was called, to continue till the criminal cases were disposed of; that jurors were summoned for three weeks; that sentence was imposed on July 25th, and contained an undated entry stating that defendant had given notice of appeal and filed his bill of exceptions in term time. At the close of the bill of exceptions was a statement, signed by the judge, that the bill of exceptions was signed on August 4th and within the time allowed by court. *Held*, that in view of Code 1896, § 215, under which the bill of exceptions is not entitled to be filed until signed, it sufficiently appeared that the bill of exceptions was filed in term time.

2. INDICTMENT—QUASHING—CONSTITUTION OF GRAND JURY.

That more than 21 names were drawn from which to form the grand jury is no ground for quashing the indictment.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 481.]

3. RAPE—EVIDENCE—COMPLAINT BY PROSECUTRIX.

In a prosecution for rape, evidence that the prosecutrix had told her foster father what defendant had done and the particulars was not competent.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, §§ 67-69.]

4. SAME.

In a prosecution for rape, a question to prosecutrix as to what time her menses came on was properly excluded.

5. CRIMINAL LAW—EVIDENCE—ATTEMPT TO SETTLE PROSECUTION.

In a prosecution for rape, evidence that defendant had offered money to the foster father of prosecutrix to stop criminal proceedings was incompetent.

6. RAPE—INSTRUCTIONS.

In a prosecution for rape, an instruction that, if the private parts of prosecutrix were torn and bleeding, this was a corroborative fact, while argumentative, was not erroneous.

7. CRIMINAL LAW—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a prosecution for rape on a negress, requested instructions that the known character, proclivities, and habits as to chastity of females of the negro race in general might be considered on the question of consent were properly refused as argumentative and not based on any evidence in the case.

Appeal from Circuit Court, Monroe County; John T. Lackland, Judge.

"To be officially reported."

John Sanders was convicted of rape, and appeals. Reversed and remanded.

The defendant was indicted, tried and convicted of the offense of rape, alleged to have been committed on one Verda Puryear. The evidence tended to show that the rape was committed in the morning of a certain day; that defendant came into the house, where prosecutrix, another woman, and some small children were, and after sending all of them out on one pretext or another, caught prosecutrix around the waist, carried her to the bed, and forcibly entered. There was evidence tending to show consent on the part of prosecutrix. On examination of prosecutrix, she was asked if she told any one what had happened to her soon after the occurrence. There was objection by defendant, which was overruled. When prosecutrix's foster father was put upon the stand, the state was permitted, over the objection of the defendant, to state that prosecutrix told him, soon after it was alleged the offense was committed, what defendant had done to her, and the particulars. The testimony referred to in the opinion as question 8 was a question propounded to the prosecutrix by the defendant on cross-examination as to what time her menses or monthly flow of blood came upon her. Objection by the state to this question was sustained by the court. The other facts sufficiently appear from the opinion.

At the request of the solicitor the court gave the following charge for the state: "If you believe that Mariah Puryear made an examination of the private parts of the prosecutrix, Verda Puryear, and they were torn and bleeding, this is a corroborative fact, which you may consider with the testimony of the prosecutrix and the other testimony in the case." The defendant requested the following written charges, which were refused by the court: Charge 11: "The court charges the jury that in arriving at your verdict in this case, as men of experience and affairs, the law permits you to draw upon and rely upon your common knowledge and observation of the habits and characteristics and natural proclivities of the colored race as a race, as bearing on the question of the probable consent of the woman to the act of intercourse." Charge 13: "The court charges the jury that matters within the common

knowledge of the jury may be considered by them in arriving at their verdict; and if it is within their knowledge, as members of the community at large, that the race to which the prosecutrix belongs are of loose habits of virtue, then you may consider this as bearing upon the question of consent of the female to the act of sexual intercourse charged." Charge 14: "The court charges the jury that you may consider the known habits and characteristics of the race of people to which this prosecutrix belongs in determining whether or not she consented to the intercourse with the defendant in this case." Charge 15: "The court charges the jury that you may consider facts within your common knowledge relative to the natural habits and general customs of the race to which the prosecutrix belongs as of evidential value on the question of her consent to the alleged intercourse with this defendant." Charge 12: "The court charges the jury that in your deliberations on this case you are at liberty, as reasonable men of experience, in determining whether or not the woman consented to the act of intercourse alleged, to consider the proclivities, habits, and characteristics of the race to which she belongs.

McCorvey & Hare and J. N. Miller, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The defendant in this case was found guilty of the offense of rape, and sentenced to be imprisoned in the penitentiary for 10 years. The record shows that the adjourned term of the court was called to meet on July 17th, and to continue until the criminal cases on the docket were disposed of; that jurors were ordered to be summoned for three weeks; that this case was tried on July 22d; and that the defendant was sentenced on July 25th. Just after the minute of sentence, there is an entry, not dated, stating that, "the defendant having given notice of appeal, and having filed his bill of exceptions in term time, the execution of this sentence is hereby suspended," etc. At the close of the bill of exceptions are these words: "The foregoing bill of exceptions is now signed by me, J. T. Lackland, judge of the circuit court of Monroe county, Alabama, and is now dated by me the 4th day of August, 1905, the same being within the time allowed by the order of the court for the signing of the said bill of exceptions." The 4th day of August would be Friday of the third week of said court. While the record should be more explicit, yet we think it sufficiently appears that the bill of exceptions was signed during the term. The record states positively that the bill of exceptions was filed in term time. It could not become a part of the record and be entitled to be filed until after it was signed. Code, 1896, § 615.

The motion to quash the indictment, de-

cause more than 21 names were drawn from which to form the grand jury, was properly overruled. *Rogers v. State* (Ala.) 40 South. 572.

There was error in allowing proof of the particular statement of the prosecutrix to her adopted father, Puryear.

The objection to the question marked 6 was properly sustained. In the form in which the question was framed, it does not show that it was material. It should have been confined to the condition of the witness at the time the complaint was made.

The court erred in allowing the witness, Sandy Puryear, to testify, against the objection of the defendant, that the defendant had offered to bribe him to "squash" the proceedings. Said Puryear was not merely a witness, but, being the father by adoption of the prosecutrix, this was not analogous to the cases where efforts were made to bribe witnesses, but was an effort to compromise the case. The decisions of this state are uniform to the effect that efforts to compromise cannot be proved as admissions against the party making them. It is true that these decisions have been in civil cases, and in one instance in a quasi criminal case of bastardy. *Martin v. State*, 62 Ala. 119. But in a criminal case this court, speaking through Brickell, C. J., applies the same reasoning, and gives cogent reasons why courts should be careful about admitting such testimony. *Wilson v. State*, 73 Ala. 527. It is true that there is no authority of law for compromising a felony, yet it is a fact that less penalties are sometimes agreed upon between the prosecutor and the defendant, and, however that may be, an effort to compromise is not an admission of guilt. "The true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a belief that the adversary's claim is well founded, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong done." 2 Wigmore on Evidence, p. 1231, § 1061c. While there are decisions to the contrary in other states, yet the reason of the law, as expressed by our own court and the eminent text-writer just quoted, commends itself to our judgment.

While charge 1, given by the court at the request of the solicitor, might have been refused, as argumentative, yet the court cannot be placed in error for giving it. *Karr v. State*, 106 Ala. 1, 17 South. 328.

Charges 11, 12, 13, 14, and 15, requested by the defendant, were properly refused, as they were argumentative, and not based on any evidence before the court.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded. All the Justices concur.

CITY OF MOBILE v. FOWLER et al.
(Supreme Court of Alabama. June 5, 1906.)

1. DEDICATION—ACCEPTANCE—OFFICIAL ACTS—PUBLIC USE.

Acceptance of a dedication may either be by formal action of the municipal or other authorities or may be inferred by long public use.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 70, 73-76.]

2. SAME—PLATTING LAND.

The platting of land by the owner, and dividing it off by streets and avenues, and selling lots with reference to a map showing the streets, is a complete dedication of the streets thereon disclosed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 34-47.]

3. SAME—EVIDENCE OF DEDICATION.

The fact that a street appears on the map which is referred to in some of several deeds to lands in the vicinity is not equivalent to a dedication.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 37, 85.]

4. SAME—PRESCRIPTION—EVIDENCE.

Mere testimony that certain land formed a part of a street before it was fenced in was not sufficient to show that it was used for such length of time as to become a public highway.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 85.]

5. SAME—NECESSITY OF ACCEPTANCE.

A dedication must be accepted in order to become irrevocable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 64.]

6. PLEADING—GENERAL DENIAL.

In a suit to enjoin the obstruction of a street, a general denial of allegations that the land was dedicated to a public use at a certain time, and that pursuant to the dedication it was opened as a street and used by the public, was sufficient to put the truth of the allegations in issue.

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

"To be officially reported."

Action by the city of Mobile against Elise M. Fowler, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This was a bill filed by the city of Mobile to enjoin respondents from obstructing the western end of Georgia avenue and to require them to immediately remove any obstructions therein placed. The second paragraph of the bill alleges that one Sage O. Butler in 1845, being then the owner of the land covered by said avenue, by deed dedicated the said avenue as a street 60 feet wide, extending from Dauphin street, to Old Shell Road. Here follows a description of several deeds made by Butler to various parties. These deeds contain the following stipulation: "Also the right, title, and interest, being one undivided half of, in, and to the street adjoining said lands and known and called Georgia avenue; that is to say, so much of said street as adjoins the land hereby conveyed on the side of Dauphin street, said avenue being 60 feet wide and extending back from Dauphin street northwardly 670 feet, together with the right of compensa-

tion for the said avenue from the corporation of Mobile, with the condition and stipulation that the said avenue shall be kept open as a public street." The third allegation of the bill is that pursuant to said dedication the said Georgia avenue was opened as a street 60 feet wide from Dauphin street to said old Shell Road, and remained in use by the public as such for a considerable period of time. In the answer the respondents entered a general denial of the truth of the allegation of the second and third paragraphs of the bill. The other facts sufficiently appear in the opinion. There was judgment denying relief, and the plaintiff appeals.

D. B. Boone and R. W. Stoutz, for appellant. Erwin & McAleer and W. J. Young, for appellees.

ANDERSON, J. The bill in this case can only be maintained upon the theory that the respondents are wrongfully closing or obstructing complainant's highway. The question therefore arises: Was the strip in controversy a public highway, or a part thereof, when inclosed by the respondents? In order for the complainant to obtain relief, it is incumbent upon it to show that there was a dedication of this strip by the owner and an occupation. Acceptance of the dedication may be either by a formal acceptance by the municipal or other authorities or may be inferred by long public use. So, too, would the platting of land by the owner, and dividing it off by streets and avenues, and selling lots with reference to a map defining and delineating the streets, amount to a complete dedication of the streets thereupon disclosed. *Reed v. Birmingham*, 92 Ala. 339, 9 South. 161; *Evans v. Savannah & Western R. R. Co.*, 90 Ala. 54, 7 South. 758.

There is no evidence in this case of a formal dedication and acceptance of the street in controversy. Nor was the fact that Georgia avenue appeared on a map which was referred to in two of the deeds equivalent to a dedication. On the other hand, every conveyance introduced in evidence which mentions a map negatives the idea that this land was a part of a public street or that any lands were conveyed upon the strength of being bounded by a public street or avenue or a part thereof. The witness Gazzam testified: "My father dedicated Georgia avenue as thirty feet." This was not sufficient to show a dedication and acceptance of the land in controversy. Nor does the fact that this land formed a part of the street before Kimball fenced it in show that it was used by the public a sufficient length of time to become a public highway (*McDade v. State*, 95 Ala. 28, 11 South. 375), or that it was so used by the public as to amount to an acceptance of the dedication, if one was made. There may be express or implied dedications, but in either event there must be an

acceptance, in order to make the dedication complete and irrevocable.

There is some evidence that the avenue was wider than it now is; but there is no evidence to show that this particular part, or the other part even, was used and kept up as a public highway, and for aught we know, it was a private way when fenced in by the respondents and by Kimball. It may be that there is a public highway now being kept up by the public, known as "Georgia Avenue"; but there is no proof that the part in dispute, though included within the 60 feet intended to be dedicated, was accepted or used as a part of a public highway. "It does not necessarily follow, because a part of the offer has been accepted, that the whole has been. If it is evident that only a part of the land dedicated is needed, or is of value to it, the acceptance will be held to extend only to the part improved or occupied by the public, and which has been clearly recognized as a public highway." 9 Am. & Eng. Ency. Law, 50; *Alton v. Meenwenberg*, 108 Mich. 629, 66 N. W. 571. There is no evidence that the strip in question was ever accepted, or that Georgia avenue had ever been used as a public highway, before this strip was detached.

The appellant contends that the general denial of paragraphs 2 and 3 of the bill is insufficient to raise an issue, and that the facts therein averred should be considered as admitted. We do not understand that the charges made in said paragraphs are prima facie within the knowledge of respondents. *Moog v. Barrow*, 101 Ala. 209, 13 South. 665; *Smille v. Siler's Adm'r*, 35 Ala. 88; *Grady v. Robinson*, 28 Ala. 289. If Georgia avenue was opened as a street 60 feet wide and used by the public, it was as easy for complainant to prove the fact as it was for the respondents to negative the charge, and a general denial was sufficient to require proof of the averment.

The decree of the chancellor is affirmed.

TYSON, SIMPSON, and DENSON, JJ., concur.

WESTERN UNION TELEGRAPH CO. v. DICKENS.

(Supreme Court of Alabama. June 6, 1906.)

1. TRESPASS—PLEADING—COMPLAINT.

A count of the complaint alleging that a trespass was committed on the property of plaintiff, "a description of which is hereto attached, marked 'Exhibit A,' and made a part hereof, that portion of the same which lies adjacent to the roadbed of the S. Railroad Company," was not demurrable on the ground that it did not sufficiently describe the premises.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 82.]

2. SAME—PLEA—JUSTIFICATION.

In an action against a telegraph company for trespass on land adjacent to the roadbed of a certain railroad, a plea that before the hap-

pening of the matters alleged defendant had permission to enter on and construct its telegraph lines across the lands described in the complaint, such permission having been granted by the railway company, which was duly authorized to give such permission, did not show a justification.

3. SAME — PLEADING MITIGATING CIRCUMSTANCES.

Facts which do not justify a trespass on land, but merely go in mitigation of damages, need not be specially pleaded.

4. SAME—EXEMPLARY DAMAGES.

Where a trespass on land is attended with aggravating circumstances of wantonness or malice, exemplary damages may be awarded.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 144.]

5. SAME.

In an action against a telegraph company for a trespass on land incident to the repair of defendant's lines, it appearing that plaintiff's fence was destroyed in several places and that such destruction was not necessary to the repairing of the line, the jury were authorized to imply malice and wantonness, authorizing exemplary damages.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 58.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by Charles C. Dickens against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The complaint in this case originally contained one count, and it was amended by adding the second count. It is in words as follows:

"Plaintiff claims of the defendant corporation one thousand dollars (\$1,000.00) damages for a trespass by the defendant upon the property of plaintiff, a description of which is hereto attached, marked 'Exhibit A,' and made a part hereof, that portion of the same which lies adjacent to the roadbed of the Southern Railway Company, and which said lands belong to plaintiff, and for cutting timber thereon and breaking down the fences, piling brush and debris on and along plaintiff's fences, and doing other damage on, to wit, the 1st day of February, 1903.

"Count 2. Plaintiff claims of the defendant corporation one thousand (\$1,000.00) dollars damages for a trespass by defendant upon a portion of the property, a description of which is hereto attached and marked 'Exhibit A,' and made a part hereof, which lies adjacent to the roadbed of the Southern Railway Company, and which said land belongs to the plaintiff, and for cutting timber thereon, and breaking down the fences, and piling brush and debris on and along plaintiff's fences, and doing other damage on, to wit, February 1, 1903."

The defendant interposed demurrers to the second count as follows: "(1) Because the complaint does not aver with sufficient certainty which portions of the land described in Exhibit A to the original complaint were trespassed upon. (2) Because

count 2 does not aver or show which portion of the lands described in Exhibit A to the original complaint lie adjacent to the roadbed of the Southern Railway Company. (3) Because said count does not show or aver how much land, or how wide a strip of land, lying adjacent to the railroad of the Southern Railway Company, was trespassed upon." The demurrers were overruled.

The defendant interposed the following pleas to the complaint as amended: (1) General issue; (2) That the plaintiff was not the owner of all the land for a trespass to which the action was brought; (3) That before the happening of the matters and things alleged in the complaint this defendant had permission to enter upon and construct its line of telegraph along and across the lands described in the complaint, which permission was granted by the Southern Railway Company, a corporation, to this defendant, and said Southern Railway Company was duly authorized to give said permission to this defendant.

Plaintiff demurred as follows: To second plea: "It does not undertake to answer the whole complaint and is not pleaded to the whole complaint. Said plea only denies that the plaintiff owns all the lands in question, and does not deny that plaintiff owns the lands trespassed upon. Said plea sets up a defect in plaintiff's title, and is no answer to an action of trespass, which is an injury to the possession and not to the title." And to the third plea: "Because it does not appear from said plea that the authority of the Southern Railway to grant permission was an authority from the plaintiff. Because the authority alleged in said plea to enter upon and construct its lines along and across said lands did not justify the cutting of timber and the destroying of fences as alleged in the complaint. Because no privity is shown between the plaintiff and the said Southern Railway Company.

These demurrers were sustained, and defendant granted leave to plead over. The defendant filed the fourth plea, which was in effect the same as the first plea, except that it attempted to set up a privity between plaintiff and the Southern Railway, through a contract made by plaintiff with the Mobile & Birmingham Railroad Company for a spur track and the right of way for such track over the lands alleged to have been trespassed upon, and the fact that plaintiff's fences were on a part of this right of way, and a subsequent purchase by the Southern Railway of the rights, franchises, and property of the Mobile & Birmingham Railroad Company. Plea 5 was filed, and, in addition to what was stated in 4, set out the contract pleaded in 4 in full. Demurrers were sustained to all these pleas, and trial was had on the general issue. The other facts necessary to a proper understanding of the opinion are set out therein.

The court refused the following charges

asked by the defendant: "(1) The damages, if any, to be awarded the plaintiff, should be such as will compensate him for the actual loss or damage sustained. (2) If the jury believe from the evidence that the premises described in the complaint were for all purposes just as valuable after the entry by the telegraph company as they were before that entry, then the plaintiff, if entitled to recover, should have a verdict for nominal damages only. (3) Every unauthorized entry upon the lands of another is a trespass, for which the owner of the land may sue, if he choose to do so; but, when neither the rental nor the selling value of the premises trespassed upon is in any wise changed or impaired, the amount of recovery must be nominal. (4) If the jury believe from the evidence that the trespass complained of was committed, and that the value of the plaintiff's premises for all and every purpose was left just the same after the trespass as it had been before the trespass, then the jury will find for the plaintiff for one cent. (5) If the jury believe from the evidence that the plaintiff is entitled to recover, then the verdict should be for such sum as will make him whole—that is, the difference in the value of the premises before and after the trespass with interest; and if you further find from the evidence that there was no decrease in the value because of the acts complained of, then one cent. (6) This is what is commonly called a trespass (without aggravation), and the measure of damages is the diminution in the value of the premises resulting from the injury, with interest computed to the date of the trial. (7) If the jury believe the evidence in this case, they will return a verdict for the defendant. (A) The plaintiff cannot recover vindictive damages in this case. (B) The plaintiff cannot recover punitive damages or smart money in this case. (C) There cannot be any recovery had in this case because of any fires or fire which has taken place upon the premises or along the fence line."

There was verdict and judgment for plaintiff, and defendant appeals.

G. H. Fearons and W. O. Fitts, for appellant. Gregory L. & H. T. Smith, for appellee.

ANDERSON, J. The demurrer to the second count of the complaint was properly overruled, as it sufficiently described the premises. *Jean v. Sandiford*, 39 Ala. 317; *Bessemer Land Co. v. Jenkins*, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26.

The demurrers to special pleas were properly sustained. The facts set up in the fifth plea, which was but a repetition of the third and fourth pleas in a more extensive and minute way, could not operate as a justification of the trespass. We do not understand that facts which would not justify a trespass, but which would go in

mitigation of damages, should be specially pleaded. "Circumstances in mitigation of damages may be shown, if relevant and proper, only, under the general issue, if they do not amount to a justification, in which cases they must be specially pleaded." 28 Am. & Eng. Ency. Law, 600. In the case of *Womack v. Bird*, 51 Ala. 504, our court held that a justification under legal process had to be specially pleaded, and that it could not be proven under the general issue, if only intended in mitigation of the damages. But we do not understand the rule to be that facts which would not justify the trespass, but which would mitigate the damages, cannot be shown under the general issue.

The other assignments of errors relate to the ruling of the trial court in refusing charges requested by the defendant, and all of which, except the affirmative charge, relate to the measure of damages. If, therefore, this was a case where the jury was authorized to assess punitive or vindictive damages, these charges were properly refused. If not, then they, or some of them, should have been given. It is well settled that in cases of trespass *quare clausum fregit*, which are attended with the aggravating circumstances of wantonness or malice, the jury may give exemplary damages. 28 Am. & Eng. Ency. Law, 610. And our own court is committed to this rule. *Mitchell v. Billingsley*, 17 Ala. 391.

There was evidence in this case showing acts of aggravation on the part of the defendant's hands, and from which the jury were authorized to imply malice or wantonness. There was evidence tending to show that plaintiff's fence was cut and destroyed in several places, and that the doing of this was not at all necessary to the repairing of defendant's line. Under the evidence the court could not, as matter of law, confine the plaintiff's recovery to actual damages, and properly refused all the written charges requested by the defendant.

There was no error in refusing the general affirmative charge requested by the defendant. If plaintiff was entitled under the evidence to nominal damages merely, the defendant was not entitled to the affirmative charge.

The judgment of the circuit court is affirmed.

TYSON, SIMPSON, and DENSON, JJ., concur.

BRADFORD v. STATE.

(Supreme Court of Alabama. June 7, 1906.)

1. ESCAPE—SENTENCE AND PUNISHMENT.

Code 1896, § 4707, provides the punishment for an escape or attempt to escape from a penitentiary, hirer, or guard; section 4705 relates to an escape from a county jail by one sentenced to imprisonment therein; and section 4710 provides the punishment to be imposed

upon any prisoner escaping from lawful custody. *Held* that, where one who had been sentenced to the penitentiary after a conviction of larceny escaped from the county jail while his sentence was suspended pending an appeal, he might be convicted under section 4710, but not under section 4707, nor section 4705.

2. CRIMINAL LAW—ELEMENTS OF CRIME—ATTEMPTS.

Under Code 1896, § 5306, authorizing a conviction for an attempt to commit any offense charged, the state may indict for any attempt in lieu of the offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 51.]

3. SAME—EVIDENCE—CONFESSIONS—CORPUS DELICTI.

Where, on a prosecution for an attempt to escape, it appeared that the sheriff, on entering defendant's cell, found that several bricks had been taken from the wall, and found a number of saws and steel instruments, there was sufficient proof of the corpus delicti, and it was proper to permit the sheriff to testify that, when defendant was questioned by witness, defendant stated that he and certain others had made an effort to escape from the jail, and that he had assisted certain others in removing the brick from the wall and in procuring the instruments.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1225, 1226.]

4. CRIMINAL LAW—APPEAL—SCOPE OF RECORD—DEMURRER.

Though the judgment entry recites action on a demurrer, said demurrer not being disclosed by the record, it cannot be considered.

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

"To be officially reported."

J. M. Bradford was convicted under Code 1896, § 4707, making it an offense to escape from the penitentiary, hirer or guard, etc., and he appeals. Reversed.

The indictment in this case was in the following language: "The grand jury of said county charged that before the finding of this indictment J. M. Bradford, whose Christian name to the grand jury is unknown, having been convicted of the offense of grand larceny in the city court of Montgomery of Montgomery county, Ala., at the October term, 1906, of said court, and duly sentenced to the penitentiary of the state of Alabama, did attempt to escape before the expiration of his sentence from the county jail of Montgomery county, Ala., where the said J. M. Bradford was held in custody under authority of law, against the peace and dignity of the state of Alabama." The defendant was convicted and sentenced to perform hard labor for Montgomery county for a term of 1 year, and a sufficient length of time for the payment of costs at the rate of 30 cents per day, making in all 1 year and 142 days. The evidence tended to show that a few days before the indictment was found, and while defendant was incarcerated in the Montgomery county jail, the sheriff went to defendant's cell and found that a good many bricks had been taken from the wall, so that there was a considerable hole in the wall of the jail, and that he found a lot of saws and other steel instruments. The record shows

that, after a predicate had been laid for the introduction of a statement or confession, the solicitor asked the sheriff if the defendant made any statement or confession to him. Objection was interposed to the question, which objection was overruled. The witness answered as follows: "That in the county jail of Montgomery county, which is in Montgomery county, Ala., and about the time he found the saws and other steel instruments in the cell occupied by the defendant, and when questioned by witness the defendant said that he and one Glass and others had made an effort or attempt to escape from jail, and that he assisted Glass and others in removing the brick from the jail wall, and that the saws and other instruments were brought to the Montgomery county jail and delivered to the defendant and Glass and others to be used by them in an attempt to escape." The records of the court were then introduced, showing that defendant was under conviction and sentence to the penitentiary for two years for grand larceny, and that execution of sentence had been stayed pending an appeal to the Supreme Court, and that the defendant was confined in the Montgomery county jail awaiting a decision from the Supreme Court when the defendant attempted to escape. The defendant requested the general affirmative charge, which was refused.

ANDERSON, J. The indictment charges that the defendant, who had been duly sentenced to the penitentiary, "did attempt to escape before the expiration of his sentence from the county jail of Montgomery county, Ala.," where the said J. M. Bradford was held in custody under authority of law. The indictment evidently intended to make out a charge under section 4707 of the Code of 1896, which relates to escapes and attempts to escape from the penitentiary, hirer or guard, and not from a jail. The indictment may have been drawn under section 4707 of the Code, and the trial court proceeded upon that idea in fixing the sentence of one year. The record does not disclose the demurrer, though the judgment entry recites action on a demurrer, but we cannot consider same.

In order for the state to be entitled to a conviction under section 4707 of the Code of 1896, the proof must show an escape or attempt to escape from the penitentiary, hirer or guard, which was not averred or proven in the case at bar. The facts do not bring the case within the influence of section 4706, as the defendant was not "sentenced to imprisonment in the county jail or to hard labor for the county." Besides, the court did not proceed under that section in fixing the punishment, which must not be for more than six months. As the facts do not bring this case within the operation of any of the other statutes, it falls within the influence of section 4710, which relates to "any prisoner who escapes from lawful custody." The

defendant, notwithstanding he had been convicted and his sentence had been suspended pending an appeal, was a prisoner in lawful custody at the time of the attempted escape. It is true said section 4710 relates to an escape, and the indictment in this case avers only an attempt to escape. But section 5306 permits a conviction for an attempt to commit the offense charged, and we see no reason why the state cannot indict for an attempt in lieu of the offense.

There was no error in permitting the state to prove the confession of the defendant, as the proper predicate was established and there was sufficient proof of the corpus delicti. There was no error committed during the trial, but the court erred in the sentence, and the judgment is therefore reversed as to the sentence, and the cause is remanded, in order that the defendant may be sentenced under section 4710 of the Code of 1896.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

CALDWELL v. STATE.

(Supreme Court of Alabama. May 29, 1906.)

1. INDICTMENT—FORMER REQUISITES—VENUE—STATUTES.

Under Cr. Code 1896, § 4902, providing that it is not necessary to allege in an indictment where the offense charged was committed, it is not necessary to aver in an indictment for bigamy that the bigamous cohabitation occurred in the state or within the county.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 230; vol. 6, Cent. Dig. Bigamy, § 20.]

2. BIGAMY—EVIDENCE—ADMISSIBILITY.

Where, on a trial for bigamy, a witness proved a prior marriage of accused, it was competent to prove acts, declarations, or admissions of accused in recognition of the alleged first wife as his legal wife.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bigamy, §§ 42-45.]

3. WITNESSES—CONFIDENTIAL COMMUNICATIONS—HUSBAND AND WIFE.

A letter in which the writer called the addressee his wife, and in which he subscribed himself as her loving husband, and containing no fact of a confidential nature, is admissible in evidence as against the objection that the same is a confidential communication between husband and wife, where a third person testified that he saw the letter delivered by mail.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 734-738.]

4. INDICTMENT—ALLEGATIONS—PROOF—VARIANCE.

There is no variance between an indictment for bigamy, alleging the name of the alleged second wife as "Lydia E.," and the proof, showing her name as "Liddle E."

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 551-554; vol. 6, Cent. Dig. Bigamy, § 31.]

Appeal from Circuit Court, Elmore County; S. L. Brewer, Judge.

"To be officially reported."

Manning H. Caldwell was convicted of bigamy, and he appeals. Affirmed.

E. F. Tate and Pearson & Richardson, for appellant. Massey Wilson, Atty. Gen., for the State.

WEAKLEY, C. J. It was not necessary to aver in the indictment that the bigamous cohabitation occurred in this state, or within the county of Elmore. Said averment is dispensed with by section 4902 of the Criminal Code of 1896. The proof of venue was abundant.

The witness Wingo, a brother of the first and legal wife, gave evidence which, if believed beyond a reasonable doubt, proved defendant's marriage to his sister in South Carolina in 1899, his living with her as husband, and that she was still living at the time of the trial. For the purpose of supplementing this evidence, it was competent to prove acts declaratory or admissions of the defendant in recognition of the alleged first wife as his legal spouse. The witness Wingo produced and identified certain letters written by defendant to the sister of the witness, addressed to Mrs. Minnie Caldwell, and in which the defendant called her his wife and subscribed himself as her loving husband. The only tendency of the letters was to show the relation of husband and wife between the parties, and thus lay the predicate for the charge that the defendant's second marriage was illegal. There was no fact of a private or confidential nature disclosed by the letters; and hence we do not think, under the circumstances of this case, that the admission in evidence of the letters, coupled with the testimony of the witness Wingo, who saw them when delivered by the post, violated the rule against allowing proof of confidential and private communications between husband and wife, not intended to be made public. We are unable to reach the conclusion that any public policy would be infringed or the peace of the family disturbed by showing that the husband had written his wife letters, when absent from home, in which he spoke of himself as her loving husband. No error was committed in allowing proof of the letters. They were competent for the purpose and upon the considerations above stated.

There was no material variance between the names "Lydia" and "Liddle." Greater differences between names than this have been held immaterial, both by this and other courts. The case is within the rule of *idem sonans*. The accent or emphasis in each name is upon the first syllable. Every one knows how in rapid utterance final vowels and such final syllables consisting of single vowels are slighted; and, if the two names were spoken according to the usual manner and with the usual rapidity, it would be very difficult to distinguish them. The point of difference is entirely too imperceptible to raise any question of importance. Edmund-

son v. State, 17 Ala. 179, 52 Am. Dec. 169. In *Dickson v. State*, 34 Tex. Cr. R. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694, it was held that the names "July" and "Julia" were the same sound. Any one interested in pursuing the subject further will find a most excellent note, with a full collection of the cases, in 100 Am. St. Rep. 322, 354. The cases manifest an increasing tendency on the part of the courts to ignore slight differences in names, raising questions devoid of substantial merit.

The court charged the jury more favorably to the defendant than was his due. It might have held as a matter of law that no variance appeared in the matter of the name of the woman with whom the defendant cohabited under his second marriage. We have examined the other rulings, although not argued in brief of appellant's counsel, and we find no reversible error in any of them. There was no conflict in the evidence. The defendant made no pretense of any defense further than an effort to show the name of the second wife was "Liddle Edwards," instead of "Lydia Edwards," and no jury could have properly done otherwise than find him guilty. The trial court might well have charged the jury, upon written request, to convict him if they believed the evidence beyond a reasonable doubt.

Affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

SICARD v. GUYLLOU et al.

(Supreme Court of Alabama. June 5, 1906.)
EQUITY—BILL—MULTIFARIOUSNESS.

Complainant purchased a portion of a plat of ground, all of which originally belonged to his vendor, W., who had previously sold another portion of the plat to G., who had taken possession only of the portion so purchased; W. retaining the balance. As the result of inaccuracies and misdescriptions in each of the deeds there was a confusion of boundaries on the face of the paper titles, and G., claiming that her deed conveyed the land claimed by complainant, instituted ejectment against him to recover the lot of which he was in possession, whereupon complainant filed a bill against G. and W. and wife, seeking to correct the errors and misdescriptions in both deeds, to enjoin the ejectment suit, and for general relief. *Held*, that the bill was properly maintainable to prevent a multiplicity of suits, and was therefore not demurrable for multifariousness.

Appeal from Chancery Court, Jefferson County; Alfred H. Benners, Chancellor.

"To be officially reported."

Suit by Adrien Sicard against Catherine Guyllou and another. From a decree dismissing the bill for multifariousness, complainant appeals. Reversed and remanded.

Arthur L. Brown, for appellant. Bush & Bush, for appellees.

WEAKLEY, C. J. Multifariousness is incapable of exact definition, and the impossi-

bility of laying down any general rule whereby it may be determined in all cases whether the objection is well taken has been often recognized. "The objection is frequently a matter of discretion, and so the circumstances under which it is allowed to prevail, so that every case must in a measure be governed by what is convenient and equitable under its own peculiar facts, subject to the recognized principles of equity jurisprudence; and it is always proper to exercise this discretion in such manner as to discourage future litigation about the same subject-matter and to prevent a multiplicity of suits, and never so as to do plain violence to the maxim, that courts of equity 'delight to do justice and not by halves.'" *Adams v. Jones*, 68 Ala. 117. No universal rule in regard to multifariousness can be or has been attempted to be established. "The substance of the rules on the subject appears to be that each case is to be governed by its own circumstances, and must be left in a great measure to the sound discretion of the court." 1 *Daniell*, Ch. Pl. & Pr. 334, note 2. All that can be done in each particular case, as it arises, is to consider whether it comes nearer to the decisions where the objection has been held fatal or to those where it has not been so held; and, if a complainant has an equitable right against each of the defendants in the subject-matter of the suit, he may proceed against all of them in one suit. *Boyd v. Hunter*, 44 Ala. 705.

The complainant in the present bill comes into the equity court as the owner and as being in possession of a certain lot, a portion of a plot of one acre, which originally belonged to his vendor, Wheeler. The defendant Guyllou, who filed the demurrer on which the decree we are reviewing was rendered, is alleged to have previously purchased from Wheeler another portion of the acre, and to have taken possession of that portion so purchased and that only; and the common vendor, Wheeler, is alleged to have retained and yet to own the remainder of the plot, the three parties together owning the whole, and each being in possession of his respective part. As a result of inaccuracies and misdescriptions in each of the deeds from Wheeler and wife to their two vendees, confusion of boundaries on the face of the paper titles has resulted; and Guyllou, claiming that her deed from Wheeler, properly construed, conveyed the land claimed by complainant, has instituted an action of ejectment against complainant to recover the lot of which he is in possession. The complainant files this bill against Guyllou and against Wheeler and wife, the common grantors, seeking to correct the errors and misdescriptions in both deeds, to enjoin the ejectment suit, and for general relief. In support of the grounds of demurrer, which assert that the bill is multifarious, it is argued: (1) That there is no connection between the deeds made by Wheeler and wife to Guyllou and the deed subsequently

made to the complainant by Wheeler and wife; and (2) that there is no connection between the deed made by Wheeler and wife to the complainant and the ejectment suit brought against complainant by Guylou. In a general way, it may be said that the bill is one to quiet the title and possession of complainant to the lot purchased from Wheeler. As one step in the process it is desirable and important to him to secure a correction of Wheeler's deed, under which he claims, so as to make it speak the real purpose of the parties and to correctly and accurately describe the lot purchased. When this correction is accomplished, it will show him to be a purchaser of the lot he claims, and will place him in a position where he is entitled to secure a correction also of Wheeler's deed to Guylou, so as to make that deed describe the lot purchased and to exclude from it complainant's lot or any part of it. When it appears that complainant acquired from Wheeler the land of which he is in possession, his right to secure a correction of Wheeler's deed to Guylou, in so far as it affects complainant's property, is apparent. *Jones v. McNealy*, 139 Ala. 379, 35 South. 1022, *Harris v. Ivey*, 114 Ala. 367, 21 South. 422.

Proceeding, therefore, to enforce against Guylou the right to have a correction of the latter's deed, he may, as incidental thereto, and to secure complete relief, proceed further and ask that the ejectment suit be restrained. All the equities asserted by the bill are therefore connected together, and all converge to the end and purpose of quieting complainant's title and possession, and, furthermore, to the settling of the boundaries between the three persons whose separate holdings make up the acre tract. No doubt the complainant might have maintained a bill against Wheeler and wife alone to correct their deed to him; but under the facts alleged, and in view of the situation of the parties and their relation to each other, we hold he might go further, for the purpose of preventing a multiplicity of suits, and also seek a correction of Wheeler's deed to Guylou, with a consequent injunction of the latter's ejectment suit. There is a unity of purpose in the bill, and all the equities relate to the subject-matter of the suit or are incidental thereto. There was not a joining of distinct and disconnected matters in such sort as to constitute multifariousness. *Jones v. McNealy*, 139 Ala. 379, 35 South. 1022, 101 Am. St. Rep. 38. No good purpose would be subserved by comparing this case with others, in which the objection of multifariousness has or has not been sustained, since each case must be determined upon its own facts, and no two will probably appear to be exactly alike. Doubtless the combination of facts and circumstances here found does not exist in any other adjudication.

Appellees' counsel make no argument in support of the other grounds of demurrer.

We have examined them, however, and are of opinion that they are not well taken. The decree of the chancellor sustaining the demurrer is reversed. A decree is here rendered overruling the same, and the cause will be remanded for further proceedings.

Reversed, rendered, and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

SMITH v. PIONEER MIN. & MFG. CO.
(Supreme Court of Alabama. June 12, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF MASTER'S SUPERINTENDENT—LIABILITY OF MASTER—STATUTES.

To create a liability under Code 1896, § 1749, subd. 2, making a master liable for an injury to an employé caused by the negligence of an employé who has any superintendence intrusted to him, while in the exercise of such superintendence, it is not sufficient to show that the injury was caused by the negligence of an employé intrusted with superintendence; but it must also appear that the negligence occurred while such employé was in the exercise of such superintendence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 449, 450.]

2. SAME.

An employé was engaged in helping others to dry out troughs for the purpose of running the molten pig from the furnace into pigs. The drying process was done by placing in them hot slag, obtained from a pile near the troughs by means of ladles. The foreman of the drying gang was using a ladle, assisting to dry out the troughs, when he spilled some of the contents on plaintiff's foot. The foreman did this work because of the absence of one of his gang, and it did not belong to his ordinary employment. *Held*, that the master was not liable for the injury, under Code 1896, § 1749, subd. 2, making a master liable for an injury to an employé, caused by the negligence of an employé intrusted with the duty of superintendence while in the exercise of such superintendence.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"To be officially reported."

Action by Ed Smith against the Pioneer Mining & Manufacturing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This was a suit for damages for personal injury, brought by appellant against appellee. The complaint is as follows: "Plaintiff claims of the defendant the sum of \$5,000 as damages, for that heretofore, to wit, on the 17th day of February, 1903, the defendant corporation was engaged in the business of running and operating a furnace at Thomas, in Jefferson county, Ala., and on said day and date aforesaid the plaintiff was in the employ of defendant and engaged in the work of carrying cinders and drying a trough of defendant, which the plaintiff had washed with clay under direct orders of defendant's superintendent, to wit, one Bob Blair; and while the plaintiff was so engaged in the regular discharge of his duty plaintiff was injured by the pouring or spilling of hot cin-

ders on his left ankle and left foot, whereby he was permanently injured, was made sore and sick, and suffered great mental and physical pain, and was put to great expense and inconvenience in and about his efforts to heal said wound and injuries. And plaintiff avers that the aforesaid injuries were caused by reason and as a proximate consequence of the negligence of a person in the employment of defendant, to wit, Bob Blair, who was intrusted by the defendant with superintendence; said negligence of said superintendent occurring whilst in the exercise of such superintendence as follows: Whilst said Bob Blair was superintending the washing and drying of a trough or troughs of defendant, he, the said Bob Blair, negligently ran over or against the plaintiff and spilled hot cinders in plaintiff's shoe and on his left ankle and left foot, whilst plaintiff was engaged as aforesaid, and injuring plaintiff as aforesaid—all to plaintiff's great damage in the sum of \$5,000 as aforesaid. Hence this suit." There were demurrers to the complaint, which were overruled, pleas of contributory negligence, to which demurrers were interposed and overruled, and the general issue. The evidence tended to show that the plaintiff (appellant) was engaged in helping others dry out said troughs for the purpose of properly running the molten pig from the furnace into pigs. These troughs were of sand wetted for the purpose of properly shaping them, and they had to be dried before running the molten iron into them. This drying process was done by placing in them hot slag, and the slag was obtained from the slag pile near the troughs, by means of small ladles with handles. The plaintiff was using one of these at the time of the injury. Blair was foreman of the drying gang, and, as one of his gang had quit work, he was using a ladle assisting to dry out the sand, when he spilled some of the contents of his ladle, hot slag, upon plaintiff's foot. It was shown that this was not his usual and ordinary employment, but that he was doing this manual labor to fill in at that time. The court gave the affirmative charge for the defendant.

A. O. Lane and R. L. Leatherwood, for appellant. Campbell & Walker, for appellee.

WEAKLEY, C. J. To create a liability under subdivision 2 of section 1749 of the Code of 1896 (section 2590, Code 1886), it is not sufficient merely to show that the injury was caused by reason of the negligence of a person in the service or employment of the master or employer who had superintendence intrusted to him, but it must also appear that the negligence occurred whilst the offending employé was in the exercise of such superintendence. This is the plain requirement of the statute. If it were held to be enough to constitute a cause of action to show that a superintendent had been negligent, without

reference to the nature and character of the act he was performing when the negligence occurred, then the effect would be to read the last clause of subdivision 2 out of the statute and give it no field of operation. "The negligence must be that of some agent or employé who is in the exercise of superintendence, and to whose negligence in such exercise the disaster is traced." *Drennen v. Smith*, 115 Ala. 396, 22 South. 442. In *Dantzler v. De Bardeleben Coal & Iron Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361, it was contended by the plaintiff that under one phase of the evidence the negligent employé, who had set the engine in motion, was a superintendent, in that he had the direction of his helper, and from this circumstance liability was sought to be imposed upon the defendant. But in response to this contention the court said (page 318 of 101 Ala., page 14 of 14 South. [22 L. R. A. 361]): "The evidence in this case is without conflict to the effect that, when the engine was moved or was set in motion, Gould's helper was not even on the premises, and that, if the engine was started by Gould, it was the direct, negligent act of a manual laborer, not in any sense done in the exercise of superintendence, conceding that at any time superintendence was intrusted to him. This leaves the case outside of subsection 2 of section 2590. The death of McKay, on this hypothesis, was not caused by the negligence of a person to whom superintendence was intrusted 'while in the exercise of such superintendence.'"

Assuming that Blair was a superintendent within the meaning of the statute, and that he was guilty of negligence, yet we are not of opinion that liability for such negligence has been shown, for the reason that it does not appear it occurred while he was in the exercise of the superintendence with which he had been intrusted. On the contrary, he was performing a mere act of manual labor, having in it no quality or element of control or direction. The work that was being done by the plaintiff was very simple, and at the time of the injury no orders or directions were given to him. In no proper sense can it be said that Blair was directing or superintending his own act at that time. All that can be said, and the most that can be asserted, is that one doing the work of a laborer of the kind the plaintiff was doing, and working in the place of another laborer, who had desisted from the work, negligently injured the plaintiff. "The employé is not answerable for the negligence of a person intrusted with superintendence, who at the time and in doing the act complained of is not exercising superintendence, but is engaged in mere manual labor, the duty of a common workman." *Cashman v. Chase*, 156 Mass. 342, 344, 31 N. E. 4; *Dresser on Employers' Liability*, § 62. The case of *Roche v. Lowell Bleachery*, 181 Mass. 481, 63 N. E. 943, is distinguishable from this

and the earlier Massachusetts case above cited, which it was not intended to overrule.

The case of K. C., M. & B. R. R. Co. v. Burton, 97 Ala. 240, 12 South. 88, is relied on by appellant as being directly in line with his contention that the facts establish the cause of action laid against the defendant in the complaint. In the twelfth paragraph of the opinion in that case there is an inadvertent omission of the last clause of subdivision 2 in stating the liability of the master under section 2590 of the Code of 1886, which, however, was harmless, because the case did not turn upon the last clause of the section. There the evidence showed (and we have examined the original record to ascertain what the evidence was) that the negligence of the foreman consisted in directing the train crew to place a refrigerator car in a position of dangerous proximity to another track, and hence that his negligence occurred while he was in the exercise of the superintendence intrusted to him by the company. The charges there under consideration pretermitted all consideration of this circumstance, and placed immunity from liability upon the fact alone that the foreman had performed a portion of the manual labor necessary to execute his negligent order. It could not have been intended by the paragraph of the opinion under consideration to assert that the negligent performance of manual labor to the injury of another laborer by one who was for certain purposes a superintendent, but outside of the scope of the superintendence, would render the employer liable. The language of the opinion must be construed in the light of the evidence, and thus considered it intended to assert no more than that, where it appears the superintendent is negligent while in the exercise of such superintendence as has been intrusted to him, the mere fact that he assists or co-operates in the manual labor of executing his negligent order will not relieve the employer from liability. That this was the full extent of the decision in Burton's Case, supra, furthermore appears from the citation of Osborn v. Jackson & Todd, 11 L. R. C. B. 619, which was also a case in which liability was rested upon the finding that the superintendent negligently directed the performance of an act, in which, however, he assisted, and that at the time he was in the exercise of superintendence.

We will not discuss the numerous other cases cited by appellant's counsel from other states. They did not arise out of statutes similar to ours. Furthermore, they do not state the common law upon the subject of master and servant as it has been declared in this state. The cases involving the question as to when an employé is a vice principal, so that the master is liable for his negligence, are confessedly in conflict and manifest a contrariety of opinion in different jurisdictions. Our own cases are collected and the subject is discussed in A. G. S. R. R. Co. v. Vall (Ala.) 38 South. 124.

The circuit court properly gave the affirmative charge for the defendant.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

(117 La.)

No. 16,183.

STATE v. ROGERS et al.

(Supreme Court of Louisiana. June 18, 1906.)

CRIMINAL LAW—APPEAL—DISMISSAL.

Appeal dismissed on the admission that the defendant and appellee has been hanged by a mob.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Criminal Law, §§ 2701, 2971-2975.]

(Syllabus by the Court.)

Appeal from Ninth Judicial District Court, Parish of Madison; Francis Xavier Ransdell, Judge.

Robert T. Rogers and others were indicted for murder and discharged, and the state appeals. Dismissed.

See 38 South. 952.

Walter Gulon, Atty. Gen., and John R. McIntosh, Dist. Atty. (Frederick Gray Hudson, E. Tyler Lamkin, Henry Bernstein, and George Wesley Smith, of counsel), for the State. Carey J. Ellis, H. Flood Madison, T. S. Ward, Elstner & Land, George S. Dodds, and David Mandeville Evans, Jr., for appellees.

On Motion to Dismiss.

LAND, J. Defendant, Robert T. Rogers, charged with murder, was discharged on a plea of former jeopardy, and the state appealed. Counsel for defendant have moved this court to dismiss the appeal on the ground, which is admitted by the state, that said defendant and appellee is dead, having been taken from jail and hanged by a mob. We are advised that a prosecution is pending in the district court against the alleged lynchers.

Appeal dismissed.

(117 La.)

No. 15,809.

LOUISIANA RY. & NAVIGATION CO. v. SARPY.

(Supreme Court of Louisiana. June 4, 1906.)

1. EXPROPRIATION — PROCEDURE — TRIAL BY JURY—QUASHING VENIRE.

Where, in an expropriation proceeding, a jury is impaneled, without objection, and the case is continued to another day, under an agreement which contemplates that the defendant shall then answer, a motion to quash the venire (upon grounds which were known when the jury was impaneled) and dilatory exceptions come too late when offered upon the day thus fixed for the trial, and are properly overruled.

2. SAME—COMPENSATION.

Where, in an expropriation suit, a lump sum is claimed by way of damages, and the petition sets forth a number of distinct items, or

elements, of damage, without specifying the proportion of the sum claimed which is to be attributed to either of them, testimony offered in support of the claim is properly rejected.

3. SAME—EVIDENCE OF VALUE—OPINION EVIDENCE.

In an expropriation proceeding, a person who resides, and owns, and has bought and sold, and knows of other sales of, property, in the vicinity of the property to be expropriated, is not disqualified to give an opinion as to the value of such property because of his statement to the effect that, in forming such opinion, he would consider, *inter alia*, the amount paid to him by the plaintiff in compromise of a proceeding for the expropriation of property owned by him and his wife in the same neighborhood; the possible influence of that circumstance upon his judgment being a question for the jury to consider.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2303.]

4. SAME.

A witness who states that he has only a general knowledge of the value of certain property sought to be expropriated, derived from passing, on a railroad train, through the parish in which the same is situated, and who admits that, for six years, he has not kept in touch with such property even in other parishes, is not qualified to enlighten the jury as to the value of the property to be expropriated, and his testimony is properly excluded.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2273.]

(Syllabus by the Court.)

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Jérôme Louis Gaudet, Judge.

Action by the Louisiana Railway & Navigation Company against George Sarpy, to expropriate certain land. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Dart & Kernan, for appellant. Foster, Milling, Godchaux & Sanders and Louis Hermann Marrero, Jr., for appellee.

Statement.

MONROE, J. Plaintiff seeks to expropriate, for the purpose of constructing thereon part of a continuous line of railway, extending from Shreveport to New Orleans, a strip of land containing about 5.86 arpents, 100 feet wide by, say, 1,200 feet in length, running through the St. Martin plantation, owned by the defendant and situated in the parish of Jefferson.

The record shows that on July 24, 1905, the case having been called for trial, the following agreement was entered into between Mr. Sanders, of the firm of Foster, Milling, Godchaux & Sanders and Mr. Marrero, representing the plaintiff, and Mr. Kernan, of the firm of Dart & Kernan, representing the defendant, to wit:

"It is agreed that, owing to the absence of Mr. Dart, of the firm of Dart & Kernan, this case be postponed until August 3d, at 11 o'clock, and that nothing be done to-day in the case save and except impaneling and swearing the jury; that on August 3d, or before, Dart & Kernan will have the right to file their answer the same as if the jury had not been impaneled."

Thereupon the jury was impaneled (after the jurors had been examined by the counsel, present, and without objection) and was discharged until August 3d, to which day the case was continued. On August 3d, counsel for defendant having offered to file an exception, and a question having arisen as to the terms of the agreement, the case was continued until August 4th, when counsel filed an exception of want of citation, and also moved to quash the venire on the ground that the jurors had, purposely, been selected from the right bank of the river, and had no personal knowledge of the property to be expropriated, which lies on the left bank. And the counsel further excepted that the sketch annexed to the petition was not such as is contemplated by law; that the description of the property to be expropriated was insufficient; that the plaintiff company was not properly in court; that no steps had been taken by the proper officers of the company to locate the land to be expropriated; that the suit had not been authorized by the proper officers of the company; that defendant was entitled to oyer of plaintiff's charter; and that the petition disclosed no cause of action—which exceptions and motion were overruled by the court. And thereupon defendant answered, denying the existence of plaintiff as a corporation with the power to expropriate, alleging that it was unnecessary to plaintiff and inconvenient to defendant that the particular land selected should be taken; that it would divide defendant's property into small parcels, interfere with the drainage, require a rearrangement of the ditches and bridges, and prevent the profitable management thereof; and that the property to be taken was worth \$3,000, and the damage to the remainder would amount to \$3,000. After a trial, in which there were many bills of exception reserved, there was a verdict fixing the value of the land (evidence in regard to damage having been excluded on the ground of insufficiency of allegation in the answer) at \$500, which verdict was made the judgment of the court, and the defendant, after moving, unsuccessfully, for a new trial, has appealed.

Opinion.

1. It is said that, upon the suggestion contained in the motion to quash (that the jurors had been purposely selected from the right bank of the river, and knew nothing of the value of the property to be expropriated), the court should have inquired into the matter. The facts alleged were, however, known to counsel at the time that the jury was impaneled, and (apart from the agreement, by a fair interpretation of which the defendant was to answer to the merits), the motion came too late. It may be that the sheriff, in summoning the jurors from the right, instead of from the left, bank, was of the opinion that he would be more likely, in that way, to obtain men who would not be ob-

jectionable on account of interest; and, so far as their knowledge was concerned; the law was complied with when the jury was composed of "freeholders, residents of the parish in which the land lies and not interested in the issue to be tried." It is not expected that each juror shall have a personal knowledge of the particular land to be expropriated.

2. Defendant urges that his exceptions: (1) that the petition failed to allege that the plaintiff's board of directors had designated the route and authorized the institution of the proceedings; (2) that the map annexed to the petition and the description of the property were insufficient—should have been sustained. These exceptions were clearly dilatory, and, in view of the agreement which contemplated an answer, were properly overruled.

3. It is also said that the judge erred in rejecting, upon the ground that the demand was not itemized, testimony offered in support of defendant's claim for damages.

The allegations of the answer upon that subject are:

"That the road has been so located as to divide his property into small parcels, thereby aggravating the injury which he will suffer by this new incumbrance; * * * that the expropriation of said property will inflict loss, damage and injury on your respondent, and upon his other property, to the extent of \$3,000; that the route selected and the right of way expropriated will injure and damage the remainder of respondent's property; that it will close the drains and interfere with the drainage, and make necessary a re-establishment of ditches, bridges, etc., in order to utilize the remainder of the property; that it will make more laborious and expensive the cultivation of said property and the removal of crops therefrom; that it will prevent the profitable management of the remainder of the property, and, by cutting same into small pieces, will obstruct intercommunication and prevent respondent from disposing of same at its real value, which, as a large body (it) now has, owing to its proximity to New Orleans; that said property is now in cultivation and is now bearing growing crops of sugar cane and corn, and the loss and deterioration of said crops is a part of the loss which respondent will incur and part of the damages which will be justly due him should said property be expropriated; that, inasmuch as respondent expects to cultivate the tracts of land on either side of said railway, proper protection should be afforded in the decree for cattle guards, road crossings, and for drainage."

It will thus be seen that the lump sum of \$3,000, which the defendant claims is to be made up of a number of distinct items which will require the testimony, pro and con, of witnesses possessed of different kinds of information, and it is fair to presume that the defendant arrived at that sum, for the purposes of his allegata, by adding together the amounts attributed by him to each item, and that he expects to follow the same course for the purposes of his probata, it is therefore only fair, in order that the plaintiff may be apprised of the nature of his demand, that the process of addition to which we have referred should be set forth in the petition.

As the pleadings stand, no one but the defendant knows what proportion of the damages claimed is attributed to the loss of the growing crop, or to the obstruction of the drainage, or to the required rearrangement of the ditches, bridges, etc., or to the division of the property into small parcels, or to the additional cost of cultivating and removing the crops, etc., and we think the plaintiff needed that information in order to enable it to meet the claim. It is suggested that plaintiff opened the door to proof upon the subject by the examination of its own witnesses, but we do not find that to have been the case. It is also suggested that plaintiff is obliged to have the value of the land "and what damages, if any, the owner would sustain, in addition to the loss of the land, by its expropriation," assessed, as a condition precedent to its expropriation. We take it, however, that, when the owner comes into court and sets up a specific claim for damages, the matter is governed by the ordinary rules of pleading, and that he should state his case in such a manner as to place the party from whom he expects to recover on his defense.

4 The trial judge excluded the testimony of several witnesses, called by the defendant to prove the value of the land, on the ground that they were not qualified to testify on that subject.

J. A. Gaudet testifies that he has bought and sold property, and that he and his wife own property, in the parish, near the property in question; that he knows the property in question, and knows its value. His testimony as to its value was, however, rejected, on the ground, as we understand the ruling, that he stated that, in making his estimate, he would take into consideration the amount recovered from plaintiff, by way of compromise, by him and his wife, for land owned by them. The witness, however, stated that he would take into consideration the sale made by his wife and himself "and other sales." Being asked whether the compromise that he had made would be the main factor in his estimate of the value of the defendant's land, he answered that it would not, though it would influence such estimate.

We are of opinion that the testimony should have been received. The witness, we infer, is as capable of giving an intelligent opinion upon the question at issue as any one who can be found, and is not disqualified because he has owned, and has recently sold, land in the immediate vicinity of that which he was called upon to value, or because he would have taken that circumstance into account. How far it might affect his judgment is a question for the jury.

We are of the same opinion in regard to the testimony of B. Morere and R. H. Hackney; the former having been a resident of the parish for many years and an owner of real estate, and the latter being a manufacturer who has dealt in real estate in New Orleans and was called to give his opinion of

the value of the land in question as a manufacturing site.

Mr. J. W. Ross being asked, "Are you thoroughly familiar with the property forming the plantations above the line of New Orleans?" replied, "Only in passing through on the railroads." Being asked, "Did you know this place?" he replied, "Only in a general way." Being asked, "Do you know the value, in a general way?" he replied, "Yes, sir." It does not appear, however, that he ever left the railroad train in the parish of Jefferson, and, though he was interested in sugar planting in St. James, up to 1898, he admits that he has been out of that business and has not kept in touch with sugar plantations during the last six years. We are of opinion that his testimony was properly rejected.

For the reasons thus assigned, it is ordered, adjudged, and decreed that the verdict and judgment appealed from be set aside and annulled, and that this case be remanded to the district court to be proceeded with according to law and to the views expressed in this opinion.

(117 La.)

No. 15.737.

**NATIONAL BANK OF COMMERCE v.
SULLIVAN (UNION OIL
CO., Intervener).**

(Supreme Court of Louisiana. April 23, 1906.
Rehearing Denied June 4, 1906.)

**1. AGRICULTURE—LIENS ON CROP—ADVANCES
—EXTENT OF LIEN.**

The right of pledge, in favor of the furnisher of money, resulting from the execution and registry of the written instrument authorized by Act No. 66, p. 114, of 1874, is intended to bear upon the crop as security for the reimbursement of the money that the planter "may require" for necessary expenses of the crop and plantation, and not as security for money which has already been advanced and used before the execution and registry of the instrument.

2. CONTRACTS—BREACH—DEFENSES—WAIVER.

Where a planter in consideration of advances made and to be made by the factor agrees to ship his crop of cotton to the latter, or to a consignee to be designated by him, but without the knowledge of the factor ships the greater part of the crop to some one else, it is no answer to the charge that he has violated his contract to say that the factor failed to designate a consignee, and, after being informed of the partial shipment already made, received the promise of the planter that the balance of the crop would be shipped according to the contract and that by these acts he waived his rights in the premises.

**3. AGRICULTURE — LIEN FOR ADVANCES —
BURDEN OF PROOF.**

The crop privilege conferred by Civ. Code, art. 3217 (in so far as it relates to that subject), is intended to secure the reimbursement only of money which, having been advanced, is actually used, for the purchase of necessary supplies and the payment of necessary expenses for the farm or plantation, and it is for the person seeking to enforce the privilege to prove that the money claimed by him was so used; otherwise, no privilege can be recognized.

4. CONTRACTS—BREACH—KNOWLEDGE.

Where a planter obtains advances for the making of his crop from a bank where he keeps

an account in which he deposits other funds than those advanced, the fact that the bank collects the proceeds of a draft drawn by him on a cotton seed oil company and credits same to his account cannot be presumed to convey notice to the bank that the planter had sold his cotton seed in violation of his contract with it.

5. AGRICULTURE—LIEN FOR ADVANCES—PROPERTY SUBJECT—SALE.

The privilege for advances conferred by Civ. Code, art. 3217 is not confined to the growing crop, but bears upon the products after they are severed from the soil, and follows them into the hand of a purchaser, who, buying directly from the planter, is presumed to know that such privilege may or actually does exist.

(Syllabus by the Court.)

Appeal from Tenth Judicial District Court, Parish of Concordia; John S. Boatner, Judge.

Action by the National Bank of Commerce against J. B. Sullivan, in which the Union Oil Company intervened. From a judgment for plaintiff, defendant appeals. Affirmed in part, and reversed in part.

Samuel Lucius Elam, for appellant. Samuel Lucius Elam and T. M. & J. D. Miller, for appellant intervener. Dagg & Dale, for appellee.

Statement.

MONROE, J. Plaintiff sues on three notes of \$1,600, \$1,500, and \$4,000, dated July 9, August 16, and September 26, 1904, respectively, and on open account for \$1,440.25, all for advances alleged to have been made to the defendant for the purposes of the crop of 1904 on Dunbarton plantation in the parish of Concordia. It alleges that it has a privilege for the whole amount claimed, and also a right of pledge resulting from a written instrument duly recorded, and it prayed for a writ of sequestration, and for judgment with recognition of its privilege, and pledge on the products to be seized. A writ of sequestration was accordingly issued under which certain cotton and cotton seed were seized on Dunbarton plantation and elsewhere and, thereupon, the Union Oil Company intervened, alleging that the sheriff had taken 129 tons of seed which it (intervener) had bought, paid for, and had in its possession, and praying judgment for the same with damages. To this intervention, plaintiff answered, averring that when intervener made the alleged purchase it was well aware of plaintiff's privilege and right of pledge, and adopted the course pursued by it for the purpose of defeating the same, and it prays for judgment not only with respect to the seed actually taken into custody by the sheriff, but, also, with respect to certain other seed which the intervener acquired possession of, not as plaintiff alleges by virtue of a sale, but by virtue of a fraudulent giving in payment by an insolvent debtor. The defendant, after moving unsuccessfully to dissolve the sequestration, filed an answer, denying the allegations of the petition, and setting up some other matters which are not insisted on and need not be considered.

The facts of the case appear to be as follows:

Defendant was regarded as a man of means, and enjoyed a good credit, and his embarrassed condition, as made known through the transactions out of which this litigation arises and more particularly, perhaps, through the litigation itself, appears to have been a matter of surprise to those with whom he was doing business. He owned a residence in Natchez, and a valuable plantation in the parish of Concordia, La., which was made up of four contiguous tracts or plantations, known as "Dunbarton," "Fairview," "McCarthy," and "Ramshorn" (or Ross & Marks), respectively; the whole operated under one management, as one plantation, and known as "Dunbarton." On April 18, 1904, he entered into a verbal contract with plaintiff to the effect that the latter should advance him money to the extent of \$12,000 for the making of his crop for that year. What then occurred is stated by the assistant cashier of the bank in the following language, to wit:

"He said he wanted \$3,000 on that day. I told him I would let him have the \$3,000, but, owing to the importance of the transaction, would not attempt to prepare the papers myself, but would have the necessary act of pledge drawn up which he could sign at a later day. He, then, before the pledge was executed, wanted \$3,000 more, which we let him have, as evidenced by note dated May 31, 1904. On July 9th, I had the necessary paper and this pledge was executed, and another note for \$1,600, dated July 1st [9th] was made."

Referring elsewhere to this matter, the witness testifies as follows:

"Q. How much had the bank advanced to Sullivan for his crop at the time the pledge was signed? A. \$7,600. * * * Q. The pledge describes three notes—one for \$3,000, dated April 18, 1904, one for \$3,000, dated May 31, 1904, and the third for \$1,600, dated July 9, 1904. Had the money evidenced by these notes been advanced to Mr. Sullivan prior to the execution of the pledge? A. It had."

The act of pledge referred to reads in part as follows:

"Personally came * * * J. B. Sullivan * * * who declared * * * that he has this day borrowed from the * * * bank * * * the sum of \$7,600 * * * to enable him * * * to cultivate, make, and produce a crop of cotton, corn, and other produce on his Dunbarton plantation * * * during the year 1904, for which amount the said James B. Sullivan has executed his three promissory notes * * * for \$3,000, dated April 18, 1904, * * * for \$3,000, dated May 31, 1904, * * * and for \$1,600, dated July 9, 1904, * * * and the said appearer hereby declares that in order to fully secure the * * * bank * * * in the full and final payment of the said notes and said advances so made, or that may hereafter be made, * * * he does hereby give and grant, * * * in addition to the privilege now conferred by law to the furnisher of supplies, a lien and pledge upon all the cotton, cotton seed * * * raised or produced by him, either by himself, his tenants, * * * on said plantation. It is further agreed that said J. B. Sullivan will cultivate his said crop, gather and prepare same for market as soon as practicable, and, as soon as same is

prepared for market, will ship the same to the * * * bank * * * or to any commission merchant designated by them, to their account; the proceeds thereof shall be applied to the extinguishment of the advances so made, or, at the option of the * * * bank * * * shall be applied to any other or additional amount advanced that may not be secured by an act of pledge, as the bank may see fit. * * * It is agreed that this is a Louisiana contract, and the enforcement, if necessary, shall be governed by the laws of the state of Louisiana."

About September 1st, following the foregoing, the defendant agreed with H. & C. Newman, of New Orleans, to ship to that firm his entire crop of cotton, less about 60 bales which he shipped to J. Wels & Co. of New Orleans, and when and as the cotton was picked and ginned, he shipped it accordingly—367 bales to Newman and 61 bales or 63 bales to Wels; all of which was without plaintiff's knowledge or consent. On September 26th or 27th he sold to the intervener for future delivery 300 tons of cotton seed from the Dunbarton crop of 1904, for which intervener paid, in advance, by honoring his drafts, of September 28th for \$1,500, and of October 4th for \$2,000, and this, also, was done without the knowledge or consent of plaintiff; in fact, as late as January 5th, 1905, plaintiff wrote to defendant:

"You are aware we have a crop pledge on your cotton, cotton seed, corn, etc., recorded, and this pledge promises all cotton shall be shipped for our account. Please accept this as notice that no cotton, or seed, or corn, must be shipped or sold, except for our account, until this indebtedness is satisfied."

To which defendant replied, on January 6th:

"No cotton, or anything, will be shipped until you are paid, which will be in four or five days; some time next week."

It is fair to say that defendant's arrangements with H. & C. Newman had up to that time enabled him to pay to plaintiff the two notes of \$3,000 each, mentioned in the act of pledge, as also a note of \$3,500, which he had previously given to plaintiff in a different matter, and that he appears to have entertained the hope (which was not realized) that Newman would pay the balance of his debt to plaintiff. It was part of intervener's understanding with defendant that it should send for the seed for which it had contracted when the river (Tensas) should have become navigable, and, on Thursday, January 18, 1905, the steamboat J. W. Swayze was dispatched on that mission, the general situation at that time, so far as these litigants are concerned, being about as follows: For a day or two before there had been a movement looking to the attachment by plaintiff of defendant's store (a general store at Dunbarton), and one of the counsel who now represents both intervener and defendant had been consulted and had prepared the necessary papers, in the doing of which he had occasion to read the act of pledge

here relied on by plaintiff. So far as the attachment was concerned, however, the matter was arranged by the defendant consenting that the stock in the store should be sold and the proceeds divided among his creditors, and there having been some suggestion of a purpose on the part of the plaintiff to seize the cotton seed now in dispute, the counsel above mentioned stated or intimated that he would be unable to represent the plaintiff; his reason (whether given or not) being, that he was the regularly retained counsel of the oil company. He was then called elsewhere, and, on the following day, the captain of the Swayze (who, and whose boat, have been in the employ of the intervener for some years), telephoned to the office of intervener for instructions, and was directed by some one in charge to go after the seed at Dunbarton, which he at once proceeded to do. Later on the same day Skipwith, intervener's manager who had been temporarily absent, and was uninformed as to what had just taken place, met defendant on a railroad train and was told by him that his (defendant's) affairs were in bad shape, though there was a prospect that Newman would straighten them out, and he was asked whether intervener's seed had been taken from Dunbarton, to which he replied that he did not know, whereupon defendant suggested that he had better move the seed as soon as he could. The boat which had been sent for that purpose arrived at Dunbarton that same evening (probably whilst the conversation thus mentioned was going on) and the captain there found Lee, the manager of the plantation, who had previously been informed by defendant that the seed had been sold to, and would be called for, by intervener, and who was, therefore, ready to deliver it. The loading of the boat, accordingly, began on Friday morning, and continued until 3,555 sacks, which was as much as she could carry, had been placed on board, and on Saturday she steamed to Clayton, a station at which, as we understand the testimony, the railroad touches the river, and where it was the purpose to discharge the cargo; the understanding being, that the boat was then to return to Dunbarton for the balance of the seed, consisting of loose seed, "estimated" at about 20 tons, and seed in sacks, also "estimated" at about 500 sacks. On the arrival of the boat at Clayton part of the cargo was discharged and put in warehouse or on cars, and of that part 168,200 pounds was subsequently seized by the sheriff and bonded by intervener, who also retained possession of the balance of the cargo (as shipped on the Swayze, consisting of 276,195 pounds) as will be hereafter stated. On the day (Saturday) upon which the Swayze left Dunbarton, defendant visited the plaintiff bank in Natchez and had an interview with the officers, in which he informed them of the shipment of cotton which he had made to Weis, and of the sale of the seed to in-

tervener, and in which, no doubt, his previous shipments to Newman (of which plaintiff had learned some five days before) were referred to, and as a result of which, he executed an instrument, reading (save the merely formal part), as follows:

"Jany 21, 1905."

"Gentlemen: I hereby agree and promise to ship the cotton and cotton seed now on my Dunbarton plantation * * * to you at Natchez, Mississippi—the cotton, in care of Rumble, Wensel Co, and the seed, in care Natchez Oil Co; said shipments to be made on first boat to arrive at the landing."

In executing this instrument, defendant informed plaintiff that there were then at Dunbarton 79 bales of cotton and between 250 and 300 tons of seed, and he promised, as he was about going to the plantation, that he would wire on his arrival whether the seed was still there, from which it is evident that plaintiff was given to understand that there was some reason to apprehend that it might have been removed, though we are not led to infer that defendant told plaintiff that he had on the preceding Thursday advised the intervener to remove it as soon as practicable. Defendant reached Dunbarton on the following day (Sunday, July 22d) and learned what had taken place, but he left the "wiring" to an agent of plaintiff whom he found on the spot, and, either through the latter, or in some other way, plaintiff learned of the situation, and immediately caused the issuance of the sequestration under which the sheriff seized 100,580 pounds of seed, which had been left on the plantation, as also some cotton, amounting, as we understand, to 52 bales, and under which he proceeded to Clayton and boarded the Swayze, as that boat was about moving over the Catahoulas side of the river, but without stopping the boat or seizing her cargo. He, also, as has been stated, seized 168,200 pounds of seed, which had been discharged at Clayton, and which, with that seized at Dunbarton, was subsequently bonded by intervener. It may also be here stated that plaintiff bonded the cotton which was seized at Dunbarton, and that the same was afterwards sold, and the proceeds amounting to \$1,185.12, applied in reduction of plaintiff's claim.

The two notes of \$3,000 each, mentioned in the act of pledge, were, as has been stated, paid, the amounts represented by the other note of \$1,600, mentioned in the pledge, and by the notes of \$1,500 and \$4,000, and by the claim on open account, for \$1,440.25, are shown to have been furnished by plaintiff, to defendant, and to be unpaid. Plaintiff insists that its entire claim is secured by the act of pledge, but even if that be not so; having contracted with defendant to make advances for the purposes of a crop, that it has a privilege for the whole amount advanced irrespective of the use to which the money was actually applied; and on the trial below it objected to the introduction of

testimony going to show that a large proportion of the money advanced was used for other purposes than the making of the crop. There was, however, some testimony on that subject which found its way into the record, from which the judge a quo concluded that nearly \$6,000 was actually used for crop purposes. There was judgment in the district court in favor of plaintiff, and against defendant, for \$3,540.25, with interest, recognizing the privilege and right of pledge asserted by plaintiff, maintaining the seizure, as made, decreeing that the \$1,185.12, realized from the cotton be applied as a credit on the open account, that intervener surrender the seed bonded by it, or pay plaintiff \$1,340, and that intervener pay plaintiff \$1,794 as the net proceeds of the seed taken by it and not seized by the sheriff; the whole judgment against intervener to be credited with \$2,000, being the amount of its check, given to plaintiff in payment of defendant's draft for that amount. The defendant was condemned to pay the costs of the main action and the intervener those of the intervention. Defendant and intervener have appealed and plaintiff has answered, praying that the judgment be amended.

Opinion.

Plaintiff agreed to make advances for the purposes of the crop to be made in 1904 on Dunbarton plantation (which plantation, we find, included the several tracts, or plantations, known as "Fairview," "McCarthy," "Ramshorn," or "Ross & Marks," and "Dunbarton," proper), and it was part of the agreement that the advances should be secured by a written pledge of the crop, to be thereafter executed and recorded. But, without waiting for that security plaintiff advanced \$7,600 represented by the notes of April 18th, May 31st, and July 9th, and when, upon the date last mentioned, the act of pledge was executed, that amount, representing the aggregate proceeds of the three notes mentioned, was the only specified amount which it purported to secure. The law (Act No. 66, p. 114, of 1874) which is relied on as authorizing a pledge so peculiar in its character, however, provides that the planter "may pledge his growing crop, * * * for advances, in money, goods, and other necessary supplies, that he may require for the production of the same," and we do not understand this to mean that he may so pledge his crop for advances which have already been received and consumed. In other words, we do not understand that a factor may advance money and supplies without a pledge of the crop, and, after the advances have been made, perhaps, at the end of the season, and after the crop has been gathered, avail himself of the benefit of the act of 1874 by taking a pledge, the authority for and the legality of which is made dependent upon other conditions. No one will pretend that, quoad a crop not delivered into

his possession, a right of pledge can exist in favor of the furnisher of supplies (whether as between him and the planter or as between him and anyone else) unless it be acquired under the act of 1874, and since, as we have seen, that act authorizes such a pledge as security only for advances which the planter may require, it follows that an attempt in that way and without delivering it into the possession of the pledgee to pledge a crop for advances which have already been made and used, must be abortive, as to the parties themselves and all the world.

It is said, however, that the act of pledge here relied on was intended to secure not only the \$7,600, which had already been advanced, but also any further sum that might be advanced. We do not so understand the act. It may be conceded that the original agreement contemplated that the advances to be made should be secured by pledge, but the act of pledge, as executed, specified a particular amount, already advanced and used, as representing the particular debt to be secured, and, toward the end of the instrument, we find the following, to wit:

"Said J. B. Sullivan will cultivate his said crop * * * will ship the same to * * * the * * * bank * * * or to any commission house designated by them to their account; the proceeds thereof shall be applied to the extinguishment by them of the advances so made, or, at the option of the * * * bank * * * shall be applied to the payment of any other or additional amount advanced that may not be secured by an act of pledge, as the said bank may see fit."

From which, and from the positive and reiterated statements of the plaintiff's witnesses, to the effect that the contract with the defendant called for no advances save for crop purposes, it is evident that it was within the contemplation of the parties that some of the advances under the contract should be secured by pledge, and some should not, and our conclusion is that the only advances to be included in the class first mentioned were those specifically referred to in the act of pledge, but for which, as we have seen, the property could not be pledged without being delivered into the actual possession of the pledgee. We therefore conclude that plaintiff has no pledge. It is, however, secured, to the extent of the privilege accorded by Civ. Code, art. 3217, "on the crops of the year and the proceeds thereof," which privilege is conferred in the same terms as those of the laborers by whom the crops are made, of the lessor upon whose land they are made, and of the overseer under whose supervision they are made, and, as there is neither laborer, lessee, nor overseer before the court, it follows that for the purposes of this suit the privilege of the plaintiff, to the extent mentioned, is paramount to any other claim upon the crops made on Dunbarton in 1904, and upon the proceeds thereof.

The learned counsel for defendant (who also represents the intervener) argues that,

quoad the defendant, the sequestration should be dissolved, because the plaintiff made no inquiry, as to the disposition of the crop during the crop year, and because, failing to designate a consignee, it is presumed to have waived its rights in the premises. The argument is predicated in part upon an error of fact. Baker, the assistant cashier of the bank, testifies that he inquired about the crop in November, 1904, and that defendant told him that he had neither ginned nor shipped any of his cotton, and would not attempt to operate his gin because the weather was too fine, and because he had no water, and after that it does not appear that defendant ever notified plaintiff that the crop was prepared for the market or ever gave plaintiff an opportunity to designate a consignee; the shipments to Newman and Wels having been made without its knowledge, as had been the agreement for the sale of the seed. It is also argued that when plaintiff accepted defendant's written obligation of January 21, 1903, to ship the cotton and seed then on his plantation, it did so with full knowledge of all that had been done, and hence waived its right to make a seizure for any cause which may have existed prior to that time. We do not, however, find that plaintiff did anything more than accept the obligation referred to, and there is nothing in that, nor is there any evidence in the record, from which any waiver can be deduced. It is further argued that Civ. Code, art. 3217, confers a privilege only "for money actually advanced and used for the purchase of necessary supplies and the payment of necessary expenses for any farm or plantation, on the crops of the year and the proceeds thereof," and that it was incumbent on plaintiff to show what proportion of the amount claimed by it was devoted to those purposes. As the main proposition is stated in the language of the law, there can be no denying its soundness, and the other is a corollary. The question is, "what does the language of the law mean?" This question has been answered by our predecessors as follows:

"The account is generally attacked on the ground that the proof does not adequately establish the necessary nature of the supplies. It is said that the showing of such necessity is an essential element of proof, to create the privilege. Such was, undoubtedly, the rule under Civ. Code, art. 3217, which, in terms, gave the privilege for money actually advanced and used."

But the act of 1874 has made an important modification of our law on this subject. It provides:

"That, in addition to the privilege now conferred by law, any planter, or farmer, may pledge, or pawn, his growing crop * * * for advances * * * that he may require for the production of the same." It is as plain as words can make it that the privilege which, formerly, was made to depend not only on the advance of the money, but, also, on its actual use for necessary purposes, is, now, caused to result from the advance of the money * * * that may be required by the planter."

And, it being found in the case then under consideration that the third opponents had a pledge, executed and recorded in conformity to the act of 1874, it was held that they were not called on to prove the actual use of the money advanced for the purpose for which it had been required. *Laloue v. Wiltz*, 31 La. Ann. 439.

In the instant case, the plaintiff, as we have seen, is not protected by such pledge, but its learned counsel contends that the law has been differently construed in *Hewitt v. Williams*, 47 La. Ann. 742, 17 South. 269, and that the interpretation adopted in that case has become a rule of property, under which (as was said in *Grocer Co. v. Adams*, 112 La. 75, 36 South. 226) the parties must be presumed to have acted. There is no doubt some conflict between the views expressed in the two cases, but we are of opinion that those which we have cited are correct and must be adhered to. Whatever may be said of the act of 1874, the language of article 3217 of the Code is perfectly plain, and makes it clear that it was not the intention of the law that a person who may have furnished money used in the purchase of a residence in New Orleans or Natchez, should enjoy a privilege therefor, giving him a preference over other creditors on a crop of cotton in Concordia. As to the other proposition, the testimony adduced on behalf of plaintiff shows, affirmatively and conclusively, that plaintiff did not govern its action by the views expressed in *Hewitt v. Williams*, but that it entered into its business arrangements with defendant with a distinct understanding of the difference between advances intended to be secured by pledge and those not so intended; the reason of its present trouble being that it waited for advice in order that the act of pledge might be formal and regular, and did not, then, have it so drawn as to cover the amount eventually advanced. Counsel for plaintiff contends that it appears from the record that more than \$5,000 of the money furnished was used for necessary plantation supplies, and in this we believe he is correct. But, upon the other hand, plaintiff has been paid \$6,000, and has attributed that amount to the satisfaction of the two notes of April 18th and May 31st, respectively. It has therefore been reimbursed the money advanced by it and actually used for the making of the crop, to the extent that the \$6,000 mentioned was applied to that purpose, and it can now recover with privilege only so much of the balance of the amount advanced by it as was used in the same way. That the proportion of such balance so used was considerable in amount we entertain no doubt, but the rejection of testimony (and the failure to offer it) renders it impossible for us to reach any satisfactory conclusion as to the figures, and the case will have to be remanded for further inquiry upon that subject.

Counsel for defendant further urges, as a reason why the sequestration should be dis-

solved, that defendant, having drawn on intervenor, through the plaintiff bank, for \$2,000, as part of the price which intervenor had agreed to pay for the seed, and intervenor having paid the draft, by its check, in favor of the plaintiff, the latter must be presumed to have known of the purpose of the draft and check, and must, therefore, be considered as having acquiesced in the sale of the seed, and as having profited to the extent of the \$2,000 thereby, and this view seems to have been taken by the judge a quo. The evidence, however, shows conclusively, as we think, that the draft drawn by defendant was collected by plaintiff for defendant; that the proceeds were placed to the credit of the latter's account; and that the plaintiff paid no more attention to it than it would have paid to any other draft deposited for collection, and drew no inference from the fact that it was drawn on intervenor, nor did it profit by the collection, since the proceeds were subject to defendant's control, and were checked out for his own purposes.

Apart from the issues which have thus been considered, and in which intervenor makes common cause with defendant, the main contention of the learned counsel for the intervenor is, that the seed in question had ceased to be part of the "growing" crop on Dunbarton, had become an article of commerce, and had been delivered to a bona fide purchaser, to whom it had been sold, and into whose hands the privilege of the furnisher of supplies does not follow it. We do not concur in this view. The law does not confine the privilege here asserted to the "growing" crop. On the contrary, the provision relied on reads:

"The debts which are privileged on certain movables are the following: 1. * * * Debts due for necessary supplies * * * and debts due for money actually advanced and used for the purchase of necessary supplies and the payment of necessary expenses for any farm or plantation, on the crops of the year and the proceeds thereof."

Ordinarily speaking, a growing crop is not movable but immovable property, and whilst for the purposes of the law cited, it has been held to be movable, at all times (*Weill v. Kent*, 52 La. Ann. 2141, 28 South. 295), it has never, so far as we know, been held to be immovable for any purpose, after being severed from the soil, and if it then becomes movable for all other purposes, it would be a singular perversion of ideas that would lead to the conclusion that it would not become so for the purposes of the law by which that status is, in terms, attributed to it, and hence would not be affected by the privilege conferred by the law on movables. To adopt such a theory would be equivalent to holding that the laborer, the overseer, and the furnisher of supplies, who have given their services and money to the cultivation of the crop, lose their privileges by giving the additional service and money necessary to harvest, and

prepare the crop for market, a proposition which finds no support in either the reason or the language of the law.

If Dunbarton plantation had been sold with the crop on it, the latter would have passed to the purchaser, subject to the privilege of the furnisher of supplies. Under the law as it formerly stood a privilege was granted to the overseer for his salary "for the year last past, and so much as is due for the current year, on the product of the last year's crop and the crop at present in the ground," which was interpreted by our predecessors in this court as follows:

"This law supposes a continuity of services, and the privilege is not confined to the crop itself of the past year, but extends to the product of it. In relation to the growing crop, the expression is different. The privilege as to the last year's crop may be exercised, it would seem, upon the proceeds, after the crop has been sent to market and sold." *Succession of Johnson*, 3 Rob. 217.

In a later case it appears that the plantation was sold in 1842, after the overseer had acquired a privilege on the then growing crop, for his salary for the year 1841. He sued the vendor for the salary of 1841, and sequestered the crop of 1842, in the hands of the vendee, who set up that he had purchased without notice. The court said:

"But how can this be a ground for depriving plaintiff of his rights? The law does not require that such privilege be recorded. * * * The plaintiff's privilege existed on the growing crop, at the time of the purchase by Barrow by the mere effect of the law. Until the sale of the plantation, with the crop then in the ground, the latter belonged to Shields, against whom the right could be exercised. This Barrow must have known, as no one can be presumed to be ignorant of the law. He was aware that a privilege might exist on the growing crop in favor of the overseer for the current and the preceding years, and it was, perhaps, his duty to inquire and to ascertain at the time of the sale whether the crop that he was then purchasing was affected with that kind of a privilege. This he might have easily known from the very person whom he kept in his employment, and who was, perhaps, unaware of the purchase, had no notice to give of the existence of the right, which the law secured, and which he had long before acquired." *Welsh v. Shields*, 6 Rob. 484.

Applying the doctrine thus stated to the instant case, it may be asked: How can the fact that the intervenor agreed with the defendant for the purchase of cotton seed (which was then hanging on the plants) and paid him for it, affect the privilege of the plaintiff for the security of the money which it (plaintiff) was furnishing and continued to furnish for the production and harvesting of that seed? The intervenor was bound to know that there was or might be just such a privilege, and others besides on the crop, including the seed, and that it (intervenor) would necessarily take the seed cum onere. The plaintiff was under no obligation to give notice, but if it had been so disposed it was not afforded the opportunity, since it was not informed of the transaction

between intervener and defendant until about the time that intervener undertook to remove the seed. No one doubts that privileges, whether recorded or unrecorded, against immovables, follow the property, and if the rule is not more frequently applied to privileges on movables, it is rather, as we apprehend, because of the difficulty of tracing property of that character by reason of which the holder of the privilege becomes equitably estopped than because of any difference in the law; and the argument, ab inconvenienti, that such a rule, as applied to crops, would prove a burden to commerce, is met by the consideration that, if a crop could be sold for future delivery, for a price advanced by the buyer and spent by the seller, and could be delivered on the plantation, remote from a court of justice, in the twinkling of an eye, free of all privileges, it would, perhaps, be found a difficult matter for planters to obtain either labor or means with which to make any crops.

In the instant case intervener, in the month of September, whilst the Dunbarton cotton was in the field, and the money of the plaintiff was being expended on it, agreed with defendant for a future delivery of the seed, and advanced to him a certain amount in consideration of his obligation to make the delivery. No one will pretend that such a transaction was a sale, and no one will deny that the intervener entered into it with full knowledge of the fact that the seed was, probably, if not certainly, subject to privileges for labor and supplies. In January, 1905, when intervener thought proper to send for the seed, or, at all events, before the seed was delivered, the probability that it might be affected with a privilege had become, as we think, to the knowledge of intervener, the certainty, but intervener took the seed, nevertheless, or as much as it could carry away with the means at hand, and it is now said that the privilege which the law gives to the plaintiff as security for the money used in producing the property thus carried away is thereby defeated. If this be true, then the privilege of the overseer and of the laborer may be defeated in the same way, not only as to the seed, but as to the entire cotton crop of a plantation; to the production of which they may have devoted a year of honest toil. The proposition is equally abhorrent to law and justice, and cannot be sustained. The intervener must be held to have taken the seed subject to the obligation with which it was burdened, and must either return it or discharge that obligation.

Counsel for plaintiff in his brief puts the query:

"If the thing in the vendor's hands is subject to a lien or incumbrance, why should he be permitted to give his vendee a title, free from that lien or incumbrance?"

And the only answer that can be given is, "the vendor cannot be so permitted." Privi-

leges on immovables affect "all persons" from the date of their registry. Civ. Code, art. 3274. Privileges on movables require no registry. Const. art. 187. They affect all persons, nevertheless; otherwise they would be of no use to those in whose behalf they are conferred. Privileges, whether recorded or unrecorded, whether bearing on movable or immovable property, become extinct (1) by the extinction of the thing; (2) by the acquisition of the thing by the creditor; (3) by the extinction of the debt; (4) by prescription. Civ. Code, art. 3277. The law does not contemplate that a privilege shall become extinct by the sale of the thing on which it bears. On the contrary, its adhesion to the thing under such circumstances is of its very nature and essence, and unless it so adheres it is no privilege at all.

It is said by counsel for intervener (on the basis of the decision of this court in *Minge & Co. v. Barbre*, 51 La. Ann. 1285, 28 South. 180), that the amount of advances intended to be secured having been fixed, by the act of pledge, at \$7,600, the plaintiff is entitled to no privilege beyond that amount. The case relied on is, however, inapplicable, since, from the face of the act of pledge here presented, it is evident that the parties contemplated other advances, to be otherwise secured, the limit of which is not fixed.

The only point remaining which it seems necessary to notice is that presented in the motion of the plaintiff to amend the judgment, concerning which, for the facilitation of matters in the future, we think it advisable to say that should it eventually appear that plaintiff's privilege, resulting from the actual use, for plantation and crop expenses, of the money advanced by it, requires more property for its satisfaction than has already been realized upon, and should it become necessary to call upon intervener to account for the seed taken or bonded (or both) by it, the intervener should be required to produce the seed itself, or account for it at the market price at the date of the trial hereafter to be held.

For the reasons thus assigned, it is ordered, adjudged, and decreed that in so far as it condemns the defendant in favor of the plaintiff in the sum of \$8,540.25, with interest on the different amounts aggregating that sum, and for the costs of the main action, and in so far as it maintains the writ of sequestration and recognizes plaintiff as entitled to the privilege accorded by article 3217 of the Civil Code for the amount which may ultimately be found to be due for money actually advanced and used for the purchase of necessary supplies and the payment of necessary expenses for the defendant's Dunbarton plantation for the year 1904, the judgment appealed from be affirmed, and in all other respects that said judgment be annulled and avoided; and it is further adjudged and decreed that the case be remanded for the purpose of further inquiry, the admission of

further testimony, and further adjudication, as to the use made by defendant of the money advanced to him by plaintiff after the exhaustion of the proceeds of defendant's notes for \$3,000 each, of April 18, and May 31, 1904, respectively, and for further adjudication as to the rights of the parties upon the basis of the information so to be obtained.

It is further adjudged and decreed that the costs of the appeal be paid by plaintiff, and that the costs in the district court of the intervention await the determination of the question whether, agreeably to the views expressed in the foregoing opinion, any or all, of the cotton seed removed, at the instance of intervener, from Dunbarton plantation, on the 20th and 21st days of January, 1905, was, at that time, subject to a privilege in favor of the plaintiff.

NICHOLLS, J., absent.

BREAUX, C. J., and LAND, J. We concur in all the conclusions set forth in the opinion handed down by Justice MONROE in so far as they are applicable to the facts of this particular case, but we are not prepared to assent to the general proposition that the privilege of the furnisher of supplies follows the crop in the hands of third persons.

(117 La.)

No. 15,992.

**STATE ex rel. BOARD OF LIQUIDATION
OF CITY DEBT v. BRIEDE, City
Treasurer.**

(Supreme Court of Louisiana. May 7, 1906.
Rehearing Denied June 4, 1906.)

**1. MUNICIPAL CORPORATIONS—NEW ORLEANS
BOARD OF LIQUIDATION — CUSTODY OF
FUNDS.**

The proceeds of the 1 per cent. tax should be paid over to the fiscal agent or depository of the board of liquidation, as directed by that board and to the credit of the board.

2. SAME—STATUTORY PROVISIONS.

The purpose of section 3 of Act No. 111, p. 147, of 1890 is separate and distinct. The instruction touching the deposit of the fund therein referred to is special and direct.

3. SAME—ACTION OF BOARD—QUORUM.

There was no quorum at the meeting of September 1, 1905, at which a depository was selected by the board.

4. SAME—ABSENCE OF QUORUM—EFFECT.

The question was jurisdictional—it went to the power vel non of an illegal quorum. The relator had the right to stand in judgment to have it determined where the fund should be deposited. He had the further right.

5. SAME—OFFICERS—REPRESENTATION BY DEPUTY.

Record evidence should be kept of the fact that, on account of the "absence" of one of the executive officers, the comptroller, his chief clerk or deputy acted.

6. PRINCIPAL AND SURETY—CONTRACT.

A contract, entered into to secure funds deposited, and the accompanying bond, should clearly set forth the extent of the liability of principal and security.

7. MUNICIPAL CORPORATIONS — ACTION OF OFFICERS.

No changes should be made before the board has acted through a legal quorum.

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Application for mandamus by the state, on the relation of the board of liquidation of the city debt, against Otto F. Briede, as city treasurer, to compel respondent to pay over certain funds to relator. From a judgment for relator, respondent appeals. Reversed.

Samuel Louis Gilmore, City Atty., for appellant. Howe, Spencer & Cocke, for appellant intervener. Miller, Dufour & Dufour, for appellee.

BREAUX, C. J. The relator prayed for a mandamus to issue, commanding the treasurer of the city of New Orleans to pay to it, or its fiscal agent, the proceeds of the 1 per cent. tax.

Judgment was pronounced in its favor, from which respondent and intervener appeal.

The judgment in question directs that the tax in question be paid over to the Canal Louisiana Bank & Trust Company, alleged depository of the fund.

On appeal, the relator answered and asked that the judgment be amended by directing the respondent treasurer to pay the amount over to it, the relator, and, in the alternative, to the Canal Louisiana Bank & Trust Company.

The plaintiff board was established in the year 1880, and in the same year the Louisiana National Bank was elected its fiscal agent, and in the year 1896 the Canal Bank was elected to be joint fiscal agent of the board.

From 1880 to November, 1905, the proceeds of all taxes collected by the city treasurer for the board of liquidation were delivered to, and deposited with, its fiscal agent. In November, 1905, as relates to deposits, matters came to a stop. The treasurer notified the board of liquidation that, advised by the city attorney, he would pay the amount of the tax in question to the fiscal agent of the city of New Orleans.

Thereafter a writ of mandamus was sued out by the board of liquidation to compel the city treasurer to turn over the proceeds to it or to its fiscal agent, the bank before named.

The city treasurer, respondent here, and the Interstate Trust & Banking Company, in their pleadings, traverse relator's right to designate its depository, and specially aver that the Canal Louisiana Bank & Trust Company cannot be selected as depository by reason of the fact that, at the time of the averted selection, five of the members of the board of liquidation, constituting a quorum, were stockholders and officers in the Canal

Louisiana Bank & Trust Company, and peculiarly interested in its selection as custodian of said funds.

The relator, with the view of meeting this contention, averred that it is expressly intrusted by statute with the control and administration of the bonded debt of the city of New Orleans, and with the payment, with interest thereon, and that, under the statutes, the treasurer is required to turn over to it (relator) the proceeds of the 1 per cent. tax in question; that the proceeds of this tax are under its care and keeping; and that the depository's right cannot be attacked collaterally. While, on the other hand, the intervenor, that is, the Interstate Trust & Banking Company, sets up that it is the fiscal agent of the city of New Orleans, and that it is its right to have the proceeds in question deposited with it; and it also avers that the proceeds of this tax annually exceed the sum of \$500,000, and that the custody thereof is worth to it, at least, the sum of \$5,000 during the unexpired term of its fiscal agency.

The record does not disclose whether the fiscal agent of the city of New Orleans was or was not satisfactory to the board; nor does it appear that any of the banks mentioned by relator or by respondent were unsafe or improper custodians. They are equally responsible, as we understand.

The first proposition before us for discussion is that the 1 per cent. tax, levied and collected in accordance with Act No. 110, p. 144, of 1890, should be paid over to the board of liquidation directly.

Relator, in support of its contention, invokes the force of contemporary construction, which grows out, as it urges, of the fact that these funds to November, 1905, had always been paid to it; that the officers charged with the execution of the statute had from the first always construed it as requiring the deposit of the funds to be made with relator.

Relator quotes from several decisions in which the maxim "*contemporanea expositio est fortissima in lege*" was held as controlling of the points at issue in the respective cases. *Succession of Connolly*, 5 La. Ann. 753.

Beyond question, great weight should be given to contemporaneous construction.

We leave the question of contemporaneous construction with the statement that the officers have deposited the fund in question, as averred by relator. But contemporaneous construction invoked is not determinative of the issues for reasons that will be stated.

We take up for decision the different views taken by relator and appellee, on one hand, and respondent and appellant, on the other, touching the proper interpretation to be placed on three of the sections of Act No. 110, p. 144, of 1890.

That statute provides, in its seventh section (page 149) that the proceeds of the 1 per cent. tax shall be paid over to the fiscal

agent, or depository of the board of liquidation, to the credit of said board, day by day, as the same is collected, and that the city, or its officers, shall not have the custody or control of the tax, except as provided for in the statute.

The board, under the terms of that section, selected the Canal Louisiana Bank & Trust Company as its depository.

The objection by the appellant and respondent to the selection of the bank just named is especially that, taking the three sections together, the taxes in question should be deposited with the fiscal agent of the city and nowhere else; and, in the second place, that the quorum of the board was illegal when the bank before named was selected, for the vice president of this bank and one of its directors were part of the quorum. That, as these members were interested, it is against public policy to permit public officers, charged with the duty of selecting a safe depository for public funds, to select for such depository a bank in which they are officers and stockholders, since such selection involves a conflict between their duty and private interest.

We will have to divide the questions to the end of deciding them. This being done, we take up the contention of respondent that the proceeds of the 1 per cent. tax should be deposited with the fiscal agent of the city.

In three of the sections of the cited act reference is made to the deposit of the board's funds. The third section of the act refers to the proceeds from the sale of constitutional bonds, an independent matter. These bonds are set apart for a purpose mentioned in the act, and the direction to deposit them with the city fiscal agent is not pertinent to the issue here.

Section 11 of the act (page 151) provides:

"Their funds shall be deposited with the fiscal agent of the city of New Orleans or with some chartered bank in the city of New Orleans, selected by said board."

In the alternative the board of liquidation has the authority to select some chartered bank, so that, even under this section, the board is not without authority to select its depository.

Section 7 of the statute deals exclusively with the 1 per cent. tax, the deposit of which is now at issue. We do not feel authorized to write, in section 7 of the statute, the words, viz., "city of New Orleans," after the words, "fiscal agent," as the quoted words, "fiscal agent," do not, as we read, refer to the fiscal agent of the city of New Orleans.

We make summary of the cited act, *supra*, as follows: The funds, under the third section, received by the board from the sale of constitutional bonds, shall be immediately deposited with the fiscal agent of the city of New Orleans, or, if the fiscal agent is not satisfactory in the opinion of the board, then into the chartered depository selected by the board. This refers to the "bond

sale funds" used solely and exclusively for the purpose stated in the section, and therefore it is not pertinent to the issue whether the board has or has not expressed disapproval touching the city's fiscal agent.

The next section, to which we have already referred on the subject of deposits, refers exclusively and solely, to the 1 per cent. tax. The last section of Act No. 110 (page 152) is general in terms and does not control the particular provision of section 7. A general provision does not change a particular or special direction in regard to a particular matter.

We come to the second of the divided questions before referred to, which involves the charge that the depository was favored owing to the relation existing between some of the members of the board with it (the depository). We will not discuss the subject at any great length. When considered in its last analysis, the amount involved is not large, not large enough, at any rate, to influence any one, but there is a principle which we are constrained to notice, and which forces us to the conclusion that the board's action in selecting its depository must be set aside. The quorum by whom the selection was made was not legal, and it follows that the resolution adopted in selecting the Canal Louisiana Bank is of no effect. It can have no legal result.

The acts of the board are quasi judicial. The duty, quasi judicial, is defined generally as a duty lying in the judgment or discretion of an officer other than a judicial officer. Throop, Public Offices, § 533.

The function is not strictly judicial, nor, on the other hand, ministerial. It is midway between the two; that is, quasi judicial. When an officer is charged with looking into and acting upon facts "not in a way which it specifically directs, but after a discretion, in its nature judicial, the function is termed quasi judicial." Bishop on Contract Law, § 785 et al.

"An act is judicial when it requires the exercise of judgment or discretion by one or more persons or by a corporate body, when acting as public officers in an official character in a manner which seems to them just and equitable." Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; People v. Supervisors, 35 Barb. (N. Y.) 414.

It is evident that the members were charged with a great public duty.

We feel at liberty to say that, in the discharge of these functions, the credit of the commonwealth has felt its good influence.

The power being quasi judicial, decisions touching the exercise of powers, judicial and quasi judicial, are pertinent to the issues. There are a number of authorities in which it has been laid down as a principle that even the appearance of interest should be avoided.

A question of interest was before the court in *Swayze v. Monroe*, 116 La. —, 40 South. 926, though the interest was not a matter

of moment, and the case was decided on other issues. It was nonetheless sufficiently referred to to render it evident that the appearance of interest did not meet with approval in deciding the issues.

"Contracts opposed to the public policy of the state cannot be enforced." *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415.

In *Succession of Jan*, 43 La. Ann. 924, 10 South. 6, the account of the executor had long since been homologated. On appeal, appellant complained of the district judge's action in having homologated a claim for a fee which had been paid him before he was promoted to the bench, and to which no one objected. Among a number of claims, his was carried. It was urged that there was a warranty, a shadowy one, it must be said. The court attached no importance to it, but nonetheless said that there should be no pretext for unreasonable suspicion, and called attention to the proneness of human nature, always quick to assert itself, that "praise is without feet, but the wings of blame are swifter than the air." In the decision, the court said that the district judge was disinterested, that the interest was too remote to influence any one; still there was a remote interest. The judgment was annulled, and the case was remanded.

While there is here no question of wrong either directly or indirectly, it is best, in the interest of all concerned, to set aside the proceedings to the extent that the depository was selected. The situation was fiduciary. It should not be possible to refer to the most remote or infinite small interest.

Defendant and intervener further charge that there was no legal quorum at the meeting of September 1, 1905, at which time the depository was selected, for the additional reason that the chief clerk of the comptroller was not entitled to sit as a member of the relator board. The comptroller was temporarily absent, we understand. The charter of the city provides that the chief clerk or deputy of each department shall represent his principal in case of suspension, absence, resignation, or death. This does not enable the deputy to act if his principal is only casually absent. If the comptroller was absent on the day that the depository was selected, we have not succeeded in finding a mention of it in the portly record of the appeal. True, at the bar it was said that he was absent, and in oral argument that was, as we understand, substantially admitted. We only wish to say that in our view of the statute there must be something in the nature of permanent absence to enable the deputy to act, and a record should show the absence. The legal reasons for acting must appear and be satisfactorily established.

Learned counsel for relator, in substance, states that, even if the election of the Canal Louisiana Bank as depository be irregular, the city treasurer cannot decline to perform

his ministerial duty in a collateral proceeding, in which the bank is not a party; that the treasurer was without right to decline to turn the proceeds of the 1 per cent. tax over to it, on the ground he urges, that is, the alleged interest of two of its members, and other grounds; that the duty of the officer was ministerial; that the city of New Orleans might and would have the right to contest such an election, but that she would have to bring her action against the bank. We do not agree with that view.

Relator's grounds are stated at some length. As stated above, we have abbreviated them.

The evidence shows that the selectors and the selected have an interest. It is against the policy of the state to enforce a selection made, when there is an interest involved even if under circumstances showing that it had no influence.

There is no dissent expressed from the view that the interest here is not susceptible of judicial approval. The attack should be direct and not collateral is the only position taken in the dissenting opinion.

Let us see:

The relator has some authority to inquire into the legality and the regularity of the resolutions and motions of the board in so far as he is concerned.

The question relates to the power and jurisdiction of the board to act through an illegal quorum. He (relator) can stand in judgment in collateral proceedings to prove the illegality.

It is the duty of an officer to see to it that the funds he pays over are placed in the hands of those entitled to it under the statutes.

The funds are public, and unlike a private interest under the circumstances. There must be no illegality, and, if there is, the illegality should receive early consideration by the courts.

In the case of *Capdevielle, Mayor, v. New Orleans & San Francisco R. R.*, 110 La. 904, 34 South. 868, the action of the mayor in energetically seeking judicial action touching a public interest was approved.

We think that the relator has the right to stand in judgment to raise question of authority on the grounds here urged by him.

We will go one step further in this case and state that, if we had arrived at a different conclusion from what we have, we, nevertheless, would not have found our way clear to recognize intervenor's right to the funds in question as depository of the 1 per cent. tax. Its contract with the city and the bond it furnished were not entered into and furnished so as to cover the proceeds of that tax. The bond specially refers to other funds and does not include those deposited under a section of the statutes not in contemplation of the parties at the time that it was signed. No reference whatever is made to the 1 per

cent. tax either in the contract or in the bond.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment of the court a qua is avoided, annulled, and reversed. It is further ordered, adjudged, and decreed that the right of the board of liquidation to receive the 1 per cent. tax from day to day as collected, and to place it in the depository of its own selection by a quorum legally constituted be, and the same is hereby, maintained. And it is further ordered, adjudged, and decreed that, until that selection be legally made, the status quo be maintained; the board of liquidation to pay the costs of both courts.

MONROE, J. I concur in the opinion and decree, save that I think the fiscal agent referred to in section 7 of Act No. 110, p. 149, of 1890, is the fiscal agent of the city of New Orleans.

PROVOSTY, J., dissents, holding the legality of the appointment of its fiscal agent, by the board of liquidation, cannot be collaterally inquired into.

NICHOLLS, J., absent.

(117 La.)

No. 16,073.

Succession of **LANDRY**.

(Supreme Court of Louisiana. May 7, 1906.
Rehearing Denied June 4, 1906.)

1. EXECUTORS—CLOSING SUCCESSION—PARTITION BY HEIRS.

A judgment, recognizing heirs and decreeing that they are entitled to receive the estate from the executrix, does not close the succession or authorize the heirs to partition the property.

2. SAME—HOMOLOGATION OF ACCOUNT.

In such case, the executrix has the right to oppose the partition and to retain the property until her final account has been homologated. Code Prac. arts. 1003, 1007.

3. ATTORNEY AND CLIENT—POWERS OF ATTORNEY.

The attorney for the executrix has no right as such to waive or compromise her rights or to make a settlement for her with the heirs at law.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 209-216.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommerville, Judge.

In the matter of the succession of George Landry. Angeline Yrle, executrix, obtained as order for an accounting, and from a judgment overruling her opposition to the homologation of a partition by the heirs, and sustaining the opposition of the heirs to her final account, she appeals. Reversed and final account reinstated.

See 40 South. 696.

Albert Voorhies, for appellant Angeline Yrle. James J. McLoughlin, John G. Robin.

Henry George McCall, Jr., Simeon Belden, and Armand Romain, for appellees.

LAND, J. This is a sequel to the suit entitled "Succession of Landry," reported in 114 La. 829, 38 South. 575, which was an action by the heirs at law of Geo. Landry to annul the last will and testament of the decedent, instituting Angeline Yrle as universal legatee, on the ground that the testator and the legatee had lived together in open concubinage, and that the testator was prohibited by law from donating to his said concubine more than one-tenth part of the value of his estate, payable from the movables.

This contention was affirmed by the district court, and by this court on the appeal, and the legacy reduced to the amount permitted by law.

Angeline Yrle was not only universal legatee, but was also executrix of the last will and testament of George Landry, and as such administered his estate.

The judgment referred to did not send the heirs into possession, but merely recognized their right to be put into possession contradictorily with the executrix.

The heirs thus recognized should have proceeded to demand an account of the executrix in order to ascertain the residuum of the estate remaining after the payment of debts, legacies, and costs of administration.

Instead of so doing, the heirs proceeded to have the remainder of the property partitioned among themselves without making the executrix a party. It must be stated, however, that the attorney for the executrix was consulted and entered into an agreement with the attorneys for the heirs, for a settlement of the rights of the legatee on a certain basis. This agreement, however, was not ratified by the executrix and legatee, and was therefore as to her *res inter alios acta*.

It appears that the heirs were willing to waive an accounting by the executrix, and to accept the remaining property of the estate as representing the residuum to be divided.

The heirs obtained an order for the sale of the real estate still belonging to the succession for the purpose of effecting a partition. The assets to be divided consisted of the proceeds of the sale of the real estate, and a certain sum in bank to the credit of the executrix and certain rents which had been collected by the heirs.

The court ordered a partition among the heirs and referred them to a notary for the purpose of making a distribution. This officer found that the active mass consisted of \$6,142.20 in cash, and that, after deducting costs and charges, there remained for distribution the sum of \$5,434.70, which he apportioned among the heirs. In this partition no provision was made for the payment of the reduced legacy in favor of Angeline Yrle, who was not a party to the proceeding. The district judge, however, ordered that she be cited to show

cause why the procès verbal of partition should not be homologated.

Shortly before the service of this order, Angeline Yrle had filed her final account as executrix and obtained an order that public notice be given of the filing. This account purports to cover the whole administration of the executrix and shows debts and charges far exceeding the assets in her hands.

In this account the executrix claims to be an individual creditor of the succession in the sum of \$4,920, for service rendered and cash advanced to the deceased. In this account the executrix charges that the heirs had by an *ex parte* proceeding withdrawn from her deposit in the bank the sum of \$1,144.15, and had taken properties amounting to \$3,977.81.

Angeline Yrle opposed the homologation of the partition proceedings and the proposed distribution among the heirs on a number of grounds, among others, that she had not been made a party either individually or as executrix, had not been called upon to render an account, was a creditor of the estate as shown by her final account filed, and that before taking possession the heirs were bound to give security. The heirs opposed the final account of the executrix on the ground that the succession had been closed, the heirs placed in possession, the debts paid, the property partitioned, and the partition homologated; and on the further ground that Angeline Yrle had had, through her counsel of record, a final settlement and accounting with the heirs, and had turned over all the effects of the succession, and had received the legacy to which she was entitled.

The opposition of Angeline Yrle to the homologation of the partition was overruled, and the opposition of the heirs to her final account was sustained, with reservation of her rights against the heirs for any debts that might be due her by the estate.

Angeline Yrle has appealed from both judgments.

The fundamental error in the premises of the district judge is the assumption that the judgment recognizing the heirs, reducing the legacy of Angeline Yrle, and declaring that the heirs were entitled to be put in possession of the estate by the executrix, was equivalent to a decree sending the heirs into possession of all the property in the hands of the executrix.

The heirs were entitled to the residuum of the estate remaining after the payment of the legacy, and all debts and charges due by the succession.

The judgment contemplates that the executrix should render an account and be discharged before the heirs should be sent into possession.

Counsel for the heirs urge that there was an amicable settlement of accounts between the parties prior to the partition proceedings, and that the legacy due Angeline Yrle has been satisfied. It is true, as has already

been stated, that counsel for the heirs and counsel for Angeline Yrle agreed upon a settlement; but it is equally true that she did not ratify the action of her attorney, who testified, in part, as follows:

"When I informed her of the settlement, she never positively ratified what I had done nor positively rejected it; but she told me to keep the \$81, and she would see me later about it. Later, I understood that she had decided to present new claims and to renew the fight in some other form, and I ceased to be her counsel. * * *

"She was never positive about it in one way or the other.

"She seemed to be greatly shocked because the heirs had gotten possession of the cash in bank and real estate, and were in possession and were suing for the partition before the court. My understanding of the matter was that it was over, so far as she was concerned, and that she had been treated fairly in the settlement which I had made for her; but, at the very second interview, I believe, after that settlement, she began to show unmistakably to me that she had something else in her mind, that she was going to try something else, and that she was afraid, by ratifying this settlement made by me and taking the balance, she would in some way preclude herself from some other proceeding; but she never told me either that I should not have made the settlement or that she was glad I made it. She never gave any direct or positive statement in connection with the matter."

Angeline Yrle testified that she refused to approve the settlement and to receive the balance in the hands of her attorney.

While counsel unquestionably acted for his client in perfect good faith, and from his point of view made for her a favorable settlement, it remains that he had no legal authority to waive or compromise her rights.

The executrix had the seisin of the estate, and the partition proceedings were as to her *res inter alios acta*.

The judgment recognizing the heirs, and decreeing that they were entitled to receive the estate from the executrix, did not close the succession. Even a judgment ordering the heirs to be put in possession must be accompanied by an order directing the succession representative to render an account, which the heirs or creditors may oppose. Code Prac. arts. 1003, 1004; Succession of Sterry, 38 La. Ann. 854.

Pending the homologation of the account, the succession representative has the right to retain the property of the succession to secure the payment of any balance that may be found due him. Code Prac. art. 1007.

The succession remains open until the administrator or executrix is discharged.

It is therefore ordered, adjudged, and decreed that the two judgments herein appealed from be annulled, avoided, and reversed, and it is now ordered and decreed that the rule filed December 12, 1905, be dismissed and the notary, Bussiere Rouen, make no distribution of the funds in his hands until the further orders of the court, and it is further ordered that the final account filed by Angeline Yrle, executrix, be reinstated for fur-

ther proceedings according to law; the appellees to pay costs incurred in district court and costs of appeal.

NICHOLLS, J., absent.

(117 La.)

No. 15,824.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Louisiana. June 4, 1906.)

1. EMINENT DOMAIN—FOREIGN CORPORATION—LEGALITY OF ORGANIZATION.

A corporation organized under the laws of another state, which seeks to expropriate a right of way, must meet objection raised on ground of illegality of its organization by proving the regularity of its organization.

2. EVIDENCE—JUDICIAL NOTICE—STATUTES OF OTHER STATES.

Courts will not take judicial notice of statutes under which a company is organized—not offered in evidence and not proven.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 51.]

3. SAME—JUDICIAL NOTICE.

The district court is without authority to take judicial notice of proceedings in a case in another jurisdiction.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 65.]

4. APPEAL—THE RECORD AS MADE UP.

The appellate court, although a case has been decided by it on appeal, will not go beyond the record in hand to examine into the facts of the decided case.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2959, 2960.]

5. EVIDENCE—JUDICIAL NOTICE—OVERRULED CASES.

Graham v. Williams, 21 La. Ann. 594; Smith v. McWaters, 7 La. Ann. 147, and other cases in which different views are expressed, are overruled.

(Syllabus by the Court.)

Appeal from Sixth Judicial District Court, Parish of Ouachita; Luther Egbert Hall, Judge.

Action by the Cumberland Telephone & Telegraph Company against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Frederick Gray Hudson and William Brainerd Spencer (Hudson, Potts & Bernstein and Howe, Spencer & Cocks, of counsel), for appellant. John Merritt Munholland and Dart & Kernan, for appellee.

BREAUX, C. J. The plaintiff corporation (organized under the laws of the state of Kentucky) instituted this suit to expropriate a right of way over the right of way of defendant company from Monroe to Alexandria.

It owns and operates telephone lines in Louisiana, as well as in other states of the Union. The purpose of the expropriation is to connect its lines with the projected line from Monroe to Alexandria.

The plaintiff in the expropriation suit in-

produced some testimony to show that it had been legally incorporated, but it did not introduce certain statutes essential to prove that it had been legally incorporated.

The contention on the part of plaintiff is that that was not essential, for the court may take judicial notice of the statutes of Kentucky, particularly by reason of the fact that, in the case of *Cumberland Telephone Company v. Morgan R. R. Co.*, 112 La. 287, 36 South. 352, it was proven that the plaintiff company was legally created and organized, and that this court, in consequence, has judicial knowledge of the laws of Kentucky on the subject-matter; that, if there has been any amendment or change since, the burden was on the defendant to plead and prove the fact of change or amendment; that under the jurisprudence of this state the court will assume, in the one case, the laws as established in another.

The defense, in answer to plaintiff's propositions, is, in the main, that it has failed to prove that it was a corporation legally organized and existing under the laws of Kentucky, and that this court would not be sustained by well-considered jurisprudence, were it to take judicial notice of the proceedings in a case in which the defendant was not a party; that neither this court, nor the district court, could take notice of proceedings never offered in evidence, nor of statutes of another state which were not offered in evidence; that there has been shown no law of Kentucky authorizing the formation of three original corporations (it seems that there were three original corporations which were merged); and that if there is any such law the companies were deficiently organized. The judge of the district court took judicial cognizance, despite defendant's objection, of the proceedings of a case in another jurisdiction, and of the statutes of the state of Kentucky.

Corporations, in order that they may have the right of expropriation, must be chartered under the laws of this, or of any other, state, or of the United States, and they must be legally organized. Foreign corporations, as well as corporations in other states, must prove that they have legal corporate existence in the state in which they are organized. Without proof of statutes under which they were organized, there is a hiatus which cannot be supplied under the rule which authorizes courts to take "judicial notice" of certain commonly well-known facts.

This was substantially decided in the 112 La., 36 South., case, cited above. The court took cognizance of the question of the legality vel non of the plaintiff corporation, and decided that it was legally organized, save that it had not been shown that section 190 of the Constitution of Kentucky had been complied with. The case was remanded to enable plaintiff to make written proof. We are here concerned only with a corporation seeking to exercise the right of eminent domain.

The next proposition with which we have

to deal is, in the first place, whether the district court can take judicial notice of proceedings in another suit, in another parish, and, in the second place, whether, on appeal, this court can take judicial notice of statutes of other states, by reason of the fact that they were introduced in evidence in another case in another court of first instance. If an affirmative view should be taken and an exceedingly broad construction given to the rule touching "judicial notice," the district court might take "judicial notice" of facts and shape its decree thereon without previous notice.

It might give occasion to the happening of the unexpected. The representative of opposing interests would be exposed to surprise. He would sometimes be uncertain as to the evidence which might be brought to bear.

The safe practice is laid down in *Bouguille v. Dede*, 9 La. Ann. 292, in which the court positively declined to consider a record concerning which no motion had been made to have it made part of the transcript of appeal.

The facts should be brought up after full notice to all parties concerned.

The appellate tribunal should not extend further the rule regarding "judicial notice" than is proper to follow it in the court of first instance.

There, also, the evidence, directly pertinent, should be well known to all parties in interest.

Commentators following well-considered decisions on the subject give expression to similar views. Jones on Evidence, verbo "Judicial Notice."

There are decisions of this court entirely at variance with that view.

We are constrained to overrule them as going beyond the limit intended by the rule relating to judicial notice.

We do not think that a court is bound to take judicial cognizance of the existence of statutes quoted in another and entirely different case.

A contrary opinion was expressed in *Graham v. Williams*, 21 La. Ann. 596.

We are compelled to dissent from the opinion just cited and every opinion which may go to upholding the view that judicial notice may be taken of pleadings and facts in other cases.

We are compelled, in carrying out that dissent, to state that they will, from this time, be considered overruled.

Cases must be made up before the court of first instance, and the facts upon which they are based brought up properly. This does not prevent the court from taking judicial notice of historical facts, and also of notorious facts and matters concerning general government. Usually such facts come up incidentally and not directly.

They came up under a well-settled rule.

We will conclude by restating; in other words, that, as before stated, a court should not take judicial knowledge of other pro-

ceedings between other parties in other courts to serve as a basis of proof of a given fact of direct pertinency to the issues presented, and upon which to shape its decree.

Otherwise, it might arise that parties would find themselves liable under laws they never suspected as pertinent, or amenable to undreamt of proceedings. A right might be affected by unknown laws or by records previously covered by the dust of ages.

There might occasion arise when a party in interest would not know where the possibility, under "judicial notice," was about to take him.

Instead of plain sailing in a good cause there would be danger of concealed rocks and reefs.

The case will be remanded.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is annulled, avoided, and reversed.

It is further, adjudged and decreed that this case be remanded, and that evidence touching the creating and organization of plaintiff company be admitted and a judgment thereafter rendered in the district court.

The appellee to pay the costs of appeal. The costs of the district court to await the final decision of that court.

(117 La.)

No. 15,905.

FAURE v. FAURE et al.

(Supreme Court of Louisiana. June 4, 1901.)

1. APPEAL—REVIEW—AFFIRMANCE.

Where, in a suit for a partition of a tract of land among the heirs of the deceased owner, the court ordered a sale at public auction for the purposes of affecting a partition, and subsequently nonsuited the demands of the heirs against each other and ordered a distribution of the proceeds of the sale, the judgment will be affirmed, when the evidence is too uncertain, vague, and contradictory to enable the court to render an intelligent judgment on the respective demands of the parties.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 4450-4453.]

2. PARTITION—ISSUES.

In a partition of the separate estate of the deceased father, the accounts to be settled are those between the heirs and his succession, and claims of the heirs against the mother or against each other individually are foreign to the issue.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 228.]

3. SAME—AMICABLE DIVISION—ACCOUNTING.

Where the father died in 1872, and the widow and four of the five children, in 1880, made an amicable division of a tract of land belonging to the decedent, and each possessed the separate portions allotted to them respectively until the death of the mother in 1902, they owe no accounting to each other for fruits and revenues or for taxes and repairs.

4. SAME—IMPROVEMENTS—APPRAISAL.

Where heirs have claims for improvements enhancing the value of land belonging to the estate, such improvements should be appraised separately either before or immediately after the partition sale.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 236-246.]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas Moore Burns, Judge.

Action by Antonia Faure against Ernest Faure and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Benjamin Moore Miller, for appellant. Charles Louque, for appellees Mrs. Blanche Reine and Geo. W. Reine. Joseph B. Lancaster, for appellees Gabrielle Leaumont and Ernest Faure. Henry L. Garland, Jr., and Lewis Lovering Morgan, for appellees Mrs. Ernest Sharp and Mrs. Reine.

LAND, J. This is a suit for a partition by licitation of a certain tract of land belonging to the succession of Emile F. Faure, the father of all the litigants, who died in the year 1872, leaving a widow and five children. The tract of land was the separate property of the decedent. In 1880, the widow, in an instrument purporting to be a donation and partition, divided the tract of land among the five heirs.

This instrument was recorded in 1887. Plaintiff alleged that her signature to said document was a forgery, that the act as a donation was null for want of form, and that her mother had no interest in the property.

The court held that the pretended donation and partition was a nullity, and ordered the land to be sold for the purpose of effecting a partition. An appeal was taken to the Court of Appeal on the sole issue as to how the partition and sale should be made. The appellate court said:

"The judge should have appointed experts and ordered an appraisement. He named a notary, but failed to name experts. Rev. Civ. Code, arts. 1325, 1326. The judgment also orders the sheriff to pay into the registry of the court the amount received by him as the purchase price of said described lands, after deducting the cost and expenses. We think this order should have exempted the heirs from paying cash in case they or any of them purchased. We shall remand the case to have these errors corrected."

The district judge appointed three experts and appraisers to examine the lands and to report whether the same could be equally and fairly divided in kind. The experts reported that they had appraised the property at \$2,000, and that it could not be fairly and equally divided in kind and should be sold for the purpose of effecting a partition.

The court rendered judgment, ordering the lands to be sold at public auction according to law for the purpose of effecting a partition, and appointed a notary public to take testimony and report upon the claims of the parties to the suit against said lands, and to make a partition of the proceeds of the sale in the manner provided by law.

The judgment recognized the joint ownership of the plaintiff and defendants as heirs of their father, and declared the act of partition and donation executed in 1880 to be null and void. No appeal was taken from this judgment.

The property was sold for \$2,700, and the improvements on the land were not separately appraised, either before or after the sale.

The notary took testimony as to the claims of the parties against, the property decreed to be partitioned, and reported the same to the court, which thereupon rendered judgment ordering the proceeds of the sale to be divided and distributed by the notary equally among the heirs, reserving to the parties whatever rights they may have against each other.

The defendants Ernest Faure and Mrs. Gabrielle Leaumont have appealed. Mrs. Sharp and Mrs. Reine have joined in the appeal, pleading prescription against certain demands urged by Ernest Faure, and praying that the reservation in the judgment be stricken out, and for general relief.

Mrs. Gabrielle Leaumont in her answer set up a claim of \$500 for the erection of a house and other buildings on the lands to be partitioned.

Ernest Faure in his answer set up the following claims:

(1) For support of the common mother for 30 years, worth the sum of \$4 per month.

(2) For support of the plaintiff, Antonia Faure, for 30 years, worth the sum of \$4 per month.

(3) For support of Gabrielle Leaumont for 8 years, worth the sum of \$4 per month.

(4) For the support of Blanche Reine for 2 years, worth \$4 per month.

(5) For the support of Emilie Sharp for 18 years, at the rate of \$4 per month.

(6) For cost of constructing two houses, outbuildings, and fences upon said land, \$300.

(7) For cost of repairing and improving the family dwelling house and premises on said lands, \$500.

(8) Taxes for 30 years, \$180.

(9) Funeral expenses, etc., of mother, \$57.03.

Mrs. Emilie Sharp in her answer sets up that Ernest Faure should be compelled to collate the value of 50 head of cattle, 100 head of hogs, and a lot of carpenter tools received by him from the succession of the father; and also shells and red oak bark taken from the lands in question and worth \$500.

Mrs. Sharp further claims that the plaintiff should collate \$110, the cost of a building erected upon the parcel of land allotted to said plaintiff in the amicable partition of 1880. Mrs. Sharp also claims in her answer several hundred dollars for improvements and taxes.

Mrs. Reine in her answer avers that she paid to her mother \$100 for 25 acres of land, and that the purchase price was turned over to the plaintiff, who used the same in the construction of a building on the lands in question. Mrs. Reine prayed that the suit be dismissed, and that she be recognized as the owner of said 25-acre tract of land. The evidence is as confused and unsatisfactory as the pleadings. The father died in 1872.

The widow and children continued to reside on the tract of land. In 1880, some kind of a partition was made. All the heirs except the plaintiff signed the act, which, however, is not in the record. There can be no doubt, however, that from and after the year 1880 the heirs possessed and enjoyed by common consent distinct portions of the property.

Ernest Faure and family resided on the premises for 30 years or more. He occupied the old family residence. The widow had a house constructed for herself and daughter Antonia. Mrs. Leaumont also erected a dwelling and other improvements on the premises.

The alleged deed from the widow to Mrs. Reine is not in the record, and the house she caused to be constructed is not on the land in controversy.

Ernest Faure made repairs and some improvements on the portion of the tract occupied by him. He also paid taxes, but the receipts are not in the record. The widow died in 1902, and shortly after her death the present suit was instituted.

After the death of the mother, family dissensions arose and gave birth to the extravagant demands urged by the heirs against each other. Ernest Faure undoubtedly contributed something to the support of his mother and sisters.

He seems to have been the manager of the property down to the date of partition. The mother, however, was not without resources, as she paid Ernest Faure \$100 for work done on her house. After 1880, each heir seems to have enjoyed the portion of ground allotted to him or her.

For such enjoyment they owe no accounting to each other. There is no sufficient evidence of the alleged collations. The claim of Ernest Faure against his mother for support is foreign to the partition of the father's estate. The same may be said of the claims of the heirs against each other arising after the opening of the succession, for support, money advanced, etc. A partition involves the settlement of accounts between the heirs and the succession, which includes the sums which each of the coheirs owes to the deceased, those which each of the coheirs may have received or disbursed on account of the succession, and those which each of the coheirs may owe by reason of damages or injury, which may have been caused by his fault to the effects of the succession. Civ. Code, art. 1350.

The only demands urged by the appellants in this court are for useful improvements made by them which enhanced the value of the land. The evidence shows that during 30 years Ernest Faure made repairs and improvements, which he used and enjoyed, but there is nothing to show what was the value of same at the date of the partition sale.

The evidence tends to show that the Leaumont house and appurtenances originally cost from \$650 to \$850, but is conflicting as to val-

ue at the date of the partition sale. Ernest Faure estimated such value at \$500. Ernest Sharp testified that the improvements made by Faure and Mrs. Leaumont were in bad condition, dilapidated, and "not fit for a negro."

No intelligent judgment can be rendered on testimony so uncertain, vague, and contradictory. Two district judges so held, and we heartily concur in their opinion.

Judgment affirmed.

(117 La.)

No. 16,108.

STATE ex rel. BROUSSARD, Dist. Atty., v. HENDERSON, Sheriff.

(Supreme Court of Louisiana. June 18, 1906.)

APPEAL—JURISDICTIONAL AMOUNT—HOW DETERMINED.

The sheriff having denied that the district attorney was entitled to a commission on fines in criminal cases, and refused to pay him such commission on certain fines already collected, and declared his intention not to pay same on future fines, held that, in a mandamus suit to compel the payment of the commissions, the only amount in dispute is the commission on the fines already collected, and that, for determining the jurisdiction of the appellate court, the commissions on the future fines cannot be taken into computation. Courts can only decide actual controversies. They cannot prescribe for the future. Mandamus will not lie to compel a general course of official conduct.

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Application by the state, on the relation of Edwin S. Broussard, district attorney, for writ of mandamus against George Henderson, sheriff. Judgment for plaintiff, and defendant appeals. Dismissed, and transferred to Court of Appeal on conditions.

Weeks & Weeks, for appellant. Foster, Milling, Godchaux & Sanders, Joseph W. Joffrion, John C. Theus, and James Pemberton Madison, for appellee.

PROVOSTY, J. This is a mandamus suit by the district attorney of Iberia parish to compel the sheriff of that parish to pay over to him a commission of 20 per cent. on certain fees collected in criminal cases.

The jurisdictional allegation of the petition reads as follows:

"That the amount due your relator is accumulating in the hands of the sheriff, and the said sheriff persistently refuses to turn over the amount to your relator, and that said commissions will in a short time, and long before the expiration of his term of office, amount to a sum a far exceeding two thousand one hundred dollars (\$2,100.00), of which amount he will be illegally deprived, unless the aid of your honorable court is invoked to force said sheriff to perform his duty in this regard."

The amount at the present time in the hands of the sheriff, which he is to be ordered to turn over, is not stated, and, in argument, the admission is made that it falls below \$2,000, the lower limit of this court's jurisdiction.

Under these circumstances, the court must notice, *ex proprio motu*, its want of jurisdiction.

The case is not one of those of which this court has jurisdiction irrespective of the amount in dispute, and the only amount in dispute is the amount actually in the hands of the sheriff, and which he refuses to turn over. In vain is it said that the case involves also the 20 per cent. on the future fines which the sheriff declares he will refuse to turn over. As to these future fines, any judgment rendered by this court would not be binding on the sheriff. They are not therefore involved in this suit. As to them the decision of this court could only be advisory, precisely as would have been the situation, if, there being no amount at all in the hands of the sheriff, the suit had, nevertheless, been brought. Plainly, the case would then have been simply a moot case, involving purely a question of law. The amount in dispute is the amount for which the judgment may be enforced, or as to which it will be res judicata. After this court should have decided the present case, and the sheriff had turned over the amount presently in his hands, if he refused to turn over the next fine that would come into his hands, no execution or writ could issue against him. It would be different if this court could adjudicate upon controversies in advance of their arising, but it is for the Legislature to prescribe for the future. The courts cannot. They can only adjudicate upon actual controversies. "That which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions." Cooley, Const. Lim. (6th Ed.) p. 108.

Mandamus will not lie to compel a general course of official conduct. A. & E. E. of L. vol. 19, p. 724.

It is therefore ordered, adjudged, and decreed that the appeal herein be dismissed; provided, however, that if, within 15 days from the date upon which this judgment shall have become final, the appellant, or his attorneys, shall make oath that the appeal was not taken for the purpose of delay, the cause shall be, and is, transferred to the Court of Appeal for the parish of Iberia.

It is further ordered, adjudged, and decreed that the costs of this court be paid by the appellant.

COMMANDER v. BRAZIL.

(Supreme Court of Mississippi. May 28, 1906.
Suggestion of Error Overruled June 18,
1906.)

INFANTS — CONTRACTS — FALSE REPRESENTATIONS AS TO AGE—EFFECT.

An infant, who, after reaching the stage of maturity indicating that he is of full age, enters into a contract falsely representing himself to be of age and accepts the benefits thereof, is estopped from denying that he is not of age when the contract is sought to be enforced against him; the party dealing with him believing him of full age.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 100, 135.]

Appeal from Chancery Court, Monroe County; Baxter McFarland, Special Chancellor.

Suit by H. A. Brazil against W. H. Commander. From a decree for plaintiff, defendant appeals. Affirmed.

Appellant and his stepfather, McDaniel, entered into business as liverymen, and purchased from the wife of appellee certain horses, carriages, etc., giving notes for the purchase money, which notes were secured by a trust deed on the personal property transferred, and as additional security embraced in said trust deed a tract of land belonging to appellant. McDaniel afterwards died (according to the allegations of the bill, intestate and insolvent), and the payment of the notes having failed, and the personal property conveyed in said trust deed having been sold, and the amount realized from said sale not being sufficient to liquidate said notes, Mrs. Brazil filed a bill in chancery praying an accounting to ascertain the amount due on said indebtedness, and for the sale of the land and the application of the proceeds to the payment of the balance found to be due. The appellant filed a plea of infancy, which being overruled by the court, he answered, making his answer a cross-bill, and denied that he received any benefits from the property purchased by him and his stepfather, and charged that the complainant below knew of his infancy at the time the trust deed was executed, which facts are denied by the cross-defendant. The chancellor rendered a decree granting the relief prayed, ordered the land sold, and a payment out of the proceeds of said sale of the amount due appellee, who had acquired the claim by assignment from his wife.

W. H. Clifton, for appellant. Geo. C. Paine, for appellee.

MAYES, J. We think this case was correctly decided on facts, and would affirm it without any opinion, were it not for the fact that it involves a question as to whether or not a minor may make false representations as to his age, thereby inducing a contract with another person, accepting the benefits to be obtained under the contract, and afterwards escape liability by proving that he

was not of age at the time of making the contract. The case of *Ostrander v. Quin*, 84 Miss. 230, 36 South. 257, comes very near deciding this question; but, inasmuch as there is some question as to whether the decision was based on the ground that the minor in that case used the money for necessities, and because it was so used the court held him liable, we deem it necessary to remove all doubt on this subject. The record in this case shows that W. H. Commander was 19 years and 9 months old at the time he bought out the livery stable and executed the deed of trust in question; that he was asked the direct question, two or three times, while negotiations were being held, as to his age, and he stated he was of age; that appellee made the trade with him in good faith believing him to be 21 years of age, and on faith of the contract turned over to him the entire livery business—the appellant executing at the same time a deed in trust on the live stock, buggies, etc., so sold by appellee to him, and giving as additional security a deed of trust on 50 acres of land. The appellant having failed to pay according to his contract, and the personal property sold him by appellee having been sold under the deed in trust and not bringing enough to satisfy the debt, the land is now resorted to. It may be stated in this connection that the proof shows that the personal property sold had been much abused by misuse and neglect. Under these circumstances can appellant successfully set up his minority as a defense to foreclosure proceedings?

Perhaps there is no subject in the law that has received more elaborate discussion, or wherein there is more hopeless conflict of authority, than the subject now presented for decision by this court. It may be stated that the great weight of earlier authorities on this subject hold that a minor cannot be held liable on his contract, but the tendency of all modern text-books and decisions is in favor of holding a minor responsible under his contract, where he deliberately makes a false representation as to his age, and in this way induces another to contract with him, and accepts the benefits of the contract. Whatever may be the weight of earlier authorities on this subject, common justice outweighs the unsatisfactory distinctions attempted to be set up as reason why a minor should not be held liable under these circumstances. It may be said that all authorities, with hardly an exception, and regardless of the way that the different courts have held upon the subject, recognize the right of the proposition; for while they hold a minor cannot be sued on his contract, yet they hold that he is liable for his tort and make him responsible in damages for his false representations. Other authorities lay down the rule that he may not be sued at law, but he may be sued in equity. But it matters not in what court the suit may be brought or what the form of the action, the thing

done is the subjecting of the minor's property to the payment of an obligation that his fraudulent conduct has created. If the property of a minor is to be subjected to the payment of debt or damages thus created by him by his fraudulent misrepresentation, we fail to see what protection is given the minor by adhering to the distinction of form attempted to be drawn by many of the earlier authorities. As it is aptly expressed in the case of *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53: "There is a connection between contract and tort in every case of bailment—in the bargain and sale of personal property and of the purchase and sale of real estate; and if an infant is not responsible for his fraudulent misrepresentation of his age in connection with these transactions, there is not within the whole range of business transactions any case in which he could be made liable for his fraud." The tendency of courts at this present time, and of legislation, is to break away from mere forms and to go to the real substance of a controversy, irrespective of forms, and administer the law according to substantial right, unhampered by the technicalities of the older authorities.

If a minor is to be made liable for his fraud, and his property is to be taken to compensate in damages a person who has suffered damage by the minor's deceit, we fail to understand how it could be made any easier on the minor for this to be done through an action in tort, instead of on his contract, if the same results follow. Minority is given for the protection of a person under age, but it cannot be used as a weapon with which to commit fraud. When a minor has reached that stage of maturity in years and physical appearance as to deceive a person of ordinary prudence, and the minor does deceive such person as to his age, and asserts that he is of full age, and induces a contract to be made with him, and accepts the benefits of his contract, he will not be heard at any future time to deny that he was of full age at the time the contract was executed, and thereby escape the obligation of his contract. where the party dealing with him has dealt with him believing him of full age. We do not hold that an executory contract may be enforced against an infant who falsely represents himself to be of age, unless some damage has been done to the party with whom he contracts. We do not hold that an infant is estopped by his deed merely. We do not hold that any sort of a contract may be enforced against an infant at any time on account of his false assertion that he is of age, unless the age and appearance indicate such years of maturity as the person whom he deals with may well be deceived by it. We do hold, however, that when a minor has reached that stage of maturity which indicates that he is of full age, and enters into a contract falsely representing himself to be of age, accepting the benefits of the contract, he will be estopped to deny that

he is not of age when the obligation of the contract is sought to be enforced against him. *Ostrander v. Quin*, 84 Miss. 230, 36 South. 257; *Ferguson v. Bobo*, 54 Miss. 121; *Levy v. Gray*, 56 Miss. 818; *Brantley v. Wolf*, 60 Miss. 420; *Rice v. Boyer*, 58 Am. Rep. 53; *Pomeroy's Equity* (3d Ed.) 945; 2 *Palge on Contracts*, § 880; 16 *Am. & Eng. Ency. of Law* (2d Ed.) 292.

The chancellor in this case decreed a foreclosure of the deed in trust, with a decree over against the minor for any balance that remained due after the sale of the property if the property did not bring a sufficient price to pay the debt. We approve the chancellor's decree in toto.

Affirmed.

CALHOON, J. (concurring). Recoiling from the multitude of undistinguishable distinctions in the books, I take the law to comport with what is plainly right. Infants are shielded from their own improvidence, and their contracts, as to them, are of no force except for necessities. But when a minor, whose appearance justifies belief in such statement, induced a contract, which is reasonable, by false assurances that he is of the age of majority, he should be, and is, estopped to repudiate it, and should be, and is, compellable to carry it out, or to fully restore the status quo by returning what he got and making compensation if he has wasted it.

THORNTON et al. v. CITY OF NATCHEZ et al.

(Supreme Court of Mississippi. July 2, 1906.)

1. JUDGMENT—CONCLUSIVENESS—COURT RENDERING JUDGMENT—UNITED STATES COURT.

A judgment of a federal court is conclusive upon the parties thereto in a subsequent action in a state court as to all matters pleaded or that might have been pleaded.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1150-1155, 1350.]

2. EQUITY—JURISDICTION—FORFEITURES.

Equity cannot be invoked merely to enforce a forfeiture, or to divest an estate for breach of a subsequent condition against a vendee in possession.

[Ed. Note.—For cases in point; see vol. 19, Cent. Dig. Equity, §§ 70-74.]

3. DEEDS—CONDITIONS SUBSEQUENT.

A provision in a deed, reciting a money consideration, to the effect that the grantee city should hold the premises for a burial place and for no other purpose, did not impose a condition subsequent.

4. EQUITY—BREACH OF COVENANT—REMEDY AT LAW.

Where a deed to a city contained a provision holding the grantee to an implied covenant to use the land forever for burial purposes, on a cessation of such use by the grantee the remedy of the grantor was at law and not in equity for an injunction or a reconveyance.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 130-136.]

5. SAME—LACHES—FOLLOWING STATUTE OF LIMITATIONS.

Ann. Code 1892, § 2731, provides that in every case of a concealed fraud the right to bring suit in equity for the recovery of land shall be deemed to have accrued at the time when the fraud was, or with reasonable diligence might have been, first known. Section 2749 makes the same provision as to personal actions. Sec-

tion 2702 provides that, whenever there is concurrent jurisdiction at law and equity, provisions relative to limitations at law shall apply to suits in chancery. Land was deeded to a city for a money consideration, and the deed provided that it should be held by the city for burial purposes and no other, and after an abandonment of use for burial purposes the grantors sued in equity for a reconveyance and accounting or for an injunction. *Held*, that complainants could have no relief against the 10-year statute of limitations on the ground of concealed fraud; concealment in such a case being impossible.

6. SAME—NONRESIDENCE.

Where a deed to a city for a money consideration recited that the grantee should hold the land for burial purposes and no other, and after an abandonment of such purpose the grantors sued in equity for a reconveyance and accounting or an injunction, the fact that complainants were nonresidents was of no avail to them as against the 10-year statute of limitations.

7. SAME—EXISTENCE OF TRUST.

The city could not be regarded as a trustee of an express trust, in order to save complainants from the bar of the statute.

Appeal from Chancery Court, Adams County; W. P. S. Ventress, Chancellor.

Suit by Marcellus E. Thornton and others against the city of Natchez and others. From a decree in favor of defendants, complainants appeal. Affirmed.

Suit instituted in the chancery court of Adams county by the appellants, seeking to have them adjudged the owners of certain property in the city of Natchez, which had been dedicated to and for more than seventy years used as a burying ground, but which for more than 10 years before the filing of this suit had been used as a public park by said city, and praying that said city be ordered to reconvey to appellants, and that an account be taken of all rents and revenues from said property since its wrongful conversion, less the \$500 consideration originally paid, together with interest thereon, or, in the alternative, if the words of limitation in the original deed conveying said property to said city should be held to create a covenant, rather than a condition subsequent, or that there has been no abandonment of the land from the uses for which it was originally granted, then that said city be perpetually enjoined from using said property as a public park. All of the complainants except one, before the beginning of this suit, instituted in the United States Circuit Court for the Southern District of Mississippi, a suit in equity to all intents and purposes the same as this one. The defendants' demurrer to the bill of complaint in the federal court was sustained and the suit dismissed. The complainants prosecuted an appeal to the United States Circuit Court of Appeals, Fifth Circuit, where the decree was affirmed. See *Thornton et ux. v. City of Natchez*, 129 Fed. 84, 63 C. C. A. 526. The complainants then sought a writ of certiorari from the Supreme Court of the United States, but the writ was denied them. See *Thornton v. City of Natchez*, 197 U. S. 620, 25 Sup. Ct. 797, 49 L. Ed. 909. A demurrer to the bill of complaint was filed, which was sus-

tained by the court, and the bill dismissed. Appellants prosecute this appeal.

Wade R. Young, for appellants. K. Palmer Lanneau and McWillie & Thompson, for appellees.

CALHOON, J. This whole controversy arises out of the proper construction of a deed executed by Wm. Rutherford and John P. McNeil in the year 1817, which conveyed to the president and selectmen of the city of Natchez a certain lot of land in that city, reciting that the consideration was "for and in consideration of the sum of five hundred dollars to them in hand paid," and then showing that the grantors had "bargained, sold, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, convey, and confirm, unto the said parties of the second part and their successors, forever, all those lots and parts of lots," describing the property; and then it proceeds, under the conveying clause, "and also all the right, title, interest, property, and claim whatsoever, either at law or in equity, to them, the said parties of the first part, in or to the same," and then proceeding, "to have and to hold the said lots or parcels of ground and described premises, with the appurtenances, to the parties of the second part and their successors, forever, for the uses and purposes of a burial place, and to be forever kept, used, and inclosed in a decent manner, and to and for no other use or purposes whatsoever," and then proceeds, "and the said parties of the first part, for themselves, their heirs, executors, and administrators, do covenant, grant, affirm, and agree to and with the said parties of the second part and their successors that they, said parties of the second part, and their successors, the above mentioned and described premises and any part thereof, with appurtenances, unto the said parties of the second part and their successors, against the said parties of the first part and their heirs, and against all and any other person or persons lawfully claiming or to claim by, from, or under them, or any of them, will covenant and by these presents forever defend." One of the main controversies is, of course, as to whether the use described in the deed to be for a burying place, and for no other use or purpose whatever, is or is not a condition subsequent. The other controversies will be shown further on in this opinion.

The complainants, except one, a new one, appearing first in this new litigation in the state court, filed a bill about the same subject-matter and against the same defendants on July 25, 1902, in the Circuit Court of the United States for the Southern District of Mississippi, against the city, in possession, praying the same relief, which is a decree that the land revert to the complainants, and that defendants be ordered to reconvey and pay rents from the 1st day of January 1890, or that defendants be perpetually enjoined from using the land for any other purpose than that of a burying place. To this bill in

the federal court the defendants demurred: (1) Because the bill showed no equity. (2) Because it shows that one of the grantors died in 1819, and devised all the residue of his estate, real and personal—that is, all of his estate except the land in controversy—to be equally divided between his brother, John Rutherford, and his three sisters, named in the bill, but does not show to whom he devised the land in controversy, and the complainants are not shown by the bill to have any interest whatever in the land involved in this suit. (3) That the court is without jurisdiction of the suit; it being practically an action of ejectment for the land. (4) That John Rutherford is averred to have died in North Carolina in 1880, testate, and it is not shown that his will has ever been admitted to probate in this state. (5) The bill does not show that the interest of John P. McNeill, one of the grantors in the deed, has ever been acquired by the complainants, or either of them; the assertion in the bill that the complainants are the sole surviving legal representatives of John P. McNeill being a mere statement of the conclusions of the pleader, and that interest is shown to be outstanding, and he is a necessary party, and, if dead, his heirs or devisees are necessary parties. (6) Said John P. McNeill is shown by the bill to have been the surviving partner of the mercantile firm of Wm. Rutherford & Co., and the land presumptively partnership assets, and as such became the property of said McNeill as surviving partner, and his interest appears to be outstanding and never acquired by complainants. (7) By the terms of the deed the fee passed absolutely to the grantees. (8) Complainants are barred by laches. (9) Complainants are barred by the 10-year statute of limitation. (10) The bill does not show that the cause of action was fraudulently concealed, but does show, in fact, that defendants exercised such public ownership of the land as to make it impossible that complainants, with reasonable diligence, would not have known of their rights more than 10 years before the beginning of this suit. (11) Want of knowledge cannot excuse from the bar of limitation, because no fraudulent concealment is shown; the averment on that subject being too vague and indefinite. (12) Divers other causes to be shown at the hearing. This demurrer was argued and taken under advisement by Judge Niles, of the federal court here, and it was decreed as follows: "It is now ordered, adjudged, and decreed that the said demurrer be, and the same is, hereby sustained, and the bill of complaint in this cause is dismissed. Let the defendant go hence, and have and recover of and from the complainants the costs of this suit, to be taxed, and for which execution may issue." The complainants then, in the federal court, took an appeal to the United States Circuit Court of Appeals, and assigned as error: (1) The court erred in its conclusion that complainants had full and complete and adequate remedy at law

and that equity was without jurisdiction. (2) The court erred in its conclusion that the claim was barred by the statute of limitation. (3) The court erred in its conclusion that the deed conveyed a fee-simple title, without condition or reservation. (4) The court erred in sustaining the demurrer to the bill of complaint. On this appeal the United States Circuit Court of Appeals decreed an affirmance, and delivered an opinion through Justice Parlange, which opinion appears in the record, and also appears reported in *Thornton v. Mayor*, 129 Fed. 86, 87, 63 C. C. A. 526, 528, and is as follows:

"We are satisfied, after full consideration of the matter, that the grant was not made on condition subsequent. Such a condition is not favored in law. 4 Kent's Com. marg. p. 129. Even when a provision is stated in terms to be a condition, a court will determine for itself, not from the statement alone, but from the whole deed or grant, whether a condition was really intended. In this case no condition was stated in terms. A consideration of \$500 was paid the grantors, and the grant was not made purely and exclusively from motives of charity or benevolence. No provision whatever was made for re-entry by, or reversion to, the grantors or their heirs or legal representatives. The land was maintained as a public burying place for nearly three-quarters of a century. There is nothing averred in the bill from which we could gather that the grantors intended that the land should be maintained as a public burying place literally in perpetuity, and without regard to the necessities and welfare of all the generations which were to follow. In the absence of any declaration of such an intention, and of anything in the grant from which it could be reasonably inferred, we are to conclude that the grantors meant that the land should be used for the purposes for which they desired it to be used, as long as it was right and proper to do so, in view of the nature of the grant and of its purposes. But, in any event, it is beyond question that the grantors made no record of any intention on their part, either expressed or intimated, that the land should ever under any circumstances revert to them or to their representatives. The appellants have not stated a case entitling them to the reversion. They have not even shown that they have an interest or a right in the further carrying out of the purposes of the grant. The matter in hand was carefully considered in the able opinion in *Rawson v. Inhabitants of School District No. 5 in Uxbridge*, 89 Mass. 125, 83 Am. Dec. 670. Also see *Greene v. O'Conner* (R. I.) 25 Atl. 602, 19 L. R. A. 262 (see notes); *Sohler v. Trinity Church*, 109 Mass. 1-19; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Barker et al. v. Barrows*, 138 Mass. 578; *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502. We are furthermore fully satisfied, after consideration of the statute of limitation of Mississippi, that the appellants have by their laches debarred themselves from prose-

cutting this action. The conversion of a public burying ground into a public park, and the other acts which the appellants averred in support of the fraud and concealment alleged by them, could not but have been open, public, and notorious. Concealment of those acts would have been impossible. The bill, it is true, avers that the appellants had neither notice nor knowledge. But such an allegation, in a matter like the one in hand, is a mere conclusion of the pleader, not binding on demurrer, unless facts are stated from which the court can determine for itself whether the conclusion was correctly drawn. See *Wood v. Carpenter*, 101 U. S. 135-140, 25 L. Ed. 807. The acts complained of took place in the year 1890. Either the appellants knew of those acts prior to the year 1901, or else they could have had the knowledge by exercising reasonable diligence. The appellants, having allowed such a lapse of time to occur before bringing their action, cannot be heard to complain at this late hour. In view of the statutes of limitations of Mississippi, we do not understand that the appellants' counsel contends that the appellants were entitled to actual notice. But see *Elder v. McClaskey et al.*, 70 Fed. 529, 17 C. C. A. 251. There are other matters averred in the demurrer which have much force, but we deem it sufficient to rest our affirmance of the decree appealed from on the two grounds stated."

After this opinion and affirmance the complainants sought certiorari from the Supreme Court of the United States, which denied it without an opinion. So, in the federal court, the complainants there were solemnly adjudicated to have no rights on a bill on which they stood without any application to amend. As to these, that adjudication is conclusive in all forums. It is conclusive as to all things they pleaded or could have pleaded. 24 Ency. 714; *Phillips v. Wormley*, 58 Miss. 398; *Straw v. I. C. R. Co.*, 73 Miss. 446, 18 South. 847; *Weathersby v. Pearl River Lumber Co. (Miss.)* 41 South. 65; *Smedes v. Hiley*, 68 Miss. 590, 10 South. 75; *Davis v. Hart*, 66 Miss. 642, 6 South. 318; *Perry v. Lewis*, 49 Miss. 443; *Lorance v. Platt*, 67 Miss. 183, 6 South. 772; *Bell v. Medford*, 57 Miss. 31; *Chiles v. Champenols*, 69 Miss. 603, 13 South. 840. After the proceedings stated in the federal courts had ended, this bill is filed in the state court to accomplish the same purpose, with one new complainant introduced. It sets up nothing which was not or could not have been set up in Judge Niles' court, and so, as to the old complainants, as we have said, the adjudication in that forum is conclusive. This new bill is demurred to on the same grounds as was the old one, with the additional one that the bill shows at large upon its face the proceedings in the federal courts, and they show res judicata as to those complainants who were such in the federal court suit.

The deed before us is clearly based on a valuable consideration. In its conveying clause it grants the fee in the land, and the

concluding clause is a covenant of general warranty. Equity cannot be invoked merely to enforce a forfeiture or to divest an estate for breach of a subsequent condition against a vendee in possession. It abhors forfeitures and looks with hostility on conditions subsequent. To give the right of reverter through the courts it should be expressed in the instrument that by devotion of the land to a purpose other than that indicated the whole estate should revert to the grantor and his heirs. "The words in the deed are quite as consistent with an intent to repose a trust and confidence * * * as they are with an intent to impose a condition which should compel, on pain of forfeiture, to maintain the premises as a burial place for all time." *Rawson v. School*, 7 Allen (Mass.) 125, 83 Am. Dec. 670. In support of the foregoing propositions, see *M. & C. R. R. Co. v. Neighbors*, 51 Miss. 413; *Cross v. Carson* 44 Am. Dec. 742, and notes; *Rawson v. School*, 83 Am. Dec. 671, and notes; *Packard v. Ames*, 16 Gray (Mass.) 327; *Rankin, etc. Church v. Edwards*, 204 Pa. 216, 53 Atl. 770; *Davis v. Jernigan (Ark.)* 76 S. W. 554; *City v. Wilcox (S.D.)* 98 N. W. 88; *Carroll v. Trustees (Ky.)* 47 S. W. 617; 13 Cyc. 683, and notes; *Coburn v. Coxeter*, 51 N. H. 158; *Barker v. Barrows*, 138 Mass. 578; *Railroad Co. v. Ragsdale*, 54 Miss. 200; *Miller v. Tunica*, 67 Miss. 651, 7 South. 429; *V. & M. R. R. Co. v. Ragsdale*, 54 Miss. 209. Of these, cases will be found covering every postulate stated. We do not stop to classify them.

It is also plainly deducible from these authorities that the most that can be claimed here, if that can be claimed, is to hold the city to an implied covenant to use the land forever for burial purposes only. We do not hold that this may be done, but we do hold that equity has nothing to do with this, and that such a claim must be, if anywhere, at law, and seasonably urged. We think the present proceeding barred by the 10-year statute of limitations. We cannot approve the idea that these nonresidents are in any better shape than if they lived in the city of Natchez. The action of the municipal legislature was open, notorious, flagrant, adverse, and continuous in the hostile claim. It cannot be contended that the board was guilty of any "concealed fraud" under Ann. Code 1892, § 2731. Concealment of what was done here was plainly impossible. If we could imagine a "concealed fraud," then, clearly, under the same section, it, "with reasonable diligence, might have been first known or discovered" before the statute began to run. Under this section 2731 and sections 2749-2762, we hold the bar complete. *Barker v. Barrows*, 138 Mass. 578; *Elder v. McClaskey*, 70 Fed. 529, 17 C. C. A. 251.

The city in this record is not in the category of a trustee of an express trust, even if such could save the bar of the statute on the facts averred. We decide none of the other grounds of demurrer.

Affirmed.

**SCOTTISH-AMERICAN MORTG. CO.,
Limited, et al. v. BUNCKLEY et al.**

(Supreme Court of Mississippi. June 11, 1906.
Suggestions of Error Overruled July 6,
1906.)

1. ESTOPPEL—FAILURE TO ASSERT TITLE.

The fact that plaintiff, having an interest in land, did not assert it at a time when he knew that another was mortgaging the land as his in fee, did not estop plaintiff, where at that time he was ignorant of his interest.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 128-135.]

2. SAME.

Plaintiff, having an interest in land, was not estopped by his silence at a time when he knew that another was mortgaging the land as his in fee, where plaintiff's interest appeared of record.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 128-141.]

3. SAME—RELIANCE ON ADVERSE PARTY.

In order for one to be estopped by his conduct, the other party must have relied thereon.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 136-141.]

4. TENANCY IN COMMON—MUTUAL RIGHTS—ADVERSE POSSESSION

The giving of a mortgage on the fee by one of several co-tenants, where no possession was taken under the mortgage, does not amount to an ouster, so as to start the running of limitations against the other tenants.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 33, 39.]

5. QUIETING TITLE—SCOPE OF RELIEF.

Where one of several co-tenants conveyed his interest to another, and the latter was successful in a suit to set aside a certain mortgage as a cloud on his title, it was error to decree him the rent of the interest acquired from the other co-tenant for a period prior to the time that complainant acquired such interest.

6. SAME.

Where one of several co-tenants sued to set aside a mortgage as a cloud on the title, making the other co-tenants defendants, but they filed no cross-bill, and complainant did not ask for partition, it was proper to refuse partition.

7. JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED—MATTERS NOT IN ISSUE.

In a suit to cancel clouds on title and obtain partition of an interest, complainant claimed by virtue of certain deeds, and in deraigning his title set forth and made exhibits of certain deeds to his grantor, not claiming any right in himself by virtue of such deeds. The deeds to complainant were held ineffectual to vest title in him, and nothing else was considered. *Held*, that the decision was no bar to a subsequent suit between the same parties to set aside the clouds on the title, in which complainant claimed by virtue of the deeds relied on in the former suit as the source of the title of complainant's grantors.

Appeal and Cross-Appeal from Chancery Court, Franklin County; W. P. S. Ventress, Chancellor.

Suit by Albert N. Bunckley against the Scottish-American Mortgage Company, Limited, and others. From a decree in favor of complainant, defendants appeal, and complainant prosecutes a cross-appeal. Affirmed. Suggestion of error filed on behalf of the heirs of the grantees of Ransom Bunckley, deceased, and suggestion of error filed on behalf of the Scottish-American Mortgage Company and its vendees, overruled.

Albert N. Bunckley filed a bill in chancery against the Scottish-American Mortgage Company, Limited, and those claiming through it, and also all the other heirs at law of the original grantees of Ransom Bunckley, deceased, the original owner of the property. The bill sought to set aside certain conveyances as clouds on the title to the property in controversy. This bill was demurred to, and the demurrer overruled, and an appeal taken to the Supreme Court, which affirmed the action of the lower court in overruling the demurrer, and remanded the cause for answer. See *Scottish-American Mortgage Co. v. Bunckley*, 81 Miss. 599, 33 South. 416, where a statement of facts will appear. The defendants answered, and the case went to trial on the pleadings and proof. The court held that the complainant was entitled to a one-fourth interest in the property, being entitled to one-eighth as heir at law of his father, Nathan Bunckley, and one-eighth as assignee of his brother, W. R. Bunckley, and decreed possession of the one-fourth interest to complainant, and canceled as a cloud upon complainant's title the trust deed executed to the defendant, the Scottish-American Mortgage Company, by Nathan Bunckley, the father of complainant, in so far as it affected complainant's title and allowed complainant the rents and profits, less taxes, on his portion of the property, and taxed all costs against the defendants. The Scottish-American Mortgage Company and its vendees appeal, assigning numerous errors which are set forth in the opinion of the court. The defendants, the heirs of Ransom Bunckley, also appeal, admitting the correctness of the decree of the court in decreeing in favor of the complainant, but contending that their rights, which are identical with those of appellee, were ignored, and that the court should have granted them relief, although they filed no cross-bill with their answer to the original bill of complainant. The appellee prosecutes a cross-appeal, contending that the court should have ordered a partition of the property. See, also, *Bunckley v. Jones*, 79 Miss. 1, 29 South. 1000, for a more complete history of the case.

Calvin Perkins, for appellants, Scottish-American Mortg. Co. and others. Theo. McKnight, for appellants R. S. Butler and others and for appellee and cross-appellant A. N. Bunckley.

CAMPBELL, Special Judge. This case was before this court on demurrer to the bill, and was reported in 81 Miss. 599, 33 South. 416. The demurrer was held bad, because it was decided that Albert N. Bunckley, the complainant, was entitled to an interest in the land in his own right as a son of Nathan Bunckley and also as grantee of his brother W. R. Bunckley. The cause was remanded, and the bill was answered by the mortgage company and by some of the other defendants, and was heard on pleadings and evi-

dence, and resulted in a decree for the complainant for the interest in the land sued for and rent for the use of it. The grounds set up for the defeat of the claim of complainant are *res judicata*, estoppel by conduct, and the statute of limitations of 10 years.

The defense of *res judicata* consists of a decree in a case in which complainant exhibited a bill of chancery in which he propounded a claim of ownership of an interest in the land embraced in this suit by virtue of two conveyances set forth in his bill, which are altogether different from the claim he makes in this suit. It was held in that case on appeal to this court that he had no right by virtue of the claim made in that suit. The subject-matter of the two suits is different, and the former decree is not a bar to the claim made in this. That case is reported in *Bunckley v. Jones*, 79 Miss. 1, 29 South. 1000, by reference to which the manifest difference between the two cases will be apparent.

The presentation relied on as estopping by conduct is, as to Albert N. Bunckley, that he was at the home of his father, Nathan Bunckley, when the agent of the mortgage company was there to inspect the land for a loan of money on it by the company, and was cognizant of the proposed loan, and was silent as to any claim of his own to the land; that a large body of some 3,000 acres of land was conveyed in 1847 by Ransom Bunckley in remainder, after a life estate to his three sons, of whom Nathan was one; that soon a partition was made between the three grantees and a partition deed executed; that Nathan went into possession of the part allotted to him and soon acquired other interest in the large tract by purchase from co-owners, and from 1873 or before was in possession as sole owner of all the land in controversy, dealing with it as his own, having it assessed as his, paying the taxes, receiving the rents, selling timber—in short exercising all such acts of individual ownership and control as pertain to complete and undisputed ownership, and that in order to get the loan from the mortgage company Nathan made affidavit that his father had long owned the land and his title had never been disputed, and that he had acquired it from his father by the conveyances in 1847, and had gone into possession in the early '70's, and his title had never been questioned, and he had, as he believed, a perfect title in fee simple; that an attorney at law employed by Nathan had made an abstract of the title, and given an opinion that it was perfect in Nathan, whereupon the sum of \$5,000 was loaned and a deed of trust taken on the land, under which the mortgage company acquired title by a sale in accordance with the deed in 1893. Albert N. Bunckley, the complainant, lived with his father, Nathan, on the land, and cultivated a part of it, and was on the land with his father when it was sold under the deed of trust, and was dispossessed with his father by proceeding of unlawful detainer, after the sale.

The question is: Is he estopped by his silence? The truth is he did not know that he had any interest in the land. As stated by counsel for the mortgage company, "it was not considered in the family at that time, nor until after 1893, that the children of Nathan had any interest whatever in the property in controversy." His ignorance of his rights precludes the claim of estoppel by his mere silence. 11 A. & E. Enc. p. 433, 434b, and cases cited; *Pomeroy*, Eq. Jur. § 805; *Houston v. Witherspoon*, 68 Miss. 190, 8 South. 515; *Hignite v. Hignite*, 65 Miss. 417, 4 South. 345, 7 Am. St. Rep. 673; 7 *Ballard*, Real Property, p. 40. Apart from this, it is by no means certain that he knew of the loan being effected, and, if he did, he was under no legal obligation to assert his claim, to interfere with the success of his father's application for a loan. His title in fact had not then accrued, so far as he derived from his brother W. R. Bunckley, and his claim arising from the conveyances of Ransom Bunckley in 1847 was of record and constructively as much known to the mortgage company as to him.

The claim of estoppel as to the interest in the land acquired by complainant by conveyance of W. R. Bunckley is based on the fact that on the 5th January 1891, W. R. Bunckley opened a written correspondence with the agent of the mortgage company in behalf of his father about the deed of trust and its payment, and wrote several letters in which he spoke of the land as his father's and about paying the debt of his father, and made no claim of his own to any interest in it, and as the mortgage company afterwards sold the land, and purchased it, W. R. Bunckley was estopped to assert any claim to it, and, he being estopped, complainant, his grantee, is. But W. R. Bunckley was ignorant of his right to the land and did nothing by which the mortgage company was misled to its prejudice. It thought it had a lien on the fee, simple and a perfect claim on the land by virtue of its deed of trust, relied on that, and could not have been misled by any act of W. R. Bunckley, on which it did not rely. He was not estopped, and his grantee took his title free from estoppel.

The statute of limitations is not a bar, for the reason that, although they did not know it, as before stated, Nathan Bunckley, who thought he was sole owner, was a co-tenant with the complainant and W. R. Bunckley, and his possession was, in view of the law, that of all the co-owners, and the statute of limitations could not be set in motion until an ouster or its equivalent, and there was none. "A conveyance alone, without possession taken under it, can never amount to an ouster. The same remark is applicable to a mortgage of the whole." *Freeman on Co-tenancy*, § 226; *Warvelle on Ejectment*, § 450 et seq.; *Wood, Limitations*, p. 621. The intimate relationship between the co-tenants here is an important circum-

stance. Warvelle on Ejectment, § 456. In such case much stronger evidence is required to start the running of limitations than among strangers. Wood on Lim. p. 621.

The complainant is entitled to recover the land, as held by the decree of the chancellor, but is not entitled to rent of the interest acquired in 1898 from W. R. Bunckley prior to that date.

The mortgage company sought to amend its answer, so as to set up the six-year statute as a bar to the claim for rent and to have stricken out of the bill an amendment allowed long before, and was refused, we think properly, because, while amendments are to be liberally allowed, there is a limit to liberality, and it was reached in this case.

On cross-appeal complainant insists that partition should have been decreed, and part of the defendants insist that partition should have been decreed. It was not asked by complainant in his bill, nor did the defendants exhibit a cross-bill. "Ask, and ye shall receive," is still the law to which we are subject, and no complaint against the decree on this ground can be maintained.

The decree will be opened, so far as to correct it by reducing it by the amount of the part of the rent accruing prior to the conveyance by W. R. Bunckley to complainant, and with this change the decree will stand.

The costs of the appeal will be taxed on complainant; the other costs on the defendants below.

CALHOON, J., being disqualified by reason of former connection with this case, took no part in the decision.

A suggestion of error was filed on behalf of the Bunckley heirs by Theo. McKnight, counsel, which was overruled by the court.

CAMPBELL, Special Judge. In disposing of this case on a former day, we gave full consideration to the claim of the cross-appellants that the court should declare their rights as to the land and decree partition; and, as they were defendants and had not exhibited a cross-bill, we held they were not entitled to any relief. We are "strenuously" urged by counsel to re-examine this question, and have done so, and have examined every citation of counsel, and not found one which, according to our apprehension, calls for a change of our view as heretofore announced. Our own cases certainly sustain this view. In *Millsaps v. Pfeiffer*, 44 Miss. 806, it is said: "It is the settled doctrine of equity that a defendant cannot pray anything in his answer, except to be dismissed, with his costs. If he has any relief to pray, * * * he must do so by a bill of his own, which is called a cross-bill." In *Weeks v. Thrasher*, 52 Miss. 142, it is said: "It is impossible for us to understand how a decree could be made in this case for the sale by the administrator of the lot. * * * The answer of the administrator could ask no re-

lief, and the court could grant none." To the same effect are *Bay v. Shrader*, 50 Miss. 326; *Edwards v. Hillier*, 70 Miss. 803, 13 South. 692; *Preston v. Banks*, 71 Miss. 601, 14 South. 258.

It is true that a court of chancery will shape its decrees to effect justice between parties, without regard to their attitude as complainants or defendants, but with due regard to the rules above announced. There are cases in which relief will be given to the complainant on terms, as illustrated by *Harrison v. Harrison*, 56 Miss. 174, and *Ragsdale v. Alabama G. S. R. Co.* 67 Miss. 106, 6 South. 630, and there are cases where relief may be granted between defendants, as declared in *Arnold v. Miller*, 4 Cushm. 152; but they are exceptional and stand on peculiar grounds, and in our opinion this case does not come within the exception. We found one case which may be claimed as a precedent for the action asked of us in this. In a suit by a vendor of land to reform the bond for title on the ground of mistake and to enjoin an action by the vendee for breach of the condition, the decree reformed the bond and dissolved the injunction of the action, leaving the vendee to his remedy on the bond.

On his appeal the decree was reversed, because the chancellor had not declared the rights of the vendee as to the course he might pursue in dealing with the case. *Reese v. Kirk*, 29 Ala. 406. The right and future course of the vendee were not involved in that suit and were not the subject of discussion by counsel, and announcement by the court on that subject was uncalled for. "Sufficient unto the day is the evil thereof" is a good maxim for courts as for individuals. We are not willing to follow such a precedent. Whatever may be true as to the right of a court to pursue such a course, its refusal to do so is not ground for reversal of a decree which gives all proper relief as properly asked and stops at that.

We adhere to our former announcement on this subject.

A suggestion of error was filed on behalf of the Scottish-American Mortgage Company and its vendees, by Calvin Perkins, Carruthers Ewing, and Green & Green, counsel, which was overruled by the court.

CAMPBELL, Special Judge. The complaint is that the court erred in not sustaining the defense of *res judicata* and as to the statute of limitations of ten years as to the land and of six years as to rents. The doctrine of *res judicata* is probably as well settled and understood as any in the whole range of jurisprudence. Its application is illustrated by many cases in our own Reports and by vast multitudes elsewhere, so numerous as to discourage any effort to cite them. The learning is familiar to every lawyer. "Nemo bis vexari debet pro una et eadem causa" is the maxim on which it

rests. "Una et eadem causa" is the test by which to determine the question of *res judicata*. The parties may be the same, and the property about which the controversy is may be the same, in the two suits; but what is involved in the second may be entirely different from that involved in the former, and, if so, *res judicata* does not apply. The distinction is clearly made in *Barataria Canning Co. v. Ott* (Miss.; July 2, 1906) 41 South. 373, and may be found in many other cases, while *Thornton v. Natchez* (decided at the same time) 41 South. 498, presents a case where the vital matter involved had been decided in a former suit, and it was rightly held to be *res judicata*. Judgment on the same cause of action is always conclusive between parties and privies, but it must be the same cause—"una et eadem causa." It is probable that there is really no difference of opinion between the court and the learned counsel in this case as to the law applicable, but that the difference is as to the case, and we address ourselves to that.

The former suit, the decree in which is invoked as *res judicata*, was brought by the complainant to cancel clouds and obtain partition of an interest he claimed in the land now in suit by virtue of two deeds, one made in 1873 and one in 1890. In deraigning his title he set forth and made exhibits of the deeds of 1847, not claiming any right in himself by virtue of those deeds, but presenting them as the source of the title of the grantors in the two deeds to him, by virtue of which alone he made any claim. These two deeds were held to be ineffectual to vest any title in him, and this court held that there was nothing else in the case calling for decision, and refused to consider anything else. *Bunckley v. Jones*, 79 Miss. 1, 29 South. 1000. Undoubtedly the matter decided was put at rest forever, and it was that complainant has no valid claim to the land by virtue of the two deeds of which he propounded his claim. The present suit is for an interest in the same land based on entirely different grounds wholly independent of the two deeds in the former suit. All that was put in issue in the former suit was the claim of complainant to an interest in the land by virtue of two deeds, made, respectively, in 1875 and 1890. Nothing else was litigated or decided, and therefore nothing else was settled by that suit. It was needless for counsel to cite decisions holding that a decree for partition is conclusive as to the interest of parties. That is too plain for dispute. There was no decree for partition in the former suit. What would have been the effect of such a decree we are not called on to decide. Had one been made, it is reasonably certain that the present case would never have arisen to vex counsel and court. Perhaps a decree for partition in the former suit would have precluded all further claim by complainant, not on the doctrine of *res judicata*, but on a totally different one, the

doctrine of election; but as to that we do not decide. One of the rules as to *res judicata* is that it must not be open to argument or inference whether the same cause was decided. It must not be doubtful or uncertain. There must be certainty that the very matter in dispute has been the subject of judicial determination. Here we have indisputable evidence in the opinion of this court as to what was involved in the former suit.

On the statute of limitations of 10 years the argument of Messrs. Perkins & Ewing proceeds on a misapprehension of our opinion on that subject. It was not necessary to argue or quote books to convince us that ignorance of one's rights does not prevent the running of the statute of limitations. We have not held or intimated that it did.

We do not perceive any merit in the "new" suggestion of counsel, consisting of a quotation from the bill in the former suit spoken of. That is an averment that certain parties including complainant were tenants in common of the land. We held that they were such, and therefore the statute of limitations did not run as between them upon the facts of the case. We think it still necessary to set up the bar of the statute of limitations, unaffected by the statute, which makes the completion of the bar an extinguishment of the debt as well as the remedy.

In conclusion, we disclaim any purpose to overrule or modify any former decision of this court on any of the questions involved: but we adhere to our former views in this case.

MISSISSIPPI CENT. R. CO. v. HARDY.

(Supreme Court of Mississippi. July 2, 1906.)

1. MASTER AND SERVANT—PLACE FOR WORK—RAILROAD TRACKS.

A railroad company owes its servants operating trains a duty to keep the track in a safe condition, which it cannot delegate.

[Ed. Note.—For cases in point, see vol. 34. Cent. Dig. Master and Servant, § 175.]

2. PLEADING—DECLARATION—DEFECTS—AIDED BY VERDICT AND JUDGMENT.

In an action against a railroad for injuries to a servant, the declaration alleged that the injuries were due to the negligence of defendant, in that the switch where the derailment occurred was not properly constructed, or was not properly adjusted, and in that defendant negligently failed to supply all the cars with air brakes. The evidence showed that the proximate cause of the injury was an original defective construction of the switch. The instructions, taken as a whole, showed that no liability was sought to be imposed by reason of the negligence of any fellow servant, and the court specially instructed that, though a brakeman had failed to couple the air brakes, defendant was not liable because of such failure, as the brakeman was a fellow servant. *Held*, that the declaration was sufficient to sustain a judgment for plaintiff.

3. TRIAL—INSTRUCTIONS—CONSTRUING INSTRUCTIONS TOGETHER.

Instructions are sufficient where, taken together, they announce the law of the whole case.

4. SAME—SPECIAL REFERENCE TO TESTIMONY.

A requested instruction, having a special reference to the testimony of a certain witness, was properly refused.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Trial, §§ 577-580.]

5. SAME—REQUESTS COVERED BY OTHER INSTRUCTIONS.

A requested instruction is properly refused, where the propositions covered are contained in instructions given.

6. NEGLIGENCE—ACTIONS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Contributory negligence is an affirmative defense.

7. APPEAL—FAILURE TO PRESENT QUESTION ON TRIAL—INSTRUCTIONS.

An appellant cannot assign error on the modification of an erroneous instruction, since, if not content with the instruction as modified, he should have declined to read it to the jury.

8. DAMAGES—EVIDENCE—LOSS OF EARNINGS.

In an action for injuries to a railroad fireman, incapacitating him for employment as an engineer or fireman, plaintiff could not give evidence of promises of promotion on the question of damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 237.]

9. APPEAL—FAILURE TO PRESENT QUESTION ON TRIAL—EXAMINATION OF WITNESSES.

An appellant cannot complain of unresponsive answers of a witness, where he made no motion to exclude the answers.

10. SAME.

On appeal, testimony cannot be regarded as ground for reversal because it appears to be incompetent only when taken in connection with other testimony to which no objection was made by appellant.

11. APPEAL—NECESSITY OF OBJECTION BELOW—IRRESPONSIVE ANSWER.

Where a question proper in itself is asked, and the only error consists in an answer utterly irresponsible and containing objectionable matter, it is the duty of the party objecting to the answer to move to exclude it, and on failure so to do he cannot urge the objection on appeal.

12. DAMAGES—EVIDENCE—POVERTY OF PLAINTIFF.

In an action for injuries to a servant, his testimony that he went to his father-in-law's because he had no business to make a living at, and that he had been living with his father-in-law since he got out from his illness consequent upon his injuries, was not susceptible of the construction that it showed him to be a poor man without property.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 498.]

13. SAME—PERSONAL INJURIES—EXCESSIVE DAMAGES.

In an action for injuries to a locomotive fireman, it appeared that plaintiff was 24 years old and in vigorous health, married, and earning about \$40 a month before the accident, but that since the accident he had not earned \$4, that his leg and foot were crushed, and that the leg would always be shorter than the other. The court instructed that in determining the damages the jury should consider the wages earned by plaintiff, and the sum of money, less any amount that he could or might earn, that would produce a similar income, and that the jury could only award compensatory damages, and could not allow anything as a punishment. *Held*, that a verdict for \$10,000 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 372-396.]

Appeal from Circuit Court, Perry County; Will T. McDonald, Judge.

Action by R. R. Hardy against the Mississippi Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

Action for personal injuries sustained by appellee by reason of the derailment of appellant's locomotive on which appellee was working as a fireman at the time the injury was received. On the day of the accident appellee was engaged in his duties as fireman and was on the tender of the locomotive. When it became derailed the engineer escaped by jumping, but the appellee was caught between the tender and cab and fastened in the wreckage, receiving injuries on the head and in the leg, suffering physical and mental anguish, and being left a cripple in one leg. The declaration alleges that the injuries were due to the negligence of the defendant company, in that the front trucks did not have the proper gauge or were out of gauge; that a flange of a wheel of said truck was badly worn; that the switch where the derailment occurred was not properly constructed, or was not properly adjusted at the time of the accident, so that said truck split the switch; that the defendant failed to provide a safe way or track, as was its duty, over which to run its trains; that the defendant negligently failed to supply all the cars in said train with air brakes, which, had they been supplied, the engineer would have stopped the train promptly, and averted the injuries complained of. He further avers that the accident which caused his injuries was due wholly to the negligence of the defendant railroad, without any fault or negligence on his part. The defendant demurred to the declaration on the ground of duplicity, uncertainty, and insufficiency. The demurrer was overruled. The case then went to trial on the merits, and the jury awarded the appellee a verdict for \$10,000 as compensatory damages. The defendant railroad company appeals, assigning numerous errors, which are treated in the opinion of the court, chief among which is the modification of the eleventh instruction asked by the defendant, which is as follows; the modification being indicated by italics: "No. 11. Before the plaintiff is entitled to recover in this case he must establish to the satisfaction of the jury and by a preponderance of the evidence, first, that the trucks of the engine did not have the proper gauge, or were out of gauge; or, second, that the flange of the left wheel of the front truck was worn so as to make it unfit for use; or, third, that the defendant negligently failed to supply the cars in said train with sufficient air brakes; or, fourth, *that the switch where the derailment occurred was not properly adjusted at the time of the accident, and a failure so to do was the proximate cause of the injury to plaintiff.*"

S. E. Travis, Alexander & Alexander, and Geo. B. Power, for appellant. W. H. Hardy and Brame & Brame, for appellee.

WHITFIELD, C. J. A patient and careful examination of the entire testimony in this record makes it perfectly obvious that the proximate cause of the injury was the split switch and the defective trucks and flange. The rails did not fit. They had to be knocked together. After they were locked they still did not fit. The trucks were out of order, and the flange of the wheel worn. The derailment was caused by the improper condition of the track at the switch point and the defective trucks and flange. It was the undeleagable duty of the master to have the track in safe condition. A careful and repeated examination of the instructions on both sides and of the declaration, taken in connection with this testimony, makes it very clear that the plaintiff proceeded upon the theory of the negligence of the company itself, and not the negligence of any fellow servant. The evidence makes it plain that the adjustment of the switch referred to in the declaration was not an adjustment by a fellow servant; but the adjustment referred to was the fitting of the rails together so that they would not split, so that there could be no split switch—an adjustment synonymous with construction. The declaration, after stating five specific grounds, expressly sums up by saying that the injury was due wholly to the negligence of the defendant; that is, the company itself. Looking back over the completed record, this case cannot be said to fall within the principles announced in the *Abrams Case*, 84 Miss. 456, 36 South. 542. Whilst the declaration might have been more felicitously phrased, so as to say with more perspicacity that the adjustment referred to was the construction of the switch, yet since all the testimony and the whole course of the trial on the evidence and on the instructions show this plainly, the case is thus separated by a great distance from the extraordinary irregularities condemned in the *Abrams Case*. There is no difficulty here, as there was in that case, in ascertaining the true line on which the plaintiff's case moved, from the declaration through the evidence and through the instructions to the verdict. Much is said about the train not being fully equipped with air, and much urged with reference to the injuries being due to the negligence of a fellow servant and in regard to the adjustment of the switch, meaning by "adjustment" the improper handling of the switch by the employes charged with that duty, but the complete answer to all this is to be found in the fifteenth instruction given for the defendant itself, which is as follows: "The court further instructs the jury for the defendant that, although they should believe from the evidence that there was a car in this train not equipped with air brakes, yet if they believe from the evidence that it was the duty of the brakeman of said train to couple the air brakes in the cars of said train, and because of the brakeman's failure to perform this duty said air brake was not in use, then

the defendant is not liable to the plaintiff because of any failure to have air brakes in use; that the brakemen on said train were fellow servants of said fireman, and the defendant is not liable to the plaintiff for any injury resulting from the negligence of the brakeman on said train."

Besides, the other instructions, taken as a whole, show that no liability was sought to be imposed by reason of the negligence of any fellow servant in any respect. The instructions, taken together, properly announce the rule that the defendant must provide safe ways and appliances. There is no error in this respect. The seventh, eighth, twelfth, and seventeenth instructions for defendant, as also the tenth, eleventh, and nineteenth, cover this ground fully. The criticism that in some of the instructions for the plaintiff the negligence counted on is not the negligence alleged in the declaration is hypercritical. The tenth instruction for the defendant expressly charges the jury that the injury must "have resulted from the alleged negligence of the defendant." No other negligence than the negligence alleged in the declaration, to wit, the negligence of the company itself, could have been referred to in the instructions for the plaintiff; but this instruction for the defendant expressly advises them of the fact, and the eleventh instruction for the defendant actually enumerates the specific grounds of negligence set out in the declaration. Instructions cannot be objected to separately with any justice. The instructions must be taken as a whole, as one body, and announce, not the law for the plaintiff or the defendant, but the law of the case, and, so taken, if they reasonably advise the jury of the true principles applicable to the case made by the facts, that is all that is required as a guide for the twelve plain, practical men who sit in the jury box. Any other view would sacrifice substantial justice in a very large percentage of the cases appealed to this court.

The fourth instruction for the defendant was properly refused, because of a special reference to the testimony of the witness Lee, and, besides, had been abundantly covered by instructions 7, 12, 15, and 18 for the defendant. The fifth instruction was properly refused, because there is not a shred of evidence of any contributory negligence on the part of plaintiff, and so well satisfied was the defendant that he was not guilty of any contributory negligence that the defendant did not even plead contributory negligence. Contributory negligence is an affirmative defense. *McMurtry v. Railway*, 87 Miss. 601, 7 South. 401; *Simms v. Forbes*, 86 Miss. 412, 38 South. 546.

All the modifications in instructions No. 6, 10, 11, 15, 17, and 19, asked by the defendant, were proper as shown by the testimony in the case. The only serious comment needed to be made as to modifications, is as regards the modification of the eleventh

instruction for the defendant by the court, which modification was in these words: "(4) That the switch where the derailment occurred was not properly adjusted at the time of the accident and that the failure to do so was the proximate cause of the injury to plaintiff." Of course, this instruction and all the instructions were given by the circuit judge looking back over the case made by the evidence, and it was just as clear to him then, as it is to us now, that the adjustment of the switch made out by the evidence was its failure to fit up tight and close as it should have done, and not the handling of the switch by an employé. The instruction as asked was clearly erroneous, because it omitted absolutely the only real ground on which the plaintiff proceeded. If the defendant did not choose to use the instruction as modified, it should not have read it to the jury before it asked another instruction, but stood upon the error in the modification, if error there had been. This court said in *Railroad Company v. Sudoth*, 70 Miss. 265, 12 South. 205: "One who has asked an erroneous instruction cannot assign for error its modification; for, if not content with it as modified, he should have declined to read it to the jury." If the instruction had been correct as originally asked, then a modification might have been insisted on as error; but it was erroneous as originally asked, and the modification made it correct as to the main point in the case. We may say in one word, without further detail as to the instructions, that a body of instructions probably were never given a defendant railroad company drawn with more consummate care or evidencing more profound knowledge of the law applicable to every phase of the defendant's case. The defendant got all, and more than all, he was entitled to on the facts, and we do not think any reversible error can be found in the law of the case as charged by the learned judge below.

This brings us to the only other contentions we deem it necessary to notice. First, as to the admission of testimony regarding the plaintiff's prospects of promotion. This testimony is found on pages 79 and 80 of the record, and is as follows: "Q. State whether or not you had any promise of promotion by any officer of the company. (Objected to; overruled; exception.) A. Nothing, only Mr. Bell, when I had the typhoid fever and got well and went to my boarding house—he was boarding at the same place—he says: 'I wish you had been well. I would have had you running an engine since you have been sick.' Q. Did he ever say anything to you afterwards about that? A. Yes, sir; that he had put in another man. He said I would have to wait awhile. Q. You would have to wait awhile before you could get an engine? A. Yes, sir. Q. What was your object in hiring to the railroad company as a fireman? A. The

only purpose of it was to earn a living. The only purpose was I wanted to become a locomotive engineer." For the plaintiff it is insisted that the question whether plaintiff had any promise of promotion by any officer of the company was competent, and that the only thing that was wrong was the answer of the witness, which was not responsive to the question. We cannot concur in this view. We think the question as to a promise was not competent, as inquiring as to a matter entirely too speculative and remote, within the rule announced by the Supreme Court of the United States in *Richmond & Danville R. R. v. Elliott*, 149 U. S., on page 268, 13 Sup. Ct. 837, 37 L. Ed. 728. It is there said: "We think there was error in the admission of this testimony. It did not appear that there was any rule on the part of the Central Company for an increase of salary after a certain length of time, or that promotion should follow whenever a vacancy occurred in a higher grade of service. The most that was claimed was that, when a vacancy took place, a subordinate, who had been faithful in his employment and had served a long while, had a chance of receiving preferment. But that is altogether too problematical and uncertain to be presented to a jury in connection with proof of the wages paid to those in such superior employment. Promotion was purely a matter of speculation, depending, not simply upon the occurrence of a vacancy, but upon the judgment, or even whim, of those in control. Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury, in estimating the damages sustained, will doubtless always give weight to those general probabilities, as well as those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exaggerating, in the minds of the jury, the amount of the damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has been in fact deprived of, to show his physical health and strength before the injury, his condition since, the business he was doing (*Wade v. Leroy*, 20 How. [U. S.] 34, 15 L. Ed. 813; *Nebraska City v. Campbell*, 2 Black [U. S.] 590, 17 L. Ed. 271; *Vicksburg & Meridian Railroad v. Putnam*, 118 U. S. 545, 554, 7 Sup. Ct. 1, 30 L. Ed. 257), the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion. Beyond that it is not right to go and introduce testimony which simply opens the door to a speculation of possibilities." This is certainly sound doctrine, and we give it our hearty approval, but do not think the principle announced finds application here as to the question objected to, for the reason that the witness distinctly answered, so far

as any responsive answer was concerned, that no promise of promotion was made by any officer of the company. The jury, therefore, had before them the distinct and positive declaration of the plaintiff himself that no such promise was made to him with respect to promotion by any officer of the company. Having answered the question, the witness then went on to say—what was not responsive to the question—that a Mr. Bell, who is not shown to have held any office at all in the company, merely expressed the wish that he had been well, so that he might have had him running an engine during the time he had been sick. This part of the answer does not state that there was any promise—the witness had already said that there was none—but contained matters not responsive to the question, which, if the defendant wished to exclude, he should have made a motion to that effect.

All the other questions and answers set out above are not with respect to a promise, but along the same line of interrogation which had been previously addressed to the witness Wainwright, subsequently to be noticed in this opinion. It seems very clear that the learned counsel who represented the appellant in the court below regarded the line of interrogation embraced in these very questions as being the same that was pursued with respect to the interrogatories and answers addressed to Wainwright, none of which was objected to. These latter interrogatories and answers of the plaintiff above set out, not having been objected to below, cannot, of course, be objected to here. So that the only thing which the defendant reserved below, so far as this testimony is concerned, was the single objection to the question whether plaintiff had any promise of promotion by any officer of the company, which question was explicitly answered by the witness to the effect that no such promise had been made. The manifest difference, therefore, between the testimony in this case and the testimony in the case of *Richmond & Danville R. R. v. Elliott*, supra, shows plainly that there is nothing in this testimony to show any promise of any sort, and that, so far as the other questions and answers are concerned, no objection was reserved. This falls far short of the testimony on this point in the case of *Richmond & Danville R. R. v. Elliott*, supra. The witness there was asked this question, "What were your prospects of advancement, if any, in your employment on the railroad, and of obtaining higher wages?" And he answered that he thought that by staying with the company he would be promoted; that in the absence of the yardmaster he had sometimes discharged his duties, and also in like manner temporarily filled the place of other employes of the company of a higher grade of service than his own; that there was a system by which you go in there as coupler, or

train hand, or in the yard, and if a man falls out you stand a chance of taking his place; and that the average yard conductor obtained a salary of from \$60 to \$75 a month. There is no evidence in the testimony objected to that this man had ever discharged the duties of any one higher in the service than himself, and especially is there no evidence of any system of promotion at all by this railroad. It is earnestly urged, however, that this testimony must be taken in connection with the previously delivered testimony of the witness Wainwright, to be found on pages 56-59 of the record. This witness Wainwright was permitted to testify that "he ran a locomotive for the Newman Lumber Company, and that the course of the training usually pursued by a man who wanted to become a locomotive engineer was to begin by firing a locomotive and that a man had to fire two, three, or four years before promotion, but that promotion sometimes occurred more quickly on new roads, and that that was the only way now to secure such promotion, and that the pay of a fireman was from \$45 to \$100 per month and that of a locomotive engineer from \$80 to \$125 per month." But the remarkable fact about this testimony is that the counsel for the defendant who tried this cause in the court below allowed all this testimony to go to the jury without the slightest objection. Learned counsel who represent the defendant here cannot invoke the aid of this testimony, and, by adding it to the incompetent testimony we have referred to, make out of both, taken together, an available objection. He could only have done it if proper objection had been interposed to Wainwright's testimony in the court below. To hold otherwise would be to permit the appellant to reverse the cause because of the force of the added testimony of Wainwright, which testimony the defendant permitted to go to the jury without any objection whatever. This, of course, cannot be done.

But it is insisted in the next place that there was evidence of the poverty of the plaintiff which ought not to have been permitted to go to the jury. The evidence on that point is found on page 82 of the record, in cross-examination drawn out by the defendant itself in the court below, and on page 84 in the redirect examination. In the cross-examination, the plaintiff was asked whether he did not work. He stated that he did not, but that a man wanted to go around, if he could not work. He was then asked: "What particular business made you go around so early?" and he answered: "I was in the house so long I wanted to get about. I was here so long I wanted to get to my father-in-law's in Scott county." The object of this testimony was to show, if possible, what work or business, if any, the plaintiff had. On redirect examination, he was asked: "You stated in your cross-ex-

amination you went away from here about the 22d of April to your father-in-law's. State to the court and jury why you left here and went to your father-in-law's?" He answered, after the objection was overruled: "I left here because I had no business to make a living at, and didn't have the means to stay here on. I have been living with my father-in-law since that time." We think the question as to why he went to his father-in-law's house was a perfectly competent question, it was simply a re-examination on the identical line of interrogation along which, as above shown, plaintiff had been examined. If the answer can be properly held to show with the clearness required to make it objectionable that he was a poor man, then it was clearly irresponsible to the question, and gave what the question did not call for, and defendant should have objected to the answer on that ground and moved to exclude it from the jury. No such objection was made. Certainly, where a question perfectly proper in itself is asked, and the only error consists in the witness making an answer utterly irresponsible and containing matter clearly objectionable, it is the duty of the party objecting to the answer to move to exclude that answer. But, in addition to this, we do not think the answer can be given the large significance learned counsel for appellant would have us to attach to it, as showing that the plaintiff was a poor man without property. In the case of *Railway v. McLellan*, 80 Miss. 708, 32 South. 283, it was said that the testimony in that case showed "that the plaintiff was poor and had no property and no money." The testimony here does not, in any positive terms, show that the plaintiff was even poor, much less that he had no property and no money. So large an inference as that of absolute poverty cannot justly be drawn from testimony on this point, so very scant and meager.

Lastly, it is insisted with great earnestness that the verdict is grossly excessive. The testimony shows that the plaintiff was a young man in vigorous health, working as a fireman; that he was 24 years old, married, and earning about \$40 a month before the injury; that since the injury he had not earned \$4; that he had tried a job of sawing with a cross-cut saw, but, having to stand on one foot, could not stand it, and had to give it up; that the injury was permanent. Dr. Ross, the railroad physician, so testifying; that one leg would always be shorter than the other, and crooked; that it took five minutes to get his head and neck from the timbers clinching them, and nearly choking him to death, and between two and three hours to get the timber away so as to free his leg and foot, which had been crushed; when released he was unconscious part of the time. It was the province of the jury,

and the jury alone, to measure in dollars and cents the amount due him for physical and mental anguish and suffering, and, unless in a case where the verdict plainly shows that the jury must have been influenced by passion, prejudice, or corruption, this court never interferes with their finding as to damages. The defendants secured an instruction, No. 19, which is as follows: "The court instructs the jury for the defendant, that in the event they do find that the defendant was alleged in the declaration, and that such negligence was the proximate cause of the injury, and that the plaintiff's negligence did not contribute to his injury, and they find for the plaintiff, then they are the sole judges as to the amount of damages sustained by the plaintiff, and will determine said damages from the testimony; and in determining such damages they may take into consideration the amount of wages earned by the plaintiff, and the sum of money, less any amount that the plaintiff can or may earn by the reasonable employment of his mental and physical energies, that would produce a similar income. The jury can only award compensatory damages, and are not authorized to allow anything as a punishment to defendant, or to allow anything except a reasonable compensation in dollars and cents, to be arrived at and made up from the testimony in the case and from no other source." It will be seen from this instruction that the jury were expressly told not to allow anything as a punishment to the defendant, and, further, not to allow anything but reasonable compensation in dollars and cents, to be arrived at and made up from the testimony in the case and from no other source. They were particularly and explicitly held to the strictest possible rule in favor of the defendant company on this subject. Their verdict must be accepted as responsive to this instruction. This court has no scale delicate enough to weigh physical and mental anguish. At best it is an extremely difficult task. The law has committed this delicate task to the unbiased judgment of the 12 plain, practical, everyday men who compose the jury, and it can nowhere be more safely rested than in the application of their good sense and honest judgment to the particular facts proven in each particular case. We cannot say on the facts in this case that their finding is not warranted. If the highest order of legal ability and the most consummate skill in the presentation of a case could avail to save a failing cause, this judgment would be reversed; but the very right of this case stands out in such clear relief, it is so manifest that substantial justice has been done and that no other result could reasonably be reached on another trial, that we do not feel warranted in disturbing the verdict.

Affirmed.

SOUTHERN RY. CO. v. WILEY.

(Supreme Court of Mississippi. July 2, 1906.
Suggestion of Error Overruled July 6,
1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE.

A steam shovel operated by defendant railroad company was defective, in that the track bolster holding the circle of the crane had sunk, owing to the rotten condition of the timber supporting it. The attention of the railroad company's roadmaster had been called to the defects, but he simply directed the tightening of certain bolts and ordered its continued use, during which the chain by which the crane was turned slipped from the circle and crushed plaintiff's ankles as he was standing on the platform operating the crane. After the accident the shovel was taken apart, and it was then found that the wood supporting the circle was so rotten that it crumbled. *Held* sufficient to establish negligence on the part of the railroad company.

2. SAME—ASSUMED RISK.

A servant does not assume the risk of injuries resulting from defects in the instrumentalities provided by the master which are not obvious.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 610-624.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff had no knowledge of the defective condition of a steam shovel crane on which he was employed, and could not have discovered the same except by taking off the circle, and had not heard a conversation between defendant's superintendent of machinery and its roadmaster concerning the defective condition of the crane, he was not guilty of contributory negligence in continuing to work thereon.

[Ed. Note.—For cases in point see vol. 34, Cent. Dig. Master and Servant, §§ 706-722.]

Appeal from Circuit Court, Tishomingo County; T. J. O'Neill, Special Judge.

"To be officially reported."

Action by Samuel Wiley against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee was in the employ of appellant as cranesman, operating a steam shovel used in getting out gravel from a pit on a spur track of appellant's railroad. The steam shovel is built on a flat car, and is operated by a stationary engine, which is also built on the car. In operating the crane the cranesman, who manages the shovel, stands on a circular revolving platform at the opposite end of the car from the engine. On the occasion of the injury complained of the appellee was standing on the platform, when the chain which was attached to the crane slipped over the rim of the platform and out of the groove in which it worked, there being no guards to prevent its slipping, and caught him around the ankle and fastened him to the mast post around which the platform revolved, breaking and crushing both ankles, inflicting painful and permanent injuries, and leaving appellee a cripple for life. Appellee filed suit, alleging negligence on the part of the appellant railway company in not furnishing him with safe and suitable machinery with which to work, instead of worn and decayed machinery; in not providing guards

to prevent the chain from slipping; in not having the machinery properly inspected and ascertaining the defects and having same repaired; and that his injuries were the direct result of such negligence. A demurrer was interposed to the declaration, which was overruled by the court, when appellant pleaded the general issue, setting up contributory negligence on the part of the appellee, and that appellee knew of the defective and dangerous character of the machinery. This appellee denied in his replication. On the trial the testimony showed that the revolving platform had lowered as a result of the rotting of the bolster supporting it and the worn condition of the washer; that the superintendent in charge of the machinery, one Redman, had reported its condition to the roadmaster, McGinnis, who came to the place where the machinery was in operation, remaining only a few minutes, walked around it and looked it over, and ordered a few bolts tightened, stating that operations could not then be suspended for repairs, but promised to have it sent to the shop for repairs later on, and ordered appellee to go ahead with his work. The case went to a jury on the pleading and evidence, and appellee was awarded exemplary and compensatory damages to the amount of \$20,000.

W. J. Lamb and L. E. Sawyer, for appellant. T. D. Young, for appellee.

WHITFIELD, C. J. The evidence in this case shows the grossest and most outrageous negligence on the part of the appellant company in not furnishing appellee with safe machinery and appliances with which to work, especially in furnishing a wooden beam or bolster truck, as one of the witnesses called it, in an utterly rotten and decayed condition, and in not properly inspecting said machinery and appliances and having the same put in safe condition after repeated notice and with full knowledge of their utterly unsafe character. The proximate cause of this injury is shown with sufficient clearness by the testimony to have been the rotten condition of the woodwork of the truck, or the wooden beam, or as some of the witnesses call it, the truck bolster. This rotten wood, not visible from the outside, gradually crumbled and gave way, and thus the chain slipped over the top of the rim of the cylinder and the injury followed. The witness J. J. Redman, who was an employé of the Southern Railway Company, the appellant here, engaged in operating a steam shovel, makes out an overwhelming case for the plaintiff, so far as the negligence aforesaid is concerned. He points out all the particulars in which the machinery and appliances were defective, testifies positively that the plaintiff stood in a position which was dangerous in consequence of the "circles" dropping down too much, and shows that the chain was not the chain that originally belonged to the machinery, that it was defective, and not such a

chain as should have been used. He testified: "Q. Detail to the court and jury what happened when he got hurt. A. Well, the chain came over the circle there, and caught him against the mast post, and that is the reason he got hurt. Q. How came it to come over the top of the circle? A. The front end of the machine was lower than it originally ought to be. Q. How came it to be lower than it ought to be? A. The woodwork of the truck, known as the 'truck bolster,' where the central casting is placed on the boom deck of the car, it was rotted out and sunk down, and the timber on the front end, it was rotten, and by that means it swagged down a portion of the machine, and that's how come it to get lower." He further testified that when the beam was taken off, and they raised the circle off and took the bolts out, "you could take that wood with your hand and pull it off, down until it was nothing; what you might call just like ashes, most. The inside was plumb rotten." He again expressly says "the more this wooden circle worked, the more it dropped down, and that had been going on for some three months." He was again asked if anybody could not see that, and he stated that they could not, there was nothing there to see, and "that a man could not get in there and examine." When asked if the plaintiff could have seen it, he said: "If he looked through the circle he could." Redman further testified that Mr. McGinnis came from Tusculum, Ala., having been previously notified fully of the condition of this machinery, for the purpose of inspecting it; that he only stayed about 20 or 30 minutes; walked around it, and directed him to tighten up the truck rods and to do some other wholly futile things; and that when he (Redman) told him of the trouble with the machinery, and that the situation had given him a great deal of trouble, that "the machinery was down so low on the bearings that it would not go down, and showed him the condition, his response was, 'Well, Johnnie, God damn it, go ahead anyhow.'" This was the remarkable conduct on the part of the appellant's agent; this, the style of inspection; this, the utterly willful and reckless disregard of the duty of putting this machinery in such condition as to be safe as regards the life and limbs of employes. Another witness, Smith, says that McGinnis said to Mr. Redman, "John, I cannot afford to stop the shovel now," and that Redman said, "I don't think that we can run it any longer; it has got to go to the shop," and that Mr. McGinnis then said, "I can't afford to stop it at this time; Memphis is wanting some gravel." And again he stated that McGinnis said to Redman, "Try to get enough ahead to fill the orders, and then he would take it in the shop, and fix it up;" but before he did so the accident occurred.

Without wasting any further time on detailed statement of the testimony as to the negli-

gence of the company, it is sufficient to say that it is overwhelmingly shown that the company was negligent; not only negligent, but manifesting the utmost unconcern as to the safety of the employes charged with the duty of operating this miserable machinery. We have quoted thus much with the double purpose of showing the negligence of the company, and also of showing the very important fact that this negligence clearly renders the company liable on common-law principles, unless the plaintiff can be shown to have had knowledge of the rotten condition of this interior wooden work within the circle, and thus be shown to have been guilty of contributory negligence in continuing to operate the machinery after such knowledge. We think a clear case of liability is shown at common law, and we do not, therefore, deal with any asserted liability of defendant company under section 193 of the Constitution. The only defense, therefore, which the appellant could possibly make, was to show, and to show clearly, that the plaintiff had knowledge of the rotten condition of the interior timbers of this machinery, sometimes called by witnesses "truck bolster," the sinking of which is shown to be the proximate cause of the injury. We have given this record careful and painstaking examination on this point, with the result that we are unable to say that the verdict of the jury, which found that he did not know, is manifestly and plainly wrong. It was a question of fact for the jury to settle, and we think that, after the evidence is carefully considered, it must be held to be such, on this point, as that the verdict of the jury may fairly be supported. We certainly cannot say that it is manifestly wrong—the result of prejudice, passion, or corruption. As already shown, the witness Redman, an employe of the appellant itself, stated that the plaintiff could not have known the condition of this inside wood, unless he could have seen through the circle, and that he himself did not know it until after the machinery was sent to the shop and taken to pieces, so that the interior could then be examined. The appellee himself testified that he knew nothing about how the sinking down of the machinery occurred—"how the circle came to be lower." And he further expressly testified that he knew nothing of the rotten condition of the timber under the platform on which he stood. It may very well be that appellee knew that the circle, bound with iron bands was without sufficient guards, and that he may have observed, generally, the condition of the machinery on the outside, open and visible to the naked eye; but these things were not the proximate cause of the injury, and it is fully shown, in this testimony, that he could not by any possibility have known of the utterly rotten condition of the interior timber of this circle. No amount of ingenuity can obscure the plain fact that his injury was attributable alone to the rotten condition of the interior wood

of this circle, or truck bolster, or wooden beam. It was well said by the United States Supreme Court, through Mr. Justice Harlan, one of the greatest justices that ever occupied a seat upon that exalted tribunal, in *Hough v. R. R. Company*, 100 U. S. 217, 25 L. Ed. 612, that the "negligence of the master, in respect to supplying physical means and agencies for the conduct of his business, is not one which the servant, in legal contemplation, is presumed to risk, "for the obvious reason that the servant who is to use the instrumentalities provided by the master has ordinarily no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master." In *Porter v. Railroad Co.*, 71 Mo. 66, 36 Am. Rep. 454, it is held: "It is not incumbent upon the servant to search for latent defects in machinery or implements furnished him by his employer; but he has, without any investigation, the right to assume that they are safe and sufficient for the purpose." We think this is sound common sense, and sound law as well.

The plaintiff, Wiley, shows that, when McGinnis and Redman and Smith "walked around" the shovel, he did not stay with them all the time while they were examining the machinery, and knew nothing about Mr. McGinnis' orders as to repairing it. He says again positively that he did not know the condition of the machinery when he went to work there, but that, later on, he found out the condition of part of it, meaning, of course, the part he could see and observe. He further shows that he and Redman never had any talk "when the roadmaster came or after he came, about the condition of the machinery; that that was no part of his business." Further he says, and this is very important, that he only walked around the shovel once; that he walked around it to find out what McGinnis and Redman were talking about, and that Redman was showing him the tank trucks under the tank; that McGinnis did not instruct him to do anything, and that the only instructions he got were from Redman, and they were simply to "get some wrenches and tighten up the bolts." He further says that he knew nothing about the washer being worn down, and never saw it until after he was hurt. The fact was it was an improper one, did not fit, and was never used. He further says he never heard anything about sending the machinery to the shop, and that the failure to tighten the bolts had nothing to do with the accident. When it is remembered that we must take the whole testimony together, and that according to the testimony of Redman, the appellant's employé, he himself did not know the rotten condition of the timber until after the machinery had been taken to the shop, and that the plaintiff himself could not have known it unless he "could have seen through the circle"—that is through the wood—and

that the plaintiff's testimony shows that he knew nothing as to the interior condition of these timbers, it cannot be said that the jury did not have evidence enough to find that the plaintiff did not know of the rotten condition of the interior timbers within this circle, unobservable to anybody on the outside. The crumbling and rotting and the gradual sinking was a continuous process, proceeding in a very slow and gradual way and on the inside of the circle. It was a latent defect, not a patent defect.

We are therefore clearly of the opinion that the verdict rests upon evidence amply sufficient to support it on the common-law cause of action. The negligence of corporations in respect to machinery, ways, and appliances, their refusal to use the improved appliances science is constantly affording them, although directed so to do by Congress itself, has come to be known of all men and is an evil—a great and pernicious evil—that the courts of the country, so far as their legitimate power is concerned, should stamp out. There must be some regard for the sacredness of human life, there must be more concern about the sacredness of human limbs, even if the lives and limbs be those of the employés of these great corporations. The "God damn it, Johnnie, go ahead anyhow" style of attention to the nondelegable duty of the master to supply to employés safe machinery and appliances can meet at the hands of this court nothing short of the sternest condemnation.

Let the judgment be affirmed.

MOBILE, J. & K. C. R. CO. v. KAMPER. (Supreme Court of Mississippi. July 6, 1906.)

1. RAILROADS—CONVEYANCE TO ROAD—CONDITIONS—RAILROAD PURPOSES.

Where a deed conveyed land as a donation to a railroad company "for railroad purposes only," the grantor could not obtain a cancellation of the conveyance on the ground that it was understood that defendant would use the land in connection with a main line through the town where the land was situated, but that it had only built a branch.

2. SAME—ABANDONMENT OF LAND.

Where land was conveyed to a railroad company for railroad purposes only, and thereafter the road abandoned some of the land, the grantor was entitled to recover that part of the land abandoned.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 213-219.]

Appeal from Chancery Court, Perry County; T. A. Wood, Chancellor.

Suit by John Kamper against the Mobile, Jackson & Kansas City Railroad Company. From a decree overruling a demurrer to the bill, defendant appeals. Affirmed, and remanded for proceedings in accordance with the opinion.

Kamper filed his bill in the chancery court to cancel a conveyance made by him to the appellant railroad company of certain real estate in Hattiesburg, conveyed to appel-

lant as a donation by a general warranty deed. The following clause appears in the deed, to wit: "It is distinctly understood that the above-mentioned lots and rights of way are donated for railroad purposes only." The bill alleges that at the time this deed was made it was understood that the appellant would build its line from Mobile, Ala., to Jackson, Miss., "through" Hattiesburg, but that subsequently this route had been abandoned, and a branch only of said road built "to" Hattiesburg. It alleged that appellee was interested in the development of the territory through which the road would pass, and that he made the donation to appellant in aid of the road as originally projected. It also charges the abandonment by the appellant of certain parts of the property donated. The railroad company demurred to the bill, the demurrer was overruled, and the railroad company appeals.

May & Flowers, for appellant. W. H. Hardy and Brame & Brame, for appellee.

MAYES, J. The bill filed in this case shows that Kamper is still in possession of the property. It is only necessary for us to say that we think the action of the lower court in overruling the demurrer was proper; but, this appeal being prosecuted for the purpose of settling the principles of the case, we deem it necessary to say that complainant will not be allowed to show that the donation of the land for "railroad purposes only" was meant for the purpose of being used only for the road to be built from Mobile, Ala., through Hattiesburg, to Jackson, Miss. But the land will be deemed to have been used for the purpose of its donation when it is shown that it is used for any railroad purpose by the defendant company, appellant. The demurrer to the bill admits all the facts, and thereby admits that appellant has abandoned a part of the land conveyed by appellee and its use for railroad purposes. It only remains for us to say that the appellee should be allowed to recover such part of the land conveyed as is shown to have been abandoned by appellant, and that he should be denied relief as to such parts of the land conveyed as is shown that appellant is using for railroad purposes.

Let the decree be affirmed, and the cause remanded to be proceeded with in accordance with this opinion, and 30 days allowed defendant to answer after mandate filed.

CHANCELLOR v. LAW & EDMONDS.
(Supreme Court of Alabama. May 30, 1906.)
LANDLORD AND TENANT—LANDLORD'S LIEN—ESTOPPEL TO CLAIM.

Claimant went to plaintiffs, and represented to them that defendant was his tenant, and was to have the land on which the attached cotton was raised free of rent for the year, and that he had no claim to the crop grown on the

land. By this means he procured plaintiff to make advances to defendant, and to secure the same plaintiffs took a mortgage on the property attached. *Held*, that claimant was thereby estopped from setting up any claim as landlord to the crop grown on the land by defendant for rent or advances.

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

"To be officially reported."

Action by Law & Edmonds against Tom Daniel, in which Abe Chancellor filed claim to certain attached property. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

This is an action of attachment begun by Law & Edmonds, as individuals and partners, against Tom Daniel, which was executed by levying the same upon a lot of seed cotton, a lot of cotton seed, fodder, corn, oats, and three head of hogs. Appellant filed his claim to said property as landlord of Daniel. The other facts sufficiently appear in the opinion. The court gave the following written charge at the plaintiff's request: "If the jury believe from the evidence in this case that Abe Chancellor went to Law & Edmonds, and represented to them that Daniel was to have his land rent free for the year 1902, and that he (Chancellor) had no claim to said crop, and by that means procured Law & Edmonds to make advances for the year 1902 to Daniel, taking a mortgage on Daniel to secure said advances, then you must find for the plaintiff."

W. O. Mulkey, for appellant.

DOWDELL, J. This is a statutory claim suit for trial of right of property. Issue was regularly made up under the direction of the court. There is only one insistence of error, and that was the giving of the written charge requested by the plaintiffs.

There was evidence tending to show that the claimant, Chancellor, went to the plaintiffs, Law & Edmonds, and represented to them that one Daniel, who was Chancellor's tenant, was to have the land on which the cotton in question was raised free of rent for the year, and that he (Chancellor) had no claim to said crop, and by that means he procured the plaintiffs, Law & Edmonds, to make advances to Daniel for the current year, and Law & Edmonds, to secure the advances so made by them to the said Daniel, took a mortgage from him on the property in question. If this evidence was true, then Chancellor would be estopped from setting up any claim as landlord to the crops grown on the land by Daniel for rent or advances. The charge requested hypothesized the above facts which the evidence tended to prove, and consequently in the giving of the charge the court committed no error. If the charge possessed any misleading tendency by reason of other evidence in the case, it was the right and duty of the claimant to meet and counteract the same by requesting an explanatory

charge. It was not denied that Law & Edmonds made the advances to Daniel as testified to by the plaintiffs. It is true that both Chancellor and Daniel testified that Law told Daniel in May that he would not make him any more advances, but this was no denial of the fact that the plaintiffs did continue to make advances. We find no error in the record, and the judgment appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

UNIVERSALIST CONVENTION OF ALABAMA v. MAY.

(Supreme Court of Alabama. May 31, 1906.)

CHARITIES—CY PRES DOCTRINE.

The doctrine of *cy pres*, recognized and administered by the English Court of Chancery with reference to trusts, being based on the prerogative power of the king, is not recognized in Alabama.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 91-93.]

Appeal from Chancery Court, Houston County; W. R. Parks, Chancellor.

"To be officially reported."

Bill by the Universalist Convention of Alabama against Willie May. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The case made by the bill is that the appellant is a corporation organized under the laws of Alabama and engaged in the work of propagating a religious doctrine known as Universalism, and in the building and organizing of churches within said state for the purpose of furthering said work and enabling them to carry on the same in a more efficient manner; that all of such churches are the property of the state organization; that in January, 1897, Green conveyed to Granger and Price, as trustees of the Universalist Church of the town of Dothan, a certain lot, which was sold upon order of this court at public outcry, and the sum of \$750 was realized from said sale, the same being net after payment of costs and expenses, and that the same is now in the hands of the register of this court; that said trust estate has failed of execution because there is not now and never has been a Universalist Church organized in Dothan, and the said estate is entirely wanting in a *cestui que trust*, and that there is but one Universalist Church organization in Alabama, this plaintiff, and as such all church property becomes the property of and belongs to the state organization; that it was contemplated by the grantors in said trust deed at the time of its execution that the beneficiary, the church at Dothan, should become a part of the Universalist General Convention, or the complainant in this case, which is one of its subdivisions, and that com-

plainant should become the owner and control the property so conveyed for the establishment of such a church at Dothan, but that after diligent effort to organize and establish a church of this faith and order at Dothan they have failed; that unless the chancery court grants relief in this behalf, the trust estate will continue dormant and unused, and the purposes for which the same was created will fail; that after making the conveyance above set out the said Granger and Price died, and that no trustee was appointed or elected in their place until the appointment of the respondent herein as trustee by the register of this court; and that said respondent is the sole trustee of said trust estate. The bill contained an offer to make bond for the fund above referred to in double its amount, to be approved by the register of this court and payable to this respondent, and conditioned upon the return of the said fund whenever a Universalist Church is organized in Dothan, Ala. The prayer of the bill was that complainant be entitled to have the use and custody of the fund in the hands of the register of this court, and that the said trust estate has failed, in that there is no beneficiary therefor, and that the property conveyed to said trustee, or the proceeds thereof, be delivered to orators, to be used as to them may seem right and proper. There were demurrers and motions to dismiss for want of equity. From this decree, this appeal is prosecuted. There was also motion to dismiss the appeal in this cause, which was overruled.

R. D. Crawford, for appellant. Espy & Farmer, for appellee.

DOWDELL, J. The complainant by its bill invoked an application of the doctrine of *cy pres* in the application of a trust. Upon this theory, and this alone, is the bill filed. The bill was demurred to by the respondent, assigning a number of grounds, which demurrer was sustained by the chancellor, and from his decree the present appeal is prosecuted.

Apart from any consideration of insufficiency in the averments of the bill, as pointed out by the demurrer, it is enough to say that the theory upon which the bill is filed finds no support in the former adjudications on the subject by this court. The doctrine of *cy pres*, as recognized and administered by the English Court of Chancery, was based upon prerogative power of the king, and the principle, therefore, is by us, under our institutions, without recognition. *Carter v. Balfour's Adm'r*, 19 Ala. 814; *Williams v. Pearson*, 38 Ala. 200; *Johnson v. Hollifield*, 79 Ala. 423, 58 Am. Rep. 596. There was no error in sustaining the demurrer to the bill, and the decree of the chancellor will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

MERCHANTS' NAT. BANK v. BALES.

(Supreme Court of Alabama. May 31, 1906.)

1. DETINUE — TITLE — TRANSFER — RIGHTS OF OWNER.

Where G.'s agent obtained possession of certain apples sued for without the consent of the owner or any one authorized to bind him, the owner was entitled to reclaim the apples and recover the same in detinue wherever found.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, §§ 4-12.]

2. CARRIERS — BILL OF LADING — TRANSFER — FRAUD.

Where a bill of lading for a car load of apples was obtained from a carrier by a person having no right to the apples, the transfer of such bill of lading to a bank was ineffective to pass title as against the true owner.

3. DETINUE — DETENTION — DAMAGES — PARTITIONABLE PROPERTY.

Damages for detention in an action of detinue may cover loss by deterioration in the value of perishable property sued for while wrongfully detained from the owner.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, § 38.]

4. SAME — CLAIMS BY THIRD PERSONS.

Where a claimant voluntarily made himself a party defendant in an action of detinue, as authorized by Code 1896, § 2634, he thereby subjected himself to the same judgment for the recovery of the property and damages for its detention that would have been rendered against the original defendant.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"To be officially reported."

Detinue by H. S. Bales against the Louisville & Nashville Railroad Company, in which the Merchants' National Bank of Lawrence, Kan., intervened. From a judgment for plaintiff, intervenor appeals. Affirmed.

This is an action of detinue begun by appellee against the Louisville & Nashville Railroad Company to recover a car load of apples in barrels and damages for their use and detention. The Louisville & Nashville Railroad Company filed a sworn statement that they held the apples only as a common carrier of freight; that they had no right or title in the same, except for their freight charges; and that they were advised that the Merchants' National Bank of Lawrence, Kan., claimed to own the said apples. Notice was issued to said bank, and through its attorneys it came in and defended the suit. The evidence tended to show: That appellee had a car of apples barreled at Wytheville, Va., and that one Goodrich, representing himself to be an agent of one Greenlees for the purchase of apples for market, offered to purchase said carload of apples from appellee. That appellee made him a price of \$1.90 per barrel cash f. o. b. cars at Wytheville, Va. Goodrich said he would inspect the apples, but did not think that he could pay that much for them. That on the Saturday following Goodrich and bookkeeper of appellee went to Wytheville for the purpose of inspecting the apples. That the bookkeeper had no authority to sell the apples, and was instructed not to let Goodrich have them until cash was paid for

them. That on the Monday following the said Saturday appellee asked Goodrich if he had inspected the apples and whether he would take them, when Goodrich replied that he had procured bill of lading for same from the railroad and that the car of apples had gone to Montgomery and the bill of lading had been sent to Greenlees in Kansas. It further appeared from the testimony that the bookkeeper had not sold or authorized said Goodrich to take the apples, nor authorized the railroad to issue bill of lading to the same. It further appeared that Goodrich left at once and that the bill of lading sent to Greenlees became the property of appellant through a proper transfer. There was some controversy as to whether or not appellee was indebted to Greenlees on account of damages alleged to have arisen on defects in a car load of apples heretofore shipped to some point in Texas. It was further shown that, soon after the apples arrived in Montgomery, a demand was made on the Louisville & Nashville Railroad Company by appellee for the car load of apples, and the road replied that they would deliver the same to the consignee, Greenlees, when properly identified or on surrender of the original bill of lading. It was further shown that the apples, on the day they arrived in Montgomery, were worth \$2.25 per barrel, or \$300, and on the day when they were released to appellee, on making of a replevy bond, by virtue of deterioration and depreciation in value, they were worth only 75 cents per barrel, or \$120. It was further shown that the suit was filed and served October 23, 1903, and the apples were seized and held by the sheriff until October 31, 1903, when they were delivered to appellee upon his executing replevy bond. That on November 12th the railroad company suggested that appellant and Greenlees were claimants, but no order was made requiring them to come in and defend until April 4, 1904. On June 6, 1904, the railroad company amended its suggestion by striking out the name of Greenlees as claimant, and on that day for the first time the appellant appeared in the case. On December 6, 1904, it entered its plea of non detinet, with leave to prove any legal defense. The case was tried by the court without a jury, and judgment awarded to appellee for the car of apples and \$241 damages for detention. Appellant excepted to the finding of the court upon the facts and to the judgment rendered.

Fred S. Ball, for appellant. Steiner, Crum & Well, for appellee.

HARALSON, J. The evidence warrants the conclusion that Greenlees' agent obtained possession of the car load of apples sued for without the consent of Bales, the owner, or any one authorized to bind him; that the bill of lading issued in Greenlees' name at Wytheville, Va., was also procured tortiously. The owner, therefore, had the right to

reclaim the property wherever found. The transfer of the bill of lading to the defendant bank, while operating as a symbolical delivery of Greenlees' title and possession, could pass no higher title than if Greenlees had delivered the property in any other way. A bill of lading, or even a negotiable warehouse receipt obtained by one whose possession of the property is tortious, cannot by assignment, even to an innocent purchaser divest the title out of the true owner. *Moore v. Randolph*, 52 Ala. 537; *Jasper Trust Co. v. K. C., M. & B. R. R. Co.*, 99 Ala. 421, 14 South. 546, 42 Am. St. Rep. 75; *Commercial Bank of Selma v. Hurt*, 99 Ala. 130, 12 South. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38.

Damages for detention in an action of detinue cover the loss by deterioration in the value of perishable property while wrongfully detained from the owner. Such damages are the direct and necessarily proximate result of the wrongful detention. *Freer v. Cowles*, 44 Ala. 314; *Wortham v. Gurley*, 75 Ala. 356; *Heard v. Hicks*, 101 Ala. 102, 13 South. 256.

A claimant who voluntarily comes in and makes himself party defendant under section 2634, of the Code of 1896, subjects himself to the same judgment as to recovery of the property, and damages for the detention, as would have gone against the original defendant. The substituted defendant assumes the defense of the suit, the original defendant is discharged, the detention of the property by the original defendant must be treated as held for and on behalf of the new defendant, and judgment should go accordingly.

The findings and judgment of the court below were in accord with the foregoing views, and his judgment is affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

CENTRAL OF GEORGIA RY. CO. v. CARROLL.

(Supreme Court of Alabama. May 31, 1906.)

1. APPEAL—RULINGS ON AMENDED PLEADING—REVIEW.

The overruling of a demurrer to a complaint as amended is not reviewable, where the record does not show the allegations of the amendment.

2. APPEAL—RECORD—BILL OF EXCEPTIONS—TIME OF SIGNING—EXTENSION OF TIME—ORDER—NECESSITY OF INCLUDING IN RECORD.

A recital in a bill of exceptions signed in vacation that an order was made in term time for the signing of the bill in vacation, being a mere statement by the presiding judge that the making of such an order was a fact, cannot supply the omission from the record proper of the order.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 2404.]

3. SAME.

A bill of exceptions signed in vacation cannot be considered on appeal, where there is in the record proper no order made in term time for the signing of the bill in vacation.

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

"To be officially reported."

Action by S. C. Carroll against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Espy & Farmer, for appellant. B. D. Crawford, for appellee.

DOWDELL, J. The complaint, as originally filed, contained two counts. Demurrers were interposed to each count and were by the court sustained. It appears from the judgment entry that, by leave of the court, after ruling on demurrers, the complaint was amended, and demurrers were refilled to the complaint as amended, which demurrers were overruled. It does not appear from the record in what the amendment to the complaint consisted. We therefore are unable to review the court's action in overruling the demurrers to the complaint as amended.

Other assignments of error relate to questions which can be considered on appeal only when presented by a proper bill of exceptions. The bill of exceptions in this case appears to have been signed by the presiding judge on the 31st day of July, 1905. This was after the adjournment of the court. The court convened on Monday, the 1st day of May, 1906, and under the law the time was fixed at four weeks. The time, therefore, by operation of law expired on the 28th day of May. See Gen. Acts 1903, p. 149. It does not appear from the record proper that any order was made by the court in term time for the signing of the bill of exceptions in vacation. It is true that the bill of exceptions contains a recital to the effect that an order was made by the court that the defendant be allowed 30 days in which to prepare and have signed his bill of exceptions. But under former rulings of this court we cannot look to the bill of exceptions for an order of the court which should otherwise appear of record proper. It has, time and again, been held by this court that the bill of exceptions cannot be looked to or considered for any purpose if signed in vacation, when not done in pursuance of the requirements of the law. The recital in the bill of exceptions that an order was made by the court is nothing more nor less than a mere statement by the presiding judge that such was a fact. Such an order is a matter of record, and cannot be supplied by the statement of the presiding judge.

The bill of exceptions in this case, having been signed in vacation, cannot, therefore, be considered by us for any purpose. No error appearing of record, the judgment will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

MITCHELL v. STATE.

(Supreme Court of Alabama. June 14, 1906.)

1. EXCEPTIONS, BILL OF—TIME FOR ALLOWANCE — EXTENSION OF TIME — POWER OF COURT.

Where the time fixed for the settlement of a bill of exceptions has expired without the entry of an order extending the time, the court cannot by order grant further time.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 60.]

2. SAME—RECITALS IN BILL—EFFECT.

A defendant, convicted on November 11th, was given 30 days in which to tender a bill of exceptions. A bill of exceptions, signed December 13th, recited that a motion in arrest of judgment was overruled and that the court granted defendant 30 days from November 13th, within which to tender his bill of exceptions, and that on November 17th the court made an order extending the time for 30 days from that date. *Held*, that the recitals in the bill of the orders did not supply their omissions in the record proper, and the bill could not be considered.

Appeal from Circuit Court, Butler County; J. C. Richardson, Judge.

"Not officially reported."

Joe Mitchell was convicted of crime, and he appeals. *Affirmed*.

G. A. Crenshaw and Powell & Hamilton, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. It appears from the record proper in this case that the defendant was convicted on November 11, 1905, and the defendant was allowed 30 days from that date within which to tender and have signed a bill of exceptions. According to said record the next order extending the time was made on December 13, 1905, by which the time was extended to January 20, 1906. The bill of exceptions was signed December 13, 1905, two days after the time originally granted had expired, and the same day on which the judge had made the second order. It is clear, under the numerous decisions of this court, that after the time granted had expired the judge could not bring new life into the order by granting further time.

The defendant, however, presents his bill of exceptions, and in it is set out a motion in arrest of judgment, which it is stated was overruled by the court, and it goes on to state that the court granted the defendant 30 days from November 13, 1905, within which to tender and have signed his bill of exceptions, and that subsequently the court on November 17, 1905, made another order extending the time for 30 days from that date. These are mere recitals in the bill of exceptions of what had been done, and do not appear on the record, nor by any order signed by the judge. The bill of exceptions cannot be considered. *Central of Ga. Ry. v. Carroll* (Ala.) 41 South. 517; *Dantzler v. Swift Creek Mill Co.*, 128 Ala. 410, 30 South. 674; *Brown v. State*, 133 Ala. 152, 32 South. 256; *Zion Lodge v. Folkes*, 132 Ala. 609, 32 South. 485; *Thompson v. Habil*, 135

Ala. 249, 33 South. 658; *Peterman v. State*, 139 Ala. 131, 36 South. 767.

There being no error apparent on the record, the judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

HAYS v. ROUCHELLE.

(Supreme Court of Alabama. May 31, 1906.)

1. BOUNDARIES—ESTABLISHMENT—EQUITABLE JURISDICTION.

The jurisdiction of chancery to establish disputed boundaries is not original or independent, and chancery will not undertake to settle obscured or confused boundaries, unless some equity is superinduced by the act of the parties or of those through whom they claim.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 139.]

2. SAME—BILL—ALLEGATIONS—SUFFICIENCY.

A bill to establish a boundary, alleging that defendant, being the owner of sections 20 and 21, conveyed section 20 to complainant by a deed merely describing the land as "all of section 20" in a certain township and range; that during the time the two sections belonged to defendant or those under whom she claimed title, the boundary line between the sections was destroyed; that such destruction was caused by the negligence of defendant, or those under whom she claimed; that the boundary was obliterated at the date on which defendant conveyed the land to complainant, who was ignorant thereof; that defendant remained the owner of section 21; that defendant did not at the date of the sale point out to complainant the boundary, and has not done so, though requested; and that complainant employed the county surveyor to locate the boundary, but was prohibited by defendant by threats of violence—states a cause of action within the jurisdiction of chancery to determine the boundary; the acts of defendant amounting to a fraud on complainant.

Appeal from Chancery Court, Greene County; Thomas H. Smith, Chancellor.

"To be officially reported."

Suit by E. F. Bouchelle against Cornelia O. Hays. From a decree overruling a demurrer to the bill, defendant appeals. *Affirmed*.

Mayfield & Verner, for appellant. Harwood & McKinley, for appellee.

DOWDELL, J. The appeal in this case is prosecuted from the decree of the chancellor, overruling the defendant's demurrer to the complainant's bill. The purpose of the bill is to establish the boundary of the land in question, which the bill alleges has been obliterated and become confused. In an elaborate note by Mr. Freeman to the case of *Stuart's Heirs v. Coalter*, reported in 15 Am. Dec. 745, where many cases bearing on the subject are cited, the equitable doctrine in regard to the confusion of boundaries has been ably reviewed and in a most exhaustive manner, and from this review of the authorities the doctrine may be well stated as follows: The jurisdiction of chancery to establish disputed boundaries of land is ancient and well-defined; but it is not an original or independent

ent jurisdiction, and "It is accordingly settled, as laid down in the principal case, that a court of chancery will not undertake to settle obscured or confused boundaries of land unless some equity is superinduced by the act of the parties or of those through whom they claim." See authorities cited in note on page 746 of the above case.

According to the averments of the bill in the case at bar, the respondent, being the owner of sections 20 and 21, which she had owned and been in possession of for 30 years, sold and conveyed section 20 to the complainant, a copy of which deed is attached as an exhibit to the bill. By this deed, in the description of the land conveyed, no boundaries are given, but the land is merely described as being "all of section 20" in a certain township and range in Greene county, Ala. The bill avers that during the time that said two sections of land belonged to the respondent, or those under whom she derived her title, the corners and boundary line between said sections were lost, obliterated, and destroyed; that such loss, obliteration, or destruction of said corners and boundaries were caused and allowed by the design, act, or negligence of respondent, or of those under whom she claimed said lands; that said corners and boundaries were lost and obliterated at the date on which respondent sold and conveyed said land to complainant, but that the complainant was then ignorant of this fact. The bill further avers that the respondent has been, since the sale by her of said section 20 to complainant, the owner of said section 21, and is still the owner thereof; that the respondent did not at the date of said sale point out to complainant the corners and boundaries of said land sold him, and has not since that date done so, although complainant has requested her so to do. The bill further shows, by its averments, that the complainant employed the county surveyor of Greene county for the purpose of locating and ascertaining the boundary line between section 20 and 21, but was prohibited by the respondent, through her agents, by threats of violence, from ascertaining and locating the corners and boundary line between said sections 20 and 21.

It was undoubtedly the duty of the respondent to have put the complainant in possession of the land, which she had sold and conveyed to him, and likewise a duty to have pointed out the boundary line of the land so conveyed, or at least to have permitted her grantee by a proper survey of the land so conveyed to ascertain the correct boundary. We are clearly of the opinion that, if the allegations of the bill are true as to the acts and conduct of the respondent, when taken in connection with the averments as to the obliteration and confusion of the boundary line, then the equity of the bill under the authorities is put beyond all question, and the case is one that calls for the interposition of a court of chancery. The acts and conduct of the respondent, charged in the bill, in equity

amount to a fraud upon the rights of the complainant, and is such an equity, superinduced by the act of the party, as gives the court jurisdiction under the authorities above referred to. We think the doctrine laid down in our own cases of *Ashurst v. McKenzie*, 92 Ala. 484, 9 South. 262, and *Guice v. Barr*, 130 Ala. 570, 30 South. 563, are authorities in support of the complainant's bill. Our conclusion is that the chancellor properly overruled the demurrer, and his decree will be here affirmed.

Affirmed.

WRAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

RAY v. STATE.

(Supreme Court of Alabama. June 5, 1906.)

1. HOMICIDE—ASSAULT WITH INTENT—PROOF OF INTENT.

Intent, on a prosecution under Code 1896, § 4346, for assault with intent to murder, may be inferred by the jury from the character of the assault, the use of a deadly weapon and the other attendant circumstances.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 262, 263, 543-552.]

2. SAME—INSTRUCTION.

A charge, on a prosecution for assault with intent to murder, that if defendant shot B. with intent to kill him, and such shooting was done in a sudden encounter or affray, by the use of a deadly weapon concealed before commencement of the fight, and B. had no deadly weapon drawn, and defendant was the assailant, the jury should find him guilty is erroneous; the fact that the weapon was concealed being immaterial, and it being necessary that there be an intent, not merely to kill, but to murder.

3. SAME — HARMLESS ERROR — ADMISSION OF RES GESTÆ.

Though, on a prosecution for assault with intent to murder, that if defendant shot B. with intent to kill him, and such shooting was done in a sudden encounter or affray, by the use of a deadly weapon concealed before commencement of the fight, and B. had no deadly weapon drawn, and defendant was the assailant, the jury should find him guilty is erroneous; the fact that the weapon was concealed being immaterial, and it being necessary that there be an intent, not merely to kill, but to murder.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 709, 710.]

4. CRIMINAL LAW — EVIDENCE — CONVERSATIONS PROVED BY STATE.

A conversation, though not material or relevant, having been proven by the state, defendant has the right to bring it all out or give his version of it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 862.]

Haralson and Dowdell, JJ., dissenting in part.

Appeal from City Court of Mobile; O. J. Semmes, Judge.

"To be officially reported."

Marion F. Ray appeals from a conviction. Reversed and remanded.

The defendant was indicted, tried, and convicted for assaulting one Blalock with a pistol with the intent to murder him. The evidence tended to show that Clarence Blalock was shot by defendant about November 1, 1904; that there were three pistol wounds, one near the knee, one in the shoulder, and one near the spine, in the back, opposite the

tenth back bone. A conversation was introduced by the state between witness Blalock and a young lady at the depot in the waiting room named Claywell, when an officer interfered and said something to witness; that afterwards an altercation arose between witness and the officer, and a difficulty ensued, in which the officer struck witness and the witness struck the officer two or three times, when the officer put his hand behind his back and witness ran, when the shots were fired. The defendant offered to prove by its witness Wilkins the conversation between the young lady and the prosecutor just prior to the difficulty, and to that end asked a number of questions as to what that conversation was, to which the court sustained objections. The defendant endeavored to offer several sections of the Code of the city of Mobile relative to the duties of police officers, objection to which was sustained. The defendant excepted to the following part of the oral charge of the court: "If you find that a person has killed another by the use of unlawful force with a weapon calculated to take life in such a manner as calculated to produce death, the presumption would arise that the killing was intentional, unless the evidence which proves the killing, or some other evidence in the case, negatives this presumption." And: "The law is that where a killing is effected by the use of a deadly weapon, malice would be implied from the use of such a weapon, unless the evidence which shows the killing, or some other evidence in the case, negatives the presumption. The defendant requested the following charge, which was refused: Charge A: "Before a defendant can be convicted of an assault with intent to murder, the evidence must satisfy the jury beyond a reasonable doubt that he intended to murder the person assaulted. Proof that he intended to kill such person is not sufficient." At the request of the state the court gave the following written charge: "If the jury believe from the evidence beyond a reasonable doubt that the defendant shot Blalock with a pistol, with intent to kill him, in Mobile county, within three years before the finding of this indictment, and that such shooting was done in a sudden encounter or affray, by the use of a deadly weapon which was concealed before the commencement of the fight, and that Blalock had no deadly weapon drawn, and that the defendant Ray was the assailant in said difficulty, they should find the defendant guilty of assaulting said Blalock with the intent to murder him."

Gregory L. & H. T. Smith, for appellant.
Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. The defendant was indicted and tried under section 4346 of the Code of 1896, which provides: "Any person who commits an assault upon another, with intent to murder," etc. And in order to convict the defendant it is incumbent upon the

state to prove that the assault was committed with the intent to murder; but, like malicious intent in murder, it may be inferred by the jury from the character of the assault, the use of a deadly weapon, and the other attendant circumstances. *Walls v. State*, 90 Ala. 618, 8 South. 680 (where the case of *Smith v. State*, 88 Ala. 23, 7 South. 103, is explained and qualified); *Ogletree v. State*, 28 Ala. 693; *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Smith v. State*, 83 Ala. 26, 3 South. 551. Section 4856 of the Code of 1896, making a killing with a concealed weapon under certain conditions murder in the second degree, has no application to an assault to murder. Under the former the intent to murder is the very essence of the offense, while the statute with reference to the latter is intended to make certain homicides murder in the second degree, regardless of the intent.

A charge in a case of assault to murder, which predicates a conviction upon the use of a concealed weapon under certain conditions, regardless of the intent, is bad, notwithstanding it would be a good charge in a homicide case; and the case of *Scoggins v. State*, 120 Ala. 369, 25 South. 180, in so far as it holds that such a charge was good in cases of assault to murder is hereby overruled. The trial court erred in giving charge 1 requested by the state.

"It is not every assault with intent to kill that is an assault with intent to commit murder. There must be malice in the attempt to take human life to constitute this statutory felony. But, when the assault is made with a deadly weapon in sufficient proximity to inflict a deadly wound, the law implies malice from the use of such instrument, and casts on the defendant the burden of proving that the killing or attempt to kill was in self-defense, or, if successful, would only be manslaughter, unless such defensive facts and circumstances are shown in the testimony which proves the killing, or attempt to kill." *Williams v. State*, 77 Ala. 53; *Brown v. State* (Ala.) 38 South. 268; *Hadley v. State*, 55 Ala. 31; *Sylvester v. State*, 72 Ala. 201. And this rule prevails in cases of this kind, as well as cases of murder. It is true the burden of proving the intent is on the state; but, when the state shows a certain kind of assault, as above indicated, it proves, *prima facie*, its case, unless the other evidence overcomes its *prima facie* proof; and the law only implies malice after the state proves its *prima facie* case and in the absence of proof of defensive facts and circumstances. There was no error in that part of the oral charge excepted to by the defendant.

Charge A, refused to the defendant, was fully covered by charge 3, given at his request.

While it was immaterial whether the pistol was concealed or not, the trial court committed no reversible error in permitting the wit-

ness Sullivan to testify that defendant had on a coat and that he could not see the pistol before he reached back and pulled it, as it was a part of the *res gestæ*. The record discloses no exception by the defendant to the action of the court in permitting the witness to testify that the pistol was concealed.

While the conversation between Blalock and the young lady prior to the difficulty may not have been material or relevant evidence, yet it was proven by the state, and the defendant had the right to bring it all out or get his version of it. *Gibson v. State*, 91 Ala. 69, 9 South. 171; *Dobson v. State*, 86 Ala. 63, 5 South. 485.

There was no error in sustaining the state's objection to the introduction of the city ordinances upon the present state of the record.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

TYSON, SIMPSON, and DENSON, JJ., concur.

HARALSON and DOWDELL, JJ., dissent as to charge 1, given at the request of the state, and think it was properly given.

ROSE, Mayor, v. LAMPLEY, Probate Judge. (Supreme Court of Alabama. June 5, 1906.)

1. INTOXICATING LIQUORS—DISPENSARIES—CONFLICTING PROHIBITORY STATUTES.

Under Gen. Acts 1898-99, p. 110, authorizing the establishment of dispensaries, it was not the intention of the Legislature that dispensaries should be established at places where the sale of liquors was prohibited, restrained, or restricted by statute.

2. STATUTES—EXTENSION BY REFERENCE TO TITLE.

Loc. Acts 1898-99, pp. 1632, 1633, declaring that the provisions of the "Moody bill shall be operative in the town of Georgiana," etc., is in conflict with Const. 1901, § 45, providing that the provisions of a law cannot be extended by reference to its title only.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 206.]

3. INTOXICATING LIQUORS—DISPENSARY ACT—APPLICATION.

The dispensary act (Gen. Acts 1898-99, p. 110) is not made to apply to a particular locality merely by the repeal, after the enactment of the dispensary act, of a statute which existed at the time the dispensary act was passed and prohibited the sale of liquor in that locality.

4. STATUTES—EXPRESS REPEAL—APPLICATION OF REPEALING ACT.

Act Feb. 23, 1899 (Loc. Acts 1898-99, pp. 1632, 1633), entitled "An act to repeal the prohibition act approved February 26, 1887, so far as the same relates to the town of Georgiana," and by the first section, expressly repealing the act mentioned in the title, did not repeal Act Feb. 20, 1889 (Acts 1888-89, p. 512), prohibiting the sale of intoxicating liquors in Butler county.

5. MANDAMUS—COMPELLING OFFICIAL ACTION—INTEREST OF RELATOR.

Under the dispensary act (Gen. Acts 1898-99, p. 110), making it the duty of the mayor of a municipality to certify the fact of vacancy in

the office of dispenser to the judge of probate, who was then authorized to call a meeting of the county commissioners to furnish the names of three men having the qualifications of dispenser, the mayor cannot by mandamus require the judge of probate to perform the duties imposed upon him by the statute.

Appeal from Circuit Court, Butler County; J. C. Richardson, Judge.

"To be officially reported."

Mandamus proceeding by T. L. Rose, as mayor, against H. D. Lampley, as judge of probate. From a judgment denying the writ, plaintiff appeals. Affirmed.

Powell & Hamilton, for appellant. A. E. Gamble, J. D. Burnett, and Pearson & Richardson, for appellee.

TYSON, J. The object sought to be accomplished by this proceeding is to compel by mandamus the respondent, as judge of probate, to discharge a certain duty imposed upon that class of officers by the act of February 18, 1899, known as the "Dispensary Act," to wit, to call a meeting of the court of county commissioners of his court in order to furnish to the petitioner the names of three men having the qualifications of a dispenser, etc., in the town of Georgiana. Gen. Acts, 1898-99, p. 110. Of course, no such duty is upon the respondent if the act above referred to is not in force in that town. It is entirely clear from the act that it was the intention of the Legislature that dispensaries were not to be established under it when there is in force any law, local or general, which tends "to prohibit, retard, restrain or restrict the traffic in spirituous, vinous or malt liquors or intoxicating drinks of any kind."

It is in effect conceded by appellant's counsel that on the date of its approval there was in force in the town of Georgiana a local prohibition statute; that no intoxicating liquors of any kind could be legally sold in that town or the county in which it is situated, except in beat 12. Acts 1888-89, p. 512; *Ex parte Pierce*, 87 Ala. 110, 6 South. 392. But it is contended that this prohibitive act was repealed by the act of February 23, 1899. Loc. Acts 1898-99, pp. 1632-1633. This might be conceded, and yet it may be doubted whether the dispensary act would be in force in the town or county unless the third section of the supposed repealing act is valid and operative. That section undertakes to make the dispensary act operative in the town of Georgiana by mere reference to the "Moody bill." It reads as follows: "Be it enacted, that the provisions of the Moody bill be operative under this act at the expiration of sixty days." Independent of the omission of all reference to this subject in the title of the act, and its indefiniteness and uncertainty as to what is referred to, it is clearly violative of that clause of the Constitution which prohibits the provisions of any law to be extended by reference to its title only. Section 2, art. 4,

Const. 1875; section 45, Const. 1901; *Stewart v. Court of County Commissioners*, 82 Ala. 209, 2 South. 720; *Miller v. Berry*, 101 Ala. 531, 14 South. 655; *Rice v. Wescott*, 108 Ala. 353, 18 South. 844. But it seems to be insisted that, had this section been omitted and if the act operated as a repeal of the prohibitive statute, the dispensary law would be in force in Georgiana anyway. It does not appear that it was the legislative intention that this law should be so elastic as to extend to all locations where local prohibition acts have been repealed since its passage. The Legislature certainly has never given it such a construction. To the contrary, the legislative construction has been that it does not. This is clearly manifested, not only by the section above quoted, but also by the passage of a number of local statutes establishing dispensaries in theretofore prohibited districts. Indeed, the writ of quo warranto could never have been properly awarded in the case of *This Appellant et al. v. State ex rel. Sims*, 40 South. 951, if this contention be sound. For clearly, if the general dispensary act was in force in Georgiana, it was of no moment whether the local act authorizing the operation of the dispensary was constitutional or unconstitutional.

We do not wish, however, to be understood by the concessions here made, solely for the purpose of this decision, as holding that the act of February 23, 1899, was a repeal of the act of February 20, 1889. Acts 1888-89, p. 512. To the contrary, we are clearly of the opinion that it was not. The supposed repealing act in its title and body particularizes no other law than the act of February 26, 1887. Acts 1886-87, p. 700. In short, that is the only act referred to, excluding all reference to any other. "*Expressio unius est exclusio alterius*." Its language is unambiguous and plain, and therefore there is no room for construction. It is true that the act of February 26, 1887, had been repealed by the act of 1889; but this fact does not warrant the court's extending the general repealing clause contained in section 2 of the act of 1899, to a subject not enumerated in it, viz., the act of 1889. It is clear to us that the Legislature either did not know or overlooked the fact that the act of 1887 had been repealed by the act of 1889.

It is not the province of courts to enact laws, but to construe them. Nor can they, under the guise of construction, extend the legislative intention to a subject not included in an act, but rather excluded by its plain language, for the purpose of correcting a mistake on the part of the Legislature. Furthermore, the petition in this case is not exhibited by the municipality under its corporate name, "*The Town of Georgiana*," which, under its act of incorporation, is endowed with the right of maintaining suits, etc. It is true the dispensary act imposes the duty upon the mayor and other chief

executive officers of the municipality to certify the fact of vacancy in the office of dispenser to the judge of probate in the county in which the town is situated; but this is merely for the purpose of putting in operation the machinery by which the vacancy in that office may be filled, and does not confer upon the mayor the right to enforce the performance of that duty. It is a duty owing to the municipality, and not to the mayor, as its officer. This being true, the petitioner has shown no right, and, indeed, could not, to be conserved by the writ sought by his petition. On this point we apprehend it is of no moment that it is not assigned as a ground of demurrer. We will certainly not reverse the judgment denying the petition when on its face it shows that the complaining party has no right to have the duty performed by the party against whom the writ is sought to be issued, and especially where the petition cannot be amended as here. Affirmed.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

JOHNSON v. JOHNSON.

(Supreme Court of Alabama. June 7, 1906.)

QUIETING TITLE—STATUTORY ACTION—POSSESSION OF PLAINTIFF.

Under Code 1896, § 809, authorizing any one in the peaceable possession of land to maintain an action to determine title thereto, such an action cannot be maintained where the evidence shows acts of possession on the part of defendant.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quieting Title, §§ 55, 56.]

Appeal from Chancery Court, Clarke County; Thomas H. Smith, Chancellor.

"To be officially reported."

Action by Fannie Johnson against Edmond Johnson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

William D. Dunn, for appellant. John S. Graham, for appellee.

SIMPSON, J. The bill in this case was filed by the appellee (as complainant) against the appellant (defendant), alleging that she was the owner and in peaceable possession of the lands in controversy; that her husband, now deceased, had entered the land from the United States Government; that it was all the land owned by him at his death, being 160 acres, but there is no allegation or proof as to its value; also that appellant, who is her son, claims to own said land, that no suit is pending "to force the validity of his claim," and that the suit is brought "to settle the title to the land." The prayer is that "the defendant be required to set forth and specify his claim, title, or interest, and show by what instrument the same is derived or created," and that such title or interest so set up be declared to be invalid, and that

complainant's title is clear, etc. It will be seen that the bill is a proceeding entirely under the statute. Section 809 et seq., Code 1896. There are no allegations calling for an adjudication, under the general principles of the law, either for quieting title or for removing a cloud upon the title. The requirements of the statute are clear that, in order to maintain a suit thereunder, the complainant must be in the "peaceable possession" of the lands, and our decisions, following the language of the statute, are uniform to the effect that said possession must be peaceable, "as contradistinguished from contested, disputed, or scrambling possession." *Lyon v. Arndt*, 38 South. 242; *Ladd v. Powell*, 39 South. 46; *Randle v. Daughdrill et al.*, 39 South. 162.

The evidence in this case shows acts of possession on the part of the defendant, and the fact that he has been prosecuted for trespass does not change the fact that the possession is claimed by the respondent, and that the possession of the complainant is disputed and not peaceable. We do not decide as to the effect of these acts of possession in other aspects, nor do we decide that there might not be relief under appropriate allegations for removing a cloud under general equitable principles, irrespective of the statute, but only that there is not shown that peaceable possession which the statute requires in proceedings under it. It may also be remarked that the claim of title on the part of the complainant is simply as widow of Cyrus Johnson, while the respondent is his son; and, while the testimony shows that the land was only 160 acres in area, it does not show what its value was. If it was worth more than \$2,000, the son may have had some interest in it. As both parties claim under Cyrus Johnson, we do not deem it necessary to notice that the patent offered in evidence was to Cyrus Jones. We take it for granted that this is a clerical error.

The decree of the court is reversed, and the cause remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

NEW v. YOUNG.

(Supreme Court of Alabama. June 12, 1906.)

1. EVIDENCE—SUBSEQUENT ACTS OR DECLARATIONS.

Where, in a prior suit for the cancellation of certain deeds, witness had filed an answer admitting the allegations of the bill, and such answer was offered in evidence in a subsequent ejectment suit, the witness was not entitled to testify that she afterwards filed an amended answer denying the allegations of the bill.

2. WITNESSES—IMPEACHMENT.

Where a witness under whom defendant in ejectment claimed title testified that defendant had never loaned her any money and that she had no knowledge of the contents of an affidavit which she had signed admitting that defendant had loaned her various sums on the property from time to time, the affidavit was properly admitted to show that she did know its contents

at the time she made it, and to impeach her testimony.

3. EVIDENCE—PLEADINGS.

Where a witness admitted signing an answer admitting the averments of a bill, the bill was admissible to prove the admissions.

4. WITNESSES—CONTRADICTION.

Where a witness admitted having signed an affidavit which was contradictory to his testimony, it was admissible against him, though he testified that defendant procured his signature thereto by improper means.

5. EJECTMENT—IMPROVEMENTS.

A defendant in ejectment is entitled to prove valuable improvements erected by him on the land in good faith in reduction or extinguishment of the rental damages, irrespective of the statutory suggestion of the adverse possession, though he could not have a judgment over in the absence of such suggestion.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 502-508.]

6. FRAUDULENT CONVEYANCE — RIGHTS OF CREDITORS.

Where a conveyance from plaintiff's wife to her brother-in-law and another from him to plaintiff were made for the purpose of defrauding defendant, who held a mortgage on the land and was a creditor of the wife, defendant was entitled to have such conveyances set aside, though plaintiff might not have known of the existence of defendant's mortgage.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 646.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by George New against William Young. From a judgment for defendant, plaintiff appeals. Affirmed.

See 39 South. 201.

This was a statutory real action in the nature of ejectment, brought by appellant against appellee to recover certain lands therein described. The plaintiff bases his right of recovery upon a patent issued by the United States, August 5, 1897, to Martha Baker, as the widow of Henry Baker, who made the original entry on the lands; a deed from Martha New, formerly Martha Baker, and George New, her husband, to Charles New, of date June 16, 1900; and a deed from Charles New to this appellant—all of which papers were properly identified. The witness Martha New denied that the appellee had ever loaned her any money. The question was then asked her if she was not the same Martha New, then Martha Baker, who went to the office of Gregory L. & H. T. Smith with William Young, Jr., on the 9th day of October, and if she did not sign an affidavit, then shown to the witness. Witness admitted that she was the same person, and that she went to the office of said Smith on said day, and that she signed the affidavit shown her; but she did not know what the contents were. She denied all of the facts stated in the affidavit. The affidavit was then offered, and objected to by the plaintiff, which objections the court overruled. The contents of the affidavit were that prior to March 12, 1898, the appellee loaned her \$100 and took her promissory

note; that subsequently he loaned her another \$100, and later another \$100, for all of which he took her notes; that on May 12, 1898, he loaned her another \$100, for which he took her note and a mortgage on the land to secure the money then and previously advanced to her, with an agreement that, if she did not pay the money when due, appellee was to pay her another \$100 and take a deed to the land; that in February, 1900, she married George New, who knew all about this mortgage transaction; that some time in June her husband told her she could beat Young out of this debt and mortgage by making a conveyance of her property to her brother, Charlie New, and letting Charlie make a deed back to him, her husband, and that he would hold the property for her and it would be her property, but they would beat Young; that she yielded to persuasion, made the deed, and that George told Charlie the purpose of the deed in her presence; that they had a deed made from her and her husband to Charlie New, reciting a consideration of \$10, and then a conveyance from Charlie New to George New; that Charlie gave George \$10, and, then gave him another \$10, and, when the deed was made from George to Charlie, George gave Charlie the \$20 back, and Charlie gave George the deed; that she went on living on the property, and in March, 1901, her husband abandoned her; that about June 12th, Young came to her and offered to pay her the other \$100 agreed on, and asked her to make him a deed to the property. She took the \$100 and made him an absolute deed to the property, and so far as she knew Young did not know of the deeds which had passed between her and Charles and George New. Young afterwards filed a bill in chancery, setting up his mortgage and the facts alleged in the affidavit above set out, the fact of a deed from Martha New to himself, and his want of knowledge of the fraudulent transaction by which the equity of redemption was vested in George New, and praying that it be ascertained and decreed that George New had abandoned his wife before the conveyance by Martha New to him, that said George New's name was not necessary to said deed, that the conveyance by Martha New to him be declared a valid and binding conveyance, and for a cancellation of the deeds from Martha Baker to Charles New and from Charles New to George New as clouds upon his title, etc. George New and Martha New were made parties respondent to the bill. Martha New filed an answer, admitting the allegations of the bill. The defendant offered the answer of Martha New in evidence, and offered the bill for the purpose of showing what said Martha New admitted by the admissions of her answer. The plaintiff objected, but the court overruled the objection. Walter Baker, a witness for the plaintiff, testified that he was a son of Martha New; that he was present when Young and

Whitner were at the house fixing up some papers for his mother to sign; that Young told him he was fixing up a mortgage against George New. Young further stated that he wanted to buy a place from witness' mother, but he could not buy it, because she had made a deed to Charles New, and Charles had made a deed to George, and that the only way he could get it was to get a mortgage and date it back of these deeds; that Young took witness off, got him drunk, and took him down to Mr. Smith's office, and told him if he would sign a paper he would give him \$200; that he signed the paper, but after he got sober he realized that he had done wrong, and went down and asked Mr. Smith to give him back the paper, but Mr. Smith refused. The affidavit made by Baker was contradictory of the above statements made by him as a witness.

The court in his general charge said to the jury: "If the plaintiff was not aware of any debt due by Martha New to William Young, and was not aware of the existence of the mortgage of Martha Baker to William Young, the plaintiff would not be barred by the defendant's mortgage. The deed would be a good deed as against the claim of the defendant." The plaintiff excepted to the above set out charge of the court, and also excepted to the following portion of the court's oral charge: "That if the jury are reasonably satisfied from the evidence of the relation of these parties to each other, and the consideration set up in the deed, they could consider that for the purpose of and as a circumstance tending to show whether it was a bona fide deed or not." The plaintiff also requested the court to give the following written charges, which were refused: Charge 1: "The court charges the jury that if they find from the evidence that the plaintiff is a purchaser for a valuable consideration of the property involved in this suit, and that at the time of the purchase he had no notice of the defendant's mortgage on this property, then said mortgage was void as to the plaintiff; and, if you so find, then the plaintiff is entitled to recover." Charge 2: "The court charges the jury that the plaintiff is a purchaser for a valuable consideration of the property involved in this suit, and, if they find from the evidence that at the time of the purchase by the plaintiff he had no notice of the mortgage of the defendant on this property, then said mortgage is void as to the plaintiff." There was judgment for defendant, and plaintiff appeals.

Francis J. Inge, for appellant. Gregory L. & H. T. Smith, for appellee.

ANDERSON, J. There was no error in sustaining the objection to plaintiff's question to witness Smith: "If Mrs. New did not subsequently file an amended answer denying the allegations of the bill?" She could not use subsequent acts or declarations to fortify her own testimony, and this was no ex-

planation of an admission made in the original answer.

There was no error in permitting the defendant to introduce the affidavit made by the witness Martha New, as it was contradictory of her testimony and a proper predicate was laid; and while the witness did not deny making the affidavit she denied knowledge of its contents, which gave the defendant the right to prove that she did know the contents when she made the affidavit, and the affidavit was, of course, properly admitted.

There was no error in the ruling of the trial court in permitting the introduction of the bill in chancery. The defendant admitted signing the answer admitting the averments of the bill, and the bill had to be admitted to prove what she admitted, and was relevant if it contradicted or impeached the witness. Nor was there any error in overruling plaintiff's objection to the introduction of the answer.

There was no error in admitting in evidence the affidavit made by Walter Baker. It was contradictory of his testimony, he admitted having made it, and it was competent to get his former statement before the jury by introducing the affidavit.

There was no error in permitting defendant to prove valuable improvements on the land against the rent or damages, in the event the plaintiff recovered the land. A defendant has the right to prove valuable improvements erected by him in reduction or extinguishment of the rental damages, irrespective of the statutory suggestion of adverse possession, but would, of course, not be entitled to a judgment over in the absence of the statutory suggestion. *Kerr v. Nicholas*, 88 Ala. 346, 6 South. 698; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

There was no error of which the plaintiff can complain as to the oral charge of the court.

The trial court properly refused charges 1 and 2, requested by the plaintiff. We are aware of the fact that a purchaser for value without notice, whether the consideration be adequate or not, would be protected under section 1005 of the Code of 1896, as against an unrecorded conveyance. But section 2156 of the Code of 1896 may have some influence on the case at bar. If Wm. Young was a creditor of Martha New, and the conveyances made by Martha New to Charles New and by Charles New to George New were made to hinder and delay the creditors of Martha, they were void as against said creditors. There was evidence from which the jury may have inferred fraud, and that William Young was a creditor; and, if he was, he had the right to break down the plaintiff's title and defeat a recovery, whether the plaintiff knew of the existence of his mortgage or not. *Howell v. Carden*, 99 Ala. 100, 10 South. 640; *Thames v. Rembert's Adm'r*, 63 Ala. 561. He may not have known

of the mortgage, yet may have known that Young was a creditor of Martha.

The judgment of the circuit court is affirmed.

TYSON, SIMPSON, and DENSON, JJ., concur.

DANIELS v. STATE.

(Supreme Court of Alabama. June 14, 1906.)

1. CRIMINAL LAW—EVIDENCE—CONFESSIONS—CORPUS DELICTI.

Where, on a prosecution for the larceny of coal from a railroad, there was testimony that defendant was seen driving a wagon on which were several sacks of coal, the sacks not being tied and containing coal in large lumps, and it appeared that coal had been missed by the railroad company, it was proper to permit the sheriff to testify that at the time he arrested defendant he stated that he had brought the coal described in the testimony to town.

2. LARCENY—CONVERSION BY SERVANT.

A servant employed by a railroad, and who had charge of coal used at a pumping plant upon the premises of a railroad, was guilty of larceny in taking the coal and converting the same to his own use.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 42.]

Appeal from Law Court, Pike County; A. H. Owens, Judge.

"Not officially reported."

Mason Daniels was convicted of petit larceny, and he appeals. Affirmed.

The defendant was tried for petit larceny, the taking of coal belonging to the Atlantic Coast Line Railroad Company. The evidence tended to show that the coal was delivered to the defendant with which to run the stationary engine to pump water into the tanks of said railroad company. It was shown that the defendant was seen in Troy driving a wagon on which was five or six sacks of coal, that the sacks were not tied, and that they contained coal in large lumps. It was further shown that, about a week before the defendant was seen with the coal, four or five tons of similar coal had been unloaded by the railroad company at its tank and on its right of way in Pike county; that coal had been missed from said pile on several different occasions. After the introduction of this testimony the state offered to show by the sheriff, Reeves, and one Stephens, that, at the time the sheriff arrested the defendant, defendant told him that he had brought the coal to town that Mr. Harold said he brought (Mr. Harold was the witness whose testimony is above set out), but that defendant said he had a right to the coal. It was shown before the introduction of this statement that it had been voluntarily made, and that no threats were offered defendant, nor any promises or other inducements made. The defendant objected to the introduction of this testimony, because it was irrelevant, and because the corpus delicti had not been proven. It was shown that the defendant was in the employ of the railroad in and about its

tank and pumping engine, and that the coal was in defendant's charge as such employé for the purpose of being used as fuel to generate steam in said engine.

The defendant requested the following charges, which the court refused: "(8) If the jury believe from the evidence that the defendant was employed by the railroad company to run the pumping engine of said road, and coal was placed in his charge as such employé of said road for the purpose of using it to run said engine, and the defendant converted to his own use the portion of the coal so placed in his possession by said road for the purpose of running said engine, you must find the defendant not guilty. (9) If the defendant was in possession of the coal alleged to have been stolen as the agent of the railroad company, and while in such possession he converted said coal to his own use, he cannot be convicted of larceny. (10) If the jury believe from all the evidence that the defendant was in the rightful possession of the coal alleged to have been stolen at the time it is alleged he took the coal, you must find him not guilty."

T. L. Boren, for appellant. Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. If it be necessary to prove the corpus delicti before confessions are admissible in evidence in cases of misdemeanor, which point we do not decide, there was proof from which it could be inferred that the coal seen in the possession of the defendant was stolen from the pile of the Atlantic Coast Line Railroad, and the trial court committed no error in admitting the evidence of witnesses Reeves and Stephens, nor in refusing the general affirmative charge requested by the defendant.

The defendant was a mere servant of the railroad company, whose duty it was to run the tank and use the coal in the pump engine. The coal was on the company's premises, and if the defendant had the custody thereof, the possession was still in the owner, and the defendant was guilty of larceny, if he fraudulently converted the coal to his own use. *Crocheron v. State*, 86 Ala. 64, 5 South. 649, 11 Am. St. Rep. 18. There was, therefore, no error in refusing charges 8, 9, and 10, requested by the defendant.

The judgment of the lower court is affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

STEVENSON v. STATE.

(Supreme Court of Alabama. June 14, 1906.)

1. INDICTMENT—MOTION TO QUASH—ORGANIZATION OF GRAND JURY.

Under Code 1896, § 5269, limiting the causes for which the organization of the grand jury can be investigated, an indictment was not subject to a motion to quash because 24, instead of 21, names were drawn and returned into court;

it appearing that only 19 men appeared in response to the summons and that they were organized into the grand jury.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 481.]

2. HOMICIDE — INSTRUCTIONS — PROVINCE OF COURT AND JURY.

An instruction that if deceased was sitting on the ground on his haunches and defendant was standing up, and deceased started to get up and put his hand behind him or towards his hip pocket, but did not draw any pistol or other weapon, and defendant on the instant shot him, this would constitute murder, though deceased, five or ten minutes before the killing, said that he had a better pistol than defendant, and that when he pulled it he would be damn sure to use it, was erroneous.

Appeal from Circuit Court, Monroe County; C. J. Torrey, Special Judge.

"Not officially reported."

Tom Stevenson was convicted of murder, and he appeals. Reversed and remanded.

The defendant was indicted and tried for murder in the first degree, convicted of murder in the second degree, and sentenced to 37 years. The testimony tended to show that in Monroe county the defendant and the deceased and others were playing a game of dice, commonly called "craps"; that the deceased proposed to raise the bet from 10 cents to 25 cents, and the defendant objected. Deceased said he would quit the game, and got up and put his rain coat over his shoulder, but did not leave, and said he would not leave, until another man that was in the game got the 70 cents that was due him. It appeared that defendant and another man were interested in a silver dollar; the defendant owning 30 cents, and the other man 70 cents. Some conversation was indulged in in reference to it, and deceased and defendant cursed each other. At the time of the discussion defendant was standing on his feet, while deceased was squatting down on the ground. Deceased said, "I can't make you pay it, but I will be damn sure to see that you do pay it," and commenced to get up, putting his right hand behind his back on or towards his hip pocket, whereupon defendant fired downward upon deceased, killing him. No pistol was found on deceased body. The facts in reference to motion to quash are sufficiently set out in the opinion.

In his oral charge to the jury, the court said: "(1) Gentlemen of the jury, the court charges you, that if you believe from the evidence beyond a reasonable doubt that the deceased was sitting on the ground on his haunches and defendant was standing up, and the deceased started to get up and put his hand behind him or towards his hip pocket, but did not draw any pistol or other weapon, and the defendant on the instant shot him, this would in law be murder, though you may believe from the evidence that the deceased, five or ten minutes before the killing, had said that he had a better pistol than the defendant, and that, when he pulled it, he would be damn sure to use it;

that this was said some five or ten minutes before the killing. (2) That if you believe from the evidence beyond a reasonable doubt that the deceased was sitting on the ground and on his haunches and that the defendant was standing up, and the deceased started to get up and put his hand behind him and on or towards his hip pocket, and the defendant then fired the fatal shot, this would not in law be an impending and imperious necessity to take human life, though deceased had said to defendant five or ten minutes before the shooting that he possessed a better pistol than defendant, and when he pulled it he was sure to use it, and the deceased was not at that time exhibiting or showing any pistol or other weapon of any kind, or committing an assault."

The defendant requested the court to give the following charges, which were refused: Charge 1: Affirmative charge. Charge 2: "The court charges the jury that under the evidence in this case they cannot find the defendant guilty of any degree of homicide greater than manslaughter in the second degree." Charge 3: "The court charges the jury that if the intent be evident by a present act or demonstration, inducing in the mind of the defendant the belief that his life was in danger or that he was in danger of great bodily harm, then defendant had the right to shoot and take the life of deceased." Charge 5: "The court charges the jury that a reasonable belief, begotten by attendant circumstances fairly creating it and honestly entertained, will justify homicide under proper condition; and if, under the evidence in this case, such a belief existed, they will find the defendant not guilty." Charge 6: "The court charges the jury that the law does not require a man in a difficulty to retreat, if by retreating the danger is increased." Charge 7: "The court charges the jury that if the defendant was not the aggressor, and did nothing to bring on the difficulty, then he can avail himself of self-defense." Charge 8: "The court charges the jury that under the evidence in this case they cannot convict the defendant of more than manslaughter."

J. N. Miller, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. In this case the appellant was convicted of murder in the second degree. The defendant made a motion to quash the indictment, because of the fact that, in the drawing of the names for the formation of the grand jury, 24 names were drawn and returned into court, in place of 21, as the statute directs. The record shows that only 19 men appeared in response to the summons, and they were organized into the grand jury. There was no error in overruling said motion, as the statute (Code 1896, § 5269) limits the causes for which the organization of the grand jury can be inquired into. *Andrew Rogers v. State* (Ala.) 40 South. 572, and cases cited.

The court erred in giving that part of the oral charge marked (1). Under the evidence in this case it was a question for the jury to consider as to whether the expressions and demonstrations of the deceased were such as to justify the belief on the part of the defendant that he was in imminent peril. The second part of the general oral charge of the court excepted to is liable to the same criticism.

We have examined the written charges requested by the defendant in this case, and find no error in the refusal of the court to give them.

The judgment of the court is reversed, and the cause remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

SMITH et al. v. PHILIPS et al.

(Supreme Court of Florida, Division A. May 22, 1903.)

1. TAXATION—COLLECTION OF TAXES—SALE OF LAND—STATUTORY PROVISION.

Under chapter 4115, p. 3. Laws 1893, a sale of lands in 1894 for the 1893 tax assessment was authorized.

2. SAME—TAX DEED—VALIDITY.

The mere omission from the description of lands embraced in a tax deed of the words "Tallahassee meridian" does not render a tax deed void, since it must be presumed that only Florida lands are being sold, and upon such presumption no possible ambiguity is made to appear.

3. SAME.

The insertion by the clerk into the statutory form of a tax deed of the words "the required thirty days' notice having been given" is unnecessary, but, being a step in the statutory proceedings antecedent to the deed, does not render the deed void on its face. The fact, however, is presumed, subject to rebuttal.

4. SAME—CONSTRUCTION.

A tax deed, after reciting separate sales of two 40's to the same purchaser, does not show conclusively a joint sale by the recital therein that the grantee had acquired the interest of the purchaser to the lands by virtue of such tax "sale," as appears indorsed on the "certificate."

5. SAME—ASSIGNMENT—BURDEN OF PROOF.

The statutory form of the tax deed does not make provisions for an assignment, and the burden is upon the claimant under a tax deed, who was not the purchaser at the sale, to prove the assignment.

6. SAME—STATUTORY FORM.

Substantial compliance only is required by statute with the form of the tax deed prescribed in chapter 4115. The use of the words, "Done in the presence of" two witnesses, in lieu of "Signed and sealed in the presence of," does not render the deed void.

(Syllabus by the Court.)

Error to Circuit Court, Hernando County; William S. Bullock, Judge.

Action by N. D. Phillips and another against Georgiana Smith and her husband. From a judgment in favor of plaintiffs, defendants bring error. Reversed, and new trial ordered.

Coogler & Son, for plaintiffs in error. W. W. Hampton, for defendants in error.

COCKRELL, J. After the plaintiffs in an action of ejectment had deraigned their title, the defendant offered in evidence a certified copy of a tax deed, but to its being read in evidence the court sustained an objection, "that the sale of lands for taxes was not authorized by the acts of the Legislature of 1891, and that the deed is void upon its face."

There was verdict and judgment for the plaintiffs, to which the defendants prosecute this writ and assign as error the above ruling.

The first subdivision of the objection presents no difficulty. The tax deed is based upon a sale in 1894 for taxes assessed in 1893.

The scheme devised in 1891 for certification of lands for unpaid taxes had not worked successfully, and the next Legislature thereafter, which convened in 1893, returned to the former practice of a public sale, and for the taxes for that and succeeding years there has been no certification under the act of 1891. In chapter 4115, p. 3, Laws 1893, approved June 2, 1893, there was no interference with what had been done that year in the matter of assessment, but the change was made as to the compulsory process for enforcing that assessment.

The defendants in error urge various objections to the form of the tax deed, which they claim made it void upon its face, and their objections will be discussed seriatim. We shall not, however, undertake to consider other objections urged here which do not go to the face of the deed, such, for example, as the acknowledgment, the failure to account for the original, and to prove facts that may be essential to the validity of the deed, as absolute proof of title.

The first objection which we are asked to consider is that the land is not sufficiently identified to convey title. The description is "the northeast quarter of the northeast quarter of section 31, township 22 south, range 20 east, containing 40 acres, assessed and sold as the property of Phillips and Evans." The deed further shows that this land was sold by the tax collector of Hernando county for unpaid taxes. The specific objection is that the state and county are not shown. While it may be, and doubtless is, true that such description might apply to a 40 in some other state than Florida, yet it would be idle to indulge a presumption that the taxing authorities of Hernando county were selling land in some other state or country, and the description, if limited to Florida, can apply only to Hernando county. The failure to insert in the description the "Tallahassee meridian" does not render it void, even in a tax deed. *Keepfer v. Force*, 86 Ind. 81.

The unnecessary recitation by the clerk in the statutory form of a tax deed that "the required thirty days' notice having been given" does not vitiate it. While the statute requires a 30-day notice of the application for

the deed and prescribes the manner of it, it does not require the deed to set forth the notice. The statutory form prescribed by the Legislature is wholly silent as to this, and it is one of the proceedings the regularity of which is evidenced prima facie by the deed; such presumption being subject to rebuttal. The recital does not amount to an affirmative showing that the statutory notice has not been given, but is at most a short, but needless, statement that the notice was given.

The deed shows that two 40's in the same township were sold separately, but on the same day, to one Otto C. Butterwerck, and further recites that one Mary E. Morper, to whom the deed is made, "has purchased the right, title, and interest of the said Otto C. Butterwerck in and to the lands acquired by reason of such tax sale, by paying therefor 'value received,' as appears indorsed on the back of certificate of tax sale." The objection presented and urged here is that the deed shows a joint sale of separate parcels of land; but this it does not do. To the contrary, it had theretofore clearly stated separate sales of the two 40's, and the use by the clerk of the singular number in reciting the assignment does not necessarily and conclusively show a single certificate embracing the separate sales.

It may be well here to note that the statutory tax deed contains no reference to the matter of assignment, and that, as it alone is made prima facie evidence of regularity, there is no presumption to be read into it by mere recital of the clerk as to the validity of the assignment, and the burden is still upon the claimant under the tax deed to prove the assignment, as to which he alone can be held to be fully advised.

An objection is made to the execution of the deed. Substantial compliance only with the statutory form is requisite. Section 61, c. 4115, p. 36, Laws 1893.

Following literally the prescribed form, the attestation clause of the deed reads: "In testimony whereof, I, Frank E. Saxon, clerk of the circuit court of Hernando county, have executed this deed pursuant to and in virtue of the authority invested by law, for and on behalf of said state, and have hereunto subscribed my name officially and affixed the seal of the circuit court of the said county of Hernando, at Brooksville, in the said county of Hernando, this 25th day of May, in the year of our Lord one thousand eight hundred and ninety-seven. Frank E. Saxon, Clerk of the Circuit Court." The official seal is affixed. Then comes the variation. The form reads: "Signed and sealed in the presence of," with blanks for two witnesses; whereas this deed reads: "Done in the presence of J. A. Jennings and Stephen A. Wilson," and the objection is that there is no evidence that the deed was signed, sealed, and delivered in the presence of two witnesses. The variance was caused probably by the use of an old blank form, provided

under the act of 1887, in which the word "Done" occurs. Keeping in mind that "substantial," not literal, compliance is sufficient by the mandate of the Legislature, it would be the height of refinement to hold the variance fatal. The word "Done" is as broad as, if not broader than, the words "Signed and sealed," and may comprehend the idea of the execution, as well as the signing and sealing, which they attest were "done" in their presence. The statute does not require anything further in the presence of two witnesses than the signing and sealing, and does not include the delivery, so we need not determine whether "done" is as comprehensive in its meaning as its usual, but more technical, synonym "executed."

As against the objection urged the deed should have been admitted. It was apparently offered as proof of title, either in the link of the defendants' chain or in another, so as to defeat the plaintiffs upon the question of title alone, and not as color of title merely upon which to found adverse possession, which latter aspect of its admissibility has not been passed upon.

For the reasons given the court erred in refusing to permit the deed to be read in evidence, and the judgment is therefore reversed, and a new trial ordered.

SHACKLEFORD, C. J., and WHITEFIELD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

STATE ex rel. ELLIS, Atty. Gen., v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida. May 29, 1906.)

1. CARRIERS—DUTIES—SERVICE OF PUBLIC—DISCRIMINATION.

A railroad company, acting as a common carrier, is bound to serve all the members of the public alike who apply for service under like conditions.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 901-905.]

2. SAME—FREIGHT.

Where a railroad company, acting as a common carrier, voluntarily engages in transporting and delivering between stations on its line of road the poles, wires, etc., of one telegraph company, it may be compelled by mandamus to perform a similar service for another telegraph company; nor is the duty of the common carrier affected by reason of the service being performed under a contract.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 901-905.]

(Syllabus by the Court.)

In Banc. Application by the state, on the relation of W. H. Ellis, Attorney General, for a writ of mandamus against the Atlantic Coast Line Railroad Company. Demurrer overruled.

This is an original proceeding in mandamus, brought by the Attorney General under the provisions of chapter 4700, p. 76, Acts

1899, to enforce an order of the Railroad Commissioners, and seeks practically the same relief which was sought in a previous proceeding by mandamus in this court (40 South. 875) between the same parties, but under different conditions.

The alternative writ is as follows:

"Whereas, by a petition caused to be filed in this court by the Railroad Commissioners of the state of Florida, in the name of the said state, upon the relation of W. H. Ellis, Attorney General of said state, it has been made to appear: That complaint was heretofore made to the Railroad Commissioners of the state of Florida by the Postal Telegraph Cable Company, a body corporate under the laws of the state of New York and engaged in a general telegraphic business throughout the United States, with lines of wire in the several states, and in the state of Florida, against the Atlantic Coast Line Railroad Company, a railroad corporation engaged in the business of a common carrier and having and operating a railroad in the state of Florida, that the said Atlantic Coast Line Railroad Company was guilty of unjust discrimination in favor of the Western Union Telegraph Company by transporting and distributing for said Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire along its railroad, in said state, and refusing to perform like services for any and all other telegraph and telephone companies; that due notice was served by the Railroad Commissioners on the said Atlantic Coast Line Railroad Company that there would be a meeting of the said Railroad Commissioners at their office in Tallahassee, at 10 o'clock a. m., April 9, A. D. 1906, at which they would be heard to show cause, if any they had, why such unjust discrimination should not cease, and they be required to transport and distribute for any and all telegraph and telephone companies their men, wire, poles, and other material over and along the line of their railroad within the state of Florida, and why a just and reasonable rates should not be prescribed for said Atlantic Coast Line Railroad Company to charge for such services; that the said railroad company did not appear by counsel or otherwise, in response to said notice, and failed to file any answer to said complaint; that the said Railroad Commissioners did thereupon find and determine that the said Atlantic Coast Line Railroad Company, in hauling and distributing between stations on and along its line of railroad in the state of Florida for the Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire, and in refusing to perform like services for any and all other telegraph and telephone companies, was guilty of an unjust discrimination in favor of the said Western

Union Telegraph Company, and was in violation of chapter 4700 of the Laws of Florida; that it was thereupon ordered and adjudged by the Railroad Commissioners of the state of Florida that such unjust discrimination be discontinued, and that said Atlantic Coast Line Railroad Company be required to haul and distribute between its stations, on and along its line of railroad, in the state of Florida, for any and all telegraph and telephone companies, their men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of their lines of wire, and that the said Atlantic Coast Line Railroad Company, for such services performed and rendered any telegraph or telephone company, may charge the current tariff rates from the point of shipment to the first regular station next beyond the last intermediate place where such material is to be unloaded, and the consignor shall furnish all labor necessary to effect such distribution, and shall pay full first-class passenger fares for all men whom they send with such cars to effect such distribution, and for the extra service of stopping cars and engines between stations the railroad company may charge and collect ten dollars per car per day in addition to the current rate, a copy of said order being attached to said petition, and a like copy being hereto annexed, marked 'Exhibit A.' That the Postal Telegraph Cable Company, a body corporate under the laws of the state of New York and engaged in a general telegraphic business throughout the United States, with lines of wire in the several states, and in the state of Florida, desiring to extend its telegraphic line from the city of Jacksonville, in the county of Duval, to the city of Lakeland, in the county of Polk, in the state of Florida, and for that purpose to construct, maintain, and operate a line of poles and wires along the right of way of the said Atlantic Coast Line Railroad Company from the said city of Jacksonville to the said city of Lakeland, and into and through the counties of Duval, Clay, Putnam, Volusia, Orange, Osceola, and Polk, by regular proceedings in the circuit court for Duval county, Florida, under the statutes of said state in such cases made and provided, condemned and acquired a right of way and enurement to so construct, operate, and maintain a line of poles and wires upon the right of way of the said Atlantic Coast Line Railroad Company through the counties aforesaid. That after the order of the Railroad Commissioners was made as aforesaid the said Postal Telegraph Cable Company applied to the said Atlantic Coast Line Railroad Company to haul and distribute between its stations on and along its line of railroad, between the city of Jacksonville and the city of Lakeland, and through the counties of Duval, Clay, Putnam, Volusia, Orange, Osceola, and Polk, their men, poles, wire, and other material for the erection, construction,

maintenance, and operation of their telegraph line between said cities of Jacksonville and Lakeland, and offered to pay for such services the current tariff rates of said railroad company from the point of shipment to the first regular station on its line next beyond the last intermediate place where such material is to be unloaded, and to furnish all labor necessary to effect such distribution, and to pay full first-class passenger fares for all men sent with such cars to effect such distribution, and, in addition, ten dollars per car per day for the extra service of stopping cars and engines between stations; but the said Atlantic Coast Line Railroad Company refused to receive and haul and distribute between their stations, on and along their line of railroad, from Jacksonville to Lakeland, the men, poles, wire, and other material of the Postal Telegraph Cable Company under the said order of the Railroad Commissioners, aforesaid, and still refuses so to do, although demand has been made for such service, as aforesaid. That the said refusal of the said Atlantic Coast Line Railroad Company to comply with and carry out the said order of the Railroad Commissioners of the state of Florida was brought to the attention of the said Railroad Commissioners, and thereupon an order was passed by the Railroad Commissioners requesting and directing the Attorney General of the state of Florida to institute such proceedings in the courts as may be necessary to enforce compliance by the Atlantic Coast Line Railroad Company with the order of the Railroad Commissioners aforesaid, in behalf of the said Postal Telegraph Cable Company.

And whereas, the state of Florida, by W. H. Ellis, the Attorney General of said state, prays that a writ of mandamus may issue from this court, directed to the said Atlantic Coast Line Railroad Company, a corporation, commanding it to obey the said order of the Railroad Commissioners of the state of Florida, in behalf of the said Postal Telegraph Cable Company, by receiving and hauling and distributing between its stations, on and along its line of railroad, in the state of Florida, between the cities of Jacksonville and Lakeland, and in and through the counties of Duval, Clay, Putnam, Volusia, Orange, Osceola, and Polk, the men, and poles, wire, and other material, of the said Postal Telegraph Cable Company, for the erection, maintenance, operation, repair, construction, and reconstruction of its telegraph line between the said cities of Jacksonville and Lakeland, at and for not exceeding the current tariff rates, from the point of shipment to the first regular station next beyond the last intermediate place where such material is to be unloaded, and full first-class passenger fares for all men sent by said Postal Telegraph Cable Company with the cars to effect such distribution, and ten dollars per car per day in addition to the said current tariff rates: "Now, therefore, we, being willing that

full and speedy justice should be done in the premises, do command you, the said Atlantic Coast Line Railroad Company, that you forthwith comply with the said order of the Railroad Commissioners of the state of Florida, in behalf of the said Postal Telegraph Cable Company, by receiving and hauling and distributing between the stations on and along the line of your railroad, in the state of Florida, between the cities of Jacksonville and Lakeland, and in and through the counties of Duval, Clay, Putnam, Volusia, Orange, Osceola, and Polk, the men, and the poles, wire, and other material of the said Postal Telegraph Cable Company, for the erection, maintenance, operation, repair, construction, and reconstruction of its telegraph line between the said cities of Jacksonville and Lakeland, at and for not exceeding the current tariff rates from the point of shipment to the first regular station next beyond the last intermediate place where such material is to be unloaded, and full first-class passenger fares for all men sent by said Postal Telegraph Cable Company with the cars to effect such distribution, and ten dollars per car per day in addition to the said current tariff rates, or that you show cause why you have not done so before our Supreme Court at the Capitol, in the city of Tallahassee, at 10 o'clock a. m., on the 8th day of May, A. D. 1906, and have you then and there this writ."

"Exhibit A."

"Order No. 94.

Railroad Commission, State of Florida.

"To the Atlantic Coast Line Railroad Company.

"Complaint having been made to the Railroad Commissioners of the state of Florida that the Atlantic Coast Line Railroad Company is guilty of unjust discrimination in favor of the Western Union Telegraph Company by transporting and distributing for said Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire along said railroad in said state, and refuses to perform like services for any and all other telegraph and telephone companies, and due notice having been served on the Atlantic Coast Line Railroad Company that there would be a meeting of the Railroad Commissioners at their office in Tallahassee, at 10 o'clock a. m., April 9, A. D. 1906, at which they would be heard to show cause, if any they had, why such unjust discrimination should not cease, and they be required to transport and distribute for any and all telegraph and telephone companies their men, wire, poles, and other material over and along the line of their railroad within said state of Florida, and why a just and reasonable rate should not be prescribed for said Atlantic Coast Line Railroad Company to

charge for such services, and the said railroad company not having appeared, by counsel or otherwise, in response to said notice, and having filed no answer to the said complaint, and the commissioners being fully advised, do find that the said Atlantic Coast Line Railroad Company, in hauling and distributing between stations on and along its line of railroad in the state of Florida for the Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire, and in refusing to perform like services for any and all other telegraph and telephone companies, is guilty of unjust discrimination in favor of said Western Union Telegraph Company, and is in violation of chapter 4700 of the laws of Florida.

"It is hereby ordered and adjudged by the Railroad Commissioners of the state of Florida that such unjust discrimination be discontinued, and that said Atlantic Coast Line Railroad Company be and is hereby required to haul and distribute between its stations on and along its line of railroad, in the state of Florida, for any and all telegraph and telephone companies, their men, poles, wire, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of their lines of wire.

"It is further ordered and adjudged by the Railroad Commissioners of the state of Florida that the said Atlantic Coast Line Railroad Company, for such services performed and rendered for any telegraph or telephone company, may charge the current tariff rates from the point of shipment to the first regular station next beyond the last intermediate place where such material is to be unloaded, and the consignor shall furnish all labor necessary to effect such distribution, and shall pay full first-class passenger fares for all men whom they send with such cars to effect such distribution, and for the extra service of stopping cars and engines between stations, as above indicated, the railroad company may charge and collect ten dollars per car per day in addition to the current rate.

"Done and ordered by the Railroad Commissioners of the state of Florida in session at their office in the city of Tallahassee, Florida, this the 10th day of April, A. D. 1906.

"[Signed] Jeffn. B. Browne, Chairman.

"Attest:

"[Signed] R. C. Dunn, Secretary."

To this writ a demurrer has been interposed by the respondent and upon the issues thus raised has been argued and submitted. The following is the demurrer:

"Now comes the defendant, the Atlantic Coast Line Railroad Company, a corporation, and says that the alternative writ is bad in substance and insufficient in law to be answered.

"The substantial matters of law to be argued are as follows:

"(1) That the order made by the Railroad Commissioners of the state of Florida is without authority of law.

"(2) That there is no authority of law for the Railroad Commissioners of the state of Florida to make a rate special and applicable to one railroad corporation and not applicable and enforceable as against all railroad corporations in the state; that they have only powers to make rates that shall be applicable and enforceable as to all railroad corporations.

"(3) That under and by virtue of said order of the Railroad Commission set forth in said alternative writ, it is sought to compel this respondent, a railroad corporation, and no other railroad corporation in the state of Florida, to transport and carry the articles therein named for a given price, and is therefore a discrimination against this respondent.

"(4) That the Railroad Commissioners of the state of Florida have no power to make an order directing or compelling a carrier to distribute freight at points other than the stations on its line of road, and there is no authority under the railroad commission act of the state of Florida for the Railroad Commissioners to make an order to compel a railroad company to deliver freight alongside of its road and at points between stations.

"(5) There is no power under the railroad commission act vested in the commissioners authorizing them to compel respondent to give to the Postal Telegraph Cable Company, either by contract or by way of rate made by the commissioners, the advantages or facilities it gives to the Western Union Telegraph Company by contract.

"(6) That it appears by said alternative writ that no railroad company other than this respondent was ever summoned to appear at any hearing before the Railroad Commissioners of the state of Florida, and that no railroad company other than the respondent was ever given an opportunity of being heard before the Railroad Commission as to the rate proposed to be made on the articles set forth in the alternative writ; and that by said alternative writ it appears that respondent solely and alone of all of the railroad corporations in the state was singled out for the purpose of having a rate made over its line of road and no other, for the articles named in said alternative writ.

"(7) That the powers of the Railroad Commission extend only to making reasonable and uniform rates to govern all of the railroad corporations in the state, as to the same product or article to be moved, and it cannot, under its powers, make a rate to apply to one corporation only and not to other corporations, though that rate may apply to that corporation as to all telegraph and telephone companies, since it does not apply to any other railroad company moving a like product."

Fred T. Myers and Danl. W. Rountree, for relator. John E. Hartridge, for respondent.

HOCKER, J. (after stating the facts). We do not think it necessary to repeat what is contained in the opinion in the previous case decided at this term between the same parties as to the powers of the Railroad Commissioners to correct abuses and prevent unjust discriminations by persons and corporations engaged as common carriers in transporting persons and property or performing other services of a public nature. The demurrer admits the allegations of the alternative writ, and those allegations in our opinion clearly show that the respondent has violated the general order of the Railroad Commissioners requiring it to perform for any and all telegraph and telephone companies a service, in effect, similar to that which it has performed as a common carrier for the Western Union Telegraph Company, by refusing the same service to the Postal Telegraph Cable Company. For we think it is clear that a railroad company where it acts as a common carrier is bound to serve all the members of the public alike, who apply for service, under like conditions.

The contention that the general order of the Railroad Commissioners is unauthorized by law inasmuch as it applies only to the respondent, we think is unfounded. In the very nature of things such an order could not be made to apply to another railroad company which had not voluntarily performed for some patron, the services described in these proceedings, which is in some respects peculiar, in that it involves the delivery of poles, wires, etc., between stations. But the respondent having voluntarily performed this service for the Western Union Telegraph Company may not deny it to another company applying for similar service under like conditions. The order of the Railroad Commissioners is a general order, and we think fully authorized by the Constitution and chapter 4700, p. 76, Acts of 1899. Nor is this duty affected by the fact that the service was performed for the Western Union Telegraph Company under an agreement or contract. The rates prescribed in this general order for the services to be rendered are general in their nature, and apply to all telegraph and telephone companies which seek to have the services performed and are not challenged on the ground of unreasonableness. The order, therefore, is in conformity with the views of this court as expressed in the opinion heretofore rendered at this term between the same parties. We refer to the authorities therein cited.

The demurrer is overruled, and the respondent is required to answer the alternative writ within 14 days from the filing of this opinion.

SHACKLEFORD, C. J., and COCKRELL, WHITEFIELD, TAYLOR, and PARKHILL, JJ., concur. Digitized by Google

BLUTHENTHAL et al. v. JONES.

(Supreme Court of Florida, Division B. May 29, 1906.)

BANKRUPTCY—DISCHARGE—EFFECT.

Jones filed a voluntary proceeding in bankruptcy in the United States court in Georgia in the year 1900. B. & B. were then creditors of Jones, and filed their claim and resisted his application for a discharge from his debts, which resistance was successful, and the court made an order refusing his discharge. Jones, having subsequently moved to Florida, in the year 1903 filed an application in bankruptcy in the United States court in Florida. B. & B. were notified of this proceeding, but did not appear therein or raise the question of *res adjudicata* as to their claim against Jones. The United States court in Florida made a general order discharging Jones from all his debts. Afterwards B. & B. undertook to enforce their debt against Jones in the state court, and Jones pleaded his discharge.

Held, that the state court will give full effect to the discharge granted Jones and apply it to the debt due from him to B. & B., as it does not appear that the debt due B. & B. comes within any of the exceptions of section 17 of the bankruptcy act approved July 1, 1898, c. 541 (30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]). (Syllabus by the Court.)

Appeal from Circuit Court, Polk County; Joseph B. Wall, Judge.

Bill by M. C. Jones against Aaron Bluthenthal and Monroe L. Bickart. Decree for complainant, and defendants appeal. Affirmed.

On the 19th of June, 1905, the appellee as complainant filed his bill in the circuit court of Polk county against the appellants, Bluthenthal & Bickart, alleging therein that on the 7th of August, 1900, the appellants recovered a judgment against him in the said court for \$731.28, and \$6.53 costs, and had an execution thereon issued and placed in the hands of the sheriff of said county; that said judgment was rendered upon an open account for goods, wares, and merchandise sold and delivered to him by the said firm of Bluthenthal & Bickart; that on the 3d of August, 1903, complainant filed in the District Court of the United States for the Southern District of Florida, Middle Division, his petition in bankruptcy, and that among the claims of creditors of complainant scheduled and attached to this petition in bankruptcy was the said judgment of appellants, and that they received due notice of the filing of said petition; that after due notice to the creditors of complainant, including Bluthenthal & Bickart, said petition came on to be heard, and on the — day of —, 1903, the complainant was adjudged a bankrupt under the acts of Congress relating to bankruptcy, and within the time required by law he filed his application for final discharge, notice being given to the creditors, including appellants, and on the 7th of November, 1903, complainant was discharged from all debts and claims, including that of appellants, which existed on the 3d of August, 1903, excepting such debts as were by law excepted from the operation of a discharge in bankruptcy,

as will more fully appear by a copy of the order attached to the bill; and that the claim of Bluthenthal & Bickart was a provable debt against appellee's estate and did not come under any of the exceptions of the law relating to bankruptcy. The bill alleges that since the 7th of November, 1903, the date of his discharge, complainant has acquired title to certain real estate, describing it, and that appellants have caused an alias execution to be issued upon their judgment, and the sheriff levied the same on the described lands on the 19th of May, 1905, as the property of complainant, and that said lands are now being advertised for sale under said execution, to be sold on the first Monday in July, 1905, for the alleged purpose of satisfying said execution and costs. The bill alleges that said lands are not subject to levy and sale under said execution by reason of complainant's discharge, and that if Bluthenthal & Bickart are permitted to continue said proceeding and sell said lands under said execution, a cloud will be cast on the title, and complainant will be put to annoyance and expense in having same removed. The bill alleges that complainant is without remedy save in equity, and prays an injunction against said sale and general relief. The copy of the order of discharge in bankruptcy is as follows:

"The United States of America.

"In the District Court of the United States for the Southern District of Florida, Middle Division.

"In the Matter of Miles C. Jones, Bankrupt. No. 223. In Bankruptcy, Southern District of Florida—ss.

"Whereas, Miles C. Jones, of Polk, in said district, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf: It is therefore ordered by this court that said Miles C. Jones be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 3d day of August, A. D. 1903, on which day the petition for adjudication was filed by him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

"Witness the Honorable James W. Locke, judge of said District Court, and the seal thereof, this 7th day of November, A. D. 1903.

"[Seal of Court.] Eugene O. Locke,
"Clerk."

The defendants below, appellants here, answered the bill. They admit the bankruptcy proceedings and discharge of complainant as alleged in the bill; that whether or not their judgment was scheduled in said proceedings they only know as alleged in the bill, as they had nothing to do with the said proceedings as to scheduling said

debt or judgment; that they did not participate in any way in said proceedings, or prove their judgment, or ask any benefit of said proceedings. They admit notice of his application for a discharge. They deny that their debt or judgment was in any way affected or discharged by reason of the discharge of complainant which he obtained in Florida. They admit that complainant ostensibly acquired for a nominal consideration the lands as described by quitclaim deed shortly after his discharge, as shown by the records of Polk county. They admit that they levied on them as alleged. The answer then alleges that in the year 1900 complainant was a resident of Georgia, and there began bankruptcy proceedings in said state in the District Court of the United States for the Southern District of Georgia, and that they participated in said proceedings, being then creditors upon the same cause of action upon which they obtained their judgment against complainant in Florida, as alleged in the bill; that when complainant applied for a discharge in the proceedings in Georgia they resisted it, and the court refused, and the order refusing it is attached to the answer and made a part of it. The answer then alleges that, as they did not participate in the subsequent bankruptcy proceedings in Florida, their debt or judgment against the complainant was in no manner affected by the discharge in bankruptcy obtained in Florida, and that the lands levied on are subject to their execution.

The order refusing the discharge in the United States court in Georgia, is as follows:

"In the District Court of the United States for the Western Division of the Southern District of Georgia.

"In re M. C. Jones, Bankrupt. In Bankruptcy. Objections to Discharge.

"Upon considering the objections to the discharge of the bankrupt filed in the above matter by Bluthenthal & Bickart, and the evidence in support thereof, it is ordered that said objections be sustained and said application for discharge be denied and refused. This December 3, 1900.

"Emory Speer, Judge."

The foregoing contains the substance of the bill and answer. The cause was set down for hearing, and heard on bill and answer; no replication having been filed. The chancellor decreed that the lands of complainant were not subject to levy and sale under the judgment and execution of the defendants, and enjoined them from selling or attempting to sell thereunder. From this decree the defendants appealed to this court.

H. K. Olliphant, for appellants. Wilson & Boswell, for appellee.

HOCKER, J. (after stating the facts). The only question here is one of law. The

contention of the appellants Bluthenthal & Bickart is that because they participated in the bankruptcy proceeding in the United States Court in Georgia in the year 1900, and proved their account against Jones in that proceeding, and resisted his discharge there, the order of the United States district judge refusing to grant him a discharge rendered their claim "res adjudicata," and that, as they did not participate in the bankruptcy proceeding in the United States District Court in Florida in 1903, the order of the district judge in the last proceeding, discharging Jones from his debts, did not apply to their claim or judgment. We have examined all the decisions referred to in the able briefs of the respective parties, but no one of these authorities presents facts which are analogous to the one at bar. Neither have we been able to find an analogous case in our library. The case of *Re Drisko*, 2 Low. (U. S.) 430, Fed. Cas. No. 4,090, cited by appellants, turned largely upon the construction of the bankruptcy law in force in the year 1875, and there, too, the question of the effect of a previous refusal to discharge the bankrupt was raised in the second proceeding by a creditor, and in that second proceeding the effect of the former action was adjudicated.

In the case of *Kuntz v. Young*, 131 Fed. 719, 65 C. C. A. 477, it was held that "a failure of the bankrupt to apply in due time for, or a refusal by the court to grant, a discharge from debts provable in proceedings under one petition in bankruptcy, renders the question of the right of the bankrupt to a discharge from those debts in a proceeding under a subsequent petition *res adjudicata*." But in this case both petitions were filed in the same District Court, and the question of the right to a discharge seems to have been raised by the report of the Trustee showing all the facts. The District Court itself passed on the question of the effect of the second petition, and dismissed it.

In the case of *In re Flegenbaum*, 121 Fed. 69, 57 C. C. A. 409, the question of the bankrupt's right to a discharge under a second petition, he having been denied a discharge in the first, was also raised in and determined by the court in which the second petition was pending.

In the case of *In re Herrman* (D. C.) 102 Fed. 753, the question presented was whether one who had been refused a discharge under the bankruptcy law of 1867 was debarred by the bankruptcy law of 1898 from obtaining a discharge under the last act, embracing debts proven against him under the first. The court held he was not barred. In this case, also, the question of the effect of the discharge was raised by creditors in the United States District Court which was asked to grant the discharge. The Massachusetts cases turn somewhat on the insolvency laws of Massachusetts, and we think it unnecessary to review them at length.

It appears from all the decisions we have seen that the question here raised is one of *res adjudicata*; that is to say, whether, when a debt was proved under the first bankruptcy proceeding and a discharge refused in that proceeding, the right to a discharge from this debt was thereby settled and adjudicated, and could not be affected by the second proceeding. We are of opinion that such a question was one which the creditor himself should have raised in the second proceeding in bankruptcy in the United States District Court, and that court, then having jurisdiction of the whole matter, should have been requested to adjudicate the effect of the proceeding and of the general discharge which it granted. It will be observed that the record does not show why the discharge was refused in the first proceeding, nor does it show that the debt in this case comes within any of the exceptions of section 17 of the bankrupt act approved July 1, 1898 (30 Stat. 550, c. 541 [U. S. Comp. St. 1901, p. 3428]); nor is it contended here that it does. Bluthenthal & Bickart were notified of the last proceeding in bankruptcy, and refused to participate in any way in it and to raise the question of *res adjudicata* in the said proceeding. It is true that a discharge in bankruptcy is general in its terms, and its effect is generally left to be determined by the court where it is pleaded. But we do not think that in a case like the one at bar it would be prudent or proper for this court to do more, in giving effect to a discharge, than to determine whether the debt was embraced in the exceptions of the statute, leaving all other questions to be determined by the federal courts, where they properly belong.

The decree appealed from is affirmed, at the cost of appellants.

TAYLOR and PARKHILL, JJ., concur.

COCKRELL and WHITFIELD, JJ., concur in the opinion.

SHACKLEFORD, C. J., disqualified.

READDY v. TAMPA ELECTRIC CO.

(Supreme Court of Florida, Division B. June 11, 1906.)

ARBITRATION AND AWARD—PROCEDURE—VALIDITY OF AWARD.

Where parties to a suit resort to the statutory mode of arbitration, as distinguished from the common-law modes, it is essential that the requirements of the statute shall be substantially complied with; and where the parties attempt such an arbitration, and the record fails to show that the arbitration was made a rule of court, by the parties filing in the court the statement required by section 1222, Rev. St. 1892, and fails to show the recording of the same, and fails to show that the award was filed and recorded in the court, as required by section 1225, Rev. St. 1892, and fails to show that the award has been entered of record and has the force and effect of a judgment, as pro-

vided by section 1229, Rev. St. 1892, there is no award upon which a motion can be based to set it aside, as provided in section 1227, Rev. St. 1892, or upon which a final judgment can be entered.

(Syllabus by the Court.)

Error to Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Action by Emma Readdy against the Tampa Electric Company. Judgment for defendant, and plaintiff brings error. Dismissed.

In December, 1904, the plaintiff in error, Emma Readdy, sued the defendant in error, the Tampa Electric Company, a corporation, to recover damages for an alleged personal injury, in the circuit court of Hillsborough county. In April, 1905, the defendant pleaded not guilty and contributory negligence, upon which pleas issue was joined. On the 26th of June, 1905, the respective parties entered into the following agreement:

"It is agreed by and between counsel for the respective parties in the above cause that the said cause be referred to Drs. J. T. Boykin and L. S. Oppenheimer, who are hereby empowered to select an umpire or third arbitrator, to examine into said cause, and determine whether or not the plaintiff had been injured by the negligence of defendant company or its employees, and, if so, to what extent she had been injured, and what in their opinion would be a reasonable compensation, if any; that the verdict of the said arbitrators shall be binding upon the said parties, and together with this agreement shall be made an order of the court.

"(2) The respective parties shall furnish the said arbitrators with a list of their witnesses, after which they shall be left to investigate the said cause, without molestation, argument, or persuasion by counsel for the respective parties.

"(3) When the said arbitrators shall have arrived at a verdict, they will reduce the same to writing, sign the same, and deliver a copy to counsel for the respective parties.

"In witness whereof, the said parties by their counsel have hereunto set their hands and seals, on this 26th day of June, 1905.

"H. S. Hampton [L. S.]

"For plaintiff.

"P. O. Knight [L. S.]

"For defendant."

The record then shows that on the 18th of July, 1905, the finding of the arbitrators was duly filed; the same being in the words and figures following:

"Tampa, Florida, July 11, 1905.

"Hillsborough County, State of Florida.

"The case of Emma Readdy v. Tampa Electric Company having been presented by witnesses on both sides before this board of arbitrators, appointed according to an order of the court, to decide whether said Emma Readdy was injured by the negligence of said company or any of its employees, and, if so,

to what extent, after having examined the said cause, find that the defendant is not liable.

"L. S. Oppenheimer.

"A. O. Ives, M. D.

"With reference to the above findings, I, J. T. Boykin, as one of the arbitrators, have refused to sign the same, because I consider that the agreement under which the investigation of this matter was left to us has been violated in the following manner: (1) When Dr. Oppenheimer and myself first met on the morning of the 27th of June, 1905, we agreed upon Dr. M. R. Winton as an umpire, and he left my office with that understanding to meet me at 2 o'clock in the afternoon to commence the investigation. Later he returned, telling me he had conferred with P. O. Knight, the attorney for the defendant, and that they would not accept Dr. Winton, and I thereupon suggested Dr. A. C. Hamblin, to which he agreed. The next morning for some reason he returned telling me that he could not accept Dr. Hamblin, and suggested Dr. Ives, and, not knowing what to do in the matter, I agreed upon Dr. Ives.

(2) At the time of the delivery of the original agreement to me by Mr. H. S. Hampton, attorney for the plaintiff, he had attached to it a list of plaintiff's and defendant's witnesses, and told me that it was agreed between himself and Mr. Knight that only those witnesses whose names were on that paper were to be examined by us, and for that purpose he and Mr. Knight in the presence of each other had written down the names of their witnesses, and that the arbitrators were under no circumstances to communicate with the attorneys for either side. This agreement, so far as I know, was kept by Mr. Hampton; but on the last day of the hearing, over my objection, Dr. Oppenheimer, as chairman, called in Mr. P. O. Knight, attorney for the defendant, for the purpose of having him testify as a witness, and when Mr. Knight appeared he did not testify as to any facts in connection with the injury, but in narrative form testified as to insulting language used by the daughter of the plaintiff in his office, and at the same time presented several statements in regard to the accident, signed by the conductor of the car on which the plaintiff was alleged to have been injured, and by G. W. Wells, general manager of the company, and by Dr. Oppenheimer in regard to the condition of the plaintiff, which were used and considered by the arbitrator, but were taken away by Dr. Oppenheimer and not filed in the case.

"In view of the above I do not think that the proceedings were regular, or that the agreement under which the case was submitted to us has been kept, and I have concluded to submit this statement to the court and file it, together with the report of the arbitrator as a part thereof.

"Respectfully submitted.

"J. T. Boykin, M. D.

"Sworn to and subscribed to before me this 15th day of July, A. D. 1905.

"[Notary Seal.] H. D. Webster,
"Notary Public."

On the 20th of July, the plaintiff filed a motion to set aside and vacate the award of the said arbitrators; the said motion being in words and figures following:

"Now comes the plaintiff in the foregoing cause and moves the court to set aside and vacate the award of the arbitrators filed in this cause on the 18th day of July, 1905, upon the following grounds, to wit:

"(1) Because, as shown by the report of arbitrators, the agreement under which the said cause was submitted has been violated by counsel for the defendant.

"(2) Because, as shown by the said report, the said arbitrators have been guilty of misbehavior.

"(3) Because, as shown by the report, the said arbitrators have been guilty of gross negligence.

"(4) Because, as shown by the report of the said arbitrators, witnesses of the defendant were examined whose names were not submitted at the time of the submission of the said cause.

"H. S. Hampton, Attorney for Plaintiff."

Affidavits were filed in support of and against said motion.

On the 29th of September, 1905, this motion coming on to be heard, the following ruling was made:

"An inspection of the matters involved not being sufficient to show to the court that there was any fraud, corruption, or gross mistake in the award of the arbitrators which would warrant the court in setting the same aside, the foregoing motion is denied, to which counsel excepts, and defendant is allowed thirty days for bill of exceptions.

"September 29, 1905. J. B. Wall, Judge."

The writ of error and the assignment of errors are based on this ruling, refusing to quash and vacate the said arbitration proceedings.

Davis & Hampton, for plaintiff in error.
Peter O. Knight, for defendant in error.

HOCKER, J. (after stating the facts). The record shows that after suit was brought there was an attempt by the parties to have the questions involved settled by a statutory arbitration, as provided by sections 1221 to 1229, inclusive, of the Revised Statutes of 1892.

Section 1222 is as follows: "An arbitration may be made a rule of court by the parties filing in the court which would have jurisdiction of the controversy if it were not submitted to arbitration, a statement in writing signed by each party of the agreement of matters to be submitted to arbitration, and of the name of the arbitrator or arbitrators, and an umpire selected by them. The clerk

of the court (or the court if it have no clerk) shall record said statement in the minutes of the court, and thereupon the arbitrator or arbitrators and umpire shall have the powers hereafter specified."

Section 1223 provides: "The arbitrator, or arbitrators, and umpire appointed as aforesaid, shall before entering upon the investigation of the matter submitted to them, be severally sworn before some judge or justice of the peace faithfully and diligently to execute the trust committed by the submission; and the examination of all witnesses before the said arbitrator, arbitrators or umpire shall be under oath, and if the parties themselves be examined, such examination shall also be under oath, and in the presence of each other; and the said arbitrators, or either of them, shall be and they are hereby authorized and empowered to issue subpoenas to compel the attendance of witnesses, under the same regulations as the clerks of the circuit courts of this state, which said subpoenas shall be served by the sheriff or any constable of the county, and shall be obeyed by the witnesses in the same manner as subpoenas issued from any court within this state."

Section 1224 provides for compensation of arbitrators, officers, and witnesses.

Section 1225 is as follows: "The award shall be in writing, signed by a majority of the arbitrators, or arbitrators and umpire, shall state the adjudication in full, and shall be filed and recorded in the court of which the arbitration is a rule. And the clerk of such court (or court if it have no clerk) shall give notice of the entry of the award, to the persons against whom the award is rendered."

Section 1226 provides how either party may apply by motion in the court of which the submission is a rule to set aside the same.

Section 1227 provides that the submission shall be set aside by the court only on the ground of fraud, corruption, gross negligence, or misbehavior of one or more arbitrators or umpire, or of evident mistake acknowledged by the arbitrators or umpire.

Section 1228 provides that testimony by affidavits of the facts constituting the ground on which the motion is made shall be used in the hearing.

Section 1229 is as follows: "If any award be entered of record, so much thereof as decrees the payment of money by either party shall have the force and effect of a judgment from the day of entering said award, upon which execution may be issued as in cases of judgment duly entered; and so far as the award relates to the performance of any other lawful act, the party failing to comply with said award shall be considered in contempt, and, by the order of court, shall be committed to prison, there to remain without bail until he shall comply with the order of the court in the premises."

It seems to be established law, when parties resort to the statutory mode of arbitration, as distinguished from the common-law modes, that the requirements of the statute shall be substantially complied with; some courts holding that they must be strictly adhered to. These views are based on the doctrine that such statutes are in derogation of the common law. *Steel v. Steel*, 1 Nev. 27; *Monoslet v. Post*, 4 Mass. 532; *Heath v. Tenney*, 3 Gray (Mass.) 380; *Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Burghardt v. Owen*, 13 Gray (Mass.) 300; *Henderson v. Adams*, 5 Cush. (Mass.) 610; *Barney v. Flower*, 27 Minn. 403, 7 N. W. 823; *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269, 55 N. W. 121; *Kettleman v. Treadway*, 65 Cal. 506, 4 Pac. 506; *Foust v. Hastings*, 66 Iowa, 522, 24 N. W. 22; *Dudley v. Farris*, 79 Ala. 187; *Low v. Nolte*, 15 Ill. 368; *Forman Lumber Company v. Ragsdale*, 12 Ill. App. 441; *Osborn & Wacott Mfg. Co. v. Blanton*, 109 Ga. 196, 34 S. E. 306; 2 Am. & Eng. Ency. Law (2d Ed.) pp. 540, 541; 3 Cyc. 602. This doctrine seems to be recognized by this court in *O'Bryan v. Reed*, 2 Fla. 448.

In *Barney v. Flower*, supra, it is said: "The jurisdiction of the arbitrators under the statute over the matter referred to them depends on a compliance with the statute. It is a special jurisdiction, which can be created only in the manner prescribed by the statute. Every material requirement of the statute must be complied with."

In *Abbott v. Dexter*, supra, it is said: "The jurisdiction of the arbitrators to make an award upon which a judgment of the court can be rendered depends entirely upon the statute. It is a special jurisdiction created entirely by the statute, and can be sustained only by a compliance with the statute." To the same effect see *Macon & Western Railroad v. Davis*, 13 Ga. 68. We have examined a number of other authorities and find the same principles recognized in them. There are cases holding that immaterial defects in the statutory proceedings before arbitrators may be waived by the parties, but we have discovered no case which holds that matters which are in their nature jurisdictional can be waived. If such a case could be found, it would seem to be out of harmony with the weight of authority and with reason.

In the case of *Macon & Western Railroad v. Davis*, supra, the rule was applied which is applicable to courts of limited jurisdiction, viz., it must appear on the face of the proceedings that they have acted within the scope of their jurisdiction or their proceedings are "coram non jure and void. Page 76."

The record in this case fails to show that the arbitration was made a rule of court by the parties filing in the court the statement required by section 1222, Rev. St. 1892, and fails to show the recording of the same in the minutes of the court, as required in said

section. This was a requirement which under the terms of the statute was jurisdictional and necessary to confer any powers upon the arbitrators or umpire. The record also fails affirmatively to show that the award was filed and recorded in the court, as required by section 1225, Rev. St. 1892, and also fails to show that the award has been entered of record and has the force and effect of a judgment, as provided by section 1229, Rev. St. 1892. There was, therefore, nothing in the record before the circuit judge, so far as the record here shows, which gave the arbitrators or umpire any statutory authority to act, and nothing upon which he was authorized to make any ruling; for it is evident that the award was not pleaded or treated as a common-law award. The established doctrine is that a writ of error must be dismissed when the record fails to show a final judgment.

It is considered and ordered that the writ of error be, and the same is, hereby dismissed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

ROPES v. MINSHEW et al.

(Supreme Court of Florida, Division B. June 11, 1906.)

1. TRIAL—INSTRUCTIONS—NECESSITY—EFFECT OF EVIDENCE.

Where a tax deed to the premises sued for has been introduced in evidence by the plaintiff under a statute making a tax deed prima facie evidence of the regularity of the proceedings from the valuation of the land by the assessor to the date of the deed inclusive, and subsequently the defendant introduces testimony tending to show the tax deed to be void, it is error for the court to refuse to instruct the jury upon the legal effect of the evidence so introduced by the defendant.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 498, 499, 501.]

2. TAXATION—DELINQUENT LIST—ADVERTISEMENT—OWNER'S NAME—MISTAKE—EFFECT.

Where the land is assessed as the property of "Valentine Dollar, Assignee," and advertised and sold as the property of "Valentine Dallen Association," the tax deed is void, since the assessment and advertisement for sale must correspond in all material particulars.

3. EJECTMENT—TITLE TO MAINTAIN.

The plaintiff in ejectment must recover upon the strength of his own title, and not on the weakness of his adversary's title.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 18.]

4. SAME—VERDICT—POSSESSION.

A verdict in ejectment, which simply finds that the plaintiffs are entitled to a fee-simple estate to the lands described therein, does not find the right of possession in the plaintiffs, nor does it authorize the entry in behalf of plaintiffs of a judgment for recovery of possession of the land.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 336.]

(Syllabus by the Court.)

Error to Circuit Court, Volusia County; Minor S. Jones, Judge.

Action by B. B. Minshew and W. V. Carter against E. E. Ropes. Judgment for plaintiffs, and defendant brings error. Reversed.

E. E. Ropes, in pro. pro.

PARKHILL, J. On the 28th day of August, 1902, B. B. Minshew and W. V. Carter brought an action of ejectment in the circuit court of Volusia county against E. E. Ropes for the recovery of a tract of land lying in said county, described as lot 3, except southeast 10 acres, section 29, township 15 S., range 28 E., containing about 65 acres, and for mesne profits.

The defendant pleaded not guilty and the bar of statute of limitations.

A trial was had, which resulted in the following verdict being rendered by the jury in favor of the plaintiffs April 11, 1905: "We, the jury, find for the plaintiffs, and that they are entitled to a fee-simple estate to lot 3, except southeast 10 acres, section 29, township 15 S., of range 28 E., and fix their damages at \$3.00." Upon the said verdict the following judgment was entered by the court April 12, 1905:

"It is thereupon upon consideration thereof ordered, adjudged, and decreed that the plaintiffs, B. B. Minshew and W. V. Carter, do have and recover of and from the defendant herein, E. E. Ropes, the following land as described in the declaration and verdict and an estate in fee simple thereon, to wit: Lot 3, except the southeast 10 acres, section 29, township 15 S. of range 28 E., together with the sum of \$3 for their damages herein, and the sum of \$26.43 for their costs in this behalf expended, and that the plaintiff do have execution therefor."

The defendant below, who is plaintiff in error here, seeks reversal by writ of error. The plaintiffs sought to recover, in this case, by virtue of a tax deed dated the 6th day of January, A. D. 1898, based upon a sale made in 1894 for the unpaid taxes of 1893. This deed was admitted in evidence by the court; and the defendant offered in evidence, to show that plaintiffs' said deed was void, a certified copy of the tax book for 1893, so far as related to the land in controversy, as showing that the land sold was assessed to "Valentine Dollar, Assignee," which was admitted in evidence by the court.

And the defendant also offered in evidence a certified copy of the record of the advertisement of said land for sale for the unpaid taxes of 1893, as showing that the owner thereof was stated as "Valentine Dallen Association," which was admitted in evidence by the court.

The parties having concluded and submitted their evidence, the defendant requested the court to charge that, "if the jury believe from the evidence that the assessment gives the name of one person as

the owner and the advertisement the name of another, the jury will find for the defendant."

The court refused to give this charge. The defendant excepted and assigns the refusal of the court to so charge as error.

When this case was here before we said: "The tax law of 1893 (Acts 1893, p. 36, c. 4115, § 61) makes a tax deed prima facie evidence of the regularity of the proceedings from the valuation of the land by the assessor to the date of the deed, inclusive. The defendant had a right to overcome this prima facie evidence by proof showing the deed to be void. After the introduction of evidence tending to show the deed to be void, he should have prepared a charge informing the jury what effect should be given by them to his rebutting testimony, and requested the judge to give it." *Ropes v. Minshew & Carter*, 47 Fla. 212, text 214, 36 South. 579, 580.

Chapter 4010, p. 1, Acts 1891, and chapter 4115, p. 3, Acts 1893, provide: "The assessor shall set down in the assessment rolls, following and opposite the description of the lands, the name of the owner or person in whose name the return is made; and when the land has not been returned and when the assessor has no means of discovering the name of the owner the assessor shall enter the word 'Unknown' in the column of the assessment roll provided for the name of the owners or persons making return."

Chapter 4115, § 51, p. 30, Acts 1893, provides: "If the taxes upon any real estate shall not be paid before the first day of April of any year, the collector shall advertise and sell in the manner following: He shall make out a statement of all such real estate, specifying the amount due on each parcel, together with the cost of advertising and expense of sale, in the order in which the land was assessed, and such list shall be published. * * * A copy of the advertisement shall be recorded in the county clerk's office within ten days after said sale. Such advertisement shall be in the following form." Then follows the form which can be seen on page 31, Acts 1893. In this form must be stated the name of the owner of the land, a description of the land, and the amount of the taxes and costs.

In every step it is evidently intended, and the statute so requires, that the name of the owner or person in whose name the return is made shall be the same in the assessment as in the advertisement and sale. *Bettison v. Budd*, 21 Ark. 578; *Marx v. Hanthorn* (C. C.) 30 Fed. 579, affirmed 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410.

The assessment roll introduced in evidence showed that the land in question was assessed as the property of "Valentine Dollar, Assignee," while the record of the advertisement of said land showed the name of the owner to be "Valentine Dallen Association." This record evidence of the assessment and

advertisement of the land showed that the name of the owner or person in whose name the return was made was not the same in the assessment and in the advertisement, and this record evidence was not controverted by any other evidence, and was conclusive of that fact, and overcame the statutory prima facie evidence of the regularity of the proceedings from the valuation of the land by the assessor to the date of the deed, and rendered the plaintiffs' tax deed void. *Bettison v. Budd*, supra; *Daniel v. Taylor*, 33 Fla. 636, text 654, 15 South. 313. The charge asked for by the defendant ought to have been given by the court.

The defendant requested the court to charge the jury as follows:

"The court instructs the jury that the right of the plaintiffs to recover in this case rests on the strength of their own title, and they cannot recover by showing defects in the title of the defendant."

This is substantially what we have heretofore held, that the plaintiff in ejectment must recover on the strength of his own title and not on the weakness of his adversary's title. *Burt, Adm'r, v. Fla. So. Ry. Co.*, 43 Fla. 339, 31 South. 265. The court erred in refusing to so charge the jury.

The verdict of the jury is contrary to law, in that it falls to find the right of possession in the plaintiffs to the lands described therein. Section 1515, Rev. St. 1892.

The verdict simply finds that the plaintiffs are entitled to a fee-simple estate to the lands described. This is not a finding of the right of possession in the plaintiffs. *Asia v. Hiser*, 22 Fla. 378.

The judgment entered in this case is defective in the same particular. For the reasons stated the verdict cannot be sustained, and it was error to enter a judgment thereon. *Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 658.

For the errors found, the judgment must be reversed, and a new trial awarded; and it is so ordered, at the cost of the defendants in error.

TAYLOR and HOCKER, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL, J., concur in the opinion.

WHITFIELD, J., disqualified.

CARTER v. BRADY et al.

(Supreme Court of Florida. Division A. June 11, 1906. Rehearing Denied July 10, 1906.)

1. MECHANICS' LIENS—ASSIGNMENT OF DEBT—EFFECT.

Under the provisions of chapter 5143, p. 78, Acts 1903, an assignment by a contractor of the balance to become due under his contract for building a house will not defeat a materialman's lien served before the completion of the building and before the owner has actually paid

the balance to the assignee; the balance due being in excess of the materialman's lien.

2. SAME—EXTENT OF LIEN.

Under the provisions of chapter 5143, p. 78, Acts 1903, where a contractor assigns the balance due him on an uncompleted contract to build a house, and the owner of the house accepts the assignment upon condition that the assignee will complete the contract for building the house, and before the completion of the contract and before the balance due is paid a materialman's lien is served on the owner for material furnished the original contractor and used in the building, such lien is binding on the property for an amount not greater than the amount unpaid on the contract at the time of the service of the notice.

(Syllabus by the Court.)

Appeal from Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Bill by W. J. Carter against Hugh Brady and W. A. Cox. Decree for defendants, and complainant appeals. Reversed and remanded.

W. F. Himes, for appellant. Macfarlane & Glen, for appellees.

WHITFIELD, J. The appellant filed a bill in the circuit court for Hillsborough county to enforce a claim for materials furnished to W. A. Cox and used in a building on the land of Hugh Brady. The prayer is for a personal decree against W. A. Cox for the amount claimed and for the foreclosure of an alleged lien on the land of Hugh Brady for the said amount. The bill was dismissed as to Hugh Brady, and the complainant appealed therefrom.

Hugh Brady, the owner of certain land, contracted with W. A. Cox to erect a building thereon. W. J. Carter furnished Cox material for such building to the amount of \$152.53. Cox abandoned the contract before the completion of the building, and for value received gave to one W. C. Spencer an order requesting Hugh Brady to pay to Spencer the balance due Cox on account of the contract for building the house for Brady. Brady accepted in writing the said order, conditioned that Spencer should complete the building as per contract, and agreed that upon such completion he would pay to Spencer the balance unpaid on the contract. Two days after the order from Cox to Spencer was presented to and accepted by Brady, W. J. Carter delivered to Brady a written notice that Cox was indebted to Carter in the sum of \$152.53 for building material furnished by Carter and used by Cox in the construction of said building on said land, and that Carter claimed and intended to hold a lien on said land, with the buildings thereon, for the said sum so due. When Brady accepted the order given by Cox to Spencer the balance unpaid on the contract was \$287. Brady ignored the notice given by Carter. Spencer completed the contract, using \$70.40 of labor and material therefor. When the contract was completed Brady paid Spencer \$287 and refused to recognize the lien claimed by Carter.

Sections 5 and 10, c. 5143, pp. 78, 80, Acts 1903, contain the following provisions:

Section 5. "Liens shall exist in favor of any person who shall furnish any building material used in the construction, repair, or use of any building, railroad, canal, or telegraph line, wharf, bridge, mill, distillery or other manufacturing work or structure, upon the said buildings, lines, or other property and the lands upon which they stand."

Section 10. "A person entitled to acquire a lien, not in privity with the owner * * * shall acquire a lien upon such owner's real or personal property as against him * * * by the delivery to him, or his agent, of a written notice that the contractor or other person for whom * * * the materials were furnished, is indebted to the person * * * furnishing the material in the sum stated in the notice. * * * A lien shall exist from the time of the service of such notice for the amount unpaid on the contract of and by the owner to the contractor or the person for whom the material was furnished."

The contention for the appellee, Hugh Brady, is that, the contract being an entirety, its abandonment by Cox before its completion severed the contractual relation between Brady and Cox, and left Brady owing nothing to Cox; that as Brady owed Cox nothing because of the abandonment of the contract before its completion, and Cox being the contractor or the person to whom the material was furnished by Carter, the statute gave Carter no lien for material furnished to Cox, because, it is contended, Brady owed nothing to Cox, the original contractor, when the notice was served on Brady.

The bill of complaint alleges that "W. A. Cox entered into a certain contract with the defendant, Hugh Brady, by the terms whereof the said W. A. Cox agreed with the said Hugh Brady, for certain moneys to be paid him in that behalf by the said Brady, to construct and erect for the said Hugh Brady a one-story cottage on the property hereinbefore described; that a more particular description of the said contract and the terms and conditions thereof are unknown to" complainant. There is no evidence as to the terms and conditions of the contract, or as to the conduct of the parties under it, except as to the abandonment, and the nature of the subject-matter of the contract does not necessarily make it an entirety.

The acceptance by Brady of the order given by Cox to Spencer was an acknowledgment that there was an amount due and unpaid to Cox, and it is agreed that such unpaid amount is \$152.53. The agreement of Brady to pay the amount so acknowledged to be due on the contract is an evidence of the intention of Brady to accept Spencer as the successor to Cox in their contract relation as to the building. The statute provides that "a lien shall exist from the time of the serv-

ice of such notice for the amount unpaid on the contract of and by the owner to the contractor." The giving and acceptance of the order from Cox to Spencer did not operate as a payment by Brady to Cox of "the amount unpaid on the contract," and, such order not being shown to be negotiable, its receipt by Spencer and its acceptance by Brady must be considered to have been subject to the rights existing between Brady and Cox at the time such order was given and accepted. The assignment of the balance due on the contract carried with it the burden imposed on it by law. Spencer could have no greater rights under the order and its acceptance than Cox had. Under our statute an assignment by a contractor of the balance to become due under his contract for building a house will not defeat the materialman's lien served before the completion of the building and before the owner has actually paid the balance to the assignee; the balance due being in excess of the materialman's lien. See *Bolsot on Mechanics' Liens*, § 347, page 336; *Joseph Bourget v. Robert Donaldson et al*, 83 Mich. 478, 47 N. W. 326; *Texas Builders' Supply Co. v. National Loan & Investment Co.*, 22 Tex. Civ. App. 349, 55 S. W. 1059; *Jennings v. Willer* (Tex. Civ. App.) 32 S. W. 24. Spencer undertook to complete the contract begun by Cox, and could have no greater rights under it than Cox had, and, as Carter's notice of lien was served before the building was completed and before the balance due upon the contract was paid, the payment to Spencer of the balance due on the contract did not discharge the lien acquired by Carter by serving his notice before the building was completed and before such balance was paid. Our statute cannot be subject to the construction that the contractor can at any time during the progress of the building under his contract assign the balance due for such building to a third party, and upon the acceptance of such assignment by the owner, a materialman, to whom a lien is given under the statute, will be deprived of all the benefits which the statute has intended to confer upon him. The order given by Cox to Spencer and its acceptance by Brady did not prevent the lien of Carter from attaching when notice thereof was presented to Brady before the completion of the contract by Spencer, who undertook to complete it, and before the payment of the balance due thereon by Brady to Spencer, and as a consequence the decree dismissing the bill as to Hugh Brady was erroneous.

The decree is reversed at the cost of the appellee, Hugh Brady, and the cause is remanded for further proceedings in accordance with law.

SHACKLEFORD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

McGOURIN v. TOWN OF DE FUNIAK SPRINGS et al.

(Supreme Court of Florida, Division A. June 11, 1906.)

1. MUNICIPAL CORPORATIONS — OPENING STREET—INJUNCTION—RIGHTS OF PROPERTY OWNER.

A court of equity has jurisdiction to enjoin a municipal corporation and its officers from opening up and using as a public street, without the owner's consent, land belonging to an individual, which has not been condemned, dedicated, or used as a street or highway.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 842-845, 967.]

2. INJUNCTION—BURDEN OF PROOF.

Where the bill alleges that the complainant is seised and possessed of land, and the sworn answer, where the oath has not been waived, denies such seisin and possession, the burden is upon the complainant to prove the seisin and possession by sufficient evidence.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 276.]

3. SAME.

Where a bill alleges that the respondents are endeavoring to unlawfully subject land of the complainant to public use as a street, and the answer admits the attempt to subject the property to the uses of a public street, but avers a dedication of the lands to public use, the averment of dedication, being new matter, puts upon the respondents the burden of proving such dedication.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 276.]

4. DEDICATION—INTENT.

The intention to dedicate should be considered in determining the existence and character of a dedication of land to public use.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 13, 84.]

5. SAME—PLAT—STREETS.

Where the owner of land makes a town plat thereof, laying the same out into blocks and lots, with intervening streets clearly indicated upon the plat separating the blocks, and conveys lots with reference to such plat, he thereby evinces an intention to dedicate the streets to public use as such.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 34-47.]

6. SAME—EVIDENCE.

Where a dedication is alleged to have been made by making and filing a map or town plat and by selling lots with reference thereto, and the locus in quo appears to be located in a street as clearly indicated upon the map or town plat, the map or plat is evidence of an intention to dedicate the same for public use as a street; but where the locus in quo does not appear to be located in a street as clearly indicated upon the plat, the plat unexplained is not evidence of an intention to dedicate.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 13.]

7. SAME.

Where it appears that the locus in quo is not located in a street as clearly indicated upon a map or town plat made and filed with reference to which lots were sold, that the locus in quo was never abandoned and was never accepted or used as a public street or highway, and that it was from a date soon after the filing of the plat for 18 years inclosed and occupied by the owner and those holding under him, such inclosure and occupancy are inconsistent with an intent to dedicate.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 13, 84, 85.]

8. MUNICIPAL CORPORATIONS—STREET OPENING—INJUNCTION—RIGHTS OF PROPERTY OWNER.

When a bill for an injunction alleges and the proofs show seisin and possession of land and an attempt by a town and its officers to unlawfully take and subject it to public use as a street, and the answer avers a dedication of the land, but the dedication is not proven, the injunction should be granted.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 842-846.] (Syllabus by the Court.)

Appeal from Circuit Court, Walton County; Charles B. Parkhill, Judge.

Bill by T. F. McGourin against the town of De Funiak Springs and others. Decree for defendants. Complainant appeals. Reversed and remanded.

Maxwell & Reeves, for appellant. S. K. Gillis, for appellees.

WHITFIELD, J. This is an appeal from a decree of the circuit court for Walton county dissolving an injunction and dismissing the bill of complaint filed by the appellant against the appellees on May 10, 1902.

The bill in substance alleges that the complainant is seised and possessed in fee simple of two certain described parcels of real estate south of the right of way and track of the Louisville & Nashville Railroad, in the town of De Funiak Springs, Fla., which town claims to be a legally incorporated town under the laws of Florida, and to have been such since July, 1901; that complainant's title to said land is deraigned by grant from the United States to the state of Florida about the year 1856, by grant from the state of Florida to the Pensacola & Atlantic Railroad Company about the year 1881, by deed from the Pensacola & Atlantic Railroad Company to Thomas T. and Catherine P. Wright, by deed from Thomas T. and Catherine P. Wright to the Lake De Funiak Land Company, by deed to one of the above parcels to complainant, and by deed to the other parcel to the West Florida Land Company, and from said last company to complainant; that from about the year 1883, and at the time complainant acquired title to said tracts of land, there had been and were standing upon the same valuable houses, which during the whole of said time and to February 16, 1902, were continuously used and occupied exclusively, adversely, and solely by the grantors of complainant and their tenants, and by complainant and his tenants for store and office purposes; that on February 16, 1902, the buildings standing on said lands belonging to the complainant were totally destroyed by fire, save and except the brick foundations and pillars; that shortly after the fire aforesaid certain named persons, assuming to act as the town council of the said alleged town of De Funiak Springs, without notice to complainant, passed an ordinance, or what purports to be an ordinance, in and by which it was attempted to be enacted that Eighth

street in the said town should be projected southward across said railroad, so as to intersect Wright avenue; that if said Eighth street is projected as directed it will pass through and completely occupy complainant's said lots of land, so that he will be deprived entirely of all beneficial use, occupancy, or enjoyment of the same, and the same will by such projection of said street be entirely confiscated; that on or about April 15, 1902, by direction of respondent G. P. Henry, the respondent Malcolm McCaskill, claiming to act as the marshal of said town of De Funiak Springs, and claiming to have and derive ample and full legal warrant and authority for his acts from and by virtue of said pretended ordinance and under and by virtue of the directions then and there given him by the said G. P. Henry, who was then and there claiming to act as mayor of said town of De Funiak Springs, to put the said ordinance into execution and effect, entered upon the said lots of land belonging to complainant, with a great force of laborers and against the protests of complainant then and there made, and utterly tore up and removed from complainant's said land all of the said brick pillars, which were of great value to complainant for the purpose of erecting new buildings thereon; that ever since the destruction of said brick pillars the respondents G. P. Henry and Malcolm McCaskill have avowed their intention of enforcing said ordinance, so that complainant's land shall be converted into and used as a street, and to this end have repeatedly caused teamsters to drive their wagons over and across complainant's said land, and both by acts and words have invited and encouraged the general traveling public to attempt the use of complainant's said lots of land as a projection and continuation of the said Eighth street; that for the purpose of assuring the use by the general public of complainant's land as a street, and a projection of said Eighth street, the said respondents have collected and deposited on Baldwin avenue, north of complainant's said land, but not on it, a great quantity of planks and timbers, which complainant is advised the respondents intend to use in the construction of such crossings over the Louisville & Nashville Railroad Company's track and sidewalks over complainant's lands as will invite and cause the general public to use and occupy complainant's said land as a street, by reason whereof, if the said acts be permitted to be continued by the respondents and be not restrained, complainant will be wholly deprived of his said property; that if the design and evident intention of respondents to project Eighth street in accordance with said ordinance through, over, and across complainant's land be permitted to reach consummation complainant will be deprived of his said land in the manner in which it has heretofore been used and enjoyed by him, to wit, as a site for store and office buildings and such other

lawful use as he may put the same to; that the town of De Funiak Springs and respondents, as complainant is advised, believes, and therefore alleges, claim no other warrant or authority for their said acts than is contained in said ordinance; that the said respondents have neither instituted nor caused to be instituted any proceedings for the condemnation to public or other use of complainant's said lands, and have never condemned or caused the same to be condemned, save and except as the said ordinance might be deemed to be a condemnation, and have never made or offered to make or tendered to complainant any compensation for the said lands; that complainant, notwithstanding the said ordinance, has recently caused the said land to be inclosed with a substantial fence, which he is advised the respondents threaten to tear down and destroy, and which he believes they will tear down and destroy, and thereby throw open the said land as a public street, unless restrained from doing so; that the opening up of complainant's land is not necessary to the good order and benefit of the said town. An injunction was prayed for and granted.

An answer was filed in which respondents admit that certain buildings were standing on the described property and were destroyed by fire on February 16, 1902, and that the ordinance referred to was passed; that respondent McCaskill entered upon the land and removed therefrom all obstructions thereon, so that the general public could safely pass thereover, the same being a public highway; but deny that the same was done without authority, and aver that he did so in compliance with his official duties as marshal of the respondent town, it being the duty of the respondents to extend and open the streets, lanes, and avenues of the said town, and to cause encroachments, obstructions, decayed buildings, and ruins to be removed therefrom; aver that complainant is not seised and possessed in fee simple of said lands, and deny that complainant has any interest therein; aver that in the year 1884 the Lake De Funiak Land Company, through whom complainant alleges that he derelined title to said lands, was seised and possessed in fee simple of section 35, township 3 N., range 19 W., of which section the land alleged to be owned by complainant is a part; that during the year 1884 the said Lake De Funiak Land Company, a corporation, made or caused to be made a map or town plat of that part of said section 35 that contains the lands described and other adjoining lands, and filed the same in the office of the clerk of the circuit court for Walton county, Fla., upon which map or town plat were laid off blocks and lots and squares, with spaces for roads, streets, alleys, avenues, and other public highways for the use of the general public; that said part of said section was laid off into blocks, lots, squares, streets, roads, alleys, avenues, and parks, and

certain parts thereof, such as said streets, roads, alleys, avenues, and parks were dedicated to the public for public highways and other public uses; that said Lake De Funiak Land Company sold and continued to sell for several years thereafter to various and sundry persons, blocks and lots by, according to, and with reference to the said map or town plat, with the blocks, lots, squares, streets, roads, alleys, avenues, and parks indicated thereon as aforesaid; that upon said map or town plat the said spaces between the said lots and blocks form no part thereof, but are indicated upon the said map as spaces for streets, roads, alleys, avenues, and parks, and are so named and numbered thereon; the alleged continuous, adverse, exclusive, and uninterrupted possession of the property by the complainant, his tenants, his alleged grantors, and their tenants is denied. Respondents aver that the said property is public property which was dedicated to the public for public uses by the said owner thereof, and was accepted and used as such by the public long before and at the time that it was assumed to give the complainant and his grantor an interest therein other than that of the general public; that said property is included in spaces between the lots and blocks, and which form no part thereof, was laid out, surveyed, platted, indicated, and appears upon said map or town plat as street, avenue, or park property; that the respondents being informed and believing that the said property was and is public property, and it being their duty to regulate, extend, and open up the same, and to cause encroachments, obstructions, decayed buildings, and ruins to be removed therefrom, under and by authority of the town council of the said town, the said property was cleared of obstructions thereon, and, this being done, the public began to use the same as a public highway, by driving and passing thereover, and continued to so use the same up to and until the same was inclosed by a fence, and they were restrained from further using the same by the order of the court; that a temporary fence, referred to in the bill of complaint as a substantial fence, inclosing the said property, was placed there some time during the night from 10 o'clock p. m. on May 9, to 5 a. m. on May 10, 1902; that about daylight on May 10th the said fence was discovered to be there, and that the restraining order was dated May 10, 1902; that under the protection of said order the said fence has since that time been made more substantial; deny that respondents have threatened to tear down and destroy said fence; aver that the buildings referred to in the bill were built more than ten years after the time alleged; that the land dedicated as aforesaid has never reverted to the original owner thereof or to any of its grantees, and that the complainant has no interest or property therein other than

that which belongs to every person to use the same as public property as originally intended by the owner thereof and its grantees of the lots and blocks as indicated upon the said map or town plat.

A replication was filed and testimony was taken before a master. At the hearing a decree was rendered dissolving the injunction and dismissing the bill of complaint. An appeal was taken from this decree.

The orders of the court refusing the relief asked and dismissing the bill are among the errors assigned.

The contention of the complainant is that the respondents have attempted, and are threatening, to unlawfully take and subject his real estate to the uses of a public street; and the insistence of the respondents representing the public is that the property was dedicated to public use by a company through whom the complainant derails his title, and that it is the duty of the respondents to enforce the rights of the public in the use of the land as a public street.

A court of equity has jurisdiction to enjoin a municipal corporation and its officers from opening up and using as a public street, without the owner's consent, land belonging to an individual, which has not been condemned, dedicated, or used as a street or highway. See *Baya v. Town of Lake City*, 44 Fla. 491, 83 South. 400.

The bill alleges that the complainant is seised and possessed of the land in controversy and that the respondents are endeavoring to unlawfully subject it to public use as a street. The denial in the sworn answer of the respondents that the complainant is seised and possessed of or had any interest in the locus in quo, being directly and positively responsive to the allegations of the bill, put upon the complainant the burden of proving by sufficient evidence his seisin and possession. The complainant introduced testimony and deeds showing his title and possession. The answer admits the attempt to subject the property to the uses of a public street, but avers the duty of respondents to do so because of a dedication of the lands to public use. The averment in the answer that the locus in quo was dedicated to the use of the public, and accepted and used as such by the public, being new matter, put upon the respondents the burden of proving such dedication. See *Pinney v. Pinney*, 46 Fla. 559, 35 South. 95, and authorities there cited; *Parkey v. Safford*, 48 Fla. 290, 37 South. 567; *Ocala Foundry & Machine Works v. Lester* (Fla.) 38 South. 56; *Tyler v. Toph* (Fla.) 40 South. 624; *Mayo v. Hughes* (Fla.) 40 South. 490.

The averment as to dedication is that the Lake De Funiak Land Company, through which company the complainant derails his title, in the year 1884, was seised and possessed of section 35, township 3 N., range 19 W., of which section the land in con-

troversy is a part, and that said company, a corporation, during the year 1884, made or caused to be made a map or town plat of that part of said section 35 that contains the lands in question and other adjoining lands, and filed the same in the office of the clerk of the circuit court for Walton county, Fla. upon which map or town plat were laid off blocks and lots and squares, with spaces for roads, streets, alleys, avenues, and other public highways for the use of the general public; that said part of said section was laid off into blocks, lots, squares, streets, roads, alleys, avenues, and parks, and certain parts thereof, such as said streets, roads, alleys, avenues, and parks, were dedicated to the public for public highways and other public uses; that the said Lake De Funiak Land Company sold and continued to sell for several years thereafter to various and sundry persons blocks and lots by, according, and with reference to the said map or town plat, with the blocks, lots, squares, streets, roads, alleys, avenues, and parks indicated thereon as aforesaid; that the property in controversy was dedicated to the public for public uses by the owner thereof, and was accepted and used as such by the public long before and at the time that the owner assumed to give the complainant and his grantor any interest therein other than that of the general public; that said property is included in the spaces between the lots and blocks, and was laid out, surveyed, platted, indicated, and appears upon said map or town plat as street, avenue, and park property.

The averment is that the property in controversy was platted upon the map as street, avenue, and park property, and that it was dedicated to the public for public uses, and was so accepted and used. There is no direct averment that the locus in quo was platted, dedicated, accepted, and used by the public as a highway or street.

The intention to dedicate should be considered in determining the existence and character of a dedication of land to public use. 9 Am. & Eng. Ency. Law (2d Ed.) 36, 57, 79, and authorities cited; 13 Cyc. 452.

Where the owner of land makes a town plat thereof, laying the same out into blocks and lots, with intervening streets clearly indicated upon the plat separating the blocks, and conveys lots with reference to such plat, he thereby evinces an intention to dedicate the streets to public use as such. *Price v. Stratton*, 45 Fla. 535, 33 South. 644; 9 Am. & Eng. Ency. Law (2d Ed.) 57. See, also, *Florida East Coast R. Co. v. Worley*, 49 Fla. 297, 38 South. 618.

The dedication in this case is alleged to have been made by the making and filing of a map or town plat and by selling lots with reference thereto. If the land in question is located in a street as clearly indicated upon the map or town plat, then there is evidence

of an intention to dedicate the same for public use as a street.

The map or town plat referred to purports to be a map of Lake De Funiak, showing blocks, lots, streets, avenues, and parks thereon, with appropriate numbers on the lots and names on the streets, avenues, and parks. The place was incorporated as De Funiak Springs in 1901. Baldwin avenue runs east and west through the town, parallel with and immediately north of the track of the Louisville & Nashville Railroad. A lake is a short distance south of the railroad track. Eighth street runs north and south, and intersects Baldwin avenue, but, as shown by the map, does not extend beyond Baldwin avenue to the south.

The town ordinance referred to in the bill of complaint provides that "there shall be established and maintained a public crossing for all purposes across the railroad, Baldwin avenue, and Wright avenue at Eighth street, extending south to the south boundary of Wright avenue." The map or town plat does not show Wright avenue to be between Eighth street and the lake to the south; but there is testimony that Wright avenue is now so located that, if Eighth street is projected across the railroad track south as required by the ordinance, it will include the land in controversy and will intersect Wright avenue.

The map appears to have been filed of record in 1886, but it is shown to have been in existence in 1884, and that deeds made as early as May, 1884, referred to it in describing property conveyed. There is undisputed testimony that the locus in quo was never, prior to the fire on February 16, 1902, used as a street or highway; that in December, 1884, a building was erected on the locus in quo, and subsequently other buildings were erected thereon, and all remained thereon until the fire in 1902; that a fence was built around a large tract, including the locus in quo, by the owner thereof in November, 1884, and that this fence prevented the use of the lands in dispute as a street; that when this fence was removed the land in dispute was inclosed by another fence, which prevented its being used as a street, and remained so inclosed until the fire in February, 1902, which destroyed the buildings that were erected on the lands. The supposed dedication is alleged to have been made "during the year 1884" by making and filing a map or town plat and by selling lots with reference thereto. It does not appear from the map or town plat that the locus in quo is in any of the spaces indicated thereon as a street or avenue, and the testimony shows that it was inclosed by a fence and occupied by the complainant and his predecessor in title at least from November, 1884, to the fire in 1902. The inclosure and occupancy as stated show there was no abandonment of the land to public use as a highway, and such inclosure and occupancy are entirely inconsistent with

an intention to dedicate the lands as a highway. There is no testimony that this land was in any way accepted by the public as a highway or street, or used as such at any time before or after it was inclosed by the fence in November, 1884, and prior to the fire in 1902. The map or town plat has upon it, about where the locus in quo should appear thereon, irregular designs with narrow spaces between them, and there is testimony that these irregular designs upon the map or town plat were supposed to represent flower beds in a park. No figures or letters appear upon these designs or upon the spaces between them, which spaces are irregular and narrower than the spaces on the map designated as streets or avenues. There is testimony that, in selling the lots north of the locus in quo and north of the railroad, representations were made that the locus in quo would remain open, so as not to obstruct the view of the lake to the south and east of the lots so sold. Even if this be true, it does not show the dedication of the lands in controversy as a highway or street for public use; and if purchasers of lots have rights under such conditions and representations they are not affected by this suit. The respondents, representing the public, rest their justification upon the dedication of the lands for public use as a street, and no such dedication is shown by the proofs.

The decree is reversed, at the cost of the appellees, and the cause is remanded, with directions to enter a decree in accordance with the prayer of the bill.

SHACKLEFORD, C. J., and COCKRELL, J., concur.

TAYLOR and HOCKER, JJ., concur in the opinion.

PARKHILL, J., disqualified.

WILLIAMS v. WETMORE.

(Supreme Court of Florida, Division B. June 11, 1906.)

1. APPEAL—REVIEW—OBJECTIONS TO JURISDICTION—WAIVER.

Where there has been a dispute as to the boundary of a lot of land, resulting in a breach of the peace, and several ejectment suits, which have not settled the question between them, and there are difficulties connected with the ascertainment of the boundary, growing out of the manner in which the boundaries were described in the deeds made by the party from whom both claim title, and both parties agree that a court of equity is the proper forum for the settlement of the controversy, and a bill in equity is filed by one of them in the circuit court against the other, setting up all the facts, for the purpose of having that court determine the question, and the defendant does not object to the jurisdiction of the equity court by plea, demurrer, or in any other proper manner, but consents to the jurisdiction, and answers the bill, and thereby submits his defense, and a decree is rendered by the chancellor establishing the boundary, from which the defend-

ant appeals, and the question of the jurisdiction of equity is raised for the first time by him on appeal, the appellate court will not consider objections to the jurisdiction, where the record fails to show an entire absence of general jurisdiction over the subject-matter.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1166-1172.]

2. EQUITY—TRIAL—FAILURE TO CONSIDER DEFENDANT'S EVIDENCE.

Where the parties to a suit in equity agree before an examiner that each will pay the costs of taking the testimony of his own witnesses and the costs of the cross-examination of his adversary's witnesses, and the complainant pays his share of the costs, but the defendant fails after notice to pay his proportion, and after the time has expired for taking testimony the complainant sets the cause down for a hearing and gives the defendant notice thereof, and the examiner files a report of the complainant's testimony, but does not file that of the defendant because of the latter's failure to pay the costs, and no steps are taken by the defendant to procure the filing of his testimony, but he simply protests at the hearing that the chancellor should not hear the case because of the absence from the record of his testimony, and notwithstanding such protest the chancellor proceeds with the hearing and renders a final decree, the action of the chancellor presents no error of which the defendant can avail himself on appeal.

(Syllabus by the Court.)

Appeal from Circuit Court, Duval County; Rhydon M. Call, Judge.

Bill by George W. Wetmore against Henry Williams. Decree for complainant, and defendant appeals. Affirmed.

A bill was filed in the circuit court of Duval county by the appellee against the appellant, wherein it was alleged that one Jack Parker in his lifetime acquired by deed a part of fractional lot 2 in section 12, township 2 S., range 26 E., beginning at a post at the corner of sections 12, 11, 1, and 2, township 2 S., range 26 E.; thence along the section line S. 88° 15' E. to a post on the west line of the public road leading from Jacksonville to Panama Mill; thence along the west side of said road S. 20° 15' E. 5 chains 48 links to a post also on the west side of said road; thence west to a post standing in section line dividing sections 11 and 12, said township and range; thence along said section line north 6 chains 15 links to beginning. This parcel is also described as bounded by the property of other persons. It will be noticed that two of these lines are described as running from post to post without giving their lengths. The bill alleges that Parker conveyed the eastern part of this property to Matilda Robinson, wife of William Robinson, containing 10 acres, which is described by metes and bounds, and that the Robinsons took possession of that part of the same lying east of an old fence marked on a diagram as the "old fence line." Parker also conveyed 105 feet square in the extreme northeastern portion of the residue to the trustees of the M. E. Church. The trustees took possession of 105 feet square, which was bounded on the east by the "old fence line," fenced it, and built a church thereon. Parker

then sold and conveyed the western part of this tract to one Cash, being 2 acres west of Hogan's creek, which ran through the property. The bill then alleges that Parker constructed a fence along the north and south lines of said tract, extending westward from the said "old fence line," and was in occupation of the land so fenced, and in this state of the case on the 27th of October, 1885, Parker and wife conveyed to the orator, Wetmore, and his heirs, a part of the residue of said tract, described as beginning at the southeast corner of Wm. Robinson's land, running west 210 feet to a stake, north 395 feet, east 112 feet to a corner of the lot owned by the trustees of the M. E. Church, south 105 feet, east 105 feet, south 290 feet to the beginning, containing 1¼ acres, and then giving the boundaries. The bill alleges that the orator took possession of said parcel of land, extending from the "old fence line" to a fence erected along a line indicated on the plat as black line shaded red, east of a parcel marked thereon Annie Eichelberger. The orator took actual possession of this parcel and resided on it for ten years up to the time of Parker's death, and thence continuously to the present time. In the meanwhile Jack Parker, with his wife resided on a parcel west of the "Annie Eichelberger parcel." A subsequent owner of the Matilda Robinson parcel claimed that the "old fence line" was not the true line, but that the true deed line extended further west, and orator had to readjust his line to said deed line. In 1899 Parker and wife sold and conveyed to Annie Eichelberger and her heirs a certain part of the residue of his tract lying immediately west of orator's parcel, which is 30 feet east and west and 366 north and south, and described in the bill.

After making the deed to Eichelberger, Parker and wife conveyed to Joseph Robinson a parcel described as beginning at the northeast corner of the piece sold Cash, running easterly 216 feet, southerly 366 feet, westerly 216 feet, northerly 366 feet, to beginning, containing 2 acres. It will be noticed that this description was likely to produce confusion, inasmuch as Cash's western boundary was the center of Hogan's creek. It is alleged that Joseph Robinson sold this parcel to his mother, Matilda Robinson; that his mother and father then conveyed it to him; and that he then, in September, 1902, conveyed it to the defendant, Henry Williams, who it is alleged is the son-in-law of Matilda, and lived on this parcel before he acquired it by deed.

The complainant alleges that he acquired two tax titles to the Eichelberger lot in 1896, one of them through W. B. Owen, who acquired it in 1896, and fenced in a part of it in 1896. A year or more subsequently to the death of Parker on the 2d of May, 1895, the defendant, Williams, constructed a fence across the southern end of the Eichelberger parcel, and when complainant's wife

was attempting to use the said premises as formerly defendant, Williams, assaulted her, and therefor was convicted in the criminal court of record of said county, and friction and trouble have existed ever since, though the orator has managed to hold possession and use said property, except a small part of the extreme northern end.

In 1899 Matilda and William Robinson brought an action of ejectment against the complainant, and therein described the land sued for according to the description in the deed from Parker to Robinson. This suit was dismissed by the plaintiffs. In June or July, 1900, defendant, Williams, constructed a fence near the north end of the Elchelberger lot, extending westward from orator's fence, thereby excluding orator from the use of a part of the said lot. In July, 1900, orator brought an action of ejectment against Williams for said part, a plea of not guilty was entered, but before the case could be tried the fire of May 3, 1901, destroyed the records and files of the court. Subsequently, on the 25th of September, 1902, defendant, Williams, brought an action of ejectment against the orator for land described just as the description contained in the deed from Parker to Robinson, and, not being clear as to the claim of Williams, filed pleas of not guilty and not in possession, and in this way it was developed that the defendant claimed a part of the land of your orator under said description. Thus learning the claim of Williams, it is alleged that at the last term of the court on the law side thereof counsel on both sides in said ejectment suit orally agreed that the contest was such as should be decided in a court of chancery, rather than in a law court, and hence no jury trial was had. The orator claims all the land of the Elchelberger lot, and alleges that the conveyance under which Williams claims does not embrace it. It is alleged that the history of this controversy, as well as its nature, reveals that consideration and determination in a court of equity is essential to prevent a multiplicity of suits.

The bill prays the court to take jurisdiction and locate by permanent monuments on the land itself, and by a sufficient description the exact boundary between the lands of the orator and defendant, Williams, for an injunction against Williams from prosecuting his ejectment suit, from trespassing, for general relief, etc.

The foregoing contains the substance of the bill necessary to be considered. The defendant did not demur to this bill, or otherwise object to the jurisdiction of the chancery court, but answered, admitting the allegations to be true, except as otherwise contradicted by the answer. It claims that Jack Parker's occupation of the parcel marked "Joseph Robinson" on the plat covered the Elchelberger parcel; that what the bill alleges about the "old fence line" and the "deed line" is futile, and that complainant was not com-

pelled to move his line further west, because it was claimed that the "old fence line" was not the true line; that while the deed to his grantor, Joseph Robinson, was two days later than the deed to Elchelberger, yet that neither defendant nor said Robinson had any notice of said deed, except from the record, and that they were both recorded on the same day, viz., September 18, 1889.

The answer denies that Elchelberger ever took possession of the lot, and avers that complainant took nothing by his tax title; that Jack Parker remained in possession of the lot until he died in 1895, notwithstanding the deed to Elchelberger; that Wetmore did not go upon the Elchelberger lot until a year after Parker died, when he trespassed thereon by building his fences as set out in the bill. The answer sets out how defendant obtained his deed from Joseph Robinson, and that John Parker and Joseph Robinson and defendant in succession have held all the land from Hogan's creek on the west to the fence on the west side of the land of Wetmore, including the Elchelberger tract, for more than 18 years, openly, notoriously, and exclusively. The answer admits that there was a scramble for the possession of the Elchelberger lot, which led to the arrest and conviction of defendant, but he alleges he was not guilty, and that his conviction was obtained by false testimony. The answer alleges that the Elchelberger deed is a fraud, that the complainant has known for a number of years that defendant and his grantors have held the land up to the east line of the Elchelberger lot, and that complainant has no rights west of said line, and that in fact there never was such a lot as the Elchelberger lot. The foregoing is a compressed statement of the material facts of the answer.

On July 4, 1904, a replication to the answer was filed, and by consent of the parties an examiner was appointed to take and report the testimony. On the 29th of July, 1904, the examiner in his report states that he gave notice to the solicitors of the parties, when the testimony was taken, that after taking the testimony he would divide the fees between the respective parties, so that each party should pay for the direct examination of his own witnesses and the cross-examination of his opponent's witnesses, and should be charged the regular per diem for the time occupied in the examination of his witnesses, and that this arrangement was agreed to by both parties, and the testimony of the respective parties taken. He furthermore states that upon the conclusion of the testimony he rendered bills to the solicitors of the several parties, in accordance with his custom and the method above stated, and that the complainant's solicitor promptly paid the bill rendered him, but that neither the defendant nor his solicitor had paid the examiner any of the costs and expenses of taking the testimony on behalf of the defendant, though several times requested to do

so. He then states that upon demand of the counsel for the complainant, on that date, viz., 21st March, 1905, he submitted this report, and the testimony of the complainant.

It appears that the cause was set down for a hearing by complainant on the 24th of March, 1905, and while the cause was being argued for the complainant the defendant's counsel filed the following objection: "Comes now the said Henry Williams, defendant, and respectfully protests against and objects to the hearing of said cause on the ground that the examiner or master has not filed in said case any of the testimony taken by him for defendant, which consists of the depositions of defendant and several witnesses in his behalf, examined and cross-examined before said officer in support of defendant's answer, with the single exception of the agreed testimony of one Robinson; said officer having refused to file defendant's witnesses' testimony because he has not been paid his fees for the same."

The chancellor entered a final decree in favor of the complainant, settling the boundary line between the parties, the introductory part of which is as follows: "This cause coming on to be heard in due course upon the pleadings and the testimony as filed herein, and it appearing to the court that this cause was duly set down for hearing by the complainant; that due written notice was given by the complainant of this hearing on the 24th day of March, A. D. 1905; that at the day, hour, and place of the hearing set out in said notice the parties by their counsel appeared before the court, and while the argument on the part of the complainant was being presented the defendant's counsel proffered to the court the paper styled 'objection to the hearing'; that the court is not advised as to the nature, extent, substance, or effect of the testimony submitted to the examiner in behalf of the defendant; that the court is not advised as to what effort or request if any was made on the part of the defendant or his solicitor or counsel to procure the filing by the examiner of such testimony; that no motion, petition, or other proceeding or pleading has been submitted to the court to cause the examiner to file such testimony or to procure such testimony for the court's consideration; that the time for taking testimony elapsed several months before this cause was so set down for hearing by the complainant; and it further appearing to the court, after taking said cause under advisement, that there is equity in said bill and that the material allegations of said bill are true, it is thereupon considered, ordered, adjudged, and decreed that the said objection of the defendant be and the same is hereby overruled, that the controversy as to the boundary line between the parties hereto should be settled by this court, that the complainant, George W. Wetmore, should have the relief prayed, that the defendant has without right

or equity disputed the western boundary of the land of the complainant as located by the complainant," etc.

Geo. U. Walker, for appellant. A. W. Cockrell & Son, for appellee.

HOCKER, J. (after stating the facts). Two assignments of error are insisted upon here by the appellant. In substance they are, first, that the court of equity had no jurisdiction of the subject-matter of this suit; and, second, that the court erred in hearing the cause without the testimony of the defendant.

As to the first, the solicitor for appellant admits that he would not have raised this question if he had had the benefit of his testimony before the chancellor which had been taken by the examiner, but which the examiner did not report. The record shows that the defendant below and appellant here not only did not object below in any way to the jurisdiction of the court, but consented to the determination of the matters involved by the equity court. There can be no dispute as to the law that, where a court has no jurisdiction whatever of the subject-matter of the litigation, consent cannot confer jurisdiction, and that the question may be raised at any time. It is also true, we think, that, where the jurisdiction has been consented to, appellate courts do not feel called upon to make a rigorous and critical examination in order to discover the lack of jurisdiction. We think this is peculiarly true of that class of cases to which the case at bar belongs. An examination of the reported cases upon the jurisdiction of equity in matters of confusion of boundaries will show a varied application of that jurisdiction. In the case of *Doggett v. Hart*, 5 Fla. 215, 58 Am. Dec. 464, this court held: "A court of equity will not entertain jurisdiction in cases of confusion of boundary upon the ground merely that the boundaries are in controversy, but will require that there should be some equity superinduced by the act of the parties, such as fraud, gross negligence, or misconduct on the part of those whose duty it is to preserve and perpetuate such boundaries." The doctrine of this case was followed and applied in *Pendry v. Wright*, 20 Fla. 828. In the case of *Boyd v. Dowle*, 65 Barb. (N. Y.) 237, there is an extensive examination of the English and American authorities, and the conclusion of the court is that a "confusion of boundaries of lands exists when by the deeds thereof, or the acts of the owners or occupants of the same, the boundaries cannot be ascertained with reasonable certainty by one party alone, or except by the judgment or opinion of men, after an examination of the deeds and the premises with a surveyor, aided, perhaps, by the examination of witnesses." In this case the confusion was caused by the descriptions in the deeds made by the party under whom both litigants claimed title, and

the jurisdiction of equity was sustained. Under the circumstances of the case at bar we do not propose to go into a lengthy examination of authorities, but refer the student to the case of *Gulce v. Barr*, 130 Ala. 570, 30 South. 563, and the note to *Stuart's Heirs v. Coalter* (Va.) 15 Am. Dec. 745, and the text-books on Equity Jurisprudence. In the case of *Hine v. City of New Haven*, 40 Conn. 478, it was held that where it was manifest that there was a want of equity jurisdiction, because there was a complete remedy at law, the court might of its own motion dismiss the bill, but where the question is in doubt, and there has been a trial on the merits, the court will not of its own motion dismiss the bill, nor will the objection first taken in the appellate court be regarded with favor. In the case of *Tubb v. Fort*, 58 Ala. 277, the question of the jurisdiction of the court of equity was raised for the first time in the appellate court, after having been litigated on its merits in the court below. Chief Justice Brickell, speaking for the court, consisting of himself and Justices Stone and Manning, says on page 282: "The general rule of practice in courts of equity, has long been settled that if the subject-matter of the suit is not without the jurisdiction of a court of equity, and there may be circumstances under which it would be competent for the court to grant relief, the objection that there is an effectual and complete remedy at law must be taken by demurrer, and comes too late at the hearing. In its very nature the objection is of that class which ought to be taken in the earliest stage of the suit, before costs have accumulated or by the lapse of time irreparable injury may result." In 1 *Daniell's Ch. P. & Pr.* (6th Am. Ed.) p. 555, the author says: "If the objection on the ground of jurisdiction is not taken in proper time, either by demurrer or plea, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it, except in cases where no circumstances whatever can give the court jurisdiction." In the case of *De Cottes v. Clarkson*, 43 Fla. 1, 29 South. 442, this court held: "Where no objection is made in any manner to the jurisdiction of a court of chancery in a partition suit, and the case is regularly brought to final hearing and decree on bill, answer, and testimony, the appellate court will not consider objections as to jurisdiction raised for the first time on appeal, where the record fails to disclose an entire absence of jurisdiction over the subject-matter." See, also, *Howell v. Commercial Bank* (Fla.) 40 South. 76; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604, 33 L. Ed. 1021; *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; 11 Notes on U. S. Reports (Rose) 743. In the latter, under the statement that, "where the subject is of a class of which equity has cognizance, legal remedy cannot be urged for the first time on appeal,"

a large number of cases are cited. In the case at bar the admitted facts show there was much confusion and contention between the parties as to the boundaries of the respective lots which they claimed to own. The lengths of the east and west lines of the original tract of land of Parker, from whom both parties derive their titles, are not stated. These lines run from posts on one side to posts on the other side. It is possible that this caused the contention between the Robinsons and the complainant as to whether the "old fence line" or the "deed line" was the true line between them. Again, the west line of the lot conveyed to Cash by Parker was the center of Hogan's creek. The lot conveyed by Parker to Joseph Robinson, which seems to be the lot claimed by the defendant, Williams, is described as beginning at the northeast corner of the lot sold Cash, but its westerly line does not seem to follow Hogan's creek, though the defendant claims all the land between Hogan's creek and the land of complainant, which covers the Eichelberger lot. After several years of contention, several ineffectual lawsuits, the trial and conviction of defendant for an assault on the plaintiff's wife, which grew out of the contention over the boundary question, the parties, having come to a more definite understanding of their mutual claims, agreed that the case was one properly triable in chancery. The bill was filed, as well as an answer by the defendant, wherein it was practically agreed that the case was one of equity cognizance, and here, on appeal for the first time, the question of equity jurisdiction is raised. Under these circumstances we do not feel called upon to say more than that it is not manifest that the court of equity did not have jurisdiction of the subject-matter, and thus leave the jurisdiction where the parties have placed it.

We now consider the second assignment of error, that the court erred in hearing the cause without the testimony of defendant. The report of the examiner shows that the parties agreed to divide the fees between them, so that each should pay for the direct examination of his own witnesses and the cross-examination of his opponent's witnesses; that complainant promptly paid his proportion of the costs; and that the defendant, the appellant, did not pay his proportion, though several times requested so to do. This was the situation on March 21, 1906, about five months after the time for taking the testimony had expired, when on the demand of complainant the examiner filed his report of the complainant's testimony. The cause was set down for hearing by the complainant on March 24th, and notice thereof given the appellant, and he protests against the hearing because the examiner had not filed the defendant's testimony. The appellant took no step whatever to procure from the court a ruling upon the examiner's action. The max-

im that the law protects the vigilant, not the sleeping. It seems to us, applies to this situation. The mere protest of the appellant presented nothing upon which the chancellor could rule. The complainant's action in setting the cause down was within his rights, and as against these rights the defendant opposes nothing which will authorize a reversal of the decree appealed from.

We find no reversible error in this record, and the decree appealed from is affirmed.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and WHITFIELD, J., concur in the opinion.

COCKRELL, J., being disqualified, took no part in this decision.

(117 La.)
No. 16,109.

STATE v. ASHWORTH.

(Supreme Court of Louisiana. June 18, 1906.)
HOMICIDE—APPEAL—BILL OF EXCEPTIONS.

Upon an appeal from a conviction of manslaughter, on a charge of murder, a bill of exceptions to the overruling of a motion for a new trial (in support of which no proof was offered) based on the grounds: (1) That the verdict is contrary to the law and the evidence; (2) that it is not responsive to the charge; (3) that there can be no element of manslaughter when the accused is charged with murdering his infant child, and that the verdict shows that the jury did not give the accused the benefit of the doubt, and that they "could not make up their minds to turn loose, or acquit, a negro," furnishes no ground for the reversal of the judgment.

(Syllabus by the Court.)

Appeal from Twelfth Judicial District Court, Parish of Vernon; John Bachman Lee, Judge.

Dock Ashworth was convicted of manslaughter, and appeals. Affirmed.

Cunningham & Ford, for appellant. Walter Gulon, Atty. Gen., and James Wilson Parsons, Dist. Atty. (Lewis Gulon, of counsel), for the State.

Statement of the Case.

MONROE, J. Defendant, charged with the murder of his infant child, and convicted of manslaughter, moved for a new trial, on the grounds: (1) That the verdict was contrary to the law and the evidence; (2) that it was not responsive to the charge; (3) that there can be no element of manslaughter when the accused is charged with murdering his infant child, and that the verdict shows that the jury did not give the accused the benefit of the doubt, and could not make up their minds "to turn loose, or acquit, a negro." To the bill of exceptions, taken to the overruling of this motion, the trial judge adds:

"In my opinion, the accused was guilty as charged, and should have been hanged, and if by setting the verdict aside he could be again tried

for murder, I would order a new trial; but, where he can only be tried for manslaughter, and as from the evidence the accused was guilty of murder, I refuse to set the verdict aside."

Opinion.

No attempt was made to support the allegations of the motion for new trial by proof, and the motion and bill of themselves present no grounds for reversal.

Judgment affirmed.

(117 La.)
No. 16,131.

STATE v. CRAFT.

(Supreme Court of Louisiana. June 18, 1906.)

WITNESSES—IMPEACHMENT—BIAS.

Evidence was admissible, in behalf of the accused in a murder case, to prove that a female witness for the state, who denied the fact on her cross-examination, was the concubine of the deceased, for the purpose of showing the animus of the witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1193, 1201.]

(Syllabus by the Court.)

Appeal from Twentieth Judicial District Court, Parish of Terrebonne; Louis P. Caillouet, Judge.

Hilary Craft was convicted of murder, and appeals. Reversed.

Suthon & Wuszlow, for appellant. Walter Gulon, Atty. Gen., and Whitmel Pugh Martin, Dist. Atty. (Lewis Gulon, of counsel), for the State.

LAND, J. The accused was indicted for the murder of one Will Bennett, was duly tried and found guilty "without capital punishment."

The accused appeals from the sentence of life imprisonment, and relies for reversal on three bills of exception.

Bill No. 1.

William Bennett, the deceased, lived with Paul Jackson and his wife, Sarah Jackson, and slept in a separate bed in the same room, a circumstance not unusual among colored people of their class.

Paul Jackson and Sarah Jackson were eye-witnesses to the homicide which was committed in their dwelling.

On cross-examination, Sarah Jackson was asked whether she was not the concubine of William Bennett. This she denied, and counsel for the accused subsequently placed a witness on the stand for the purpose of proving the intimate relations existing between Sarah Jackson and the deceased.

Objection was made by the state, and thereupon counsel for the accused declared that their purpose was to show the existence of such a relation, the infamous character of Paul Jackson and Sarah Jackson, the bias and motive of their testimony against the accused, their depravity and want of moral accountability, their animus, and want of

credibility. The objection was sustained by the trial judge because it was not permitted to attack the character or credibility of a female witness by assailing her character for chastity.

Counsel for the accused cites *State v. Johnson*, 48 La. Ann. 438, 19 South. 476, in which it was held that the state, on cross-examination of a witness for the defendant, could ask her "if she was not his concubine," for the purpose of affecting the weight and credibility of her evidence.

The state cites the case of *State v. Jackson*, 44 La. Ann. 160, 10 South. 600, in which it was held that, in attacking a witness' general character for infamy, the investigation cannot be restricted so as to confine it to particular acts or to particular associates.

The state also cites the case of *State v. Hobgood et al.* 46 La. Ann. 855, 15 South. 406, in which it was held that a female witness for the state could not be impeached by proof of bad character for chastity or that she was a prostitute.

The state also cites the case of *State v. Baudoin*, 115 La. 837, 40 South. 239, to the same effect.

It is evident that in none of these last three cases was it attempted to prove the relations between the witness and the defendant or the accused, as in *State v. Johnson*, supra.

In the case at bar the accused offered to prove that the witness was the concubine of the deceased and therefore was prejudiced or biased against the defendant.

It would have been competent for the accused to have proven that the witness was related by blood affinity to the deceased, or was connected with him by other legitimate ties.

We do not see how an illicit connection can change the rule. The state argues that the matter inquired about was collateral or immaterial.

Mr. Rice, in his treatise on Evidence (volume 3, § 227), says:

"The general rule that a witness cannot be impeached by contradicting him as to collateral matters is well understood. But it has been held that the feelings of the witness and his disposition to tell or conceal the truth, in a particular suit in which he is called, are not collateral in the meaning of this rule."

Gillet, in his work on Indirect and Collateral Evidence (page 139, § 91), says:

"It is not, however, regarded as collateral to show prior ill feeling, interest, or other matter calculated to show the animus of the witness, and substantive evidence can be introduced on this subject, as it goes to the root of the question as to whether the witness' testimony is true."

Wigmore, on Evidence, states that extrinsic evidence is always admissible to show "emotional incapacity" that is partiality of hostility resulting from bias, interest, or corruption." Sections 940, 943.

The same writer says:

"We infer partiality from the circumstance that the witness is a party in the cause, or is a brother of a party, or has on some occasion expressed hostility to the opponent, or has received money for his testimony."

We therefore think that the testimony proffered was clearly admissible for the purpose of showing the animus of the witness.

Bill No. 2.

This exception relates to the alleged misconduct of a juror, and need not be considered, as the case will be remanded, and the incident is not likely to recur.

Bill No. 3.

This exception was reserved to the refusal of the trial judge to admit evidence to show prior threats and the dangerous character of the deceased, for the reason that the evidence adduced did not in his opinion establish any overt act on the part of the deceased at the time of the killing.

As we cannot anticipate what evidence will be adduced on this point on the new trial, it is unnecessary to pass on this bill of exception.

It is therefore ordered that the verdict and sentence appealed from be annulled, avoided, and reversed, and it is now ordered that this cause be remanded for a new trial according to law and the views herein expressed.

(117 La.)

No. 15,967.

FOSTER v. MEYERS.

(Supreme Court of Louisiana. June 18, 1906.)

1. REAL ACTION—PETITORY ACTION—TITLE OF PLAINTIFF.

Plaintiff, in a petitory action, holding a regular patent from the United States, shows a perfect legal title, which cannot be affected by an alleged error or mistake in the description of land entered and patented to defendant's authors.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Real Actions, § 22.]

2. EVIDENCE — PAROL EVIDENCE — PUBLIC LANDS—RECEIVER'S CERTIFICATE—IMPEACHMENT.

A regular receiver's receipt and certificate on which a patent issued in due course cannot be contradicted or varied by unauthorized entries and memoranda on the register of sales book or the tract book, kept by the local officials of the United States Land Office.

3. REAL ACTION — IMPROVEMENTS — EVICTED POSSESSOR.

The evicted possessor in good faith is entitled to the value of his useful improvements, i. e., cost of material and workmanship, unless the plaintiff elect to pay and show by evidence, the enhanced value of the soil. Rev. Civ. Code, art. 508; *Hutchinson v. Jamison*, 38 La. Ann. 150.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Real Actions, § 35.]

4. APPEAL—FAILURE TO PERFECT—WARRANTORS.

Warrantors who have not perfected their appeal, nor filed an answer to the appeal of the

defendant, cannot ask that the judgment on the call in warranty be reversed or amended. Code Prac. arts. 883, 889.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3581-3583.]

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Action by Joseph Warren Foster against Andrew Meyers. Judgment for plaintiff, and defendant and his warrantors appeal. Affirmed.

Anthony N. Muller, for appellant Meyers. Weeks & Weeks, for appellants warrantors. Foster & Broussard, for appellee.

LAND, J. This is a petitory action to recover the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, section 14, township 13, range 7, in Southwestern land district of Louisiana.

Plaintiff claims title under a patent, of date February 15, 1902, from the United States, based on a regular certificate of entry issued in 1901.

Defendant sets up title acquired in 1873 from Ann Peebles et al., who are alleged to have possessed since 1835 under warrants issued by J. J. Taylor, register of the United States Land Office then at Opelousas.

Defendant set up a claim for improvements in the event of eviction, and called his three vendors, two of whom were absentees, in warranty.

The court appointed a curator ad hoc to represent the absentees who excepted to the call, on the ground that absentees could not be called in warranty for the purpose of the rendition of a personal judgment against them.

This exception was overruled, and the curator and Duley T. Peebles answered, denying all the allegations of the petition and setting up title derived by mesne conveyances from Henry Wyche Peebles and John D. Wilkins from the United States in 1836.

The answer virtually admits error and misdescription in the defendant's muniments of title to the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 14, but avers payment of the price, and that certain entries in the books of the local land office evidence the purchase by his authors of said tract of land in 1836.

They charge plaintiff with a knowledge of the facts and pray for judgment decreeing that the patent issued to him should inure to their benefit.

The district judge rendered judgment in favor of the plaintiff for the tract of land in dispute and for rents from March 11, 1905, and in favor of defendant against plaintiff for \$580, the value of his improvements, and against the three warrantors for \$354.55, and for the rents which the defendant was condemned to pay unto plaintiff, and all

costs. Defendant appealed, and plaintiff has prayed for amendments of the judgment.

Warrantors took an order of appeal, but gave no bond. Hence they are appellees as to the defendant, and coappellees with plaintiff.

It is necessary first to state the alleged titles of Peebles and Wilkins as disclosed by the records of the United States Land Office. It is conceded that no application on their part to enter the land in dispute has been produced.

On January 1, 1829, Peebles and Wilkins entered the W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 14 at the rate of \$1.25 per acre, total price \$100.97 $\frac{1}{2}$, as shown by receiver's certificate in due form, on which a patent was issued on June 1, 1829.

On January 4, 1836, the same parties entered the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 14, at the same rate, total price \$100.98 $\frac{1}{2}$, as per receiver's certificate, on which patent was issued August 30, 1837.

On May 7, 1836, the same parties entered the N. E., N. W., and S. E. $\frac{1}{4}$ of section 14, containing 484.71 acres, at the same rate, the total price being \$605.83 $\frac{1}{2}$, and the patent issued on August 30, 1837.

The tract book at Washington corresponds with entries given above.

It is evident that said parties entered twice in the year 1836 the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 14.

It appears that the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 14 was offered at public sale in November, 1828, and again in May, 1879.

In a letter of date June 26, 1905, the Commissioner of General Land Office wrote that, while Wilkins and Peebles paid for as much land as is contained in section 14, their entries did not embrace the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and there was no evidence of record that they ever applied to enter the same. He adds that so far as the records show the said tract was vacant public land until entered by the plaintiff.

Defendants and warrantors rely on certain so-called "entries" on the register of sales book kept at Opelousas and the tract book kept at New Orleans. The ink entries on the tract book correspond with the original certificate, but there was a pencil entry above, not accounted for, indicating that Peebles and Wilkins had entered the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$.

The entry on the register of sales book bears the mark of erasure, but in its present shape is substantially as follows:

When Sold.	No. of Receipts and Certificates.	Purchasers.
May 17, 1836.	1,312	Wilkins & Peebles.
Section or Part of Section.		
N. E. $\frac{1}{4}$ & S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ N. W. $\frac{1}{4}$ & S. W. $\frac{1}{4}$.	No. of Section.	14

A comparison with receipt 1,312 shows that the parties entered on May 17, 1836, the N. E., N. W., and S. E. $\frac{1}{4}$ of section 14.

The entry purports to have been taken from the receipt, but eliminates the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$, and adds the whole of the S. W. $\frac{1}{4}$.

Of course the original receipt and certificate and the patent issued thereon must control.

The attempted changes on the register and tract books were wholly unwarranted and unauthorized, and are not accounted for.

The copy of a sketch purporting to have been made by Taylor, register, in 1836, for the purpose of showing entries made by Wilkins and Peebles, is at best but secondary evidence and is worth nothing as official evidence of title. The entries thereon are indicated by writing the names of the parties across parts of sections and are lacking in all the elements of certainty.

This copy was made by D. T. Peebles, one of the warrantors, and is attached to a letter written by him in 1902, to the register of the Land Office, at Washington, D. C., which concludes as follows:

"I think that we have been caught by error at Land Office at Opelousas."

Errors of this kind cannot be corrected to the prejudice of third parties, who have acquired title in good faith.

Hence we concluded that plaintiff's title is perfect. Defendant has been in possession of the land as owner since 1874, and under a recorded title since 1883. He was a bona fide possessor, and plaintiff has his choice to reimburse the value of the materials and price of workmanship of the improvements on the land or the enhanced value of the soil. Rev. Civ. Code, art. 508.

If the owner wishes to pay enhanced value, he must show by evidence what it is. *Hutchinson v. Jamison*, 38 La. Ann. 150.

Defendant was not a squatter on government land, but purchased from parties who had been in possession under title for many years. His title is good by prescription, except as against the sovereign.

The amount awarded for improvements is a big discount on the estimates of the only witnesses who undertook to place a value on all of the improvements. We see no good reason to disturb the finding of the trial judge on this question of fact.

Whether the defendant purchased the improvements or erected them cuts no figure, as the law will not permit plaintiff in the petitory action to enrich himself at the expense of a possessor in good faith.

The warrantors did not perfect their appeal, nor have they answered, praying for an amendment of the judgment on the call in warranty.

Hence the decree against them cannot be disturbed. *Garland's Notes Code Prac. arts. 888, 889.*

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed, defendant and appellant to pay costs of appeal.

(117 La.)

No. 15,983.

BOSSIER'S HEIRS v. HOLLINGSWORTH & JACKSON.

(Supreme Court of Louisiana. June 18, 1906.)

1. APPEAL—FINAL JUDGMENT.

Considered with reference to the right of appeal, a final judgment is one which decides "all the points in controversy between the parties," and which, disposing of all the issues not previously disposed of by interlocutory judgments, is the last judgment rendered in the case.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 426-443.]

2. SAME—INTERLOCUTORY JUDGMENTS.

Interlocutory judgments are appealable only when they work irreparable injury to the parties cast.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 402-416.]

3. SAME.

Where several alleged causes of action are cumulated in the same demand, a judgment dismissing one or more of them, on an exception of no cause of action, but leaving the demand, though reduced, still pending, is interlocutory.

(Syllabus by the Court.)

Appeal from Eleventh Judicial District Court, Parish of Natchitoches; Charles Vernon Porter, Judge.

Action by the heirs of Francois Bossier against Hollingsworth & Jackson. Judgment for defendants, and plaintiffs appeal. Dismissed.

Scarborough & Carver, for appellants. Breazeale & Breazeale, for appellees. Jack, Fleming & Hicks and Chaplin & Son, for appellee warrantors.

Statement.

MONROE, J. This proceeding was originally dismissed by the judge a quo as in case of nonsuit. On appeal to this court, it was held that the action was not possessory, nor petitory, nor an action of jactitation, nor, strictly, an action of trespass, and the judgment of nonsuit was set aside and the case remanded in order to enable plaintiffs to set forth their cause of action more distinctly.

Thereupon, they filed an amended petition, to which defendants excepted: (1) That it disclosed no cause of action; (2) that the allegations of possession were vague, indefinite, ambiguous, and insufficient to serve as a basis of an action of slander of title, which exception was maintained by judgment reading as follows:

"The exception filed to the amended petition in this case is sustained, with leave granted to the plaintiffs to so amend their original petition, within 10 days from this date, as to bring the action within one of the four categories into which all actions for the vindication of rights to, or growing out of, real estate must fall, under the rules of law laid down by the Code of Practice and as designated by the decision of the Supreme Court, rendered in this case; otherwise, this suit will be dismissed as in case of nonsuit. Thus done and ordered in open court, this 2d day of June, 1905. [Signed] C. V. Porter, Judge."

Plaintiffs then filed an application in this court, alleging that they were entitled to a trial of the case on the issues presented, and praying that the judge a quo be directed, by mandamus, to grant the same, which application was denied in the following language:

"Applicants' remedy is by appeal, in due time, and not by writs of prohibition and mandamus. Applicants' demand is denied, as in case of nonsuit, and their petition dismissed."

Plaintiffs then filed, in the district court, a second amended petition, to which defendants excepted: (1) That it discloses no cause of action; (2) that it is fatally defective in cumulating three alleged causes of action (if any cause of action be legally alleged), viz., a petitory action, as to 8 or 10 acres of land, alleged to be worth \$1,000, slander of title, as to indefinite acreage, and, lastly, a claim for damages for trespass on both 8 or 10 acres and indefinite acreage; (3) that this is an illegal cumulation of demands and prevents your respondents from calling their vendors in warranty, except as to the 8 or 10 acres; (4) that plaintiffs should be required to elect which of the alleged demands contained in this suit they will prosecute; (5) that the allegations of the petition are insufficient to sustain an action for slander of title; (6) that they are vague, indefinite, disingenuous, and do not comply with the decision of the Supreme Court. And they pleaded the prescriptions of one, two, three, five, and ten years to all the demands.

Defendants then filed an application averring that the amount, or value, placed in dispute, by all of the alleged causes of action, does not exceed \$1,200, and that plaintiffs allege a fictitious value in order to give jurisdiction to the Supreme Court, and they pray that the matter of value be inquired into. The filing of this application was objected to, and the objection was overruled; but the application was thereafter denied, and the court rendered judgment maintaining the exception of no cause of action, save as to those of plaintiffs' allegations which charge trespass, and decreed that the suit stand as an action in damages for trespass and not otherwise. We then find in the transcript a pleading (which appears to have been filed October 28th, but which was probably filed December 28th) in which plaintiffs move the court to strike out the signature from said judgment, on the ground that the act of the court in attaching the same, "in advance of the judgment to be finally rendered in the case, was error of law," which, if persisted in, "will operate irreparable injury, as it finally decides important issues in the case and finally closes the door to certain issues, unless corrected by appeal, which will make the trial of the case by piecemeal inevitable, and, in order to fully protect the right of the plaintiffs, an appeal will have to be taken and prosecuted from the act of the court; this exact question having been decided by the Supreme Court in *State v. Judge*, 35 La. Ann.

765, on which authority the court is asked to erase the signature, leaving all questions in the case to go up on the final decision of the case."

This motion appears to have been denied, whereupon plaintiffs appealed, and defendants now move to dismiss the appeal, on the ground that the judgment appealed from is interlocutory and does not work irreparable injury, to which plaintiffs (by pleadings filed in this court) answer that the judgment appealed from is final as to the only issue in the case to which plaintiffs and appellants attach any importance, and, for that reason, the appeal was taken on the authority of the case of *State ex rel. Ikerd v. Judge*, 35 La. Ann. 212.

On the Motion to Dismiss Appeal.

It will be observed that in the district court plaintiffs complained of the signing of the judgment (whereby the exception of no cause of action was maintained, as to part of their demand, on the ground that the judgment thereby became final, necessitating an appeal and rendering inevitable the splitting of the case and its trial by piecemeal) and prayed the judge to erase his signature, "leaving all questions in the case to go up on the final decision of the case." It is clear, therefore, that, in the opinion of the plaintiffs, the judgment appealed from will work them no irreparable injury, unless it be regarded as a final judgment. In support of the proposition, as advanced in the district court, that the judgment in question became final by reason of the signature of the judge, the learned counsel referred to "*35 La. Ann. 765*," when they, perhaps, intended to refer to *State ex rel. Ikerd v. Judge*, 35 La. Ann. 212, cited by them in the pleading, or paper, filed in this court. In the case thus referred to it appears that the relator applied to this court for a writ of mandamus to compel the trial judge to grant a suspensive appeal from a decree sustaining a motion to strike out a reconventional demand, and, in denying the writ, this court said:

"The case has not yet been tried. Hence the decree complained of is not a final judgment in the case. Therefore it is an interlocutory judgment. The right of appeal from such a judgment is recognized in our law when the judgment may cause irreparable injury to the party complaining. If the judge erred in striking out intervenor's reconventional demand, his ruling can be reviewed and his error corrected on an appeal from the final judgment, in the same manner as his ruling would be reviewed on appeal if the plaintiff had adopted the more regular proceeding of objecting to the introduction of any evidence under the plea in reconvention and a bill had been taken from a ruling sustaining the objection. The character of the injury caused by an interlocutory judgment, even when it is signed by the judge, must be tested under the following plain rule: If the decree of the appellate court can restore the parties, without loss of any right under the pleadings, to the identical positions which they respectively occupied before the rendering of the interlocutory decree or order complained of, the injury to either party is clearly not irrepa-

able, and therefore the right to appeal clearly does not exist. *Fields v. Gagné*, 33 La. Ann. 340. In the case of *Harris v. Stockett* (recently decided by us) 35 La. Ann. 387, we applied this rule to a state of pleadings strikingly similar, with the exception that the interlocutory judgment in that case had not been signed by the judge. While it is elementary in our practice that a judgment not signed by the judge is not a final judgment, it is equally true that a judgment not final in its character cannot be made final by the signature of the judge. Relator invokes the recent decision in the case of *State ex rel. Ikerd v. Judge*, etc., 35 La. Ann. 212, as directly in point and decisive of the remedy which he seeks. But he is mistaken. In that case, the judgment appealed from had partly sustained an exception and had partly dismissed a petition and prayer. Under such a ruling plaintiff's suit had been completely emasculated and the relator is materially differenced from the present case." *State ex rel. Pfug v. Judge*, 35 La. Ann. 765.

We are inclined to think that there is a conflict between the views thus expressed and those adopted by the court in the case upon which appellants rely, and we think that the doctrine of the case of *State ex rel. Pfug v. Judge*, is better sustained by authority and more in accordance with established practice. The Code of Practice declares that:

"Definitive and final judgments are such as decide all the points in controversy between the parties." Article 539.

"One may appeal from all final judgments rendered in cases in which an appeal is given by law." Article 565.

"One may likewise appeal from all interlocutory judgments when such judgment may cause him irreparable injury." Article 566.

We therefore usually understand by the term "final judgment" that judgment which, disposing of all the issues not previously disposed of by interlocutory judgments, is the last judgment which the court renders. If this be not so, there may be, in any given case, as many appeals as there are issues presented, and as the law authorizes the cumulation of separate actions in the same demand (Code Prac. art. 148), a single suit may be infinitely divided, with divisions and subdivisions pending, at the same time, in different courts. The judgment now under consideration does not dispose of all the points in controversy between the parties, nor does it cause the parties against whom it was rendered irreparable injury, and, in neither of these respects, is its character affected by the fact that it bears the judge's signature.

It can be reviewed, on the appeal from the judgment which may ultimately be rendered in the case (provided the plaintiffs take such appeal or answer it, as the case may be); but we do not think that it would conduce to an orderly administration of justice to review it at this time, and we are the less disposed to do so, because, in the district court, neither party seemed to desire the splitting of the case, and a doubt was suggested as to the jurisdiction of the appeal quoad the value involved.

It is therefore ordered, adjudged, and decreed that the appeal herein be dismissed at the costs of the appellants, without prejudice, however, to their right to have the judgment appealed from reviewed upon appeal from the final judgment to be hereafter rendered in the case.

(117 La.)

No. 15,957.

FOREMAN v. EAGLE RICE MILL CO., Limited.

(Supreme Court of Louisiana. June 18, 1906.
Rehearing Denied June 28, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT.

The servant may, to some extent, trust to the knowledge and care of the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 547-549, 675-677.]

2. SAME—SAFE PLACE TO WORK.

The master must provide a safe place for the workman.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 171, 178, 179.]

3. SAME—PROTECTING MACHINERY.

A machine that can easily and cheaply be cased in, and that is dangerous without casing, should be incased. It was a matter of a dollar or two to inclose a dangerous shaft in an exposed place.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 193, 203, 229.]

4. SAME—FAILURE TO WARN SERVANT.

The servant was employed, and a few hours afterward met with the accident which was the cause of his death. He had not been warned by the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 314.]

5. SAME.

The other employes at similar work carried strings tied around their waists necessary in sewing bags. The sewing up of the bags was part of plaintiff's work.

6. SAME.

The strings were caught by the revolving shaft, and the defendant was hurled against the wall.

7. SAME—EVIDENCE.

It appearing that the accident might have been avoided by incasing the shaft, the master is held liable.

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Pierrepont Edwards, Judge.

Action by Mrs. Eulalie Foreman, tutrix, against the Eagle Rice Mill Company, Limited. Judgment for plaintiff, and defendant appeals. Amended and affirmed.

Hampden Story and T. M. & J. D. Miller, for appellant. Medlenka & Taylor, for appellee.

BREAUX, C. J. Plaintiff, grandmother and tutrix of the minor, Ellen Foreman, daughter of the late Charles B. Foreman and Emma, his wife, both deceased, brought this suit for damages in the sum of \$10,000.

The suit was tried by jury, which found a verdict in favor of plaintiff for \$2,000.

Foreman, the deceased, was a young man 22 years of age, employed at defendant's mill at \$9 a week.

Plaintiff alleged, in substance, that at the time of the employment of her son by the defendant corporation he had scarcely any experience as a laborer in a rice mill. He was assigned to work on the first floor, filling sacks with rice bran, and sweeping the floor. That he had twine tied around his waist. That there was no pin, peg or hook on the wall or on any post in the mill for holding the twine needed in sewing up the rice sacks. That he was not warned of the danger in thus carrying twine. That, about a half hour after he had been employed, the twine around his waist, drawn by the vacuum created by a revolving shaft, caught it, wrapped it around, and drew the deceased to it, nearly cutting him in two. It caused him severe injury and great pain. He died as a result about three days after the accident.

The shaft in question was vertical. It extended from the lower to the upper floor, and on the upper floor it revolved the brush. Plaintiff alleges that the shaft or spindle was negligently exposed; that it was unsmooth, sticky with oil, and that besides it should not have been exposed, but that it should have been incased.

Defendant, while admitting that Foreman died from the effects of the injuries received, avers that it was the result of his own negligence and imprudence. He denies all liability.

The deceased at the moment of the accident, that is, about 10 o'clock in the day, was holding a broom and sweeping the floor. He was between the shaft and the wall of the room, but nearer the shaft than he was to the wall.

The evidence shows that those who sewed up sacks, as did the deceased, carried twine around their waists in order to have it ready for use in sewing up the rice bags. It was used as thread is used in sewing cloth.

The floor which the deceased had to sweep could not very well be swept without the deceased getting near the shaft. At the moment of the accident he was standing with his back to the shaft; that is, when the twine was caught by the shaft and he was injured as before mentioned.

There was, it seems, near the shaft, a bin and a shaker and a chaff grinder, one near the other. Two posts served to support the shaft.

We mention these facts to show that there was not much space around the shaft.

There can be no question but that the shaft while revolving very fast—its usual speed—was dangerous.

Workmen too frequently are unmindful of the danger to which they are exposed. They become indifferent, although they should con-

stantly bear in mind that the slightest touch with some parts of the machinery may be attended with fatal result.

Negligence is the main ground set up on the part of the defendant.

It is true that one of the fellow workmen of the deceased warned him of the danger of carrying twine around his waist. This warning was given about 15 minutes before the accident, a warning which deceased did not heed. Had it been given by the master, instead of by the unauthorized fellow workman, it may be that it would have had greater effect.

The millwright in charge of the mill testified that he, at the time, gave no warning to the young man of the danger if one be not careful while working around a mill. He did ask him if he had worked in any other mill, to which question the young laborer replied in the affirmative; but that was about all. There was no reference made regarding the extent of the young man's experience in fact, nothing was said other than as before stated.

One point we construe entirely in favor of plaintiff.

It is not necessary, nor will it serve any purpose, to go over all the grounds. Before taking up the grounds for decision, we will state that the defendant kept a record of the causes of accidents. We excerpt the following in this case:

"Injured partly engaged in sewing sacks, and strings used by him, as in the case with all sack sewers, were fastened to his waist, and in some unaccountable way the same became entangled with a perpendicular revolving shaft and before extricating himself he was thrown against the wall and injured."

This was written by the bookkeeper.

As relates to facts, we will again state that he carried the twine around his waist as did others while at work; that the shaft was oily, and to it the twine was attracted. Now, as to the law: The place in which the work is done should be suitable and the machine and appliances safe. All the authorities agree in this respect.

Here the appliance was not safe and suitable. The shaft in question should have been incased, and then there would have been no danger. It was a small matter. The cost for incasing the shaft would have been a dollar or two. The defendant did incase the shaft after the accident and thereby emphasized its necessity. It was too late to save the life of the young man.

The danger was not latent, for every master must be held to know that a fast rolling shaft in proximity to workmen is dangerous.

Everything reasonable should be done toward avoiding accident. If a shaft is exposed, the master should warn the servant of the danger. Moreover, it should be kept as clean as possible. If possible, without great labor and expense, it should be incased.

If there was danger in thus carrying the cords to sew up the sacks, the master through his vice principal was aware of it and should have given warning against it. There must be some vigilance exercised by both master and servant.

Where it is evident, however, that by some slight repair the piece of machinery in an exposed place can be covered, the master cannot claim the credit of having been mindful of the responsibility in which he is placed of showing some care for those who are under his direction.

There are reciprocal duties; the servant to render intelligent and faithful work, and the master, on the other hand, reasonably to see that his servant is not exposed.

There are machines that cannot well be inclosed. They must, in the nature of the work, be left exposed, but there are other machines which can be inclosed at small expense. The shaft in question is of the latter kind.

There was want of timely attention in not having inclosed it. The danger of accident should to a reasonable extent be minimized.

Moreover, the servant may to some extent trust to the superior knowledge of the master. *Carter v. Dubach Lumber Co.*, 113 La. 242, 36 South. 952. Moreover, it can hardly be said that the deceased was sufficiently warned or notified of the danger at the time that he was employed.

We shall have to increase the amount of the judgment from \$2,000 to \$3,000, as we think the first amount stated is too low. The young man left a young child, besides greatly suffered before dying. True, his wages were limited. None the less, the amount of damages in our view should be increased. It would serve no purpose to set forth all the details which induce us to increase the amount. We are confident that on the authority of other decisions the amount is not excessive.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is amended by increasing the amount from \$2,000 to \$3,000, and, as amended, the judgment is affirmed.

(117 La.)

No. 16,090.

ST. GEME et al. v. BOIMARE et al.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 27, 1906.)

1. PARTIES—MISJOINDER—DISMISSAL.

Where one of two plaintiffs is unquestionably entitled to bring the action, the fact that the other party plaintiff may not be an essentially necessary party is no ground on an exception of misjoinder for the dismissal of the entire suit.

2. ACTIONS—EX DELICTO—WHAT ARE LIMITATIONS.

One of two partners caused the partnership property in the possession of the other partner to be sequestered on giving bond for an amount fixed by the judge. On the trial the sequestration was dissolved. The other partner brought suit upon the bond, seeking to recover

the damages alleged to have been occasioned by sequestration. Owing to the fact that the amount of damages claimed to have resulted was in excess of the amount which the judge had fixed as likely to be occasioned, the amount demanded by the plaintiff in the suit against his partner (the principal of the bond) was greater than that fixed in the bond. The defendants in the suit were the partners who had caused the sequestration of the property and the surety on his bond; the demand against the surety being the amount recoverable upon the bond. The principal on the bond pleaded against the demand against himself the prescription of one year as being an action ex delicto. The court sustained the exception and dismissed the suit. *Held* error.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durleve King, Judge.

Action by Anatole St. Geme and others against Frank Boimare and F. G. Adolph. Judgment for defendants, and plaintiffs appeal. Reversed.

Benjamin Rice Forman, for appellants.
Dinkelspiel, Hart & Davey, for appellee Frank Boimare.

Statement of the Case.

NICHOLLS, J. This action is brought upon a petition which declares it to be "that of Anatole St. Geme for himself, and for the use and benefit of Albert Fourcade [to the amount of one-third of the sum sued for] and of said Anatole Fourcade."

The petition recites "that Frank Boimare, who resides in New Orleans, owes petitioner \$2,229.08, and Frank Adolph, who resides in New Orleans, owes petitioner \$1,000 thereof, because previous to 30th of September, 1903, petitioner, Anatole St. Geme, and Frank Boimare, had been in partnership in carrying on a successful poolroom business at No. 27 Royal street, in the city, and Albert Fourcade had acquired a one-fourth interest therein. The assets consisted of:

Cash on deposit in the New Orleans	
National Bank.....	\$6,143 10
Cash for current expenses.....	1,226 65
Fixtures worth.....	300 00
	<hr/>
	\$7,669 75

"When, on the 1st of October, 1903, the firm having expired, petitioner, Anatole St. Geme, offered immediately to pay him his share of the cash and a fair price for his share of the fixtures, and Boimare unjustly demanded \$1,000 for his one-fourth share of the fixtures, which had cost and were worth \$300, and without parley he, 'illegally and without just cause, made oath that he feared petitioner,' Anatole St. Geme, 'will conceal, part, or dispose of the partnership property, or convert the same to his own use, or make improper use thereof,' when he well knew that it was not true, and he had no reason to believe such thing, he then and there gave and filed in this court a bond signed by himself, as principal, and F. J. Adolph, as surety, in the sum of \$1,000. In favor of the

clerk of the civil district court. The condition of the above obligation was that the principal and surety will well and truly pay to said clerk or his successors in office, for the benefit of any and all persons interested in said suit, all such damages as may be recovered against them, in case it should be decided that the said writ was wrongfully obtained, and thereupon he caused to be issued from this court a writ of sequestration, and caused the civil sheriff to seize and take into his possession under said writ all of the said money and partnership property, and keep and hold the whole amount thereof, from 1st of October, 1903, until the 31st of January, 1905, one year and four months, when the said Frank Bolmare had a right to only one-fourth thereof, which he could have had at any time.

"The district court erroneously maintained said sequestration; but, on appeal, the Supreme Court of Louisiana reversed him, and decided that Frank Bolmare had wrongfully obtained said writ of sequestration, which decision became final on the 31st of January, 1905, when by direction of Bolmare's attorney the sheriff paid to petitioner's attorney \$5,527.32, being three-fourths cash in his hands. Frank Bolmare refused to allow petitioners to use the fixtures in the place, and, if sold there and then, would have brought \$300 or more, but he removed them to the sheriff's warehouse, where they were sold for \$61, entailing a loss of \$239, in which petitioner's share is three-fourths, say \$179.25. They were by his sequestration and removal of the fixtures, in order to diminish the damages resulting from the said sequestration as much as possible, obliged to refit the place of business at a cost and expense of \$637.10. They were obliged thereby to stop business for one day, and they lost thereby \$644.25. And they were obliged to employ an attorney at law to dissolve and set aside the sequestration, to whom they paid for said service \$400 (which was a reasonable fee). And they lost 5 per cent. interest for one year and four months on \$5,527.32, \$368.48. Total, \$2,229.08, in which amount petitioners have been damaged by the wrongful issuance and execution of the writ of sequestration on 1st October, 1903, finally decided to have been wrongfully issued on 31st January, 1905."

The prayer of the petitioners was "that Frank Bolmare and Frank Adolph be cited and petitioner have judgment one-third thereof for the use and benefit of Albert Fourcade, and two-thirds thereof for Anatole St. Geme, against Frank Bolmare and Frank J. Adolph in solido in the sum of \$1,000 on the sequestration bond, with 5 per cent interest from 31st January, 1905, and against Frank Bolmare in the further sum of \$1,229.08, with 5 per cent. interest from 31st January, 1905, and for costs and for general relief."

Frank Bolmare, one of the defendants, excepted to the petition on the following grounds, to wit:

First. That said petition disclosed no cause of action.

Second. That there was a misjoinder of parties plaintiff.

Third. That the petition was too vague and indefinite to enable this respondent to answer safely thereto.

Fourth. The plaintiffs' claims, if any they had, which was denied, were prescribed by the prescription of one year, which is specially pleaded against them.

He prayed that the exception be maintained and the suit dismissed.

The district court rendered judgment, declaring that considering the law it, for the reasons assigned, orally ordered, adjudged, and decreed that the exceptions be maintained, and accordingly that plaintiffs' demand be rejected at their costs.

The two plaintiffs applied for and obtained an appeal on their allegation that they were prejudiced by the final judgment rendered, maintaining the plea of prescription and dismissing that suit.

Opinion.

The defendant refers the court to *Poydras v. Patin*, 5 La. 327; *Brown v. Gunning's Curatrix*, 19 La. 462; *Ballew v. Andreus' Ex'r*, 10 La. 219; *Edwards v. Turner*, 6 Rob. 384; *Fox v. Thibault*, 33 La. Ann. 32.

This case is a sequel of that of *Bolmare v. St. Geme*, 113 La. 830, 898, 37 South. 770, 869. It appears from the reported case that Bolmare sued for the settlement of a partnership between himself and St. Geme, and prayed in that connection for a writ of sequestration, which was granted and the property of the partnership was taken possession of under the writ. One Albert Fourcade intervened and claimed an interest as partner.

In the judgment rendered by the Supreme Court on appeal, the portion of the judgment which had dismissed the intervention of Fourcade, wherein he claimed to be one of the partners, was affirmed, but the court ordered the sheriff to pay him one-half of what was decreed to St. Geme by reason of a contract which had been made between himself and St. Geme. The Supreme Court dissolved the sequestration which had issued at Bolmare's instance.

Referring to Fourcade's claim to be a partner in the concern, this court said that "he failed to make proof of that fact; that he only succeeded in proving that by an agreement he was dividing the profits with St. Geme. If he was the partner of Bolmare's partner, he was not partner in the firm." This court ordered the sheriff to pay out to each partner his proportion of the cash and to Fourcade the proportion to which he was entitled therein.

The district court assigned no reason in

the present case for its ruling. It is urged in appellee's brief that Fourcade was improperly joined with St. Geme as a coplaintiff, because it was adjudged by the Supreme Court that he was not a partner of the firm of St. Geme & Boimare and his intervention had been dismissed. It may be true that it was not essentially necessary that Fourcade should be made a party, as St. Geme brought this suit not only for himself, but for the use and benefit of Fourcade, but the latter, though not a partner, had an interest in the subject-matter of the litigation, and was concerned in the matter of the damages resulting from the sequestration. As the law now stands, the sequestration bond is made in favor of the clerk, and the bond given inured to the benefit of Fourcade as well as St. Geme. He had the right to be a party plaintiff if he deemed it to his interest to be joined. Were it otherwise, that fact would not warrant the dismissal of the suit, as was done. Defendant urges that when he filed his exceptions Adolph, the surety on the sequestration bond, had not yet been cited, and that as matters then stood the demand as against Boimare should be passed upon and considered separately and apart from the demand against Adolph, the surety on the bond, and as an action *ex delicto*, but we do not think that defendant could so deal with the case by rapidly filing exceptions before Adolph could be made a party. Besides this, we are by no means prepared to recognize that the demand as against Boimare himself was an action *ex delicto*. The latter was a partner with St. Geme, and the property which was sequestered was partnership property, in which both partners had rights and interest. He was legally entitled to invoke the aid of the court in protecting his rights when he conceived them to be in jeopardy on expressing his willingness and readiness to comply with the requirements of the statute as a condition precedent to obtaining such aid. He did so comply, and in so doing effectually withdrew his action from having attached to it the character of a tort or offense or quasi offense. We do not think that he is in a position to himself set up that he acted against the law.

The fact that his plitmate responsibility in the premises as to the amount of damages may exceed the amount fixed in the bond does not change the character of his act and its legal consequences. The question as to whether he was in fact responsible for his acts, and to what extent, was postponed until the legal questions involved could be ascertained and passed upon. 25 La. Ann. 307, *Rogay v. Juilliard*.

It is claimed that Act 1886, No. 50, p. 84, giving the defendant in a proceeding in which a sequestration is taken out the right to obtain damages, through a reconventional demand set up by himself, placed matters in such a situation as to afford St. Geme no excuse for postponing setting up his

claims in a separate suit. The statute in question is permissive in character, and not mandatory. The law does not attach as a penalty or consequence of the failure by a defendant to invoke the remedy afforded by it that he should be cut off from settling up his legal rights in a different form and at a different time.

We are of the opinion that the judgment sustaining the exceptions filed by the defendant and dismissing the suit is erroneous.

It is therefore ordered, adjudged, and decreed that the same may be, and it is hereby, annulled, avoided, and reversed, and the cause ordered to be reinstated on the docket of the district court for further proceedings according to law.

(117 La.)

No. 16,093.

Succession of HERBER.

(Supreme Court of Louisiana, June 4, 1906.
On Rehearing June 27, 1906.)

WILLS—ACTION TO ANNUL—PETITION.

The rule which imposes the burden of pleading upon him for whose interest the proof should be made suffers exception when the plaintiff's right rests on the showing that defendant has been guilty of wrongdoing. Hence, where a universal legacy is attacked on the ground that the legatee is a "minister of religious worship," who professionally attended the testatrix in her last illness, and that the will was made during that period, the petition discloses no cause of action, in the absence of allegation that there was no tie of consanguinity between the testatrix and the legatee.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durlevie King, Judge.

In the matter of the succession of Caroline Herber, widow of Joseph Herber. Abraham Creppel sued to annul the will. Judgment maintaining exception and no cause of action, and plaintiff having died, Julia Baumgartner and others appeal. Affirmed.

T. M. & J. D. Miller and Miller, Dufour, & Dufour, for appellants. Theodore Roehl and Dinkelspiel, Hart & Davey, for appellees, executors and legatees.

Statement.

MONROE, J. Abraham Creppel alleges that he is the uncle and nearest living relative of Mrs. Caroline Creppel, widow of Joseph Herber; that his niece died in Biloxi, Miss., where she had previously resided, leaving a will, executed during her last illness, containing, among others, the following dispositions, to wit:

"I direct that my property on St. Thomas street between Josephine and St. Andrew, in the city of New Orleans, Louisiana, be sold by my executor and the proceeds thereof deposited in the Germania Savings Bank of New Orleans, Louisiana, and the interest on said deposit be used, under the supervision of my executor, for the purpose of keeping in condition my

tomb in First Washington Cemetery, in said city of New Orleans, Louisiana.

"I direct that the property situated on Exchange alley and Customhouse, or Iberville, street, in the city of New Orleans, state of Louisiana, be rented by my said executor during the lifetime of my friend Henry Lienhard, of Biloxi, Mississippi, and, out of the proceeds of said rent, after paying all expenses incident to said property, my executor shall pay to the said Henry Lienhard the sum of \$75 per month, and, at the death of said Henry Lienhard, I desire that the said property be sold, and, out of the proceeds of said sale, my executor shall pay to the Charity Hospital of New Orleans the sum of \$1,000 and shall use the further sum of \$1,000 for the building of a memorial, in the Biloxi Cemetery, in Biloxi, Mississippi, in memory of my deceased brother, William Creppel, Jr.

"All the residue of my estate, both real and personal, after complying with all bequests herein, I bequeath unto Rev. J. S. Moore. I appoint the said J. S. Moore executor of my last will and testament, without bond."

Petitioner alleges that the special dispositions with respect to the real estate in New Orleans are void, as prohibited substitutions, fidei commissa, and trusts, and that the disposition in favor of the Reverend J. S. Moore is void, because he is a minister of the gospel who attended the decedent during her last illness and is therefore incapable of taking under her will, made at that time. And he prays for judgment, annulling the will and sending him into possession of the real estate referred to. The Reverend J. S. Moore and Henry Lienhard filed exceptions of no cause of action, and the Charity Hospital answered to the merits. There was judgment maintaining the exceptions and rejecting plaintiff's demands, and, plaintiff having died, Miss Julia Baumgartner and others, claiming to be his heirs, prosecute this appeal.

Opinion.

If the dispositions in favor of the universal legatee be valid, the plaintiff has no interest to attack, and discloses no cause of action in attacking the particular dispositions of the will, since, in that event, if they be annulled, the property intended to be disposed of by them would fall into the residuum. Succession of Burnside, 35 La. Ann. 708. It will therefore simplify matters to inquire whether, if all that the plaintiff has alleged be true, the court would be obliged to hold that the universal legacy is of no effect.

The Revised Civil Code (article 1489) provides that:

"Doctors of physic, or surgeons, who have professionally attended a person during the sickness of which he died, cannot receive any benefit from donations inter vivos or mortis causa made in their favor by the sick person during that sickness. To this, however, there are the following exceptions:

"(1) Remunerative donations made on a particular account, regard being had to the means of the disposer and to the services rendered.

"(2) Universal dispositions in cases of consanguinity.

"The same rules are observed with regard to ministers of religious worship."

It will be seen from this that, notwithstanding that the Reverend J. S. Moore may be a "minister of religious worship," and may, professionally, have attended the decedent in her last illness, and, notwithstanding that the will may have been made during that period, the donation mortis causa here attacked may be perfectly valid, since it falls under the ban of the law only in the event that, between the testatrix and the universal legatee, there existed no tie of consanguinity, and, as the nonexistence of such tie is not alleged in the petition, it follows that, should the complainant prove all that he has alleged, the court could decree the nullity of the universal legacy only by presuming that the testatrix had violated the law. The presumption of the law is, however, in favor of good conduct, and, although it may involve the necessity of alleging and proving a negative, those who rely upon the unlawful acts of others as the basis of their recovery must allege and prove them. "It is," said this court, "one of the first principles of justice not to presume that a person has acted illegally." Hicks & Wife v. Martin, 9 Mart. (O. S.) 47, 13 Am. Dec. 304. Mr. Cross states the proposition as follows:

"And the first rule, which imposes the burden of pleading on him for whose interest the proof should be made, suffers exception when the plaintiff's right rests on the showing that defendant has been guilty of wrong doing, or where the acts of a public officer have been questioned." Cross on pleading, p. 116.

We conclude, therefore, that, as the petition alleges no cause of nullity in the universal legacy, and, as the plaintiff has no interest in particular legacies, which, if annulled, fall into the residuum, the plea of no cause of action was properly sustained.

The judgment appealed from is, accordingly, affirmed.

On Application for Rehearing.

The court does not understand the judgment rendered (maintaining an exception of no cause of action, quoad the case presented by the pleadings) as precluding the bringing of a suit in which a legal cause of action shall be disclosed.

Rehearing refused.

(117 La.)

No. 15,903.

HAMILTON v. LOUISIANA & N. W. R. CO. et al.

(Supreme Court of Louisiana. June 18, 1906. Rehearing Denied June 26, 1906.)

1. RAILROADS—DEFECTIVE TRACK—LIABILITIES.

Where a railroad company granted to a lumber company the privilege of running a logging train on its roadway, and the train was derailed and the conductor injured by the giv-

ing way of a defective bridge, the railroad company is liable in damages.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 817, 818.]

2. MASTER AND SERVANT—INJURY TO SERVANT.

In such a case, the lumber company, not guilty of any default or negligence, and with no supervision or control over the track or knowledge of its condition, is not liable for the injuries sustained by its conductor, who had full knowledge of the situation when he accepted the employment.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 171; vol. 41, Cent. Dig. Railroads, §§ 817, 827.]

(Syllabus by the Court.)

Appeal from Third Judicial District Court, Parish of Claiborne; James Edward Moore, Judge.

Action by Thomas P. Hamilton against the Louisiana & Northwestern Railroad Company and Athens Lumber Company. Judgment for plaintiff, and defendants appeal. Reversed and dismissed as to lumber company, and, as thus amended, affirmed.

John A. Richardson, for appellant Louisiana & N. W. R. Co. Enos Howard McClen-don, for appellant Athens Lumber Co. John C. Theus, for appellee.

LAND, J. This is a suit for damages for personal injuries alleged to have been occasioned by the wreck of a log train in charge of plaintiff as conductor, by reason of the giving way of defective bridge on defendant's line.

Plaintiff was employed by the lumber company, which was operating a log train on defendant's track under the terms of a written contract between the parties defendant.

There was a verdict and judgment in favor of the plaintiff for \$6,000 against the defendants, in solido, and they have appealed. The fight is a triangular controversy; each defendant contending that, if plaintiff is entitled to recover anything, the other is liable.

Plaintiff alleges that on or about June 23, 1905, he was in the employ of the Athens Lumber Company, as conductor of a log train which was being operated over the line of the defendant railroad company, under a contract, the terms and conditions of which were unknown to the petitioner at the time.

The petition further alleges that, on said date, while said train was being properly operated, it was derailed by the giving way of a rotten and defective bridge, and petitioner was thrown violently to the ground and his right arm was crushed, and was amputated a few hours later.

The petition charges that it was the legal duty of said railroad to keep its tracks and bridges in sound and safe condition, and that the same duty devolved upon the lumber company as far as its employes were concerned, and that their failure to perform such duty caused the injury complained of.

In February, 1905, the defendants entered into a written contract by virtue of which the

lumber company acquired the right to operate a locomotive on the railroad track for the purpose of hauling logs from such points on the line as the lumber company might desire to its mill at or near Athens, on certain specific conditions.

It was stipulated that the engineer and conductors employed should be approved by the railroad company, and discharged at its request; that the locomotive should not come upon the track of the railroad company, either with or without its train, without the authority of its train master; and that the engineer or conductor should report by telephone the movements of the log train to said official from the time of going on the line to the time of leaving it and locking the switches.

It was further stipulated as follows, to wit:

"The party of the second part (the lumber company) is to be responsible for all damages that may occur in consequence of its operating its locomotive or train on the line of the party of the first part (the railroad company), except as hereinafter provided.

"The party of the second part will be responsible for all personal injuries to its own employes, to the employes of the party of the first part or to outside persons, which may result from the operation of its locomotive or train, and which may become a liability on the party of the first part.

"The same conditions apply in regard to loss of stock or from fire resulting from the use of its engine, also for all damages to track or the rolling stock of the party of the first part from any accident, wreck, or collision on the track. But, when the locomotive or train of the party of the second part is out with the authority of the train master of the party of the first part, and any collision occurs, then the question of responsibility will be a question of which party is in fault."

It was further stipulated that the lumber company should make a satisfactory bond for the performance of the conditions of the contract and to indemnify the railroad company "for any loss or damage occurring through the nonobservance of it."

It was further stipulated that no persons were to be allowed on the log train except employes actually on duty, and that the lumber company should have the privilege of transporting feed and supplies for necessary teams and camps.

It was further stipulated that the object of granting the concession to run a locomotive and train on the railroad track was to enable the lumber company to haul logs from points on the main line, wherever they might be purchased, and that certain rates according to distance should be paid by the lumber company for the use of the line for hauling logs.

The contract was made for the term of 10 years, and contains other stipulations which need not be recited. The railroad company filed an exception of no cause of action and a motion for a severance, both of which were overruled.

The railroad company then answered, pleading the general issue, but admitting that plaintiff was injured while working as a con-

ductor on a log train belonging to or being run by the Athens Lumber Company on the respondent's track, being at the time in the employ of said lumber company.

Respondent specially denied that it had any control over said log train or the conductor thereof, and averred that it was not responsible, by contract or otherwise, for the injury complained of by the plaintiff.

Respondent pleaded in the alternative that plaintiff was an expert railroad man, both as to train service and tracks, bridges, etc., and, in accepting employment under the lumber company, assumed all the risks necessarily attending that position of which he was aware or could have known by proper care and prudence.

Respondent finally pleaded contributory negligence, without specifying any particular faults of which plaintiff had been guilty.

The lumber company answered and admitted the injury as alleged in the petition, but averred that, under the contract referred to therein, it was not responsible to the knowledge of plaintiff, for damages occasioned by the defective bridge, and in the alternative charged that the injury complained of was the result of plaintiff's own negligence. The proximate cause of the accident was the giving way of the railroad bridge.

A number of witnesses for plaintiff testified that some of the timbers were rotten. The same fact is testified by witness for the railroad company.

A civil engineer was sent by said company to the scene of the accident, and he made no examination of the structure. There is no assignable reason for the giving way of bridge, save the decay of the timber.

The evidence is conflicting as to the speed of the train at the time and as to the weight of the car loads of logs.

All the men on the train testify that there was nothing unusual either in the speed or in the loading.

The rotten bridge accounts for the accident, and the evidence did not satisfy the jury and does not satisfy us that the accident would not have happened if the speed has been less or the load lighter. The objection that the conductor was riding on a loaded car and not on the locomotive is without merit.

Where a railroad bridge collapses, the burden of proof is on the company to show the highest degree of practical care and skill in the construction of the bridge and its inspection from time to time to discover defects. *Jackson v. Railway Co.*, 114 La. 981, 38 South. 701.

This burden has not even been attempted to be discharged in this case beyond the vague testimony of a foreman of a section gang that he looked at the structure and it seemed all right.

The question in the case is as to the legal liability of the defendants, or either of them, for the injuries suffered by the plaintiff.

As to the railroad company, the plaintiff

was neither a passenger nor an employé, but was lawfully on the train as an employé of the Athens Lumber Company, which had a contractual right to the use of the track.

The authorities make a distinction between the case where a lease of a railroad is authorized by statute and the case where it is not.

In the former, the lessor is not responsible for injuries resulting from the negligent operation of the leased line by the lessee company, but, where the injury results from the omission of some duty which the lessor owes to the public, its responsibility cannot be shifted by leasing its tracks to another company.

Where a lease is not authorized by statute, the corporation to which the franchise was granted is liable for all injuries resulting from the negligent operation of the road by its lessee, as well as from its omission of some duty owing to the public. See *Caruthers v. Railroad Co.*, 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 737, and notes.

The same principles apply to "running privileges or arrangements." *Id.*, notes 44 L. R. A. 750-752.

In *Muntz v. Railroad Co.*, 111 La. 423, 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495, this court held that a railroad corporation is liable for injuries to persons caused by the wrongful or negligent operation of the cars upon the road, whether operated by itself or another corporation to which it has leased the franchise.

We see no possible escape from the conclusion that the defendant railroad company is liable to plaintiff for its failure to discharge the public duty of maintaining safe bridges on its line. The fact that the plaintiff was the employé of the lessee company makes no difference. *Caruthers' Case*, supra, page 753, of 44 L. R. A. note 7.

The lumber company, under its "running contract," did not undertake to keep the track and bridges of the railroad company in good condition, nor did it assume liability for damages resulting from the faults of the railroad company.

The lumber company employed the plaintiff to operate a train over the railroad track of its grantors. Plaintiff knew that his employer had no control or supervision over the bridges of the railroad company, and had no means of knowing their conditions save through the observation and reports of plaintiff and his fellow employés.

The lumber company was guilty of no negligence or fault in the premises. Plaintiff was aware of the situation and accepted the employment, relying on the railroad company to furnish and maintain a safe track, and well knowing that it was not incumbent on the lumber company to inspect or repair bridges or roadbed.

The lumber company did not undertake to furnish the track or keep it in safe condition.

We therefore are of opinion that the ver-

dict and judgment against the lumber company should be reversed.

The verdict is not assailed as excessive in amount.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, in so far as it is against the Athens Lumber Company, and it is further ordered and decreed that plaintiff's suit and demand against said company be dismissed with costs, and that as thus amended the judgment appealed from be affirmed; costs of appeal incurred by the Athens Lumber Company to be paid by the plaintiff and the remainder by the defendant railroad company.

(117 La.)

No. 15,954.

DÉCUR et al. v. DÉCUR et al.

(Supreme Court of Louisiana. June 22, 1906.)

1. PARTITION—SALE—DEFAULT OF ADJUDICATEES—PROCEDURE BY RULE.

The sheriff and the several adjudicatees at a partition sale failing to consummate the adjudications by delivery of deed and payment of price, one of the plaintiffs in the partition suit proceeded against them by rule, making his coplaintiffs parties defendant to the rule. The adjudicatee of one of the lots joined in the prayer of the rule; the others contested, and so did the coplaintiffs in the partition suit made defendants in rule. *Held*, that between the adjudicatee, who had joined in the prayer of the rule, and the contesting coplaintiffs, defendants in rule, an issue was joined on the merits of the rule, and that the case could not be dealt with as it is stood simply between this adjudicatee and the plaintiff in rule.

2. SAME.

Held, further, that the proceeding was nothing more than a measure towards the execution of the judgment ordering the partition, and, as such, was a mere incident to the suit, and therefore properly instituted by rule, instead of by ordinary action.

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; John Robert Davis, Judge ad hoc.

Action by Mrs. Alida Décur, wife of Carlos St. Julien, and others, against Mrs. Célimene Décur and others. Judgment for plaintiffs, and defendant Edward Simon appeals. Reversed as to appellant, and judgment rendered.

Edward Simon, in pro. per. Anthony N. Muller, for appellees.

PROVOSTY, J. A certain judgment ordered certain real estate to be divided into lots and sold for effecting a partition. The division was made, and the several lots were adjudicated at the partition sale. The present proceeding is a rule taken by one of the plaintiffs in the partition suit on the sheriff and the several adjudicatees at the partition sale to show cause why the adjudications should not be carried out. The parties who, in the partition suit, were the coplaintiffs of the plaintiff in the present rule, are made parties defendant to the rule. Some of them

being minors, it was asked that a curator ad hoc be appointed to represent them, and this was done, and the curator qualified. He filed an answer, in which he alleged that he thought it would be to the interest of the minors that the adjudications be carried out. He asked, however, that a family meeting be held to advise on the subject. The meeting was held, and it advised favorably, and the proceedings were duly homologated. The other coplaintiffs in the partition suit, made defendants in rule, filed answers contesting the right to proceed by rule, and contesting the regularity of the partition sale, on the ground that, whereas, in the judgment in the partition suit the land was ordered to be divided into lots of 40 acres, some of the lots at the partition sale contained less than that number of acres.

One of the adjudicatees, Edward Simon, filed an answer acquiescing in the rule and praying that it be made absolute. The other adjudicatees contested the rule, on the ground that the adjudications were null, because of irregularities in the partition suit. The judge said that the suit had been pending a very long time, reminding him of *Jarndyce v. Jarndyce*; that the lot No. 1, which had been adjudicated to the defendant Edward Simon, was worth a great deal more than the amount of the adjudication, and that, inasmuch as this fact seemed to have escaped the attention of the parties, and inasmuch as some of the parties were minors, whose interest it was the duty of the court to protect, and inasmuch as the adjudicatees seemed to have abandoned their rights by not tendering the price and demanding a deed from the sheriff, he would set aside the adjudications, and he, accordingly, did so.

From this judgment the defendant Edward Simon alone has appealed. He contends that the partition proceedings were regular, and furthermore that, inasmuch as the sale of each lot at the partition sale was a distinct and separate sale, and inasmuch as he acquiesced in the rule and consented that it be made absolute, there was, under the pleadings, nothing for the trial judge to do, so far as the lot No. 1 adjudicated to him was concerned, but to make the rule absolute.

The latter contention would have been well founded if the plaintiff in rule and the defendant Edward Simon had been the sole parties in interest, so as to be in a position to settle the matter among themselves by agreement. But the other plaintiffs in the partition suit had a right to be heard in the matter, and, when they came in by their answer to the rule and attacked the adjudication and asked that it be set aside, they in reality joined issue with the defendant Edward Simon. The case therefore must be dealt with from that standpoint.

The first question to be considered is whether, under the circumstances, it was allowable to proceed by rule. We think it was. The situation was that a judicial sale had been made; that, for some reason or

other, the sheriff and the adjudicatees were neglecting to consummate the transaction; and that some steps had to be taken for bringing matters to an issue. This being the situation, any step that might be taken would be a mere incident to the suit, a mere proceeding in aid of the execution of the judgment, and such, therefore, as came within the proper function of a rule. Blair v. Taylor, 25 La. Ann. 144.

The next matter to be considered is the objection that some of the lots into which the land was divided contained less than 40 acres. For answering this objection, it suffices to state the facts. They are: That the partition judgment ordered the land to be "divided into fifty arpent lots or less if deemed proper by interested parties"; that the attorneys of plaintiffs and defendants in the partition suit agreed that the lots should be of less than 50 arpents; that the dividing of the property was left to an engineer, who made four lots, of which three were of 40 arpents and one of 38 $\frac{1}{2}$ arpents; and that the sale was made accordingly, no one objecting.

In this court no appearance has been made by any one save the appellant, Edward Simon. However commendable may have been the motives of the learned judge a quo in seeking to protect the interest of the minors, which appeared to him to be about to be sacrificed, we are of opinion that the judgment must be set aside and the rule made absolute, in so far as lot No. 1 of the partition sale in question and the appellant, Edward Simon, is concerned.

It is therefore ordered, adjudged, and decreed that, in so far as concerns the appellant, Edward Simon, the judgment appealed from be set aside, and that there now be judgment making absolute the rule herein, in so far as the said Edward Simon and the lot No. 1 of the partition sale in question is concerned, and, accordingly, that the said Edward Simon is hereby ordered to comply with his bid at said sale by the payment to the sheriff of the sum of \$275, upon the delivery, or tender, to him by the sheriff of a deed in due form to the said lot No. 1, and the sheriff of the parish of Iberia is ordered to make and tender to the said Edward Simon the said deed, the costs of this suit to be charged as part of the costs of the said partition suit.

BREAUX, C. J., takes no part.

(117 La.)

No. 16,110.

SAMUEL ISRAELITE BAPTIST CHURCH
v. THOMAS.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 18, 1906.)

1. COURTS—APPELLATE COURTS—JURISDICTION
—AMOUNT IN CONTROVERSY.

A claim for damages manifestly and preposterously inflated will not confer jurisdiction on this court.

2. SAME—DISMISSAL.

Act No. 56, p. 135, of 1904, provides that, in cases appealed to the wrong courts, the judges "shall have the right" to transfer the appeals to the proper tribunals, instead of dismissing them. If the lawmakers had intended that the transfers, in such cases, should be obligatory, they would, no doubt, have so expressed themselves. As the law reads, it lies within the sound discretion of the court to which the appeal is taken to transfer, or dismiss, it. In the instant case, the latter is found to be the proper course to pursue.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by Samuel Israelite Baptist Church against Jordan Thomas. Judgment for defendant, and plaintiff appeals. Dismissed.

Simeon Belden and Albert Voorhies, for appellant. Woodville & Woodville, for appellee.

Statement.

MONROE, J. Plaintiff alleges that it is the owner of certain real estate, valued at \$1,000, which it has been using for church purposes; but that defendant, aided by other persons, recently took forcible possession of the same and now refuses to allow the members and officers of the plaintiff congregation to enter and worship and conduct the temporal affairs of the corporation therein, with the result that they are scattered and are without a place of worship, and have been thereby injured, irreparably, to an amount now exceeding \$5,000; and it prays that defendant be enjoined from "in any manner interfering with the congregation of said church and its board of trustees (appearing in this suit) in the possession and administration of the affairs of said Samuel Israelite Baptist Church, and that there be judgment perpetuating the injunction, with \$5,000 damages caused by trespass, and for general relief," etc.

A preliminary injunction was accordingly issued, which defendant moved to dissolve, on the grounds: (1) That the bond was not good; and (2) that defendant had been in possession for many years and could not be ousted by a preliminary injunction. After hearing, this motion was made the judgment of the court (the injunction being dissolved with damages), and plaintiff prosecutes this appeal therefrom, which defendant moves to dismiss, on the ground that the amount involved does not exceed \$2,000. Since the submission of the case, the appellant has filed a pleading, suggesting that, in the event the court should hold that it is without jurisdiction, the case be transferred to the Court of Appeal, under the authority of Act No. 56, p. 135, of 1904, and to this the appellee has filed something in the nature of an opposition.

Opinion.

We find nothing here in controversy save the right to the possession, pending the ap-

peal, of real estate alleged to be worth \$1,000, plus a claim for damages, which, without expressing any opinion in other respects, we may say is manifestly and preposterously inflated, and is insufficient to confer jurisdiction on this court. The act of 1904 (No. 56, p. 135) provides that the judges of said courts "shall have the right," in cases where the appellants shall have appealed to the wrong court, to transfer said cause to the proper court, instead of dismissing the appeal. If it had been the intention of the law-makers that the transfer thus provided for should be obligatory, no doubt, they would have so expressed themselves. As the law reads, it is left to the sound discretion of the court to transfer or to dismiss. In the instant case, we think the latter is the proper course to be pursued.

The appeal herein is, accordingly, dismissed at the cost of the appellant.

(117 La.)

No. 15,909.

STANLEY v. SCHUMPERT et al.

(Supreme Court of Louisiana. May 21, 1906.
Rehearing Denied June 18, 1906.)

1. PHYSICIANS AND SURGEONS—NEGLIGENCE—EVIDENCE.

Two of the defendants were not the owners of, nor connected with the management of the sanitarium at the date of the accident of which plaintiff complains.

Suit against them did not lie. They are not liable.

2. SAME.

The attendant of the sanitarium was not sufficiently careful, and did not follow the prescription. The injury, if any, was very slight. There was pain caused to the patient. Nominal damages allowed.

An attendant in a sanitarium should be careful, and it is the duty of those in charge to compel the nurse to be careful, and not neglect the patient who is under the care of the sanitarium, and to whom it must see, to some extent at least, that medicines are properly administered.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by Mack J. Stanley against T. E. Schumpert and others. Judgment for defendants, and plaintiff appeals. Amended and affirmed.

Pugh, Thigpen & Foster, for appellant. Alexander & Wilkinson, for appellee Dr. T. E. Schumpert. Thomas & Herold, for appellees Doctors Abrahamson and Willis.

BREAUX, C. J. The action is one sounding in damages, which plaintiff in his petition fixes at \$5,000.

In May, 1904, plaintiff called on Dr. Dowling, an oculist in the city of Shreveport, to have his eyes treated. The physician suggested that during the treatment he should stay at the Shreveport Sanitarium. His physician prescribed a mild solution to be

applied under the direction of a trained nurse. On one of the early days in June of that year one of the nurses of the institution, owing to her carelessness, applied alcohol instead of the mild solution prescribed by the physician.

He avers that he suffered on that account excruciating pain, lost his eyesight, and that now he is entirely blind.

Defendants severed in their defense. Dr. Willis, one of the defendants, in an exception, averred that at the time of the accident he was no longer in the Shreveport Sanitarium. Dr. Schumpert also denied all connection with the institution. Dr. Abramson, the other defendant, sets up as his defense that plaintiff had been under the treatment of Dr. Dowling, and that he was admitted in the institution as his patient, and in consequence plaintiff's contract with the institution was exclusively for board and lodging, and for the services of a nurse to wait on him under the direction or supervision of his physician; that he had naught to do with the case; that he was exclusively under the treatment of his physician.

The foregoing is an abbreviated statement of the pleas and counter pleas of plaintiff and defendants.

The case was tried before a jury and decided for defendants. From the verdict and judgment plaintiff appeals.

The plaintiff is a farmer who resides in one of the parishes adjacent to Caddo. He repaired to Shreveport to have his eye treated by Dr. Dowling. Many years ago he accidentally hit his right eye, from the effects of which it was at first diseased and afterward lost its sight entirely. In the year 1900 it was completely blind. He was advised by his physician before named to have his eye removed, for it would only be a question of time when it would cause the loss of the other eye, through sympathetic infection. The eye was not removed. Some time thereafter plaintiff again called on his physician, who found him suffering with ulcer on the cornea of the left eye. It was painful to him. He was exceedingly sensitive to the light. He dreaded it. He could see only a short distance, a few feet. It was at this time that the physician advised him to go to the sanitarium, where he would be better able to take care of his remaining eye, and where he might have it looked after regularly by nurses who would apply the remedies prescribed. He prescribed for him and gave the nurses directions as to what medicines to use; how, and the time to use them.

No other physician treated him. The nurse, under the physician's prescription, only had to drop some solution prepared for the purpose into the plaintiff's eye with an ordinary medicine dropper.

One of the nurses who happened to be in charge of plaintiff's ward undertook to administer the solution. She did not administer the mild solution prescribed. Instead, through negligence, she put the dropper into

alcohol and dropped alcohol freely into plaintiff's eye.

The testimony shows that all the bottles were properly labeled. The alcohol caused intense pain, but did not destroy the sight.

When plaintiff testified it appears that he had no ulcer on the left eye. The physician also testified that he had no ulcer on the cornea, and that he could see somewhat better than he could when he called on him and consulted him before the accident.

Condition of plaintiff's eyes in 1904, before the accident:	Condition of plaintiff's eyes at the date of the trial:
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"He suffered from ulceration of the cornea. The eye that he had lost and the remaining eye were greatly inflamed. His pain was excruciating. He could distinguish the fingers of the hand placed before him at about two feet. Ulcer was the cause."

"The ulcer on the cornea of his eye was cured. His eyes were not inflamed, nor were they painful to him. He could see and distinguish the fingers of his physician's hand at a distance of about nine feet. There were spots on his eyes, caused by scars, which very much impeded his vision."

The defense sets up that it was not possible to inject into the eye as much alcohol as plaintiff contends; that the structure is such that alcohol or any other liquid is admitted in small quantity only. The testimony of witnesses described the cornea of the eye with some particularity. Its mechanism and composition, we will state, is in thickness, as they testified, about the thirty-second part of an inch, and has five layers.

Before closing the statement of facts, it is proper we should state that the testimony shows that an ulcer on the cornea is a diseased condition of the tissues and brings on suppuration, for which alcohol is sometimes prescribed as a remedy.

At the time that plaintiff's eye was examined by the physician, a few days before the accident, the iris of the eye had become involved.

The testimony shows that alcohol is an antiseptic. It is in evidence that the proper application of alcohol consists in dipping the cotton on the applicator into the alcohol, shake it so that there will be no loose alcohol to fall on the tissues, which should not be touched. It is also in evidence that the application is not scientific which consists in pouring or injecting it into an eye with a medicine dropper.

We leave the statement of facts convinced that the nurse was not very careful, and that it was negligent on her part to apply, as she did, the alcohol, instead of the solution which was intended to ease and soothe the diseased eye.

In deciding, we take up the demand of plaintiff directed against Dr. Willis. The testimony shows that he is not liable. He was not at the time owner or lessee of the sanitarium. He never had charge of plaintiff's case. This ends the suit as to him.

We take up, in the next place, the case against Dr. Schumpert. We have seen that

his defense was that he had leased the sanitarium to Dr. Abramson, the other defendant, who as lessee was alone responsible for the management. The nurse had been employed while Dr. Schumpert was in charge of the sanitarium, and the plaintiff had been received at the institution while he was the owner and in charge; but a few days thereafter, before the accident, he leased to Dr. Abramson.

The lease went into effect on the 1st of June. It was after that time that the nurse committed the mistake.

Plaintiff had no reason to be interested in the change from Dr. Schumpert to Dr. Abramson, lessee. No personal consideration entered into the case. Plaintiff had been admitted to the sanitarium to be treated by his own physician, and whether it was in charge of Dr. Schumpert or Dr. Abramson was not a matter in which plaintiff was concerned.

There is a very similar case, viz.: Property had passed from one to another without recording evidence of the fact. The court held that the new owner was liable for the tort.

Plaintiff was not in any way concerned as to the party against whom to bring his action. *Goodwin v. Bodcaw Lumber Company*, 109 La. 1050, 34 South. 74.

Moreover, plaintiff's contract with the sanitarium was not for any limited time. He was a day patient of the institution, and remained there from day to day.

We do not think that plaintiff has a cause of action against Dr. Schumpert.

Defendant's next contention is that, even if injury had been inflicted by the nurse, yet under the evidence defendant is not liable.

In support of this position, defendants aver that they are not liable for the fault of the nurse, they were not present, and knew nothing of her mistake. In support of that position defendants invoke article 2320 of the Code, which reads as follows:

"Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

In the above cases responsibility only attaches when the masters or employers might have prevented the act which caused the damage and not have done it.

The court has been called upon a number of times to interpret that article, and has never taken the restricted view that a defendant is liable only when present and when he could have prevented the act.

We are not inclined to take an extreme view upon the subject. We must say, however, that cases may arise of the master's liability, although not actually present.

It is a presumption that the employer exercises some influence over his employé's and that under that influence employé's will not be prone to negligently injure others. That they, nurses, for instance, will show

proper care of those placed in their charge, because of the duty to the employer, the performance of which it devolves upon the employer to require.

We can only cite here the different decisions upon the subject, which are a complete answer to the contention of defendant: *Hart v. Railroad Co.*, 1 Rob. 178; *Nelson v. Railroad Co.*, 49 La. Ann. 491, 21 South. 635; *Anderson v. Elder*, 105 La. 676, 30 South. 120; *Evans v. Lumber Co.*, 111 La. 542, 35 South. 736.

Defendant's next ground is that plaintiff was not injured by dropping alcohol in his eye.

A careful consideration of the testimony has not enabled us to find that plaintiff had been permanently injured. Not one of the number of physicians who testified, either for plaintiff or for defendant, said that there was probability that the alcohol had destroyed or injured plaintiff's eyesight. Plaintiff's eyesight is no weaker now than it was before the accident. He does not suffer with an ulcer. There are opaque spots on the cornea, but the testimony does not show that they were caused by the alcohol. True, he is nearly blind. But his eyesight has always been weak. While specialists as witnesses did not approve of the manner the alcohol was administered to the eye, they said that the proper application of alcohol to the eye has no effect of an injurious character. Alcohol does not destroy when applied to an eye, even if it be sore.

We do not find that there was injury.

This brings us to the question of plaintiff's suffering.

The plaintiff did not suffer as much as one of the witnesses would have it, although he must have suffered pain for a moment.

A nurse should exert her best endeavors to avoid mistakes of any kind, as they are sometimes attended in the sick room with the saddest consequences.

The only remaining question for decision is whether the sanitarium is liable for the pain caused by the mistake of the nurse, for unquestionably, as before stated, there was pain.

The proprietor of a drug store has been held liable for the mistake of his clerk. The general responsibility of a druggist and of his clerk is greater than are the duties of the nurse. Nonetheless, the functions of the nurse are sufficiently important to render her and her employers liable in damages for inflicting pain negligently. This nurse was employed by the sanitarium and had charge of plaintiff's case in accordance with his contract of employment. She was acting for the sanitarium under the direction of plaintiff's physician. Her duty was to carry out the orders of this physician, and it was the duty of the sanitarium to see that she carried out the orders devolving upon her as a nurse.

The physician could have had another nurse called in her place, but he had no right to discharge her. The management of the sanitarium had the right of control and of discharge.

We think that the plaintiff should recover something for the intense suffering, though momentary, which the negligent mistake occasioned.

It is therefore ordered, adjudged, and decreed that the verdict and judgment are amended by condemning the defendant Dr. Lewis Abramson to pay \$25, and as amended the judgment appealed from is affirmed, at defendant's and appellee's (Abramson's) costs in both courts, except as relates to suit and appeal of Drs. Schumpert and Miller; costs as to these to be paid by appellant.

(117 La.)

No. 15,951.

BURBANK v. Succession of BARTON.

(Supreme Court of Louisiana. June 18, 1906.)

APPEAL—REVIEW—PRESUMPTIONS.

The presumption is in favor of the correctness of the judgment appealed from, and where the transcript fails to show the contrary such judgment will be affirmed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3667-3672.]

(Syllabus by the Court.)

Appeal from Twenty-Seventh Judicial District Court, Parish of St. James; Paul Lèche, Judge.

Action by El. W. Burbank against the succession of El. D. Barton. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Zach Spearing, for appellant. Pugh & Himel, for appellee.

Statement.

MONROE, J. The transcript shows that, on October 24, 1904, plaintiff ruled defendant to show cause why a release bond executed by him should not be decreed insufficient, and the property affected by it returned to the sheriff; that by judgment signed November 21, 1904, the rule was discharged; that on December 1, 1905, there was a trial, the whole story of which is told in the following minute entry, to wit:

"Offered in evidence by counsel for defendant in rule:

"(1) The original rule of October 24, 1904. The judgment of his honor, the judge, of November 21, 1904.

"Plaintiff in rule offers the following:

"(1) Act No. 71, p. 185, of the 1904 session of the Legislature of the state of Louisiana.

"(2) The certificate from the Secretary of State of July 5, 1905, to the effect that 'the Title Guaranty Company of Scranton, Pa., having failed to make the deposit of \$50,000, required by the laws of this state as a condition precedent to transacting business in the state, is no longer authorized to do business in Louisiana.' To this offering, counsel for defendant objects on the ground that, under the pleadings, said evidence is inadmissible, no allegations

having been made therein to sustain or to allow the admission of said evidence; that the judgment on the rule already offered in evidence is *res judicata*, and cannot be attacked collaterally, and, especially, as no allegations are made in this rule as to any change in the status of the above company since the trial of the first rule. By the Court: The objection is overruled, as going to the effect and not admissibility. Evidence closed in open court this 1st day of December, 1905."

The court then rendered and signed a judgment dismissing the rule, and the plaintiff has appealed.

Opinion.

There is, in the transcript, so far as we are able to discover, but one pleading in the form of a rule, and that purports to have been filed on October 24, 1904, though it concludes as follows:

"It is ordered that Walter I. Barton, administrator, do show cause on the 21st day of July, 1905, * * * why the orders granted by this honorable court on August 17, 1904, in the above entitled and numbered cause, and hereinafter referred to, should not be vacated, annulled and set aside, and why the release of said property from seizure and delivery of the same, by the sheriff, to the said Walter I. Barton, administrator, should not be annulled and set aside and the property again taken possession of by the said sheriff under the writ issued in this suit.

"At Chambers, Parish of Ascension, July 7, 1905.

"[Signed] Paul Lèche, Judge."

Save by the allegations of this instrument, we have no information concerning the "orders granted * * * on August 17, 1904," and there is no evidence in the record that the corporation mentioned in the certificate of the Secretary of State has signed any bond or is in any manner concerned in these proceedings.

Under these circumstances, we are unable to say that the judgment appealed from is erroneous, and the presumption is to the contrary.

Judgment affirmed.

(117 La.)

No. 16,031.

DRISCOLL v. PIERCE.

(Supreme Court of Louisiana. June 18, 1906.)

PARTIES—NECESSARY PARTIES.

It being conceded that the minor is the party in interest, from whose estate the judgment appealed from is to be satisfied, it is evident that he should have been made a party to the proceeding in which that judgment was obtained.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 28-30, 41.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommersville, Judge.

Action by Margaret Driscoll, wife of John E. Pierce, against John E. Pierce. Judgment for plaintiff. Rule against executor and Mrs. Pierce individually to have fees of curator

and tutor ad hoc taxed as costs. From an order making the rule absolute, Mrs. Pierce individually, and as guardian of the minor, appeals. Reversed.

See 38 South. 949.

Dart & Kernan, for appellant. Dinkelspiel, Hart & Davey, for appellee.

Statement.

MONROE, J. Whilst Mr. and Mrs. Pierce, named in the caption, were living in New Orleans, the former obtained a judgment of separation of property, after which the couple moved to Wisconsin, where the husband died, leaving a minor son, issue of the marriage, and a considerable estate, and thereafter the widow brought suit against the minor and the executors of her deceased husband to annul the judgment so obtained and accord her the status of a widow in community. In that suit, the minor was represented by a curator and tutor ad hoc, who, after judgment (which was for plaintiff), proceeded by rule against the executor and against Mrs. Pierce, individually, to have his fee taxed as costs, and, the rule having been made absolute, and the fee fixed at \$1,000 and taxed as costs, Mrs. Pierce, individually, and as guardian of the minor, has appealed, and urges in this court: (1) Insufficiency of evidence to sustain the judgment; and (2) failure to make the minor a party to the proceedings. Counsel for appellee say, in their brief:

"This judgment, if it is to be paid, will be paid by the executor, out of the interest of the minor, not out of the interest of Mrs. Margaret Driscoll Pierce."

Opinion.

It being conceded that the minor is the party in interest, from whose estate the judgment appealed from is to be satisfied, it is evident that he should have been made a party to the proceeding in which that judgment was obtained.

It is accordingly ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that this cause be remanded in order that the minor John Eric Pierce be made a party to the proceedings.

(117 La.)

No. 16,153.

LAFOREST v. TOWN OF THIBODAUX et al.

(Supreme Court of Louisiana. June 18, 1906.)

BRIDGES—USE OF TOLLS—ACTION BY TAX-PAYER.

The mere interest of a plaintiff as a citizen and resident of a town and parish is insufficient in law to maintain an action to compel the authorities to invest the surplus revenues arising from the operation of a toll bridge and use the interest accruing therefrom for the maintenance and operation of the structure as a free bridge; it not being even alleged that

plaintiff had ever used the bridge or expected to use it, or had been or would be injured by the collection of tolls.

(Syllabus by the Court.)

Appeal from Twentieth Judicial District Court, Parish of Lafourche; Louis P. Caillouet, Judge.

Action by Jules Laforest against the town of Thibodaux and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Laforest, in pro. per. Howell & Martin, for appellees.

LAND, J. In the recent two cases of *Blanchard v. Abraham*, 115 La. 989, 40 South. 379, and *Police Jury of Lafourche v. Robichaux et al.*, 116 La. —, 40 South. 705, we maintained the right of the police jury of Lafourche parish and the municipal authorities of the town of Thibodaux, under special statutes, to maintain and operate a toll draw-bridge over the Bayou Lafourche, partly within the limits of the said town.

Plaintiff, in his petition, admits that the right of the parish and the town to collect tolls was conferred by statute, but takes the novel position that a large amount of tolls has already been collected, and that the interest on such fund will suffice to maintain and operate the bridge and to rebuild it when necessary, and that therefore no more tolls should be collected.

The petition prays for judgment decreeing that the Thibodaux bridge be maintained and operated, and, should the present bridge be destroyed, be rebuilt by the parish of Lafourche and the town of Thibodaux, in solido, and that no more tolls be collected on the Thibodaux bridge.

Or that the police jury of the parish of Lafourche and the authorities of the town of Thibodaux be ordered to deposit the Thibodaux bridge fund to the credit of the Thibodaux bridge, and that the aforesaid authorities be ordered to use the interest on the said bridge fund, and if necessary the principal to maintain, operate, and, as such occasions may require, to rebuild the Thibodaux bridge and to charge no tolls as long as said fund may exist.

The only interest disclosed by petitioner is that he is a citizen of the United States and of the state of Louisiana, who resides in the town of Thibodaux.

The petition admits that all the tolls heretofore collected, less the cost of maintenance, have been placed in the general fund of the parish and town respectively for their ordinary use. The fund, thus long since expended, is recreated by charging the net revenues for 14 years to the parish and town, with interest on the collections of each year. The result of the calculations is a total debit of \$92,750 to the parish and town. The court is asked to treat this imaginary fund as on hand for the purpose of maintaining, oper-

ating, and reconstructing the toll bridge, if necessary, for all future time.

Plaintiff's petition was dismissed on an exception of no cause of action.

The district judge assigns, as reasons for his ruling, that the petition discloses no interest in the petitioner to litigate the matters before the court.

The judge says:

"He does not complain of the violation of any personal rights. He is not shown to be a taxpayer. It appears not that he was ever made to pay tolls against his consent for the use of the Thibodaux bridge, and, as a matter of course, if any one else has suffered in this respect, he cannot, as a private citizen, be heard to champion the latter's cause."

We agree with our learned brother that the petition discloses no special injury to the plaintiff, and therefore no cause of action. *Werges v. Railroad Co.*, 35 La. Ann. 648.

Even taxpayers must allege and show that the burden of taxation will be increased, or that they or their property will be otherwise injuriously affected. *Handy v. New Orleans*, 39 La. Ann. 109, 1 South. 593.

In *Parish of Ouachita v. City of Monroe*, 50 La. Ann. 285, 23 South. 832, this court held that the defendant had no interest to assail an act of Legislature as unconstitutional, though its enforcement might cause an increase in the amount of taxes imposed by the city on its inhabitants—a matter which concerned only the individual citizens who might be so charged.

Hence we conclude that the mere interest of the plaintiff as a citizen and resident of the town and parish is insufficient to support this action, were it otherwise maintainable.

Judgment affirmed.

(117 La.)

No. 15,910.

GINSBERG v. GRONER.

(Supreme Court of Louisiana. May 21, 1906.
Rehearing Denied June 22, 1906.)

1. EXEMPTIONS—PROPERTY SUBJECT.

Where the only property belonging to either of two spouses separated in property from each other consists of a small house and lot, a small stock of goods, and movables, the whole amounting in value to less than \$2,000, and falling under the terms of the right of exemption, the wife is entitled to an exemption upon said property from seizure and sale by her creditors where the house is occupied by the husband, the wife, and seven children as a residence, and the stock of goods therein employed by the wife in carrying on a small trade through which the whole family is supported.

2. SAME—HEAD OF THE FAMILY.

Under article 244 of the Constitution of 1898 a right of exemption is granted to the extent and upon the things therein specified, not only to every "head of a family," but to every person having a person or persons dependent upon "him" or "her" for support. While it is true that the husband, so long as the marriage continues, is in one sense "the head of the family," it does not follow that the burden and duty of supporting the family does not under some circumstances rest upon the wife (Civ. Code,

art. 2435), and that condition of things is shown to exist in this case. That fact with its legal consequences is not affected because the husband may give his time and attention to the conducting of the wife's business. The utmost that can be claimed is that he thereby contributes something towards his own support.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Exemptions, §§ 15-19; vol. 25, Cent. Dig. Homestead, §§ 22-27.]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by Mrs. Edith Ginsberg against J. H. Groner, trustee. Judgment for defendant, and plaintiff appeals. Reversed, and judgment rendered.

John Alexander Williams (Pugh, Thigpen & Foster, of counsel), for appellant. Thomas & Herold, for appellee.

Statement of the Case.

NICHOLLS, J. Plaintiff, wife of Morris Ginsberg, has appealed from a judgment of the district court rejecting her claim to a homestead upon certain property described in her petition.

On the trial of the case the following admissions were made:

(1) That Mrs. Ginsberg is duly separated in property from her husband by virtue of judgment of First Judicial district court.

(2) That she has seven minor children.

(3) That her husband has no property in his own name.

(4) That the wife has no property other than the store, house, and lot in question, one horse and buggy, one wagon, one piano, used for her family, and one cow and calf.

(5) That she and her family moved into the said store about October 1, 1904, and have since used and occupied the rear portion of the building as a residence.

(6) That at the time she was adjudicated a bankrupt, and prior thereto she was conducting a mercantile business in the front portion of the store.

(7) That the rear portion of the store has been partitioned off into four rooms, which are occupied by the family.

(8) That none of the children own any property of any kind, and have no income.

(9) That said house and lot and personal property are jointly worth less than \$2,000.

It is distinctly understood and agreed that these admissions are made only for the purpose of dispensing with testimony on the question of exemption, and that same cannot be used in any manner by either party on any other question whatever that may have arisen or may arise.

Shreveport, La., November 6, 1905.

In the syllabus of the brief on behalf of the appellee the legal positions contended for by him are thus stated:

(1) The homestead claimant, in order to recover, must be either the head of a family

or have a person or persons dependent on him or her for support. Constitution 1898, art. 244.

(2) A married woman whose husband lives with her and is actively managing and conducting a business cannot be the head of a family. Civ. Code, arts. 120, 121, 122.

(3) Where a man is actively engaged in business, though as clerk and manager for another, and contributes the benefit of his labor to his family, his wife, though she have a small business conducted by the husband in her own name, has no one dependent upon her for support; the husband being the provider of the family. 31 La. Ann. 283, Taylor v. McElvin.

(4) The provision in the Constitution, "or person having a person or persons dependent upon him or her for support," was not intended to apply to a family where the head was already entitled to an exemption, but was inserted in order to provide a homestead in cases where single persons had persons dependent upon them for support.

The correctness of these positions is contested by the plaintiff, who maintains that:

(1) The right of exemption contained in the Constitutions of 1879 and 1898 is much broader than that contained in the act of 1865. Under the act of 1865 the right of exemption was only extended to a debtor "having a family, or mother, or father, or person or persons dependent upon him for support, while the Constitution of 1898, not only extends the right of exemption to "every head of a family," but also to a "person having a mother or father, or person or persons dependent upon him or her for support." Act 1865, p. 52, No. 33, Extra Session; Const. 1879, art. 219; Const. 1898, art. 244.

(2) Where the wife is separated in property and the husband owns no property, the wife can urge the exemption of her separate property from seizure and sale for her debts. Hardin v. Wolf, 29 La. Ann. 333.

(3) The wife who has obtained the separation of property must contribute in proportion to her fortune and to that of her husband both to the household expenses and to those of the education of their children. She is bound to support those expenses alone, if there remains nothing to her husband,

(4) The homestead law undertakes to protect individuals, while bearing certain relations to each other. Our statute fixes the legal relations of the wife to the family, when she is separated in property from her husband, "and if there remains nothing to her husband she is bound to support all of the expenses of the household," including the care and education of the children. Rowley v. Rowley, 19 La. 557; Fenn v. Holmes, 6 La. Ann. 199; Hill v. Tippet, 10 La. Ann. 554; Powell v. Hopson, 13 La. Ann. 628; Hardin v. Wolf, 29 La. Ann. 333; McElvin v. Taylor, 30 La. Ann. 552.

(5) Even in the absence of such statutory

provisions under the exceptional circumstances shown to exist in this case, the wife is recognized as the head of the family.

(6) Under article 244 of the Constitution a married woman who holds the title to property, although living with her husband, is entitled to claim the exemption, as against her own creditors, where she has been trading as a feme sole. She is the head of the family, and the same is dependent on her for support. *Richardson v. Woodward*, 104 Fed. 873, 44 C. C. A. 235.

Plaintiff cites additionally *Richardson v. Woodward*, 104 Fed. 873, 44 C. C. A. 235.

Defendant's statement of the case is that plaintiff, "a married woman, was on May 5, 1905, adjudicated bankrupt under a petition in involuntary bankruptcy."

Previously thereto she had been conducting a mercantile business in the town of Colfax, where her husband had been managing the business for her.

On her adjudication of bankruptcy and the appointment of a trustee, her property became vested in the trustee, who, under the provisions of the bankruptcy act, reported that she was entitled to no exemptions.

On the filing of this report she instituted this suit against the trustee, claiming, as exempt, the storehouse and lot owned by her and occupied in part by her and her family, and also certain personal property declared by the Constitution to be exempt to "the head of a family."

The district judge rendered judgment rejecting plaintiff's demand, and she appeals.

Opinion.

The district judge assigns no reasons for his judgment, but it is evident that it was based upon the proposition that the wife was not the "head of the family," and that she had "no persons dependent upon her for support." This conclusion was itself predicated upon assuming that because plaintiff's husband had taken an active part in the management and control of the business conducted by the wife as a public merchant it was "he" and not "she" who was "the head of the family," its bread earner and its supporter. The claim of nonexemption is claimed by the trustee on behalf of the creditors of the wife of property admittedly belonging to her.

Article 244 of the Constitution of 1898 does not exact as the condition of a right to a homestead that the person claiming it should be "the head of the family." While it grants the right to any head of a family, it does so also to any person having a person or persons depending on him or her for support. It is true that so long as a marriage is not dissolved the husband may be considered in one sense the head of the family, but it is not true that, though he may be such, the wife may not "have a person or persons depending upon her for support."

It frequently happens that the wife has to support, not only the children of the family, but the husband himself, and that is the case here. Civ. Code, art. 2435. If the property claimed as exempt were seized and sold by the wife's creditors, not only the husband and the wife, but the children, would be left in destitute circumstances without a home and without means of support—the very condition of affairs which it is the object of the law as a matter of public policy to prevent. Were it not for the continued existence of this property in the wife, the husband, as well as the children, would be absolute paupers. It is entirely through the instrumentality of this property in the wife that the whole family is and can be supported.

It is not true that because the husband may give his time and attention to the wife's business that therefore he supports her and her children. The most that can be claimed as to this is that he does something himself towards his own support. That he may choose to do this furnishes no legal ground for complaint by the wife's creditors, even though his own might have a right to object to it which they do not.

The judgment of the district court is erroneous, and plaintiff's demands are well founded.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment of the district court be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that plaintiff do have judgment against defendant declaring and decreeing that the property described in her petition is exempt from seizure and sale at the instance of the creditors or by any other legal process whatever, and that the same be released to her as required by the Constitution and laws of the state, and plaintiff recover all costs of suit.

(117 La.)

No. 16,096.

PAGE v. THOMPSON, Tax Collector, et al.
(Supreme Court of Louisiana. June 18, 1906.)

COURTS—SUPREME COURT—JURISDICTION.

The questions here presented are whether the plaintiff's land lies in the parish of Bossier or the parish of Bienville, and, if in the parish of Bossier, whether payment to the parish of Bienville discharges plaintiff from liability for taxes legally assessed by the parish of Bossier. These questions do not involve the legality of the tax in controversy, and, as the amount claimed is less than \$2,000, this court is without jurisdiction of the appeal.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 608-618.]

(Syllabus by the Court.)

Appeal from Second Judicial District Court, Parish of Bossier; Richard Cleveland Drew, Judge.

Action by T. L. Page against A. R. Thompson, tax collector, and others. Judgment

for defendants, and plaintiff appeals. Dismissed and transferred to Court of Appeal on conditions.

Alexander & Wilkinson, for appellant.
Andrew Jackson Murff, for appellees.

Statement of the Case.

MONROE, J. In April, 1902, the tax collector of the parish of Bossier was advertising for sale, for state, parish, and levee district taxes of 1901, certain land belonging to plaintiff, when the latter enjoined the sale, on the ground that the land is situated in the adjoining parish of Bienville, and that he had paid the taxes for 1901, and preceding years, in that parish. The tax collector (successor to the original defendant) answered, in 1904, insisting that the land in question lies in the parish of Bossier, and the judge a quo so held. He also held that, quoad the state tax, plaintiff was discharged by reason of his having paid it in the parish of Bienville. Plaintiff appeals from the judgment so rendered, and defendant, after moving to dismiss the appeal for alleged want of jurisdiction in this court and for alleged lack of a legal order of appeal, answers, praying that he be allowed to recover the state, as well as the other, taxes claimed.

Opinion On Motion to Dismiss Appeal.

If plaintiff's land lies within the limits of the parish of Bossier, as those limits are established by law, it is subject to taxation there, and is liable for the amount here claimed, unless the payment alleged to have been made in the parish of Bienville has discharged that liability. The questions presented for decision, therefore, are whether plaintiff's land lies in the parish of Bossier or the parish of Bienville, and, if in the parish of Bossier, whether payment to the parish of Bienville, of taxes assessed by that parish, discharges the plaintiff from liability for taxes legally assessed by the parish of Bossier. These questions do not involve the legality of the tax here in controversy, and, as the amount claimed is less than \$2,000, the motion to dismiss must prevail, subject to the right of the plaintiff to have the case transferred to the Court of Appeal as provided by Act No. 56, p. 135, of 1904.

It is therefore ordered, adjudged, and decreed that the appeal herein be dismissed; provided, however, that if, within 15 days from the date upon which this judgment shall have become final, the appellant or his attorney shall make oath that the appeal was not taken for the purpose of delay, the cause shall be and is transferred to the Court of Appeal for the parish of Bossier.

It is further ordered that the costs of this court be paid by the appellant.

(117 La.)

No. 15,991.

GIRAULT v. FEUCHT.

(Supreme Court of Louisiana. May 7, 1906.
On Application for Rehearing, June 4, 1906.
On Rehearing, June 22, 1906.)

1. VENDOR AND PURCHASER—CONTRACT—DESCRIPTION OF PROPERTY.

As between the parties to a private sale, the following is a sufficient description. "The property and all improvements thereon situated in square bounded by St. Louis, Toulouse, Rampart and Basin streets, and known as Nos. 500 to 506 Basin street."

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 27.]

2. SAME—EXAMINATION OF TITLE.

In a promise of sale, a clause which stipulates that part of the price is to be deposited in bank in the joint names of the parties until the title is examined, and to be paid to the vendor when the act of sale is passed, or to be returned to the vendee in the event the title is rejected, does not constitute a purely potestative condition. It means nothing more than that the sale is made subject to examination of titles.

3. SPECIFIC PERFORMANCE—PROMISE OF SALE.

A promise of sale amounts to a sale, and specific performance of it will be enforced.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 191-198.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Walter W. Girault against Barbara Feucht. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Miller, Dufour & Dufour, for appellant.
McCaleb, McCaleb & Leopold, for appellee.

PROVOSTY, J. Plaintiff brings this suit to compel specific performance of the following contract:

"Whereas, W. W. Girault has this day agreed to purchase from Widow Barbara Feucht the property and all improvements thereon situated in the square bounded by St. Louis, Toulouse, Rampart and Basin streets, and known as Nos. 500 to 506 Basin street, for the sum and price of ninety-five hundred dollars:

"Now, therefore, it is agreed that ten per cent. (10) of the purchase price, to wit, nine hundred and fifty dollars, shall this day be deposited in the People's Savings, Trust & Banking Company, of this city, and the certificate of deposit of the said banking company, payable to the joint order of the said Widow Barbara Feucht, and the said W. W. Girault shall be evidence that the said deposit has been made, the same to be held in escrow until the titles are examined and the act of sale duly passed, when the said nine hundred and fifty dollars shall be paid over to the said Widow Barbara Feucht as a part of the purchase price.

"In the event, however, that the title to the property should be rejected, the said nine hundred and fifty dollars shall be returned to W. W. Girault."

Plaintiff alleges that defendant delivered to him her title papers at the time of the execution of this contract. He sets out the more full description of the property contained in these title papers.

He alleges that he made the deposit as required by the contract, and that after the title had been examined and pronounced good he notified defendant of his readiness to consummate the contract, and that defendant repeatedly promised to do so, but finally notified him in writing that she would not carry out the agreement.

The suit was dismissed on exception of no cause of action. The first defense is based on the following clause of the contract:

"In the event, however, that the titles to the property should be rejected, the said \$950 shall be returned to W. W. Girault."

This clause, it is said, put it in the power of plaintiff to recede from the contract at pleasure by simply rejecting the title; that it is a potestative condition; and that:

"Every obligation is null that has been contracted on a potestative condition on the part of him who binds himself." Civ. Code, art. 2034.

Plaintiff replies that the potestative condition to which article 2034 has reference is the one "which makes the obligation depend solely on the exercise of the obligor's will" (Civ. Code, art. 2035); and that in the instant case the event of the rejection of the title was not to depend upon the will of the purchaser, but upon whether the title was found to be good, or the contrary. This appears to us to be the correct view. If the parties had intended that plaintiff should not be bound to carry out the agreement in the event the title proved to be good, they would hardly have taken the trouble to draw up and sign the written instrument.

Article 1950: "When there is anything doubtful in agreements, we must endeavor to ascertain what was the common intention of the parties, rather than adhere to the literal sense of the terms."

Article 1951: "When a clause is susceptible of two interpretations, it must be understood in that in which it may have some effect, rather than in a sense that would render it nugatory."

Article 2037, Civ. Code: "Every condition must be performed in the manner that it is probable that the parties wished and intended that it should be."

Manifestly, what the parties intended if the title was good was that plaintiff should be bound to take the property. We are constantly having suits to compel purchasers to take property which they have refused to take on the grounds of the title being bad. Such cases are so numerous that the citation of any of them is unnecessary.

The next defense is that the contract is null because the property is not so described as to be identified. In support of this the cases of Carmichael v. Aiken's Heirs, 13 La. 210; Jacques v. Kopman, 6 La. Ann. 542; Syer v. Bundy, 9 La. Ann. 540; and Augusti v. Lawless' Heirs, 45 La. Ann. 1370, 14 South. 228—are cited. Those were tax sales, and for obvious reasons analogy between them and private sales is wanting. As was said in Carmichael v. Aiken's Heirs, the leading case, the object of the advertisement "is to bring

the fact of the seizure to the knowledge of the absent owner," and "to enable the bidders at the sale to know what they are buying." It is not necessary to point out how inapplicable to a private sale these reasons are. In our case the parties knew perfectly well what property they were buying and selling, and the description they gave of it in the contract is ample for identification. It is the entire lots and all the improvements on them, bearing the numbers named, on Basin street, in the square described.

Moreover, descriptions in acts may often be supplemented as between the parties by evidence dehors the written acts, and on the trial of the merits plaintiff might perhaps be able to show that Nos. 500 to 506 Basin street are accurately described on certain public records, or that defendant owned no other property than this in the square in question.

Lastly, defendant contends that specific performance of such a contract cannot, or should not, be decreed. We do not see why not. Our Codes provide expressly that the specific performance of contracts may be enforced.

"Art. 1926. On the breach of any obligation to do or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require the dissolution of the contract, and in all these cases damages may be given where they have accrued, according to the rules established in the following section.

"Art. 1927. In ordinary cases, the breach of such a contract entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts."

The Code of Practice: "Art. 636. When the judgment orders, not the delivering, but the doing or refraining from something specified in it, if the party condemned, on demand made by the sheriff that he shall comply with it, refuses or neglects to do so, and this refusal or neglect appears by a certificate of the sheriff, the party in whose favor the judgment was rendered may obtain, on motion, an order to distrain all the property movable and immovable of the party who is in default, until he shall have fully satisfied the judgment."

The effect of adopting defendant's contention would be to wipe these articles out of our Codes, for, if not in such a case as the one at bar, in what case would specific performance of a contract ever be enforced.

According to article 1926 the obligee is "entitled" to damages or specific performance "at his option," and according to article 1927 he is "entitled" only to damages in ordinary cases, "but may" be awarded specific performance in cases where damages would be inadequate relief. Reading these two articles together, that is to say, reading the word "may" in conjunction with the twice used word "entitled," to which it stands in correlation, the word "may" must be given, we think, the meaning of shall, and the articles must read that, where damages are inadequate

quate relief, the court, not "may," but "shall" or "must," order specific performance. If the obligee is "entitled" to a thing, the court has no discretion about according it to him or not, but is obliged to do so. The sole question is, therefore, as to whether in this case damages would be adequate relief.

Evidently, in our opinion it would not be. The plaintiff is entitled to have this particular piece of property, and the measure of his right is this property. The court cannot take upon itself to say that anything short of this property will satisfy his demand. Such a thing might be as that damages to the full market value of this property would be as nothing to him, as compared with having the property itself.

We find but one case in our reports where the court has had occasion to consider a suit by the promisee for specific performance of a promise of sale of immovable property, and that is the case of *Long v. French*, 13 La. 257, where specific performance was ordered.

In *Citizens' Bank v. James*, 26 La. Ann. 264, the demand was that "the defendant be ordered to accept the sale of the property and to furnish his stock note"; in other words, to become a stockholder of the Citizens' Bank. The decision consists of a lengthy discussion of the merits of the case, with no discussion of the question of whether specific performance of contracts will be ordered or not. But the court adds at the end of the decision the following paragraph:

"The bank asks that the defendant should be compelled to comply with his contract. It is not in our power to force him to do so. The penalty he incurs for violating it is the damage he has occasioned."

The court does not explain why it has not the power. Manifestly, however, the case was not a proper one for specific performance, and defendant should not be compelled to become stockholders of a bank.

City v. Railroad Co., 44 La. Ann. 64, 10 South. 401, involved a levee building contract. *Rice v. Rice*, 46 La. Ann. 712, 15 South. 538, was for a personal judgment on a money-demand.

Laroussini v. Werleln, 48 La. Ann. 13, 18 South. 704, was by a lessor against a lessee, manifestly a demand resolving itself into a claim for money. A different decision might have been rendered had the suit been by a lessee against the lessor for possession of the leased premises.

In *Mirandona v. Burg*, 49 La. Ann. 656, 21 South. 723, the contract had special features which rendered the specific enforcement of it impossible, as the court well pointed out.

In *Caperton v. Forrey*, 49 La. Ann. 872, 21 South. 600, the specific performance was, in the words of the syllabus, "beyond the ability of the defendant."

This exhausts the list of cases cited by defendant. They do not touch the question we are concerned with, which is whether specific performance of a promise of sale of

real estate will be enforced as against the vendor. To our mind, if by virtue of a promise of sale equivalent to a sale a man is practically the owner of a certain piece of real estate, and asks the court to enforce his rights, the court would be making but a poor response by giving him damages. What he wants, and has a clear and incontestible right to, is the property itself. To award him mere damages and reject his demand for the property would not be to give him his right, but would be to deny him his right. In the instant case there was not only a promise of sale, but a sale partly executed by payment of a part of the price.

Differently from our Code the Code Napoleon provides (article 1142) that:

"Every obligation to do or not to do resolves itself into a claim for damages in case of execution on the part of the debtor."

Commenting on this article, *Baudry Lacaninerie et Barde*, *Obl.* vol. 1, p. 515, has the following:

"On lit dans l'art. 1142: 'Toute obligation de faire ou de ne pas faire se résout en dommages-intérêts, en cas d'inexécution de la part du débiteur.' En d'autres termes, une obligation de faire ou de ne pas faire se transforme en dommages-intérêts, quand il y a impossibilité pour le créancier d'en obtenir l'exécution."

"Il ne faut pas exagérer la portée de l'art. 1142; si l'on prenait à la lettre et isolément la disposition de cet article, on pourrait croire qu'il ne donne au créancier que le droit de réclamer des dommages-intérêts. Il n'en est point ainsi. Même pour les obligations de faire ou de ne pas faire, le créancier peut exiger l'exécution en nature. L'art. 1142 ne renferme point une proposition absolue, ni même une proposition générale. D'ailleurs, nous le verrons, sa portée est limitée par les dispositions des art. 1143 et 1144. De l'ensemble de ces textes et de l'histoire de la question se dégage cette idée que le créancier a droit en principe à l'exécution en nature. Au surplus, c'est là une conséquence de cette règle que la convention fait la loi des parties. Ainsi le créancier peut demander en justice l'exécution en nature, et, d'autre part, le débiteur doit offrir cette exécution pour que ses offres soient satisfactories."

Our argument, thus far, has proceeded on the theory that the obligation sought to be enforced in this case is an obligation to do. But such is not its nature. It is an obligation to deliver, and could not possibly resolve itself into an obligation to pay damages, unless where a man has a right to a cow the court could be at liberty to require him to sue for two calves, or two sheep, or the equivalent in hogs.

Article 2462, Civ. Code, provides, as follows:

"A promise to sell amounts to a sale, when there exists a reciprocal consent of both parties, as to the thing and the price thereof; but, to have its effect, either between the contracting parties or with regard to other persons, the promise to sell must be vested with the same formalities as are above prescribed in articles 2439 and 2440 concerning sales, in all cases where the law directs that the sale be committed to writing."

The articles 2439 and 2440, here referred to, read, as follows:

"Art. 2439. The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.

"Three circumstances concur to the perfection of the contract, to wit: The thing sold, the price and the consent.

"Art. 2440. All sales of immovable property shall be made by authentic act or under private signature.

"Except as provided in article 2275, every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

All the conditions here enumerated are met in the present contract—a thing, a price, a consent, and a contract reduced to writing. This contract, then, amounts to a sale.

The following, which we quote from Fuzier-Herman (article 1589), expresses the view of the French courts and law writers upon the effect of the corresponding article of the Code Napoleon:

"La promesse de vente, valant vente, lorsqu'il ya consentement réciproque des parties sur la chose et sur le prix, transfère la propriété de la chose vendue à l'acheteur vis à vis du vendeur."

To this is appended a long list of authors and decisions, nemine dissentiente.

Examination of these authorities shows that this conclusion results from the combined effect of the two codal provisions, viz., that the contract of sale is perfect as between the parties by mere consent, and that the parties may by their contract make a law for themselves in everything not contrary to public policy or good morals.

Our own decisions on the subject, in addition to those already referred to, are: McDonald v. Aubert, 17 La. 448; Thompson v. Mylne, 11 Rob. 349; Barrett v. His Creditors, 12 Rob. 474; Stephens v. Chamberlin, 5 La. Ann. 656; Peck v. Overton, 7 La. Ann. 70; Thompson v. Mylne, 6 La. Ann. 80; Peck v. Bemiss, 10 La. Ann. 160; Knox v. Payne, 13 La. Ann. 361; Garrett v. Crooks, 15 La. Ann. 483; Foreman v. Saxon, 30 La. Ann. 1117; Broadwell v. Sheriff, 34 La. Ann. 677; Thompson v. Sheriff, 40 La. Ann. 712, 5 South. 58; Collins v. Desmaret, 45 La. Ann. 108, 12 South. 121.

Whatever may be the result of these decisions, in so far as concerns the effect of a promise of sale in transferring the ownership, certain it is that they are absolute and conclusive on the question of whether the proper action on such a promise is for damages or for specific performance. Thus, in McDonald v. Aubert, 17 La. 450, the court said:

"We understand article 2437 (2462) to mean that a promise to sell is so far a sale that it gives to either party a right to claim, recta via, the delivery of the thing.

And in the leading case of Peck v. Bemiss, 10 La. Ann. 160, where the effect of article 2462 was elaborately considered, the court said:

"The antecedent history of the jurisprudence of France, from whose Code we have taken this

article, and which is luminously considered by Marcade, is a satisfactory key to the true meaning of the expression: 'La promesse de vendre vaut vente.' It seems to have been dictated by a desire to put at rest the question which had divided learned minds, whether a promise of sale created such an obligation as entitled the promisee to an action for specific performance, or simply an action for damages. It is in this sense the Code speaks, as we think that author has justly remarked: 'La promesse de vendre vaut vente, c'est à dire, oblige à passer le contra.'"

And in Collins v. Desmaret, 45 La. Ann. 108, 114, 12 South. 121, the court, speaking of the promise of sale, said:

"It produces only such an obligation as may be specifically enforced, but does not absolutely convey the property, or confer upon the promisor the rights of vendor."

Pending the suit defendant died, and her executor has been made a party in her place.

Judgment set aside, exception overruled, and case remanded for trial on the merits.

On Application for Rehearing.

PER CURIAM. The defendant died pending the appeal, and her testamentary executor made herself a party. It is suggested that the universal legatees of the defendant also should have been made parties to the appeal. The objection is well taken, as this is an action of revendication of real property, and the heirs or universal legatees of the deceased present or represented in the state are necessary parties. Code Proc. art. 123.

Rehearing granted.

On Rehearing.

PROVOSTY, J. A rehearing was granted in this case because the defendant had died pending the appeal, and the universal legatees had not been made parties to the appeal. The proper parties have now been made, and the case resubmitted "for decision upon the oral argument and the briefs heretofore filed on the original hearing."

The court sees no reason for changing the decision heretofore handed down. It is therefore reinstated and made the judgment of the court.

(117 La.)

No. 16,117.

STATE v. JAHRAUS.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 22, 1906.)

1. BILLS AND NOTES—CHECKS—NOTICE TO PAYEE—STATE FUNDS.

The check assigned to defendant was to be paid from state funds.

2. SAME.

The initials of the drawer, "T. C.," identified the funds sufficiently to place defendant on his guard.

3. ESTOPPEL—ACTS OF DEFAULTING OFFICERS.

The state is not estopped by the act of the defaulting officer, even in case of a belated settlement.

4. EVIDENCE—PRESUMPTIONS.

When a defendant can by his "own testimony" throw light upon matters at issue necessary to his defense and peculiarly within his knowledge, if the facts exist, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the facts do not exist." *Bastrop State Bank v. Levy*, 31 South. 164, 106 La. 591.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 95, 96.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by the state against Arthur Jahraus. Judgment for plaintiff, and defendant appeals. Affirmed.

William Stirling Parkerson, for appellant. Walter Guion, Atty. Gen. (Miller, Dufour, and Lewis Guion, of counsel), for appellee.

BREAUX, C. J. This suit was brought by the state to recover the sum of \$3,755.61, with interest, from the succession of the late Arthur Jahraus. The charge of the state is, as relates to the ex-sheriff of Calcasieu parish, John A. Perkins, that he collected taxes for her which he failed to turn over to the auditor.

The state charges that Jahraus knew that Perkins was sheriff at the time that he received from him different sums of money in checks; that Jahraus knew that the funds against which the checks were drawn were not the property of Perkins, but of the state; and that Perkins signed the checks as drawer in his official capacity.

The defendant denied all indebtedness on his part, and specially averred that the state is estopped by reason of the fact that through her auditor she failed to require the sheriff to make his returns and settlement as the law requires.

It appears that John A. Perkins was elected sheriff in the year 1900, that it became known that he was a defaulter in the year 1904, and that he is now a fugitive from justice.

It is a fact shown by the testimony that in the early part of the year 1904, a short time before Perkins' defalcation was discovered, the late Mr. Jahraus received from him as sheriff checks drawn against the account which he kept as sheriff and tax collector in the Bank of Calcasieu and in the First National Bank of Lake Charles.

At first the sheriff kept a personal bank account and a separate account as tax collector. In the year 1902 he ceased to keep this personal account, and only kept an account as tax collector, against which he drew indiscriminately, personally and as tax collector.

Whilst in this city checks were signed by "John A. Perkins, T. C.," and transferred by delivery to Jahraus. They were deposited by the holder, Jahraus, in the Whitney National Bank for collection, through which they were collected, and the amount was placed to his credit in that bank.

The case went to trial on the issues suggested by the foregoing, and on the trial it was shown that the sheriff was a defaulter for a large amount; that, although a large sum was collected through his sureties and other sources, there still remains due to the state an amount largely in excess of the amount for which the state sues in this case.

At the outset of the discussion we readily state that we agree with the learned counsel for the defendant in the statement that the law does not require the tax collector to make a deposit in any particular bank. There may be a rule of the tax-collecting department requiring such a deposit which is safe to follow, but we have found no statute on the subject.

We may as well state here, although the law does not require the deposit, yet, if deposit be made, the state may trace her funds to it, if it consists of her funds, or of funds out of which she can require payment.

It is also unquestionably true, as stated by learned counsel, that the state requires the sheriff or ex officio tax collector to make due returns of his collections within the first 10 days of January, April, July, and October, and that he must make a final settlement within 10 days after the 20th of July of each year. It becomes the duty of the auditor, in case of the sheriff's failure to thus settle, to bring the matter to the attention of the district attorney, and that the judge of the district court is required to place the matter before the grand jury.

This was not done, although the sheriff had not settled as required.

The defendant grounds his plea of estoppel on the fact that the sheriff was always tardy, never in time at all, and in two instances made no settlement.

Under the authorities we feel constrained to hold that even if the auditor was slow in requiring settlement, and the judge and the district attorney did nothing in the matter, and even if, in consequence of these facts, the defaulting officer continued in the enjoyment of public confidence, as if he had discharged all the duties incumbent upon him, yet the state is not estopped. It cannot well be held bound by the illegal acts of the officer who squandered her revenues and defaulted in his payments. It is well settled that "sureties on the bond of an officer cannot avail themselves of the laches or omissions of other officers of the state in the performance of duties imposed by law as a ground of discharge for their own liability."

The foregoing citation is sustained substantially by a number of decisions of this court: *State v. Powell*, 40 La. Ann. 234, 4 South 46, 8 Am. St. Rep. 522; *State v. Powell*, 40 La. Ann. 241, 4 South. 447; *Breaux v. Directors*, 40 La. Ann. 705, 4 South. 880; *Police Jury v. Tax Collector*, 31 La. Ann. 738; *Louisiana v. Gullbeau*, 37 La. Ann. 718; *State v. Lanier*, 31 La. Ann. 426; *State v. Lake*, 45 La. Ann. 1207, 14 South. 128.

The question is whether under authority we should go further and hold that third persons (different from sureties) fall within the same rule.

It has been decided that the government is not liable for the wrongs committed by its officers, even where third persons are concerned; that it is not bound by the neglect of its officers; that the acquired rights of the government cannot be destroyed by the laches of its agents. *Gibbons v. U. S.*, 8 Wall. (U. S.) 269, 19 L. Ed. 453; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720, 6 L. Ed. 199; *U. S. v. Vanzandt*, 11 Wheat. (U. S.) 184, 6 L. Ed. 448; *U. S. v. Nicholl*, 12 Wheat. (U. S.) 1205, 6 L. Ed. 709; *Jones v. U. S.*, 13 Wall. (U. S.) 662, 21 L. Ed. 867; *Shields v. Ohio*, 9 U. S. 319, 24 L. Ed. 357.

True, the state may in certain instances be estopped; but we have never found that the state was held estopped on account of the acts of an unfaithful and defaulting officer.

There are a number of decisions in matter of tax collecting and assessment, some of which have been cited by learned counsel for defendant, in which it was decided, if a person has been injured by the action of the state, the state should be held to indemnification.

These decisions are: *State v. Ober*, 34 La. Ann. 861; *Louisiana v. R. R.*, 25 La. Ann. 65; *Louisiana v. Taylor*, 28 La. Ann. 460; *Mower v. Kemp*, 42 La. Ann. 1007, 8 South. 330; *R. R. Co. v. Sledge*, 41 La. Ann. 903, 6 South. 725; *Folger v. Palmer*, 35 La. Ann. 743.

In these cases there was no question of a defalcation of an officer. The error invoked against the state grew out of some statute or act of some officer who had acted within the scope of his authority.

If, for instance, in the matter of taxation, the amount should be retained by the state, it may become a matter of bad faith to retain the amount if not due. But here a different question entirely presents itself, as we have before stated.

No decision has been cited in which it was held that the dilatoriness and subsequent defalcation of an officer was cause sufficient upon which to base an estoppel. Neither have we found in our own researches any such decision.

The moment defalcation is disclosed, policy requires that full disclosure be made which no plea of estoppel can prevent.

We leave that plea convinced that it cannot be of any avail.

We will here mention in passing that in argument at bar something was said incidentally by one of the counsel about an implied and resulting trust which gave a right of recovery to the state to the amount claimed.

We easily dispose of that ground by stating that there is no lien save that created by law.

If we were to stop here in the discussion, we would find for the defendant by reason of the fact that the state has no right springing from any sort of implied or resulting trust or lien. It is exclusively a question of ownership. If the money was not owned by the state, she is not entitled to judgment.

The question is all-important.

We feel at liberty to state that if, at any time during the discussion and before the case is finally decided, it should appear with reasonable certainty that the state is not the owner of the fund, from that moment it will be determined that the defendant is not liable.

It is the money of the state for the following reasons:

The total state taxes for the year 1903 was \$96,212.13. He owed licenses in addition. His deposits show no amount equal to this indebtedness to the state. On the contrary, it was always less, both in the year 1903 and in the year 1904.

We will again state, in other words, that all his collections as sheriff deposited with the banks before named, which were the banks in which he made his deposits, were less than the amounts owed to the state, to the parish, and to the school board.

We will here state incidentally that there is no question here of an amount due for commissions, or of any private funds deposited by him in this sheriff's account fund. It was not shown that he ever deposited a cent of his own to his credit on this account. It was exclusively his account for taxes collected.

The question suggests itself: Was the defendant sufficiently placed upon inquiry by the fact that the sheriff signed the check "John A. Perkins, T. C."?

He was dealing with Perkins personally. He knew or should have known it. He should not have accepted a check of the sheriff upon his trust fund.

"T. C." evidently means "Tax Collector." It is requisite that special heed be given to the capacity of the drawer.

The weakness of defendant's defense in the suit is illustrated by the following: A. is agent of B. C. knows that he is agent, and that A. keeps an account to the credit of B. A. as agent hands his check to C., who accepts it and collects the amount. That is the end of the matter, if C. knows nothing of the purpose for which A. has drawn the check. He may assume that it was in connection with his agency, and that is the end of the matter. But if C. knows that A. is the agent, and that he positively had no right to draw on the fund deposited to B.'s credit, except for the one purpose of settling with A., his principal, and he accepts a check and collects the amount thereon, C. might be made to refund.

Here the defendant somewhat similarly accepted a check of the tax collector on

funds collected by him for the state. The defendant must be held to have known that the sheriff had no right to dispose of that fund, except to make settlements with the state. It is the express law of the state, of which every one must take notice and be on his guard.

His dealings were with Perkins personally. As a question of law, why did he accept a check of "Perkins, T. O."?

We did think for a little time that the funds deposited in the two banks, before named, by Perkins, were the indebtedness of the banks to Perkins, the depositor, as it is well known that the relation between the depositor and the bank is that of debtor and creditor; but after some reflection and after considering eminent authority we have arrived at a different conclusion.

The syllabus of the decision to which we refer reads as follows:

"Although the relation between a bank and its depositor is that merely of debtor and creditor, the money which he deposits is held by him in a fiduciary capacity and does not change its character by its being placed to its credit in its bank account." *National Bank v. Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693.

Here the money was substantially the state's. An officer has no authority to draw out funds of his principal and use them.

The defendant knew or should have known of the trust relations existing between the drawer of the check and the state. True, the fugitive ex-sheriff abbreviated the signature. He did not set out at length that he was drawing as tax collector, but it remained that his initials indicated that fact. It has been decided that initials sufficed. *Summer v. Mitchell* (Fla.) 10 South. 562, 14 L. R. A. 823, 30 Am. St. Rep. 106; *Shattuck v. People*, 5 Ill. 477; *Russ v. Wingate*, 30 Miss. 440; *Rowley v. Berrean*, 12 Ill. 200; *Sparrow v. Hovey*, 41 Mich. 708, 3 N. W. 198.

In regard to another proposition which has entered into the discussion of the case—that is, whether the defendant should have testified and explained the nature of the negotiation—we will state that whilst the defendant should not be held too closely to the proof of facts, or of the necessity of appearing in his own cause, yet there are cases in which it does appear that he should testify, and the present case seems to be of that number.

He might have thrown much light upon the negotiation. This he has not chosen to do.

Touching the necessity just mentioned, we cite the following cases: *Nunez v. Bayhi*, 52 La. Ann. 719, 28 South. 349; *King v. Atkins*, 33 La. Ann. 1064; *School Board v. Trimble*, 33 La. Ann. 1078; *Pruyn v. Young*, 51 La. Ann. 320, 25 South. 125; *Bastrop State Bank v. Levy*, 106 La. 586, 31 South. 164.

It was said in argument that Perkins had collected other funds than those coming to

the state; that there were other interested creditors—the parish and the school board.

Reason and authority hold that the state is entitled to the preference over the fund, whether collected for it, the parish, or the school board. *State v. Foster* (Wyo.) 33 Pac. 926, 29 L. R. A. 243, 63 Am. St. Rep. 47; *Bibbins v. Clark* (Iowa) 57 N. W. 884, 29 L. R. A. 279; *Robinson v. The Bank*, 18 Ga. 96; *Jack v. Welennett*, 115 Ill. 105, 3 N. E. 445, 56 Am. Rep. 129; *State v. Mayor, etc.*, 10 Md. 504; *Orem v. Wrightson*, 51 Md. 42, 34 Am. Rep. 286; *State v. Rowse*, 49 Mo. 586; *Smith v. State*, 5 Gill (Md.) 45; *United States v. State Bank*, 6 Pet. (U. S.) 35, 8 L. Ed. 308.

We realize that this is a hard case, and have felt some concern about our conclusion. We wish it were other than it is, but in our view of the law it cannot be otherwise.

The judgment is affirmed.

(117 La.)

No. 16,129.

STATE ex rel. TOWN OF MINDEN v. HUNTER.

In re ROBERTS, Mayor, et al.

(Supreme Court of Louisiana. June 4, 1906. Rehearing Denied June 22, 1906.)

CRIMINAL LAW—JURISDICTION OF SUPREME COURT—ERROR OF LAW—SUPERVISORY POWERS.

Where, in a criminal case appealed from a mayor's court, to the district court, the parties went to trial, and on objection made, the district judge ruled that the affidavit, not having been sworn to, furnished no basis for the prosecution, and therefore discharged the accused and canceled his bond, *held*, that the court having jurisdiction, and the proceedings being regular, the case presented merely an alleged error of law, over which the Supreme Court has no appellate jurisdiction, and which does not call for the exercise of its extraordinary supervisory powers.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2572-2580.]

(Syllabus by the Court.)

W. S. Hunter was convicted in a mayor's court for illegally selling intoxicating liquors, and appeals to the district court, where the conviction was held void. Town moved for a new trial, which was denied, and the state, on the relation of the town by Robert Roberts, Mayor, applies for writs of mandamus, certiorari, and prohibition. Dismissed.

C. E. McDonald and Lynn Kyle Watkins, for the relator. Respondent Judge (Stewart & Stewart and Thomas W. Robertson, of counsel), pro se.

LAND, J. It appears from the record that W. S. Hunter was arrested, tried, and convicted in the mayor's court of the town of Minden in four cases, on complaint of A. H. Phillips, town marshal, in the form of affidavits signed by said Phillips; but not sworn to before the mayor.

Warrants were issued by the mayor, and

they refer to charges "as per affidavit of complaint on file."

Hunter was charged with selling intoxicating liquors, and soliciting, receiving, and taking orders for the sale of intoxicating liquors, and making delivery of intoxicating liquors, contrary to the town ordinances. Hunter appeared by counsel in the mayor's court, and moved to quash the affidavit and warrant in each case, on the ground that he was charged with three distinct and specific offenses requiring different and separate evidence and in no way connected with each other.

The defendant prayed in the alternative that the town of Minden be required to elect on which of said charges it would prosecute. This motion was overruled, and thereupon the defendant waived arraignment and pleaded not guilty. Defendant was tried, convicted, and sentenced on December 18, 1905, and appealed to the district court.

On April 9, 1906, the cases were called for trial in the district court, both parties announcing ready.

Defendant's counsel objected to any evidence being adduced, for the reason that no affidavits had been filed on which to base the prosecutions.

This objection was sustained, the appeal dismissed, and the judgment of conviction decreed to be absolutely null. The defendant was discharged, and his bonds canceled.

On the next day the town of Minden tendered a bill of exception, which was objected to, on the ground that it came too late; no bill having been reserved at the time of the ruling.

This bill was signed and filed. The town then filed a motion for a new trial, which was overruled, and thereupon the plaintiff excepted, and reversed a bill of exceptions, which was allowed and filed.

On April 26, 1906, the town of Minden filed the present application in this court.

The judgment of the district court became final on April 10, 1906, when the motion for a new trial was overruled, and the defendant discharged, and his bonds canceled.

We have no appellate jurisdiction of a case of this kind.

Article 3 of the Constitution provides that persons sentenced to a fine or imprisonment by mayors or recorders, shall be entitled to an appeal to the district court of the parish, upon giving security for fine and costs of court, and in such cases trial shall be de novo, and without juries.

The district court, therefore, had jurisdiction. The district judge did not refuse to try the case, but during a regular trial, heard and decided an objection to the admissibility of evidence.

The most that can be said is that the district judge, in the exercise of his jurisdiction, committed an error of law in the ruling complained of.

Such an alleged error furnishes no basis

for the writs prayed for, but, the relator appeals to the supervisory jurisdiction of this court under article 94 of the Constitution of 1898, which reads as follows:

"The Supreme Court shall have control and supervision over all inferior courts. The court or any justice thereof, shall have power to issue writs of certiorari, prohibition, mandamus, quo warranto, and other remedial writs."

In *State ex rel. Patton v. Judge*, 40 La. Ann. 893, 4 South. 50, 8 Am. St. Rep. 532, this court said:

"Mere error in the decisions of questions properly submitted to their determination and regularly determined, can only be corrected in the exercise of a jurisdiction purely appellate"—citing *State ex rel. Wintz*, 32 La. Ann. 1222.

In *State ex rel. Broussard v. Justice*, 42 La. Ann. 1190, 8 South. 441, it was said:

"This court, in the exercise of its supervisory jurisdiction will not, when the inferior court has jurisdiction of the suit, and the proceedings were regular, go behind them and review the judgment rendered by the inferior tribunal."

In *State ex rel. Rocchi v. Judge*, 45 La. Ann. 538, 12 South. 941, the court held that the object of our supervisory jurisdiction "is not to amend, reverse, or affirm the judgment attacked, but to pronounce it ab origine null, void, and of no effect."

It may be stated, however, that this court will also exercise its supervisory jurisdiction in cases where a party has been denied some plain legal right, or condemned without a hearing or a judgment has been rendered without any evidence whatever, or where there has been a downright denial of justice. *State ex rel. Negroto v. Judge*, 45 La. Ann. 1437, 14 South. 419; *State ex rel. Waller v. Justice*, 47 La. Ann. 27, 16 South. 565; *State ex rel. Hohn v. Recorder*, 50 La. Ann. 549, 23 South. 621; *State ex rel. Vincent v. Grafina*, 52 La. Ann. 694, 27 South. 564.

In *State ex rel. Lumber Co. v. Justice*, 48 La. Ann. 1532, 21 South. 119, this court said:

"The proceedings show no irregularity, and our cognizance under the writ of certiorari is confined to the record and to a correction of the proceedings. * * * The certiorari, we have had frequent occasion to hold, is not the substitute for an appeal."

See, also, *State ex rel., etc., v. Judge*, 47 La. Ann. 1085, 17 South. 590.

In *State ex rel. Guarneri v. Judge*, 52 La. Ann. 984, 27 South. 365, it was held that the mere correctness of the conclusions of the district judge as to the nullity of a judgment rendered by a justice of the peace could not be tested in the Supreme Court under its supervisory powers.

The same doctrine has been applied to a judgment of a Court of Appeal. 47 La. Ann. 1516, 18 South. 510.

In *State ex rel. Green v. Judge*, 104 La. 538, 29 South. 273, this court held that it would not under its supervisory powers review in a criminal case the correctness of the conclusions of the judge as to the admissibility, force, and effect of evidence; and *inter alia* said:

"Misapplication of law to any given state of facts is not excess of jurisdiction, but error."

The question whether the defendant could be prosecuted on an affidavit without a jurat was one of law for the judge to determine, and is no more reviewable by this court than the question of the sufficiency of an indictment or information in a misdemeanor case.

It is therefore ordered that the provisional writs herein issued be recalled, and that this application be dismissed at the cost of relator.

(117 La.)

No. 16,000.

CLARK v. WHITAKER.

(Supreme Court of Louisiana, June 4, 1906.
Rehearing Denied June 23, 1906.)

1. HUSBAND AND WIFE—WIFE AS SURETY—DISPOSAL OF SEPARATE PROPERTY—RIGHTS OF BONA FIDE HOLDERS—PURCHASER OF NOTE.

While the wife cannot be held as surety for the payment of her husband's debts if she does not avail herself of the protection afforded and chooses to dispose of her property in his interest, she cannot have the sale or other disposition made of the property, annulled to the prejudice of persons without notice, who have dealt with the husband on the faith which recorded deeds give rise to.

The sale was made by the mother to her son, part cash, part on time.

The negotiable paper executed by the son represented the credit portion, and was secured by vendor's lien and mortgage. The assignment of the paper, identified with the sale, carried with it the mortgage and privilege as well.

As relates to the negotiable paper, there was no equity which could give rise to the presumption of bad faith against the holder.

As relates to the lien and mortgage, there are no equities upon which they can be annulled in third hands, accepted as they were, in good faith.

2. PLEDGE—NOTE—INDORSEMENT.

A note may be pledged without the special indorsement of the pledgor.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 494.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Mrs. H. H. Clark, wife of S. W. Clark, against John T. Whitaker. Judgment for defendant, and plaintiff appeals. Affirmed.

E. A. O'Sullivan, for appellant. Victor Leovy, for appellee and interveners.

BREAUX, C. J. Plaintiff, wife of Stephen W. Clark, Sr., sued for the return to her of a promissory note for \$4,500, secured by vendor's privilege.

It appears that her father had large means; years ago, a few days before her marriage, her father and mother made her an antenuptial donation, consisting of a promissory note, which was paid by the mother after the father's death, by investing the

amount of the note in buying for plaintiff a home.

This investment was made in compliance with the advice of the father of plaintiff, which was that she should buy a home, and not part with it under any circumstances.

The daughter inherited other amounts which were invested in her husband's business. This business was carried on in the name of Clark & Sons, a firm at the time composed of Clark, Sr., and the two sons of their marriage.

In the year, 1899, plaintiff, at the instance of her husband, sold the home in question to her son Sheldon W. Clark, Jr., for the sum of \$6,000. The deed of sale recites that \$1,500 were paid in cash, and for the remainder, to wit, \$4,500, a promissory note was executed, representing the price, payable in two years, secured by vendor's privilege on the property. The note was made to the order of the maker, and by him indorsed, and bore the notary's paraph.

In the year 1902 she became uneasy about the health of her son, who was sick. The physician advised, in order to afford him some little relief, that he should be sent to another climate, whereupon she mentioned the necessity of the change to her husband, and said to him that she was quite willing, for the sake of her son's health, to mortgage the home. The husband's reply was that the money needed could not be raised in that way as the property was already mortgaged.

Touching the note in question, plaintiff avers in her petition that it remained in the possession of her husband with her consent, and she adds that she has never been in possession of the note since it was signed. She also states that the note was negotiated by her husband in May, 1904. It was at that time that she became aware, she says, that defendant was the holder of the note. She never received any part of the price. The \$1,500, as before mentioned as cash, was not paid, and the amount for which the note was negotiated by her husband was never turned over to her. The note was negotiated without her knowledge.

She testified as follows:

"Q. Had Mr. Clark told you that he was going to pledge this note would you have consented? A. Yes, sir, like any wife would. Q. If he had told you that he was going to do it would you have consented? A. Yes, sir."

Plaintiff urges that her husband had no right to thus pledge her note to secure payment on debt of his own; that defendant, Whitaker, knew that he was transacting with her husband, and that the note represented her separate and paraphernal fund.

An admission in the record explains the relation of defendant to the transaction, quoting:

"Admitted if the interveners were here that they would testify that Mr. Whitaker acted as their agent in this transaction as alleged in the

intervention, and would also testify that they knew nothing whatever of the matters concerned."

In the answer, defendant Whitaker alleged that, while he acted in his own name, he was the agent of the interveners; that they received the note in good faith before maturity without notice.

The interveners substantially adopted the defense which the defendant urged in his answer.

The note in question was transferred by S. W. Clark to the purchaser by an act of pledge written in the usual form of such acts.

We should mention as part of the case that plaintiff, in addition to her allegations that the note is hers, alleges that the pledge was absolutely illegal by reason of the fact that the note was not indorsed by the pledgor S. W. Clark.

The relation of the facts would not be sufficiently complete were we not to mention specially that on the 29th of September, 1899, plaintiff sold the property to her son. On the 3d day of May, 1901, plaintiff's husband borrowed \$4,500 from the Whitney National Bank, payable in one year. In May, 1902, this loan was renewed with a similar pledge; that is, the note secured by vendor's privilege before referred to. A similar negotiation was entered into for 1903. The last pledge was made to the defendant, for account of the interveners; that is, the pledge which interveners now claim.

The defendant, Whitaker, testifying in regard to this fact said, speaking of the husband of plaintiff, quoting:

"At that particular time he was a man supposed to have large means; stood remarkably well, and, on inquiry, I was told that he was exemplary in the extreme regarding his obligations; I had had dealings with him and trusted him implicitly; the note was to be an additional security and the firm also indorsed the note, so I considered that I had not only the note and a man sufficiently good, but also a mortgage note and the indorsement of the house."

The following admission is also of record, quoting:

"With few modifications they are willing to admit that the books will show that on the 3d of May, 1901, Mr. S. W. Clark, Sr., the husband of Mrs. H. H. Clark, deposited a check which he had received from Mr. Whitaker to the credit of S. W. Clark & Son, and that on the same day S. W. Clark & Son drew his check in amount sufficient to cover the loan made, and Mr. Clark presented the check and received from the bank a note of S. W. Clark, Jr., which was handed to S. W. Clark, Sr., and the transaction was closed.

"By Mr. Leovy: I note in the admission that counsel does not refer to the fact that the mortgage note was pledged as collateral for the note of S. W. Clark and Son which was handed to S. W. Clark, Jr., at the time.

"By Mr. O'Sullivan: I will admit that."

At the outset we will state that, whilst it is true that the wife's property cannot be legally pledged as security for the payment of her husband's debt, none the less, when it becomes evident that the intention was to

set aside the protection which the wife may exercise against marital influence touching her paraphernal rights, she may, under certain circumstances, lose the protection accorded by law.

The plaintiff had the right to sell her property to her son. The note which the son issued to her was negotiated and represented the credit portion of the purchase price. To this point of the case plaintiff did not aver that there had been any illegality or irregularity.

The husband's influence presents the question involved. We have not found in the testimony that he sought to influence plaintiff by resorting to methods reprobated by law; the record does not disclose that he attempted in any way to capture plaintiff's judgment or to coerce her will in matter of signing the act. The sale and purchase was a voluntary act of the mother and son.

The promissory note. The plaintiff as holder of the promissory note knew, or should have known, that if it passed into the hands of third persons it might legally be held.

It is firmly imbedded in jurisprudence that a bona fide purchaser for a consideration before maturity is protected, at least, to the extent of the amount paid by him; the note he holds is clear of all equities between the parties.

We shall not infer that, owing to the fact that the wife, plaintiff here, who was originally the person to whom it had been issued, is not bound because the husband pledged it. He treated it as his own; offered it to the defendant, and after the negotiation had the proceeds placed to the credit of the commercial firm of which he was a member.

The law has placed it within the power of the wife to take care of her paraphernal funds, but she is not entirely relieved of all care and responsibility in that regard; she also must be held to some responsibility, to some exertion on her part, in order that it may not pass out of her hands and become a snare to third persons.

This was substantially the view expressed in two cases of a comparatively recent date. *Lester v. Sheriff*, 46 La. Ann. 344, 15 South. 4; *Colgin v. Courge*, 106 La. 691, 31 South. 144.

While this is substantially admitted by plaintiff, the contention is, on her part, that the mortgage itself with which the note is identified does not pass as a negotiable instrument. This is true to some extent, but it has been held repeatedly that the mortgage also is transferred if there is nothing to warn third persons against becoming its transferees.

The decisions quoted, *supra*, lead to the one inference that the note identified with the mortgage transfers the mortgage by which it is secured if there is nothing in either to place the holder on inquiry.

In this instance, also, as well as the case in the decisions cited, the deed was placed on record with the wife's consent; she cannot recall it to the prejudice of the holder of the note and transferee of the mortgage.

Learned counsel for plaintiff cites several decisions, the first of which is *Schmidt v. Frey*, 8 Rob. 435; and, last, *Equitable v. Talbert*, 49 La. Ann. 1398, 22 South. 762, in which it was decided that the act of mortgage was not a negotiable instrument, and is subject to all the equities between the parties.

With reference to the latter, the security—the mortgage rather—there is a limit even in the cited decisions. The wife is not entirely protected against her weakness of which the transferee knew nothing.

It is evident there are two principles of law, one for which plaintiff contends; the other, the defendant. Under the former, protection is afforded the wife against marital influence in matter of her paraphernal property.

Where it is evident that the wife was the security of her husband, the public is then warned, and the transfer may become null in whatever hands it may fall. There are a number of decisions in which she has recovered her rights despite the fact that she had voluntarily contracted and consented to the transfer. She shall not be the security of her husband is the injunction of the law. Civ. Code, art. 398.

The security to which we refer manifests the intention to become the security of her husband.

But in interpreting the cited article, it has been held that there is a difference between an act of mortgage to secure a debt of the husband and an act of sale which the wife has made for the payment of his debts. 106 La. 691, 31 South. 144.

This is required by the necessity that there should be freedom in contract.

The wife can do as she pleases with the proceeds of a sale in case of a sale, and if she chooses to apply them to the payment of the debts of her husband, third persons are not to be made to lose thereby. This was the view expressed in the *Courrage Case*, cited supra. That case is very pertinent to the issues here; for the wife conferred upon the husband the ability to use the note in the manner before mentioned.

We have said above that there are two principles which present themselves in this case at this time.

We have stated the first; the other springs out of the necessity which the commercial law imposes on treating negotiable instruments before maturity as free of equities between the parties. The commercial instrument identified by the act by which it is secured gives character to the transfer and excludes the possibility of claiming it back because of some influence.

It must be remembered that this note is

complete; nothing is to be added to it; so is also the sale. It may be unfortunate that by a fiction of the law immovable property may become, as it were, mobilized, and rights thereon pass into third hands.

Under the commercial law, as now interpreted, it cannot be avoided. It may be that in the interest of the home and of the family the wife should be protected from her own weakness. If the law be deficient in this respect it is not for us to supply the omission. We interpret it as we find it.

The following decisions are in point; they strongly sustain the view that secret equities will not be of any avail against a bona fide holder of a note transferred before maturity, nor against a mortgage which secures its payment: *Carpenter v. Allen*, 16 La. Ann. 435; *Gordon v. Maxwell*, 27 La. Ann. 56; *Taylor v. Bowles*, 28 La. Ann. 294; *Davis v. Greve*, 32 La. Ann. 420.

The Supreme Court of the United States is equally as decided and direct upon the subject, as will be seen by consulting the following decisions: *Carpenter v. Logan*, 16 Wall. (U. S.) 271, 21 L. Ed. 313; *Sawyer v. Pricke*, 19 Wall. (U. S.) 146, 22 L. Ed. 105; and, lastly, the following from our own court is very clear upon the subject: *Lester v. Connelly*, 46 La. Ann. 340, 15 South. 4, and the *Whitbeck Case*, 47 La. Ann. 49, 16 South. 570.

This brings us to the second branch of the case, springing out of the proposition that the note was not indorsed by the pledgor S. W. Clark, Sr.

The following is the text of the article invoked:

"A bill of exchange or promissory note by notarial act, although endorsed by the payee in bank, is not complete and binding as to third persons without the indorsement of the pledgor if the instrument is negotiable."

In the case before us there was an act of pledge signed by the pledgor. The act itself was drawn in the usual form; true, the note was not signed by him, but it formed part of the act which he signed.

The contention on the part of the learned counsel for plaintiff (urged in argument for the first time in this court; it was not pleaded at all, nor was it previously urged in the district court) is that the article in question has not been repealed, and to sustain his contention he cites *Cater v. Merrell*, 14 La. Ann. 376, and *Sewell v. McNeill*, 17 La. 185.

True, Act No. 157, p. 239, of 1900, specially repeals only certain articles stated; it does not include in words the article quoted above, but it does repeal it in effect.

It provides that negotiable notes may be transferred by delivery to the creditor without further formality.

As relates to negotiability, there is scant difference between a negotiable stock certificate and a promissory note. As to the former, it has been held that it may be pledged

by delivery. Mineral Water Mfg. Co. v. Deblieux, 40 La. Ann. 153, 3 South. 723.

In another case the pledge of bonds and stock was attacked. While it was not on grounds entirely similar to those here, it remains as a fact that the court held that the bonds were negotiable instruments and properly transferred by delivery. The court specially cited article 153 in *pari materia*.

We quote from this article:

"Provided also that whatever may be in the form of the act, it mentions the amount of the debt as well as the species and note of the claim given in pledge." Civ. Code, art. 158.

The court interpreted this article, and arrived at a similar conclusion as before expressed in *Smith v. Crescent City Live Stock Landing & Slaughter House Co.*, 30 La. Ann. 1379.

The first act having some pertinence is Act No. 287, p. 348, of 1855; and the last act upon the subject, that is, the act of 1900, does not leave any good ground upon which to decide that the note, negotiable in form, should be signed by the pledgor.

We have arrived at the conclusion that the judgment is legal.

It is therefore ordered, adjudged, and decreed that the judgment is affirmed.

(117 La.)

No. 16,040.

BOARD OF DIRECTORS OF PARISH OF LIVINGSTON v. LANIER et al.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 23, 1906.)

PUBLIC LANDS—SALE OF SCHOOL LANDS—MINIMUM PRICE.

Act No. 239, p. 239, of 1857, fixing at \$1.25 per acre the minimum price at which public school lands may be sold, is superseded by the Revised Statutes of 1870, section 2960 of which prescribed the manner, terms, and conditions of the sale of such lands, and says nothing of a minimum price, and the repealing clause of which repeals "all laws on the same subject-matter."

Breaux, C. J., dissenting.

(Syllabus by the Court.)

Appeal from Twenty-Fifth Judicial District Court, Parish of Livingston; Clay Elliott, Judge.

Action by the board of directors of the parish of Livingston against J. S. Lanier and Malissa Lanier, warrantor. Judgment for plaintiffs, and defendants appeal. Reversed, and suit dismissed.

Stephen Dudley Ellis, for appellants. Bolivar Edwards Kemp, for appellees.

PROVOSTY, J. This suit is brought by the school board of the parish of Livingston, to set aside a sale, made on the 18th of December, 1887, of a certain tract of public school land, described as follows: the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 16, township 5 S., range 4 E.

The sole ground of nullity is that the sale was made for less than \$1.25 per acre.

The first act providing for the sale of school lands was act No. 321, p. 422, of 1855. Its section 34 (page 430) prescribed the manner of selling the lands, and fixed the minimum price of \$1.25. It was silent in regard to the making of an appraisal. It was followed by Act. No. 239, p. 239, of 1857, entitled "An act to amend and re-enact sections 16 and 34 of Act 321 of 1855." This amending act required an appraisal to be made, and preserved the minimum price of \$1.25; but said nothing as to whether the property might, or not, be sold for less than the appraisal. In the case of *School Directors v. Coleman*, 14 La. Ann. 186, a sale made on the 21st of November, 1857, was set aside, because it had brought less than the appraisal. The next act was that of 1858 (No. 287, p. 183), entitled "An act to amend and re-enact sections 16 and 34 of Act 321 of 1855." The next and last was Rev. St. 1870, §§ 1316, 2960, embodying this act of 1858, as being the law prescribing, as indicated by the marginal note, the "manner, terms, and conditions of the sale of school lands." Its requirement is that the land be appraised, and be sold to the highest bidder. No mention is made of a minimum price.

The act of 1858 makes no reference to the act of 1857, and plaintiff contends that it does not repeal it, and that the latter act, fixing the minimum price at \$1.25, remains in full force. Perhaps this might be true, if the act of 1858 stood alone. Its repealing clause repealed only conflicting laws; not also those on the same subject-matter. But the repealing clause of the Revised Statutes repealed "all laws and parts of laws on the same subject-matter." This, certainly, had the effect of repealing the act of 1857, which unquestionably was on the same subject-matter, namely, prescribing the manner and form of the sale of these school lands.

Indeed, the very purpose of revising the statutes is to winnow the mass of them that accumulates in the course of years, and separate the chaff from the grain, do away with the obsolete, and retain those still in force. Hence, section 2936, Rev. St., which prescribes in minute detail the manner of proceeding in selling school lands, must be held to be the governing law on the subject, and a safe guide to follow.

In *Telle v. School Board*, 44 La. Ann. 365, 10 South. 801, the attention of the court does not seem to have been called to the act of 1858, and to the repealing clause of the Revised Statutes.

Judgment set aside, suit dismissed, with costs in both courts.

BREAUX, C. J., dissents.

LAND, J., takes no part, not having been present at the argument.

(117 La.)

No. 15,817.

LEVERETT v. LOEB et al.(Supreme Court of Louisiana. May 21, 1906.
Rehearing Denied June 23, 1906.)**1. HUSBAND AND WIFE—INTERSPOUSAL DONATIONS—REVOCATION—PRESCRIPTION.**

Civ. Code, art. 1749, must be construed with Civ. Code, art. 3478, and, so construed, must be held to mean that interspousal donations shall always be revocable save as against third possessors acquiring property by the prescription of 10 years.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 925-928.]

2. PRESCRIPTION—SHERIFF'S DEED.

A sheriff's deed, valid in form and translativ of property, showing a sale made under a writ issued pursuant to a judgment of a competent court, together with such writ and judgment, constitute a just title, which may serve as the basis of the prescription of 10 years, *acquisendi causa*.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 445, 446.]

3. SAME—PRESUMPTION OF GOOD FAITH.

Whether the mortgagee and adjudicatee has examined the title of his debtor and has thereby, or otherwise, informed himself of its defects, is a question of fact, and, in the absence of affirmative proof on the subject, he is entitled, for the purpose of the plea of the prescription of 10 years, *acquisendi causa*, to the benefit of the presumption of good faith, established by Civ. Code, art. 3481.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by Mrs. J. E. Leverett against Herman Loeb and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Leon Rutherford Smith, for appellant.
Sidney Levy Herold, for appellees.

Statement of Lease.

MONROE, J. This is a petitory action for the recovery of certain real estate in Shreveport (described as "Lot 23" in 10 acre lot 2), concerning which the evidence and admissions in the record show that in 1887 it was purchased by plaintiff, a married woman, by an act which recites that the purchase was made with her paraphernal funds, and by way of compromise of a claim of ownership which she had set up; that in 1888 it was donated by her to her husband, who, in 1891, mortgaged it to secure \$400, borrowed by him from the defendant Loeb; that in 1892 it was sold by the sheriff in satisfaction of the mortgage thus granted, under a writ of seizure and sale issued pursuant to an order made by the court *a qua*, and was purchased by defendant, who had been in open, peaceable, uninterrupted possession as owner under the title so acquired for more than 13 years at the time that he was disturbed by this suit. It may be added that neither the act of mortgage above mentioned nor the sheriff's deed recite the manner in which the property had

been acquired by the mortgagor and selsed debtor, and that there is no evidence in the record showing that defendant, Loeb (who is the only party defendant who has a real interest) knew that it had been acquired by donation. Among other defenses, the plea of the prescription of 10 years, *acquisendi causa*, was set up, and plaintiff prosecutes this appeal from a judgment maintaining the same.

Opinion.

It is said by the learned counsel for plaintiff that as the law provides that "all donations made between married persons, during marriage, though termed *inter vivos*, shall always be revocable," the prescription relied on can have no application, since, to apply it, would be to defeat the donor's right to revoke, and, in effect, to amend the law so as to make it read "shall always be revocable, save against third persons acquiring title by prescription." The effect of the prescription is, however, to establish as valid the title of the defendant, provided that title be "just," and whether it be just or not depends upon the title itself, and the circumstances under which it may have been acquired and held, and not necessarily upon the title of its supposed author. In fact, the prescription in question finds its ordinary application in cases where the apparent title established by it is derived from one who held no title whatever, and it would seem that it ought not to be the less applicable, because the apparent title so established is derived from one who held a title though defeasible, or revocable. This appears evident from the language of the Civil Code, to wit:

"Art. 3478. He who acquires an immovable in good faith and by a just title, prescribes for it in ten years."

"Art. 3483. To be able to acquire by the species of prescription mentioned in this paragraph, a legal and transferrable title of ownership in the possessor is necessary; that is what is called in law a just title."

"Art. 3484. By the term just title, in cases of prescription, we do not understand that which the possessor may have derived from the true owner, for, then, no true prescription would be necessary, but a title which the possessor may have received from a person whom he honestly believed to be the real owner, provided the title were such as to transfer the ownership of property."

"Art. 3485. And in this case, by the phrase, transfer the ownership of the property, we understand, not such a title as shall really have transferred the ownership of the property, but a title which, by its nature, would have been sufficient to transfer the ownership of the property, provided it had been derived from the real owner, such as a sale, exchange, legacy, or donation."

These articles must be construed with article 2452, which provides that "the sale of a thing belonging to another is null," and with article 1749, which provides that interspousal donations "shall always be revocable," and, so construed, have the effect of modifying those articles to the extent suggested by

counsel for the plaintiff, otherwise, they would be given full effect and the others would be given no effect at all. The question, then, is, did the defendant acquire and hold the property by a "just title"? And we think that question must be answered in the affirmative, since he exhibits a sheriff's deed, valid in form and translativ of property, a writ directing the sheriff to seize and sell, and a judgment of a competent court authorizing the issuance of the writ, and it is well settled that such muniments establish a just title, which may serve as the basis of the prescription invoked. *Walden v. Canfield*, 2 Rob. 466; *Leduf et al. v. Bailly*, 3 La. Ann. 8; *Brien v. Sargent*, 13 La. Ann. 198; *Roberts v. Zansler*, 34 La. Ann. 209; *Stackhouse v. Zuntz*, 41 La. Ann. 415, 6 South. 666. Beyond this, it is undisputed that defendant had been in possession, as owner, under the title in question, peaceably, openly, and uninterruptedly, for more than 10 years prior to the institution of this suit, and, in the absence of both allegation and proof that he was aware of the character of the title held by his mortgagor and seized debtor, he is entitled to the benefit of the provision of the Code which reads:

"Art. 3481. Good faith is always presumed in matters of prescription, and he who alleges bad faith in the possessor must prove it."

The judgment appealed from is accordingly affirmed.

NICHOLLS, J., takes no part, not having been present at the argument.

(117 La.)

No. 16,148.

LOUISIANA & A. RY. CO. v. MOSELEY.
(Supreme Court of Louisiana. June 18, 1906.
On Rehearing, June 26, 1906.)

1. EXPROPRIATION—PROCEDURE—TRIAL OF EXCEPTIONS.

Expropriation proceedings are to be tried summarily, and a defendant who waits until the jurors have been assembled, and the case has been called for trial to present an exception involving questions of fact as well as law, has no right to insist upon a separate trial of the same before the judge.

2. APPEAL—HARMLESS ERROR.

Where, in an expropriation case, an exception is referred to the merits, and the question involved is afterwards presented to and ruled on by the judge in connection with applications for special charges and for a new trial, and the rulings so made, being brought up on the appeal, are affirmed, the exceptor has no just cause of complaint.

3. EXPROPRIATION—LOSS OF RIGHT.

The fact that a number of citizens guaranty a railroad company that property needed for its terminal facilities shall not cost beyond a certain amount does not divest the company of its right to proceed for the expropriation of such property.

4. SAME—TENEMENT HOUSES.

The requirement, contained in Civ. Code, art. 2637, concerning the expropriation of the "dwelling house, yard, garden and other appurtenances," is not intended to be applied

to a tenement bought, and held merely as an investment, and which the owner himself has never occupied as a dwelling.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 122, 123.]

5. APPEAL—REVIEW—VERDICT.

Where two juries in an expropriation proceeding have assessed damages at about the same amount, and their verdicts are sustained by a preponderance of the evidence, there is no reason why this court should disturb the last verdict.

(Syllabus by the Court.)

Appeal from Thirteenth Judicial District Court, Parish of Rapides; Wilbur Fisk Blackman, Judge.

Action by the Louisiana & Arkansas Railway Company against Madison C. Moseley. Judgment for plaintiff, and defendant appeals. Affirmed.

Madison C. Moseley, in pro. per. (Robert Persifer Hunter and William Wirt Howe, of counsel), for appellant. White, Thornton & Hollman (Henry Moore, Jr., of counsel), for appellee.

Statement of Case.

MONROE, J. This is an expropriation proceeding, upon the original trial of which, the jury awarded defendant \$4,225, which award was set aside by this court, at the instance of defendant, on the ground that two of the members of the jury were disqualified, and should have been excused (La. & Ark. Ry. Co. v. Moseley, 40 South. 37). The present appeal is prosecuted by defendant, from a verdict and judgment awarding him \$4,000. When the case was called for trial the second time, defendant excepted on the grounds: (1) That plaintiff is without interest to prosecute or maintain this suit. (2) That the power of eminent domain cannot be exercised by private individuals. (3) That such power cannot be re-delegated; which exceptions were referred to the merits, and, the trial proceeding, all testimony offered on the former occasion was re-offered, together with some additional testimony, and the record shows that the jury (of property holders) inspected the property sought to be expropriated. Of the witnesses who testified in the case, Knobel, Chamberlain, and Fenstermaker are railroad engineers (Knobel, of the plaintiff company, Chamberlain, of the Texas & Pacific Railway Company, and Fenstermaker, of the Louisiana Railway & Navigation Company; Sylvester is a civil engineer and resident of Alexandria (where the property in question is situated), with some experience in railroad building; Bringham is a retired civil engineer, who resides in Alexandria, and is acquainted with the value of the property in that city; Whittington and Iles are real estate dealers, residing, and acquainted with real estate values, in Alexandria; Hakenjos is a member of the bar, residing at Alexandria and owning property near that sought to be expropriated; Porter is the assistant to the president of the plain-

tiff company; Kilpatrick is the assessor of the parish; White is one of plaintiff's counsel (and testified to a collateral matter); and Moseley is the defendant.

Knobel, Chamberlain, Fenstermaker, and Sylvester testify that the property in question is necessary to the plaintiff for the establishment of terminals and convenient for that purpose to the public. Whittington, Iles, Hakenjos, and Bringham testify that \$4,000 is a full price for it. Kilpatrick gives the assessment, which is considerably less than \$4,000. Porter gives some testimony (as to a collateral matter), which is unimportant, and the defendant stands alone in the opinion that the expropriation is unnecessary and that the property is worth an amount in excess of that awarded. For the purposes of the exception, there was offered a written instrument evidencing an agreement between the plaintiff company and some 24 citizens of Alexandria, reading as follows:

"We, the undersigned citizens of Alexandria, Rapides Parish, La., hereby guaranty to the Louisiana & Arkansas Railway Company that they (the said company) can purchase the terminals described in the accompanying document marked 'A,' being the description of the same furnished by G. Knobel, chief engineer of the said road, at a price of not more than \$16,000; it being provided that if in any expropriation suit that may be necessary, it should be held by the Supreme Court that, for any reason, any property sought to be expropriated cannot legally be expropriated, then, and in that event, this guaranty shall not apply to such property sought to be expropriated."

And to this there is attached a description of the property referred to. It was admitted that the plaintiff company had furnished the \$16,000 mentioned; that the citizens had furnished \$10,000, in addition, and that the steps necessary for the obtention of the property needed are being taken under the immediate direction of the citizens, through their chairman who makes disbursements from the entire fund.

Opinion.

Upon the first trial of the case defendant admitted the incorporation of the plaintiff company, the appointment of an agent, and the declaration of a domicile, and, as the suit is brought by the corporation in its own name and behalf, the exceptions, offered in the second trial, that plaintiff "is without interest," etc., required testimony to explain and substantiate them. The law, however, contemplates that expropriation suits shall be tried summarily, and a defendant who waits until the jurors have been assembled on the day fixed for the trial on the merits, and until the case has been called, has no right to expect a delay for the purpose of a separate trial of an exception then offered, and, more particularly is this true, where, as in this case, the defendant has answered to the merits, and there has already been one trial and judgment on the merits. Defendant has, however, sustained no injury from

the reference of his exceptions to the merits, since he was there afforded the opportunity to offer the evidence upon which he relies to support them, obtained a ruling on the question presented by them by requesting a special charge from the judge; again presented the question and obtained a ruling on it by means of a motion for a new trial; and has brought it before this court by means of a bill of exception. His proposition is that plaintiff was divested of all interest in the matter of expropriation by reason of the agreement between it and certain citizens that the latter should bear the expense, in excess of \$16,000. We are, however, at a loss to see how the plaintiff ceased to be interested in acquiring the property as the result of an agreement the only purpose of which was to facilitate it in so doing, or, as the result of its having furnished \$16,000 to be used, in part, for that purpose. The property was to be acquired, for the direct benefit of plaintiff, by the combined efforts and contributions of the contracting parties, and the railroad company was as much obliged to contribute its efforts, and to appear as plaintiff when it became necessary to expropriate, as were the citizens to contribute the balance necessary to defray the expenses and pay the price.

The bill of exceptions to the charge of the judge "that the plaintiff, railway company, has an interest in obtaining the right of way and depot grounds, and that it makes no difference who is to pay for the property," is therefore without merit.

Defendant also reserved a bill to a portion of the charge in which the judge instructed the jury that they "were authorized to fix the value of the property, taking into consideration the assessment, the value of other property surrounding it, and the purchase price by the defendant, and to find a fair valuation, now, from all those circumstances." We are not prepared to say that there was any error in the charge so given, though, certainly, neither the purchase price nor the assessment, considered by themselves, would have been fair criterions of value. But, what the judge may have charged is a matter of no consequence at this time, since the testimony upon the question of value is all in the transcript, and we look to that in reaching our conclusion.

It is said that the judgment should be set aside because the property to be expropriated has upon it a dwelling house, yards, gardens, and other appurtenance, and the jury did not in terms, find, by their verdict, that the line of the railroad could not be diverted from that proposed by the company without great public loss and inconvenience. It is true that the verdict is not expressed in those terms, but we apprehend that the requirement on that subject, as contained in Civ. Code, art. 2637, is intended to be applied in cases where citizens are disturbed in their homes, and not in cases where the property consists of tenements which are rented from month to month

to any one who may choose to take them; which the owner has never occupied; and which he has acquired and holds merely as an investment. Defendant makes the point that by its amended charter plaintiff "claims" only the right to "build a railroad, or branch railroad, from the neighborhood of Winnfield to a point on the south bank of Red river," and that inasmuch as it now crosses Red river to the south bank on a bridge owned by another company, at a point two or three miles from where his property is situated and operated over the tracks of other companies, along the bank, until it reaches his property, it is going beyond the grant contained in its charter. Defendant's property is situated but a few hundred feet from the south bank of Red river, at a point which is conclusively shown to be as suitable as, if not more suitable than any that can be found as a terminal point for plaintiff's road, not only with reference to the present situation, but with reference to the near future. In other words, it is conveniently located for the purposes of the business to be done, and the company proposes to build a bridge across the river opposite the point in question, and is operating over the bridge and tracks of other roads as a temporary expedient until it can make permanent arrangements of its own, and the acquisition of property on the south bank of the river, for terminal purposes, is one of the necessary steps to be taken in the making of those arrangements.

Upon the question of the value of the property, defendant, most earnestly and no doubt sincerely, insists that the jury has grievously erred, and that he should be allowed a much larger sum than has been awarded him. We have, however, considered the testimony carefully, and find in it nothing that would justify us in disturbing the verdict and judgment appealed from, and the same are accordingly affirmed at the cost of the appellant.

On Rehearing.

In view of the fact that the costs of the district court are thrown on the defendant as a result of the prior tender, we have concluded that he should be awarded the amount tendered. It is therefore ordered and adjudged that the decree heretofore handed down be amended by increasing the amount awarded the defendant to \$4,200, and by condemning the plaintiff to pay the costs of the appeal.

Rehearing refused.

(117 La.)

No. 15,962.

DAVIS v. ARKANSAS SOUTHERN R. CO.
(Supreme Court of Louisiana. June 18, 1906.
Rehearing Denied June 27, 1906.)

1. PLEADING — PETITION — DEMURRER — NO CAUSE OF ACTION.

The petition in this case is lacking in some of the allegations customarily employed in actions of the character of that before the court and

is open to criticism on that account; but the missing allegations are not of character such as to call for the drastic remedy of a dismissal of the suit upon an exception of "no cause of action."

2. SAME—AMENDMENT.

The tendency of modern practice is to yield as little as possible to technicalities, and to afford aid as far as practicable to the filing of amendments which work no injury and prevent useless delays and costs.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 591.]

3. SAME—EXCEPTIONS.

When the lawmaker in the Code of Practice established and classified exceptions of different kinds to be advanced at different stages of cases, and to be followed by announced consequences, it was intended that they should be resorted to under the circumstances stated. Courts should see that each exception should be made to perform the function properly appertaining to it, and not be allowed to have another substituted for it, and thus be lost, merged, and confused.

4. SAME—NO CAUSE OF ACTION.

An exception of no cause of action should not be sustained when a judgment of some kind, however small, could be legally rendered on the allegations supported by evidence.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 408-415, 486.]

5. DEATH—ACTION BY WIFE—PETITION.

It is not necessary when a wife brings suit against a corporation for damages for the alleged killing of her husband through its negligence, that she should in her pleadings negative the existence of minor children issue of her marriage. Her right of action is not conditioned upon the nonexistence of such children.

It is not necessary that she should allege as the result of such killing that a right of action had survived therefrom to herself. That was a legal consequence resulting from the facts.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 64, 65.]

6. DAMAGES—PLEADING—NOMINAL DAMAGES.

The violation of a person's legal rights through a tort gives rise to a right of action, and to a verdict for at least nominal damages, without specification as to the particular amount of damage resulting from the tort.

Defendant is entitled to demand specific allegations on that subject before going to trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 7-18; vol. 39, Cent. Dig. Pleading, § 962.]

7. DEATH—PLEADING—DEMURRER.

The court is not warranted in disposing of an exception of no cause of action filed by a defendant (which admits the truth of plaintiff's allegations) to deal with plaintiff's husband as a trespasser on defendant's track when she alleged that he was wholly without fault in the premises, and his killing was due to the reckless and wanton negligence of the defendant corporation.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1331-1340.]

Provosty, J., dissenting in part.

(Syllabus by the Court.)

Appeal from Fourth Judicial District Court, Parish of Lincoln; Robert Brooks Dawkins, Judge.

Action by Francis Davis against the Arkansas Southern Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Clayton & Hawthorn, for appellant. Barksdale & Barksdale, for appellee.

Statement of the Case.

NICHOLLS, J. This suit was brought originally against the "Arkansas Southern Railroad Company."

Subsequently, upon motion of counsel for defendant, and by agreement of both parties, the Rock Island, Arkansas & Louisiana Railroad Company was made defendant; it assuming all liabilities of the Arkansas Railroad Company.

Upon being so substituted, the last-named company filed an exception that plaintiff's petition disclosed no cause of action against either the original defendant or against it.

The court sustained the exception and dismissed the suit, and plaintiff appealed.

In the petition so excepted to, it was alleged that "on the 28th day of December, 1904, petitioner's husband was crossing and walking in a northerly direction on the track of the said railway company, near the town of Dubach, in Lincoln Parish, La., as he was compelled to do to get from his home to his work, when a north-bound passenger train of the said railroad company, negligently, recklessly, and carelessly run over him, killing petitioner's husband; that petitioner's husband was killed wholly without fault on his part, and solely because of the gross negligence, recklessness, and wanton carelessness of the said railroad company, its officers, agents, and employes; that the said locomotive of said railroad company designated as "Engine No. 1," which was attached to and pulling the said train was old, out of repair, dangerous, and unfit for the purposes for which it was being used; that the air brakes and air on the said locomotive were out of repair, unsafe, and unfit to perform their proper functions; that the said condition of the said locomotive was, to the knowledge of said corporation, its officers, agents, and employes, such as to render its use reckless and wanton negligence; that her said husband was deaf, and did not see nor hear the said train; that the engineer on the said locomotive, on the said date of her husband's death, saw him at least 600 feet before the said locomotive struck and killed him, recognized him, and knew that he was deaf, and did not hear nor see the approaching train; that by reason of the old, dilapidated, and worn condition of the said locomotive and air brakes, and other brakes on said train, the said engineer found it impossible to stop the said train in time to avert the killing of petitioner's husband; that if the said engine and its equipments had been in proper repair, and in the condition required by law, and fit for the purpose for which they were being used, the said engineer could and would have stopped the said train within a distance of 120 feet and would have averted the killing of petitioner's said husband; that the said train consisted of the "locomotive," "tender," "baggage car," "smoker," and negro coach combined, and one "passenger

coach," and one extra car, all of which train, except the rear trucks of the rear car passed over the body of the said A. B. Davis, mangling his body and grinding him to death beneath the trucks of the said train; that the railroad tracks of the said Arkansas Southern Railroad Company extend from Eldorado, Ark., in a southerly direction to Winnfield, La., a distance of about 100 miles; that the said Arkansas Southern Railroad Company is engaged in the carrying of freight and passengers for hire.

Petitioner averred amicable demand without avail.

In view of the premises, she prayed that the said Arkansas Southern Railroad Company be cited and served with a copy of this petition according to law, and after due legal delays and trial hereof on the merits, that petitioner have and recover judgment in her favor against the said Arkansas Railroad Company for the full sum of \$10,000, for all necessary orders, decrees, costs, and general relief.

Opinion.

The petition in this case is undoubtedly lacking in allegations which are customarily employed in actions such as the one before us. It is open to criticism in that respect, and should properly be amended. We do not think, however, that the missing allegations were of character such as to have warranted the drastic remedy of the dismissal of the suit being applied. The tendency of modern practice is to yield as little as possible to technicalities, and to afford aid as far as practicable to the filing of amendments which work no injury and prevent useless delays and costs. When the lawmaker in the Code of Practice established and classified exceptions of different kinds to be advanced at different stages of the suit, and to be followed by announced consequences, it was evidently intended that they should be resorted to under the circumstances stated, and be followed by the results declared. It was not contemplated that they should be replaced by a sweeping blanket exception which would absorb and swallow up all the other exceptions and throw the plaintiffs summarily out of court. The exception of no cause of action in which no specific objections to the petition are set up, and which remits the plaintiff to an ascertainment of what they may be to the trial of the exception, is calculated to work injury, and in many jurisdictions the defendant is required by express statutes to specify in detail what the objections are so as to enable plaintiff an opportunity to remove the same. The exception in this state is some time levelled at the allegations of the petition and sometimes it reaches back of the petition to the cause of action itself, but up to this time it has never been exacted that the objections should be set out specifically, but we should see that each exception should be made to perform

the function properly appertaining to it, and not be allowed to have substituted for it another, and be lost, merged, and confounded. The exception of no cause of action should not and cannot be sustained when a judgment of some kind, let it be ever so small, could be legally rendered on the allegations supported by evidence. In the case before us, should the plaintiff, in the absence of any exception of vagueness and uncertainty, make good all the allegations of her petition, the basis for a judgment for, at least, nominal damages, would have been afforded. Under such circumstances, the violation of a legal right would have been established which would entitle the plaintiff to damages to some extent.

It is contended by the defendant that if the engineer of the train saw the plaintiff's husband on the track, as he should have seen him in the exercise of proper care, and had at once used all the instrumentalities which had been furnished him to the extent of his ability to prevent the accident (but they were unavailing), the company would be freed from all responsibility in the premises, if the husband was a trespasser on the track, however defective might have been the appliances which had been furnished by the company to the engineer to stop the train.

Its argument is that "there is no negligence where there is no inseparable correlative duty. There can be no obligation, no duty without some one to whom that obligation or duty is owing. When the defendant started its train on the road on the morning of the accident there was absolutely no relationship whatever between the deceased and the defendant. And up to the very instant of his death, there existed between them no possible relationship except that of a trespasser to a proprietor in the legitimate operation of naturally dangerous instrumentalities on his own premises. The only negligence alleged is the failure of an obligation that had not arisen, the violation of a duty that did not exist at the time of the alleged violation. 12 L. R. A. 322, 69 L. R. A. 413, and notes thereunder; *Burbank v. I. C. R. R. Co.*, 42 La. Ann. 1156, 8 South. 580, 11 L. R. A. 720; *O'Connor v. Railroad Co.*, 44 La. Ann. 339, 10 South. 678; *Fredericks v. Railroad Co.*, 46 La. Ann. 1180, 15 South. 413; *Elliott on Railroads*, pp. 1252-1254.

The owner of premises may presume that he is alone in their enjoyment, except as he may have given invitations to others, and he is entitled to the freedom of action which his exclusive possession warrants. "This freedom of action is interrupted only by the discovery of the presence and peril of uninvited trespassers. 69 L. R. A. 515, note; 23 A. & E. of Law, pp. 735, 747, et seq."

"Railroads are bound to exercise due care to avoid injury after the discovery of the trespassers' peril. There is seriously divided authority on the requirement of a railroad company to exercise care in the discovery

of the trespassers' peril, but no court, so far as we can learn, has ever advisedly and seriously supported the proposition that a railroad company is responsible to a trespasser for want of ordinary care in the use of appliances, or that the railroad company owes any duty to a trespasser on its track up to the time of the trespass."

"To recognize a cause of action in plaintiff's petition would be to hold that the deceased, a pedestrian trespasser had the right of way over defendant's tracks; that he was entitled to special protection in corresponding ratio to his multiplied infirmities and negligence; that the company was bound to anticipate his presence on its track at any time; that he had a right to demand that the railroad company discover him on its tracks before reaching him, and to expect of it to stop its train without regard to expense or delay until his attention could be attracted and he could be enticed or removed from its main line for the train to pass. The only negligence alleged is negligence antecedent to the accident and antecedent to the trespass, the running by a defendant of a defective engine over its own track, the use of a defective appliance on its own premises and property."

The specific objections urged in defendant's brief to plaintiff's petition are:

"(1) She does not allege default of minor children which is an essential condition of her individual action.

"(2) She does not allege any suffering on the part of deceased.

"(3) She does not allege any survival of any cause of action in her favor through the death of her husband.

"(4) She does not allege want of support or other pecuniary damage or injury, does not even allege loss of companionship, love, or affection, or any damage sentimental, or otherwise."

There is no allegation in plaintiff's petition of any damage or injury whatever.

The plaintiff, on the other hand, maintains as a matter of law that:

"Common carriers are required to run reasonably safe locomotives, and in such condition of repair as to prevent loss of life and property, by the proper use of them by the engineer after the discovery by him of the person on the track.

"If the servants of a railroad company are required to use ordinary care to avert loss after the discovery of a person walking on the railroad track, it would follow as a natural conclusion that the railroad companies would be likewise required to use reasonable, ordinary care in furnishing those servants with such instruments and appliances as would enable them to avert accident with reasonable effort, after the discovery of danger. It is a settled principle that masters are required to furnish reasonably safe appliances for their workmen, and, as a matter of public policy, it ought to apply with equal force that they should be required to furnish reasonably safe appliances for the purpose of protecting the public from danger. It would be futile to require of a railroad company to keep a lookout for persons on its tracks unless such appliances were furnished to the employees as could be effectually used after the discovery of the peril to such person to prevent injury or death.

"In the case of *Railroad v. Railroad*, 9 C. C. A. 314, 60 Fed. 993, cited in the note subjoined

to the case of *Bogan v. Railroad Co.*, 55 L. R. A. 418, the doctrine in the English case of *Davies v. Mann*, was applied so as to permit of recovery for damages to a car caused by a collision at a point where two railroad tracks crossed at a grade, even upon the assumption that the plaintiff was guilty of negligence; it appearing that the defendant's engineer saw the plaintiff's train, and could have stopped in time to have avoided the accident, but for the negligence of the defendant in sending out its train equipped with poor brakes.

"In the case here at issue the petition shows that the last link in the chain of causes was the old, worn out condition of the locomotive and its improper equipment, and this we maintain is the proximate cause of the injury for which defendant should be held responsible."

Plaintiff cites *Williams v. Railroad Co.*, 114 La. 13, 37 South. 992; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad v. Harvin* (Tex. Civ. App.) 54 S. W. 629; *Railroad Co. v. Smith*, 62 Tex., 252; *Union Pac. Ry. Co. v. Cappler* (Kan.) 72 Pac. 281, 69 L. R. A. 513; *McGuire v. Railway Co.*, 46 La. Ann. 643, 16 South. 457. And, particularly, *Thompson v. Railroad Co.* (Utah) 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621, in which it was held that:

"If a railroad company knowingly placed in operation upon the public street a defective car that could not be controlled, because the injury complained of was occasioned by such defective brakes and appliances, and the motorman was unable to avoid the effect of the contributory negligence of the deceased because of such defects, then it could be properly said that the defendant's negligence was the proximate cause of the injury."

There is no force in the objection urged that the plaintiff did not allege default of minor children. Her right of action is not conditioned upon the husband having left minor children. If there were such children, and defendant believed they were necessary parties to the suit, it should have so alleged, pleaded an exception of nonjoinder, and insisted upon their being made parties, and not have set up the objection under an exception of no cause of action. See *Elchorn v. N. O. & C. R. R. Co.*, 112 La. 251, 36 South. 335, 104 Am. St. Rep. 437.

The second objection that plaintiff did not allege any suffering on the part of deceased could not be alleged nor proved as it is stated that the deceased had been instantly killed.

The third objection set up in the brief is not tenable. Upon the arising of the facts stated in the petition the law itself conferred upon the widow a right of action. There was no necessity for the plaintiff to allege legal consequences which defendant is presumed to know without allegation.

The fourth objection furnishes good ground for complaint; but we do not think the objection should have been raised as it was through the exception of "no cause of action." If the death of the husband was brought about through a tort, the wife was thereby, ipso facto, deprived of the support to which she was entitled from her husband under the law itself; the party through whose fault

it occurred violated her rights in so doing, and she was entitled, on showing such violation, to a judgment for at least nominal damages independently of establishing any particular amount of damages. When the plaintiff alleged that the defendant owed her \$10,000 for the reasons thereafter stated, and prayed for judgment against it for that amount, she substantially and practically alleged that she had suffered damage to that extent.

The pleading, however, was certainly very loose, and defendant was entitled through the appropriate exception to have had the plaintiff ordered to make specific allegations as to the fact of damage, the amount thereof, and of what elements composed, and itself relieved from answering until this should be done, in order that it might meet and repel the demand if it could. It is entitled to that information and relief now.

We cannot recognize as being correct the proposition that if plaintiff's husband was killed by defendant's train when a trespasser on its track, it would be relieved from legal responsibility for the killing, if its engineer, in the exercise of proper vigilance, had discovered him thereon, and immediately on his doing so had used to their utmost capacity (though unsuccessfully) the instrumentalities which had been furnished him to stop the train. That it would make no difference in the legal situation that such appliances were not such as the situation would call for to avert the injury. *Mongogna v. Ill. Cen. R. R. Co.*, 39 South. 701, 115 La. 597.

It is true that the company may and could not have anticipated that plaintiff's husband would be on its tracks at the particular time and place he was, but it was bound to know that in the nature of things there would be trespassers at some time, and in some place upon it, and it was bound to exercise reasonable care in keeping a lookout for them and providing reasonable precautions for their protection and for avoiding disaster.

It is a mistake to suppose that the obligation of a railroad to provide proper and sufficient appliances to guard against injury to persons and property is an obligation confined, as to the effect that fact may have to the relations between the railroad company and its employés and passengers.

We have frequently held that railroad companies by and through the very fact of their organization take upon themselves the obligation of protecting the general public from injuries occasioned by the improper operation of their trains. The particular dangers from such operation are not enumerated nor are the particular methods for protection against them, for the reason that in the nature of things they cannot be all foreseen, but these matters are left to be determined by the facts of the particular cases as they arise.

The books are full of decisions where individuals connected in no way with the railroad companies have obtained judgments against them for injuries which they have

sustained resulting from the bad condition of the train and its equipment as the proximate cause of those injuries.

Individuals who may be trespassers upon the track of a railroad company do not, by reason of that fact, cease to be members of the "general public," and no longer entitled to protection from injury from the violation by railroad companies of their general obligations to the "public." That fact is not altered, because, in the consideration of the liability of the companies, and in determining whether the latter have exercised a sufficiently vigilant lookout against dangers ahead, it would be a relevant question as to whether the party injured was a trespasser upon the defendants track, and when, where, and under what circumstances he was such.

Defendant argues as a matter beyond dispute that plaintiffs husband was, in fact, a trespasser; but we are not prepared to say that, as against an exception of "no cause of action" which acknowledges the truth of plaintiff's allegations, we would under plaintiff's allegations be justified in dealing with her husband as a trespasser. A person walking across or along a track is not necessarily a trespasser, and plaintiff alleges that her husband was wholly without fault, and was killed through the reckless and wanton negligence of the defendant company.

We have concluded that under the pleadings in this case the exception of "no cause of action" should not have been sustained and the suit dismissed.

The judgment appealed from is therefore annulled, avoided, and reversed, and the cause reinstated on the docket of the district court, and remanded for further proceedings with the right reserved to the plaintiff to amend her petition, and with the right reserved to the defendant to take such exceptions in the case as from the nature and facts of the case are allowable.

MONROE and LAND, JJ., concur in the decree.

PROVOSTY, J., concurs in the decree, but dissents from the proposition that a railway company owes a duty in advance to a trespasser on its track.

(117 La.)

No. 16,176.

FLUKER v. DE GRANGE.

(Supreme Court of Louisiana. June 22, 1906.
On Rehearing, June 28, 1906.)

1. JUDGMENT—RES JUDICATA.

In a suit to annul a tax sale for irregularities, a judgment dismissing the suit after trial on issue joined by general denial concludes the plaintiff as effectually as if the defendant, in addition to the general denial, had, by way of reconventional demand, asked that his own title be recognized and enforced.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1165.]

2. PLEADING—SUPPLEMENTAL ANSWER—NOTICE.

No law requires that a supplemental answer be notified to the plaintiff otherwise than by its filing.

3. APPEAL—OBJECTIONS IN LOWER COURT—TRANSFER OF CASE—OBJECTIONS WAIVED.

After trial and judgment it is too late to object that the transfer of the case from one of the divisions to the other of the civil district court, parish of Orleans, was irregular.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1141.]

4. TAXATION—TAX DEED—VALIDITY.

When the purchaser at a tax sale made under Act No. 82, p. 104, of 1884, to satisfy taxes of 1879 and previous years, does not pay the taxes of 1880 and subsequent years, but merely promises to pay them, the title he acquires is a mere nullity.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1469.]

On Rehearing.

5. VENDOR AND PURCHASER — ACTION FOR PRICE—INTEREST.

In an action to compel a purchaser to accept title to real estate and pay the price, the defendant should be condemned to pay interest only from the date of judgment, where he had reasonable ground to defend the suit.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 933.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Fred Durlieve King, Judge.

Action by Calhoun Fluker against Joseph T. De Grange. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Guy Morville Hornor, for appellant. William Winans Wall, for appellee.

PROVOSTY, J. This is a suit to compel a purchaser to accept a title which he has refused to accept because of its not being, in his opinion, good.

The property formerly belonged to one J. Peter Hubert. It was sold at tax sale to the state in 1884 for the taxes of 1882. Notwithstanding this sale to the state, it was offered at tax sale in 1885, under Act No. 82, p. 104, of 1884, for the taxes of 1872 to 1878, inclusive, and was adjudicated to Joseph Holz. In 1893 the state sold it to W. W. Wall; and the latter at once took actual possession of it, by building around it a substantial wire fence; and he and his vendee, the plaintiff, have been in possession ever since. In 1895 the heirs of J. Peter Hubert filed suit, simultaneously, against Holz and Wall, to annul the tax sale and recover the property. In March, 1898, a judgment was rendered dismissing the suit against Wall. The suit against Holz is still pending. Plaintiff is the vendee of Wall. All the sales above mentioned were duly recorded.

In disposing of the case we shall limit ourselves to two questions: First, whether the heirs of J. Peter Hubert are concluded in their rights by the judgment dismissing their suit against W. W. Wall; second, whether the tax title of Joseph Holz is a serious menace to the title of plaintiff.

Defendant's reasons for doubting that the heirs of J. Peter Hubert are concluded by the dismissal of their suit against Wall, are: First, that the judgment was rendered by the judge of division D, when the suit had been transferred to division E, and had not been retransferred to division D, except by an order of the judge of division D; second, that the original answer of Wall was simply a general denial, without any reconventional demand for the recognition of his title and his supplemental answer, praying for a recognition of his title, was never notified to the plaintiffs in the suit.

Obviously, it would be too late after judgment for the plaintiffs in that suit to be raising these questions. Moreover, we know of no law requiring the answer in a suit to be notified to the plaintiff otherwise than by its mere filing, and we are not advised of the existence of any rule of court so requiring. And, again, we do not see why the dismissal of the suit on a general denial should not operate as *res judicata* of the issues of the suit.

The second objection, to the effect that the tax sale to Holz is a menace to plaintiff's title, is not better founded. The tax collector's deed to Holz recites that the purchaser promised and assumed to pay the taxes due on the property for 1880 and subsequent years; and it is not shown that, previous to the sale by the state to Wall—or since, for the matter of that—these subsequent taxes were paid. Indeed, from the fact that the auditor made the sale to Wall and received payment of these same taxes from Wall, a very strong inference arises that they have not been paid, so strong that the court can safely accept it as proof, in the absence of any effort on the part of defendant to rebut it. This, under settled jurisprudence (*Martinez v. Tax Collector*, 42 La. Ann. 677, 7 South. 796; *Remick v. Lang*, 47 La. Ann. 914, 17 South. 461), and numerous other cases, not needing to be mentioned, has the effect of making the Holz title a mere nullity.

Judgment affirmed.

On Rehearing.

LAND, J. In purchasing the property at tax sale in 1885 for delinquent taxes due prior to December 31, 1879, Joseph Holz assumed the payment of "all the state and city taxes on said property for the year 1880 and subsequent years, together with all interest,

costs, charges, fees, and commissions which may be due and unpaid." No title passed to the purchaser or could do so until he paid all the taxes assumed as a part of the purchase price. *State ex rel. Martinez v. Tax Collector*, 42 La. Ann. 681, 7 South. 796; *Remick v. Lang*, 47 La. Ann. 914, 17 South. 461. The title remained in the state until May 1893, when the property was conveyed by the Auditor of the state of Louisiana to W. W. Wall, for the taxes for the years 1880 to 1892, inclusive, including interest, penalties, and costs. The Auditor's deed recites that the property had been offered for sale under Act No. 80, p. 88, of 1888, and failed to sell. There is no evidence in the record tending to show that Joseph Holz paid the taxes assumed by him, but on the contrary the Auditor's deed shows that these taxes were paid by W. W. Wall in 1893. Hence, on the record before the court, we are unable to say that the tax title of Joseph Holz suggests serious future litigation, or is a cloud on the title. The burden of proof was on defendant to show danger of disturbance or eviction. The adjudication to Holz *per se* is insufficient to show that he ever acquired title to the property. In the absence of all evidence tending to show that Holz complied with the terms of the tax adjudication, we must give full faith and credit to the Auditor's deed reciting that the taxes assumed by Holz were due and unpaid in 1893. It is true that Holz is no party to this litigation, and will not be bound by the decree herein rendered, but at the same time it was incumbent on defendant to show some legal title or claim in Holz to the property in question. The undisturbed possession of Wall and his vendee since 1893, and the absence of all claims on the part of Holz, strengthens the conclusion that defendant is in no danger of eviction.

We think, however, that interest should run only from the date of the judgment of the court *a qua*. *Tobin v. United States Safe Deposit & Savings Bank*, 115 La. 366, 39 South. 83.

It is therefore ordered that our decree heretofore rendered in this cause be modified by amending the judgment appealed from, so as to allow interest from the date of said judgment, and condemning the plaintiff to pay the costs of appeal.

Rehearing refused.

ALLEN v. STATE.

(Supreme Court of Florida, Division B. July 24, 1906.)

1. CRIMINAL LAW—FORMER JEOPARDY—WHEN JEOPARDY BEGINS.

A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon an indictment or information which is sufficient in form and substance to sustain a conviction and a jury has been charged with his deliverance; and a jury is said to be thus charged when they have been impaneled and sworn.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 801, 802, 830-841.]

2. SAME—WAIVER OF RIGHT.

The silence of a defendant on trial for crime, or his failure to object or protest against an illegal discharge of the jury before verdict, does not constitute a consent to such discharge, or a waiver of the constitutional inhibition against a second jeopardy for the same offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 335.]

3. SAME—FORMER ACQUITTAL.

The power of the court to discharge a jury who have been sworn in chief before verdict should be exercised only in case of a manifest, urgent, or absolute necessity. If the jury are discharged for a reason legally insufficient, and without an absolute necessity for it, and without the defendant's consent, the discharge is equivalent to an acquittal, and may be pleaded as a bar to any further trial, or to any subsequent indictment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 330-341.]

(Syllabus by the Court.)

Error to Criminal Court of Record, Duval County; S. T. Shaylor, Judge.

William Allen was convicted of forgery, and brings error. Reversed.

George C. Bedell, for plaintiff in error.
W. H. Ellis, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, as defendant below, was informed against in the criminal court of record for Duval county for the crime of forgery, was tried, convicted and sentenced, and seeks relief here by writ of error.

On March 7, 1906, the defendant was arraigned and entered a plea of not guilty. Thereupon a panel of six jurors were examined on their voir dire, and were challenged for cause both to the array and individually, which challenges were overruled by the court and a complete jury of six was sworn in chief to well and truly try and true deliverance make between the state of Florida and the defendant. Thereupon the defendant's counsel called the attention of the court to the fact that one of the witnesses named Harrison, indorsed on the back of the information as a state witness, was also a witness for the defense, and that such witness, who lived a few miles out from Jacksonville, where the trial was proceeding, was absent from the courtroom, and moved for time to get said witness. The court then ordered the facts so stated to be set forth in

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the form of an affidavit. The county solicitor thereupon moved the court that the jury be discharged from further consideration of the case, and that said cause be continued until the 16th of March. This motion of the county solicitor was granted by the court and the jury discharged.

On March 21, 1906, when the cause was again called for trial, the defendant by leave of the court withdrew his plea of not guilty and interposed a plea of former jeopardy, setting up the former proceedings above recited. To this plea the state interposed a demurrer, which demurrer was sustained by the court, upon which the defendant was put to trial before another jury, who returned a verdict of conviction to which the writ of error is addressed. The order sustaining the demurrer of the state to the defendant's plea of former jeopardy is assigned as error.

In this ruling the court below erred. The discharge of the former jury, who had been charged with the defendant's case, upon the arbitrary motion of the state's solicitor, without any necessity or legal reason therefor, and without the consent of the defendant, amounted to an acquittal of the defendant, and his plea of former jeopardy should have been sustained, the state's demurrer thereto overruled, and the defendant discharged without day. It is true that the defendant had asked the court for time to procure the attendance of an absent witness who resided a few miles from the court; but he did not ask for a continuance of the cause, or for a discharge of the jury, and an arbitrary discharge of the jury under these circumstances, without his consent, amounted to his acquittal. His silence or failure to object or protest against the discharge of the jury did not constitute a consent or a waiver of his constitutional right. *State v. Richardson*, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238. The power of the court to discharge a jury who have been sworn in chief before verdict should be exercised only in case of a manifest, urgent, or absolute necessity. If the jury are discharged for a reason legally insufficient, and without an absolute necessity for it, and without the defendant's consent, the discharge is equivalent to an acquittal, and may be pleaded as a bar to any further trial, or to any subsequent indictment. 12 Cyc. p. 270, and citations; *People v. Grant*, 4 Parker, Cr. R. (N. Y.) 527; *State v. Wamire*, 16 Ind. 357; *Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Helm v. State*, 66 Miss. 537, 6 South. 322; *State v. McKee*, 1 Bailey (S. C.) 651, 21 Am. Dec. 499, and cases cited in notes; *Cooley's Const. Lim.* (7th Ed.) p. 467, where this great author says: "A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon indictment or information which is sufficient in form and substance to sustain a conviction and a jury has been charged with his deliverance; and

a jury is said to be thus charged when they have been impaneled and sworn." 1 Bishop's New Cr. Law, §§ 1013, 1014, et seq.; State v. Robinson, 46 La. Ann. 769, 15 South. 146; Robinson v. Commonwealth, 88 Ky. 386, 11 S. W. 210; People v. Cage, 48 Cal. 323, 17 Am. Rep. 436; Ex parte Clements, 50 Ala. 459; Bell v. State, 44 Ala. 393; Ex parte Maxwell, 11 Nev. 428; Commonwealth v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757; Weinzorpflin v. State, 7 Blackf. (Ind.) 186; Miller v. State, 8 Ind. 325; McCorkle v. State, 14 Ind. 39; State v. Callendine, 8 Iowa, 288; Hines v. State, 24 Ohio St. 184.

Many other errors are assigned and argued; but, as the error found completely disposes of the case, it becomes unnecessary to notice any other assignment. The judgment of the court below is hereby reversed, with directions to overrule the state's demurrer to the defendant's plea of former jeopardy, and to discharge the defendant without day, at the cost of Duval county.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

PEACE RIVER PHOSPHATE MINING CO. v. SINGLETON.

(Supreme Court of Florida, Division B. June 5, 1906.)

APPEAL—REVIEW—HARMLESS ERROR.

A verdict and judgment for the defendant upon the trial of a traverse of the affidavit in attachment will not be disturbed by the appellate court, on account of alleged errors committed by the trial judge in his charges and in admission and rejection of testimony, where upon the admitted facts it appears that the jury could not have rendered a different verdict.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4034-4036.]

(Syllabus by the Court.)

Error to Circuit Court, De Soto County; Bascom H. Palmer, Judge.

Action by the Peace River Phosphate Mining Company against J. J. Singleton. Judgment for defendant, and plaintiff brings error. Affirmed.

Treadwell & Treadwell, for plaintiff in error. Forrester & Burton, for defendant in error.

PER CURIAM. In this case plaintiff in error sued out an attachment in the circuit court of De Soto county against the defendant in error, wherein the affiant in his affidavit stated he had reason to believe that the said defendant would fraudulently part with his property before judgment could be obtained against him. There was a traverse by the defendant, and a trial of the same before a jury, and a verdict and judgment for the de-

fendant. There are quite a number of assignments of error based on the admission and rejection of testimony and the charge of the court. We have carefully examined the record, and, irrespective of the errors assigned, we do not see how the jury, acting upon the undisputed facts, could have arrived at a different verdict from the one rendered. Our conclusion is that there is no reversible error in the record, and it is therefore considered and ordered that the judgment of the circuit court be, and the same is, hereby affirmed.

TAYLOR, HOCKER, and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

SAXON et al. v. RAWLS.

(Supreme Court of Florida, Division A. June 11, 1906.)

1. HOMESTEAD — STATUTES—CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—TITLE OF ACT—DEVISE OF HOMESTEAD.

Chapter 4730, p. 119, of the Laws of 1899, providing that "whenever a person who is the head of a family, residing in this state and having his homestead herein, shall die and leave a widow surviving him, but no children, the homestead shall descend to the widow and shall not be the subject of devise by last will and testament," is not in conflict with sections 1 and 4 of article 10, or with section 16 of article 3, of the state Constitution of 1885, or with section 1 of the fourteenth amendment to the Constitution of the United States.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 247-249.]

2. DOWER—ELECTION BY WIDOW.

Sections 1830 and 1833 of the Revised Statutes of 1892 provide how the widow may dissent from the terms and provisions of a will and also give her the right to elect whether she will take dower or a child's part in the estate.

(Syllabus by the Court.)

Appeal from Circuit Court, Leon County; John W. Malone, Judge.

Bill by Sadie W. Rawls against George W. Saxon and others. Decree for complainant, and defendants appeal. Affirmed.

W. H. Ellis and John L. Neeley, for appellants. George P. Raney, for appellee.

SHACKLEFORD, J. On the 21st day of November, 1904, the appellee filed her bill in chancery in the circuit court for Leon county against the appellants, alleging therein, in substance, that T. Glover Rawls, who was the husband of appellee, departed this life on the 21st day of October, 1902, without issue, before his death, however, having made and published his last will and testament, which was duly admitted to probate in the county judge's court for Leon county on the 30th day of October, 1902, a copy of which is annexed to the bill as an exhibit; that George W. Saxon was named in the will as executor,

who duly qualified as such and to whom letters testamentary issued on the 5th day of November, 1902, and who took possession of the real and personal estate of the testator; that the testator died seised and possessed of certain real and personal property situated in the county of Leon, which is specifically described; that on the 17th day of October, 1903, the appellee filed in the office of such county judge a written instrument executed by her, wherein she dissented from the will and each and all of the provisions made therein in her favor, and declared that they were not satisfactory to her, and elected to take a child's part in the real and personal estate of her deceased husband, according to the laws of the state of Florida in such cases made and provided, in lieu of the provisions of the will and in lieu of dower, such written instrument stating, as was and is true, that the testator died without child or children and that the appellee was his wife at the time of his death; that such dissent was ordered recorded by the county judge, copies of which dissent and order are annexed to the bill as exhibits; that thereupon the appellee became entitled to one-half in fee simple of the personal estate, which was turned over to her by the executor on or about the 9th day of June, 1904, it being expressly stipulated, however, in an instrument of writing executed by the appellee and the executor, that such settlement as to the personal estate should not apply to or affect the interest of the appellee in any of the assets of the testator then remaining outstanding and uncollected and not mentioned in the instrument of settlement, and should not affect the appellee's interest in the real estate of the testator or in the then uncollected rentals or future rentals or income from such estate, a copy of which written instrument is annexed to the bill as an exhibit; that before such settlement was made the appellee executed under the provisions of section 1908 of the Revised Statutes of 1902 a bond in the penal sum of \$1,000, a copy of which is annexed to the bill as an exhibit; that the testator, at the time of his death, was the head of a family residing in the state of Florida, which family consisted solely of himself and the appellee, who were living together as husband and wife and living upon and occupying as their homestead, and had been so doing for about a year previous to the death of the testator, certain lands in Leon county, which are specifically described and which are included in the lands already mentioned, upon which homestead lands, were situated a dwelling house and outhouses and improvements incident to a home, which were lived in and occupied by the testator and the appellee, said homestead not being within the limits of any incorporated city, or town, but consisting of more than 160 acres; that of the lands so occupied as a homestead 160

acres thereof, including the dwelling house and curtilage, descended to the appellee as the sole heir of the testator, and she is entitled to the same in fee simple; that of the other described lands, not including the homestead of 160 acres, the appellee is the owner of an undivided one-half in fee simple absolute, and the other undivided one-half is the property of El Glover Johnston, Letitia R. Johnston, J. Kent Johnston, and Rawls Johnston, children of Fannie W. Johnston, share and share alike, in fee simple, subject, however, to the trusts vested by the will in George W. Saxon, including a power in him to sell the same; that there are no valid debts or demands outstanding against the estate of the testator; that George W. Saxon, since qualifying as such executor, has already collected and is collecting the rents, issues, and profits from the lands, of which the appellee is entitled to all net rents, issues, and profits collected from the homestead lands to the extent of 160 acres, and not heretofore paid over to the appellee, and to all net rents, issues, and profits that may be collected by the executor from the homestead lands, and to one-half of all the net rents, issues, and profits collected and to be collected by the executor from the other lands, which have not previously been divided between the appellee and the executor.

The prayers of the bill were in accordance with and based upon the allegations therein, among others being for a partition of the lands and for general relief. The oaths to the answers of the defendants were waived, and the bill was verified by the affidavit of the appellee.

On the 2d day of January, 1905, all of the defendants, except the two infants, filed their joint and several answers, wherein they admitted all of the material allegations of the bill, except as follows: They did not admit, because they were not fully advised, that the testator died seised and possessed of the lands described therein, and required strict proof thereof. They denied that the testator died intestate as to the 160 acres of land which he occupied as a homestead, or that the same descended to the appellee, and aver that the same was disposed of by the testator in his last will and testament. They further deny that the appellee is entitled to any interest therein, or to any interest in any of the lands described in the bill, except her dower. They further deny that the appellee is entitled to all the net rents, issues, and profits collected by the executor from the homestead land, or to one-half of the net rents, issues, and profits collected by him from the other lands, and aver that the only interest the appellee has therein is her right of dower, which dower had not been set apart to her in manner and form as the law requires, and until that was done she was not entitled to receive any part of the rents.

issues, and profits from said lands. The answer also contained the general denial usually found in answers in chancery.

A guardian ad litem was duly appointed for the two infant defendants, who was duly served with a subpoena and who filed the customary answer on behalf of said infants on the 6th day of February, 1905.

Replications were filed to these answers, and an examiner appointed to take the testimony, by whom a report thereof was duly made, including the testimony so taken before him and certain stipulations made by and between the solicitors for the respective parties, which we deem it unnecessary to set forth, further than to state that it was mutually agreed that the taking of testimony and all accounting as to rents, issues, and profits sought to be recovered by the appellee from the lands involved, or any of them, should be postponed until after an order should have been made in the cause by the court adjudicating the rights and interest of the appellee in such lands, and that the examiner should at once report the testimony and proceedings taken and had before him, so that such adjudication might be had.

On the 14th day of November, 1905, a decree was rendered by the court, finding all the equities in favor of the appellee and granting all the relief sought by her in her bill, ordering a partition of the lands, and appointing three commissioners to make the same, and referring the cause to Frederick T. Myers, an attorney at law, as master in chancery pro hac vice, to make and state an account of what was due to the appellee from the executor for rents, issues, and profits, and also to take testimony and report what would be a proper compensation to George P. Raney as solicitor for the appellee. In view of the conclusion which we have reached, we deem it unnecessary to set forth the contents of the decree any more fully.

From this decree, which was filed and entered on the 16th day of November, 1905, an appeal was taken by the appellants to this court.

Seven errors are assigned, but there is no occasion for discussing them in detail. The appellee's right to the relief sought in her bill is largely based upon chapter 4730, p. 119, of the Laws of 1899, providing that "whenver a person, who is the head of a family residing in this state and having his homestead herein, shall die and leave a widow surviving him, but no children, the homestead shall descend to the widow, and shall not be the subject of devise by last will and testament."

It is contended by the appellants that this chapter is void because it is in conflict with sections 1 and 4 of article 10 of the Constitution of 1885. In *Thomas v. Williamson* (decided here at the present term) 40 South. 831, since the appeal in the instant case was taken, we held that this chapter was not in

conflict with section 4, and there is no occasion for our repeating what was there said. We have given the brief of appellants a careful examination, as well as the authorities cited therein, and see no reason for changing or modifying the views which we expressed in the cited case. Neither has it been made to appear to us wherein the chapter in question is in any way in conflict with section 1 of article 10, and the same reasoning applied in our cited opinion to section 4 is applicable to section 1, so we content ourselves with saying that we fail to find in what the alleged conflict consists.

It is further contended by the appellants that the chapter in question is in conflict with section 16 of article 3 of the Constitution of 1885, providing that "each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."

The title of chapter 4730, p. 119, of the Laws of 1899, is as follows: "An act regulating the descent of homesteads and the widow's interest therein," and it is contended that the body of the act deals with two subjects—the law of descent and the law of devise by last will and testament. The cases of *State ex rel. v. Green*, 36 Fla. 154, 18 South. 334, and *State ex rel. v. Burns*, 38 Fla. 367, 21 South. 290, are cited as supporting this contention. We fully approve of the principles enunciated in these cases; but, in our judgment, they militate against the contention of the appellants instead of sustaining it. The chapter in question is copied in full in the opinion rendered by us in *Thomas v. Williamson*, supra, and there is no necessity of setting it forth again. An inspection thereof will show that the body thereof does not deal with two subjects, as the act, in so far as it deals with the question of devise by last will and testament, does so only to the extent of declaring the principles of law which are to measure and protect the interest of the widow in the homestead, and all the provisions of the act are properly connected with the regulation of the widow's interest. See *State ex rel. v. Bryan* (Fla.) 39 South. 929, and authorities cited therein.

It is also contended by the appellants that the act is void because it is in conflict with section 1 of the fourteenth amendment to the Constitution of the United States, "in that it seeks to abridge the privileges of one class of citizens of the United States by permitting another class of such citizens to exercise and enjoy the privileges withheld from the class against whom the discrimination is made." In support of this contention the appellants argue that the act is discriminative, in that it denies to a married man who has no children the right to dispose of the homestead by will, while it does not restrict a married woman from so doing. The case of *State v. Patterson* (Fla.) 39 South. 398, cited by the appellants is not in

point. There is no merit in the contention. A difference in the inheritable interests as between the surviving husband and the surviving wife was recognized at the common law, and has been almost uniformly maintained in the various states of the Union.

The appellants also contend that the appellee, having dissented from the terms of the will, is restricted to her dower interest in the testator's estate and has no right to elect a child's part therein. We cannot agree to this contention, but do not deem any extended discussion thereof necessary. Section 1830 of the Revised Statutes of 1892 provides how the widow may dissent from the terms and provisions of a will, in which case she shall be entitled to dower, while section 1833 provides that "in all cases in which the widow of a deceased person shall be entitled to dower she may elect to take in lieu thereof a child's part." See *Harrell v. Harrell*, 8 Fla. 46; *Benedict v. Wilmarth*, 46 Fla. 535, 35 South. 84.

Finding no error in the decree appealed from, it follows that the same must be affirmed; and it is so ordered, at the cost of the appellants.

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

GODWIN et al. v. PHIFER et al.
(Supreme Court of Florida, Division A. June 11, 1906.)

1. INJUNCTION—PLEADING—BILL.

It is incumbent upon a complainant to allege in his bill every fact, clearly and definitely, that is necessary to entitle him to relief; and if he omits essential facts therefrom, or states such facts therein as show that he is not entitled to relief in a court of equity, he must suffer the consequences of his so doing. This principal applies to all bills in equity, but is especially applicable to bills seeking an injunction; the rule being that the title or interest of the complainant and the facts upon which he predicates his prayer for such relief must be stated positively, with clearness and certainty. The bill must state facts, and not opinions or legal conclusions.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 225-228.]

2. SAME—TEMPORARY INJUNCTION—NECESSITY OF NOTICE.

When an application is made to the court for a temporary injunction or restraining order without notice to the defendant, the allegations in the bill should be even more carefully scanned and considered than when the defendant has been served with notice and has the opportunity of resisting the application. Before granting a temporary injunction or restraining order without notice, the court should be satisfied that a clear case is made by the bill therefor, and also that it has been clearly made to appear that it is a case of urgent necessity and one in which irreparable mischief will be produced if the aid of the court is denied.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 315, 337.]

3. SAME.

An affidavit to or an allegation in a bill for an injunction, asserting simply the legal conclusion that notice to the defendant of the application for injunction will accelerate the injury apprehended, is not a sufficient excuse, and furnishes no reason, for dispensing with notice. To justify the granting of an injunction *ex parte* and without notice, the allegations of the sworn bill or accompanying affidavit must state facts showing how and why the giving of notice will accelerate or precipitate the injury complained of, from which the court can determine for itself whether the giving of notice will, or is likely to, so result, and such facts must make it manifest to the court that the giving of notice of the application will, or is likely to, have such result.

4. SAME—VERIFICATION OF BILL.

Not only must the allegations in the bill for an injunction be clear, direct, and positive, but they must be verified by an affidavit, which must also be direct and positive; and, where any of the material allegations in the bill are stated upon information, there should be annexed to the bill the additional affidavit of the person from whom the information is derived, verifying the truth of the information thus given.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 225-230, 242, 262.]

5. SAME—GROUNDS—INSOLVENCY OF DEBTOR.

The insolvency of the debtor is never a sufficient reason of itself for the exercise of the extraordinary power of the court by way of injunction. There must be some other equitable ground combined with insolvency.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 17.]

6. SALES—CANCELLATION—GROUNDS—FAILURE TO PERFORM.

The failure of a purchaser of timber to pay the balance of the purchase money therefor at the time stipulated in the contract does not of itself furnish sufficient ground for a cancellation of the contract by a court of equity.

7. INJUNCTION—NOTICE—NECESSITY.

The writ of injunction is an extraordinary, not an ordinary, everyday writ, and it should never be granted lightly, but cautiously and sparingly, and notice should always be required to be given in accordance with equity rule 46, unless the provisions therein for dispensing with notice have been strictly followed. The writ of injunction is a highly beneficial writ, but great care should be exercised in awarding it, lest it be turned into an instrument of oppression and injury.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 1-8, 315.]

8. SAME—DISSOLUTION.

Even where all the equities of the bill are denied by the answer, it is not a matter of course to dissolve the injunction; both the granting and continuing of injunctions resting largely in the sound judicial discretion of the court, to be governed by the circumstances of the case. But, where an abuse of this judicial discretion is clearly made to appear, it is the duty of an appellate court to interfere.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 347.]

9. SAME—DISMISSAL OF BILL.

If it is plainly apparent that the bill is without equity, an injunction should not be granted in the first instance; but, if granted, it should be dissolved at the earliest opportunity by the court, and the bill ordered dismissed.

10. EQUITY—HEARING ON BILL AND ANSWER—EFFECT OF ANSWER.

When a cause is set down for a hearing upon the bill and answer, all the averments of

the answer are to be taken as true; and where the answer contains the usual general denial found in answers in chancery, and contains no admission of certain material allegations in the bill, such allegations cannot be assumed to be true—the burden being upon the complainant to prove such allegations, as well as the matters denied in the answer.

(Syllabus by the Court.)

Appeal from Circuit Court, Alachua County; James T. Wills, Judge.

Action by W. B. Phifer and others against Minnie F. Godwin, as administratrix of the estate of J. J. Godwin, deceased, and others. From a decree in favor of complainants, defendants appeal. Reversed, with directions to dismiss bill.

On the 25th day of September, 1905, the appellees filed their bill in chancery in the circuit court in and for Alachua county against the appellants, alleging therein, in substance, that on the 23d day of May, 1904, H. L. Phifer and J. A. Phifer, two of the appellees, and J. W. Phifer, since deceased, made and entered into a certain contract with J. J. Godwin, since deceased, a copy of which contract is attached to the bill as an exhibit and made a part thereof, and which is as follows:

"State of Florida, Alachua County.

"This contract, made and entered into by and between J. W. Phifer, H. L. Phifer and J. A. Phifer, of the county and state aforesaid, parties of the first part, and J. J. Godwin, of the county of Alachua and state of Florida, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of thirty-five cents per tree for each sound pine tree measuring fourteen inches and upward minimum diameter measure at the top of the stump two feet above the ground, to be paid as hereinafter provided, have bargained, sold, granted, and conveyed, and by these presents do bargain, sell, convey, and grant, unto the said party of the second part, and to his heirs and assigns, all the pine timber over fourteen inches minimum diameter measure at the top of the stump two feet above the ground, situate and being upon the following described lands lying and being in the county of Alachua and state of Florida, and more particularly described as follows, to wit: The west half of the northwest quarter and the west half of the southwest quarter, section 5, township 10 south, range 22 east; also lots one and two, section 6, township 10 south, range 22 east; also the west half of the southwest quarter of section 4, township 10 south, range 22 east, and all fractional section 31, township 9 south, range 22 east, that lies within the Arredondo grant—and other lands of J. W. Phifer, containing in all about nine hundred and seventy-seven acres.

"And it is hereby agreed that the party of the second part, his heirs or assigns, shall have full right of ingress and egress in and

upon the said land for the term and space of two years from July 1, A. D. 1904, for the purpose of cutting and removing the said timber; and it is hereby further agreed that the said timber shall be cut off each forty-acre tract before proceeding to cut timber off the other lands, except that the party of the second part may cut a few trees at the time to fill special orders from any parts of the land herein described.

"And it is further agreed that the sums of money to become due upon this contract shall become due and payable as follows, to wit: The sum of \$500 to be paid cash, the receipt whereof is hereby acknowledged by the parties of the first part herein, and the further sums to become due hereon shall be paid as fast as the timber is cut from the said lands; the same to be inspected and adjusted between the parties hereto monthly at the option of the parties of the first part, and the full sum and amount to become due upon this contract to be paid on or before the first day of July, A. D. 1905.

"The covenants herein contained shall bind the parties hereto mutually.

"In witness whereof, the parties hereto have hereunto set their hands and affixed their seals on this 23d day of May, A. D. 1904.

"J. W. Phifer. [Seal.]

"H. L. Phifer. [Seal.]

"J. A. Phifer. [Seal.]

"J. J. Godwin. [Seal.]

"Signed, sealed, and delivered in presence of us as witnesses.

"J. G. Kellum.

"J. M. Rivers."

The bill further alleges the death of J. W. Phifer and that the appellees are his only heirs at law, there having been no administrator appointed, because there were no debts against his estate; that J. J. Godwin went upon the lands and cut a large amount of timber therefrom and made certain payments on the timber, aggregating, including the \$500 cash payment, the sum of \$1,201.75; that on the 27th day of July, 1905, J. J. Godwin died, and Minnie F. Godwin was duly appointed administratrix of his estate; that after the appointment of the administratrix the appellees and the attorney for the administratrix engaged two men to count the balance of the timber then growing and standing upon the lands and estimate the value thereof, showing balance due on the contract, which was found from the estimates of the appraisers to be \$1,159, which amount the administratrix, through her attorney, promised to settle at once; that subsequently the administratrix effected a sale of the properties of the estate of J. J. Godwin, deceased, and attempted to sell the timber contract at public outcry to J. A. Maulsby and N. A. Mathews, two of the appellants; that the administratrix refuses to pay for

the timber or any part thereof in accordance with the terms of the contract; that Maultsby and Mathews, claiming the timber by virtue of the sale of the administratrix, have declared their determination to go upon the lands and cut and fell the timber, claiming to have paid the administratrix therefor and refusing to pay the appellees; that the appellees have notified Maultsby and Mathews not to go upon the lands or to cut any timber therefrom, but they have informed the appellees that they intended going upon the lands and would begin the cutting of the timber on the 25th day of September, 1905; that the lands are wild and unimproved, and chiefly valuable for the timber growing thereon; that the appellees are the owners of the fee-simple title to the lands and of the timber growing thereon; that the contract has been forfeited by reason of the failure to make the payment on the 1st day of July, 1905, in accordance with the terms thereof, and that Maultsby and Mathews have no right to go upon and cut timber from the lands, for the reason that they did not acquire any rights by their purchase from the administratrix—the estate of J. J. Godwin, deceased, having no rights in the property at the time the sale was made because of the forfeiture of the contract; that the contract does not contain any forfeiture clause; that if Maultsby and Mathews should go upon the lands and cut the timber therefrom the appellees would be without any remedy, as they “are informed, believe, allege, and charge” that the estate of J. J. Godwin, deceased, is insolvent, and that Maultsby and Mathews claim to have paid the estate of J. J. Godwin, deceased, the purchase price for the timber, and deny that the appellees are entitled to recover anything from them therefor; “that an injunction is necessary to prevent said trespass, and the giving of notice would greatly accelerate the injury and defeat the purpose of the writ.”

The bill prays for a temporary injunction at once, without notice, against Maultsby and Mathews; for an account “as to the truth of the allegations of this bill” and as to any timber that may be cut or removed from the lands prior to the granting of the injunction; for a cancellation of the contract; for the payment to the appellees by Maultsby and Mathews for any timber they may have cut from the lands prior to the issuing of the injunction; for a perpetual injunction; and for general relief.

The bill was sworn to by H. L. Phifer, one of the appellees.

On the 26th day of September, 1905, an order for a temporary injunction was made by the court against Maultsby and Mathews, without notice, as prayed for in the bill.

On the 9th day of October, 1905, J. A. Maultsby and N. A. Mathews, two of the appellants, filed their answer, and on the 11th

day of said month Minnie F. Godwin, as administratrix of the estate of J. J. Godwin, deceased, the other appellant, filed her answer; both answers being under oath, and the oath thereto not having been waived in the bill. We deem it unnecessary to set forth the averments in the answers, even in substance. It is sufficient to state that they were responsive to the bill, direct, and positive, and denied the material allegations thereof upon which the appellees based their claim to the relief sought. Each contained the usual general denial found in answers in chancery, and the answer of Minnie F. Godwin, as administratrix, incorporated a demurrer therein.

On the 12th day of October, 1905, the appellants filed a motion for a dissolution of the temporary injunction granted by the court, upon the bill and answers, which motion came on for a hearing on the 2d day of November, 1905, the appellees having filed certain affidavits, when the court made an order denying the motion.

On the 6th day of November, 1905, the appellees set the cause down for hearing upon the bill and answers.

On the 8th day of January, 1906, the court rendered a final decree therein, which is as follows:

“This cause coming on to be further heard, and it appearing to the court that the complainants have set this cause down for final hearing upon the bill and answers of the defendants, respectively, and the same having been duly argued and submitted by the counsel for the respective parties hereto, and the court being advised in the premises, thereupon, upon consideration hereof, it is ordered, adjudged, and decreed that the equities are with the complainants, and that the complainants are entitled to the relief prayed for; and, further, that the temporary injunction heretofore issued in this case against J. A. Maultsby and N. A. Mathews, therein and thereby restraining and enjoining them, their agents and servants, from going upon the lands described in complainant's bill, or any part thereof, and further cutting any of the timber thereon or disturbing the possession of the said property in any way whatsoever, be, and the same is, herein and hereby made perpetual.

“Second. That the contract made on the 23d day of May, 1904, between J. W. Phifer, H. L. Phifer, and J. A. Phifer on the one part, and J. J. Godwin on the other part, and which is attached to complainant's bill of complaint herein, be, and the same is, herein and hereby canceled and annulled, and that the complainants do, within 10 days from this date, pay to the defendant, Minnie F. Godwin, as administratrix of and for the estate of J. J. Godwin, deceased, or do pay into the registry of the court, for the use and benefit of said defendant, the excess of value

of the timber already cut off of the said lands, to wit, the sum of \$57.

"It is further ordered, adjudged, and decreed that the defendants do pay the costs of this proceeding, to be taxed up by the clerk of this court, and that execution do issue therefor upon the application of the complainants or their solicitor.

"Done and ordered at chambers, at Starke, Florida, on this 8th day of January A. D. 1906. J. T. Wills, Judge."

From this decree the appellants have entered their appeal to this court, and have assigned four errors, based, respectively, upon the order granting the temporary injunction, the order refusing to dissolve the same, the rendering of the final decree against the appellants, and the refusal to sustain the demurrer to the bill incorporated in the answer of Minnie F. Godwin, as administratrix.

W. S. Broome and J. M. Rivers, for appellants. W. W. Hampton, for appellees.

SHACKLEFORD, C. J. (after stating the facts). It is the settled law in this court that it is incumbent upon a complainant to allege in his bill every fact, clearly and definitely, that is necessary to entitle him to relief; and if he omits essential facts therefrom, or states such facts therein as show that he is not entitled to relief in a court of equity, he must suffer the consequences of his so doing. *Durham v. Edwards* (Fla.) 38 South. 926, and authorities cited therein. This principle applies to all bills in equity, but is especially applicable to bills seeking an injunction; the rule being that the title or interest of the complainant and the facts upon which he predicates his prayer for such relief must be stated positively, with clearness and certainty. In other words, the bill must state facts, and not opinions or legal conclusions. There must be something more than the opinion of the complainant, however solemnly affirmed, to authorize the interposition of the court by injunction. *Thebaut v. Canova*, 11 Fla. 143, text 167; *P. & G. and A. & G. C. R. R. Co., v. Spratt*, 12 Fla. 26, text 100, 91 Am. Dec. 747; *Garnett v. J., St. A. & H. R. R. Co.*, 20 Fla. 889, text 901; *Shivery v. Streeper*, 24 Fla. 103, 3 South. 865; *State v. Black River P. Co.*, 27 Fla. 276, text 326, 9 South. 205; *Louisville & Nashville R. R. Co. v. Gibson*, 43 Fla. 315, 31 South. 230. This is required for two reasons: First. Because courts are reluctant to interfere with the free use and enjoyment of property by an owner or occupant, and will only interfere where it is clearly made to appear that the use and enjoyment are injurious to the rights of others. *Thebaut v. Canova*, 11 Fla. 143, text 170; *Randall v. Jacksonville St. R. R. Co.*, 19 Fla. 409, text 428; *Shivery v. Streeper*, 24 Fla. 103, 3 South. 865. Second. Because, on an application for an injunction, the court may go into the merits as disclosed by the bill and which are intrinsic and dependent upon its

express allegations and charges, but cannot grant relief except upon the matters charged in the bill. *City of Apalachicola v. Apalachicola Land Co.*, 9 Fla. 340, 79 Am. Dec. 284; *P. & G. and A. & G. C. R. R. Co. v. Spratt*, 12 Fla. 26, text 114, 91 Am. Dec. 747; *McKinney v. County Commissioners of Bradford Co.*, 26 Fla. 267, 4 South. 855. It is also true, when an application is made to the court for a temporary injunction or restraining order, without notice to the defendants, that the allegations in the bill should be even more carefully scanned and considered than when the defendants have been served with notice and have the opportunity of resisting the application. In other words, before granting a temporary injunction or restraining order without notice, the court should be satisfied that a clear case is made by the bill therefor, and also that it has been clearly made to appear that it is "a case of urgent necessity, or one in which irreparable mischief will be produced if the aid of the court is denied." *Thebaut v. Canova*, 11 Fla. 143, text 168; *Swepson v. Call*, 13 Fla. 337, text 359; *Lewton v. Hower*, 18 Fla. 872. Also see *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198. It is true that equity rule 46 confers upon the judge to whom the application is presented the discretion and power to "grant instantan an order restraining the party complained of until the hearing or the further order of the court or judge;" but this should not be done "unless it is manifest to such judge, from the sworn allegations in the bill or the affidavit of the complainant or other competent person, that the injury apprehended will be done if an immediate relief is not afforded." An affidavit to or an allegation in the bill asserting simply the legal conclusion that "notice to the defendant of the application for injunction will accelerate the injury apprehended" is not a sufficient excuse, and furnishes no reason, for dispensing with notice. *Richardson v. Kittlewell*, 45 Fla. 551, 33 South. 984. To justify the granting of an injunction ex parte and without notice the allegations of the sworn bill or accompanying affidavit must state facts showing how and why the giving of notice will accelerate or precipitate the injury complained of from which the court can determine for itself whether the giving of notice will, or is likely to, so result, and such facts must make it manifest to the court that the giving of notice of the application will, or is likely to, have such result. In addition, we might state that, if notice were given to the defendant of the time and place of the application, he would have an opportunity of interposing his defense thereto by appropriate pleadings, both complainant and defendant would have the right to introduce evidence, and the court would then be in a position to consider the merits of the case as presented by the entire record. *P. & G. and A. & G. C. R. R. Co. v. Spratt*, 12 Fla.

26, text 114, 91 Am. Dec. 747; section 1466, Rev. St. 1892; Sullivan v. Moreno, 19 Fla. 200; Fuller v. Cason, 26 Fla. 476, 7 South. 870; Campbell v. White, 39 Fla. 745, 23 South. 555.

It is also the settled law here that not only must the allegations in the bill for an injunction be clear, direct, and positive, but that they must be verified by an affidavit, which also must be direct and positive; and, where any of the material allegations in the bill are stated upon information, there should be annexed to the bill the additional affidavit of the person from whom the information is derived, verifying the truth of the information thus given. Bowes v. Hoeg, 15 Fla. 403; Ballard v. Eckman, 20 Fla. 661; Ruge v. Apalachicola Oyster, C. & F. Co., 25 Fla. 656, 6 South. 489; Doke v. Peek, 45 Fla. 244, 34 South. 896.

It is further true that a court of equity cannot grant relief when the complainant's own showing in his bill demonstrates a want of equity in his prayer, and that where there is no equity in the bill the application for an injunction should be refused. Wordehoff v. Evers, 18 Fla. 339; Sauls v. Freeman, 24 Fla. 209, 4 South. 525, 12 Am. St. Rep. 190; McKinney v. County Commissioners of Bradford Co., 26 Fla. 267, 4 South. 855; Town of Orange City v. Thayer, 45 Fla. 502, 34 South. 573.

The insolvency of the debtor is never a sufficient reason of itself for the exercise of the extraordinary power of the court by way of injunction. There must be some other equitable ground combined with insolvency. P. & G. and A. & G. C. R. R. Co. v. Spratt, 12 Fla. 26, 91 Am. Dec. 747. This principle has been directly applied to bills seeking to enjoin trespasses on timbered lands under section 1469 of the Revised Statutes of 1892. See Carney v. Hadley, 32 Fla. 344, 14 South. 4, 22 L. R. A. 233, 37 Am. St. Rep. 101; Doke v. Peek, 45 Fla. 244, 34 South. 896. In addition to the above-cited cases, see Reddick v. Meffert, 32 Fla. 409, 13 South. 894; Woodford v. Alexander, 35 Fla. 333, 17 South. 658; Wiggins v. Williams, 36 Fla. 637, 18 South. 859, 30 L. R. A. 754; Brown v. Solary, 37 Fla. 102, 19 South. 161; McMullan v. Wiley, 45 Fla. 487, 33 South. 993—for the construction of section 1469 of the Revised Statutes of 1892 and the basis for equitable relief thereunder.

Even if the illegality of the acts alleged in the bill in the instant case, which were sought to be enjoined, were clearly apparent, in the absence of allegations showing some distinct ground of equity jurisdiction, an injunction should not have been granted. Strickland v. Knight, 47 Fla. 327, text 330, 36 South. 363, text 364.

It should also be borne in mind that where there are contradictory or inconsistent allegations in a bill, its equity will be tested by the weaker, rather than by the stronger, allega-

tions. Durham v. Edwards (Fla.) 38 South. 926; Barco v. Doyle (Fla.) 39 South. 103.

Of course, if the injury apprehended has already been consummated, an injunction should not be granted, as the object of an injunction is to preserve and keep things in the same state or condition, and to restrain an act which, if done, would be contrary to equity and good conscience, but it cannot be applied correctively. P. & G. and A. & G. C. R. R. Co. v. Spratt, 12 Fla. 26, 91 Am. Dec. 747; Smith v. Davis, 22 Fla. 405; McKinney v. County Commissioners of Bradford County, 26 Fla. 267, 4 South. 855; Tampa Gas Co. v. City of Tampa, 44 Fla. 813, 33 South. 465.

Testing the bill in the instant case by the principles enunciated, what do we find? It seeks the cancellation of the contract made by the Phifers to J. J. Godwin, deceased, for the sale of certain timber, which contract we have fully set forth, on the ground that the same had been forfeited by reason of the failure of Godwin to make the payment on the 1st day of July, 1905, as specified therein, although it alleges that the contract contains no forfeiture clause, and it is not alleged that the time for such payment is of the essence of the contract; for a temporary injunction against Maulsby and Mathews, on the ground that Godwin's administratrix had effected a sale of the properties of the estate and had attempted to sell the timber contract at public outcry to Maulsby and Mathews, who claimed the timber by virtue of such sale, and that they had paid the administratrix full price therefor and refused to pay the appellees anything therefor, and who had notified appellees that they intended going upon the lands and beginning the cutting of the timber on the 25th day of September, 1905, restraining them from so doing, which might be made perpetual; that an account might be taken of what was due appellees from the administratrix for balance on timber, of what might be due appellees from Maulsby and Mathews for timber cut by them prior to the granting of the injunction; that the administratrix and Maulsby and Mathews might be decreed to pay to appellees the respective amounts so found to be due; and further containing the prayer for general relief. The bill also contains an allegation that "the estate of J. J. Godwin, deceased, orators are informed, believe, allege, and charge, is insolvent," and a further allegation that "that an injunction is necessary to prevent said trespass, and the giving of notice would greatly accelerate the injury and defeat the purpose of the writ." The only affidavit appended to the bill is that of H. L. Phifer, one of the appellees.

It will be observed that the bill does not allege that Maulsby and Mathews purchased the timber contract from the Godwin estate cum onere as to the balance of the unpaid purchase price therefor, nor does it seek to recover this balance from the purchasers,

but from the administratrix of the Godwin estate, to whom it alleges the purchasers claim to have paid it. Neither does the bill seek to restrain the sale of the timber contract by the Godwin estate to Maultsby and Mathews, but shows that it had already been consummated, alleging, however, that the administratrix had "no rights in the said property at the time of making said sale; the same having been forfeited by virtue of the failure to pay for the timber in accordance with said contract." As we have already seen, the bill alleges that the "contract does not contain any forfeiture clause," and an inspection of the contract shows the correctness of this allegation.

The ground upon which the cancellation of the contract is sought is the failure of Godwin or his estate to pay the balance of the purchase price, as stipulated therein. This of itself does not furnish sufficient ground for cancellation. See *Harrington v. Rutherford*, 38 Fla. 321, 21 South. 283. Equity abhors forfeitures and penalties. 16 Cyc. 75. It is contended by the appellees that the contract is but a mere license; but this contention cannot be sustained, and we do not deem it necessary even to discuss it, as a bare inspection of the contract shows the contrary.

We have also seen that insolvency alone furnishes no ground for the interposition of a court of equity, but it must be coupled with some other equitable ground connected therewith. It will also be observed that the insolvency of the Godwin estate is not alleged positively and directly in the bill, but only upon information and belief, and the sources of the information with accompanying affidavits are not furnished. It is not even intimated in the bill that Maultsby and Mathews, the purchasers, against whom the injunction was sought, were insolvent. We also fail to find any sufficient showing made in the bill or affidavit that the threatened injury was imminent or that the giving of notice would accelerate the same, so as to make it manifest to the judge that a necessity existed for dispensing with notice of the time and place when the motion or application for the injunction would be made, as is provided by equity rule 46. In other words, we are of the opinion that the bill is entirely wanting in equity and that the temporary injunction should not have been granted, most assuredly not in the absence of notice. See *Swepton v. Call*, 13 Fla. 337.

It should be borne in mind that the writ of injunction is an extraordinary, not an ordinary, everyday writ, and it should never be granted lightly, but cautiously and sparingly, and notice should always be required to be given, in accordance with equity rule 46, unless the provisions therein for dispensing with notice have been strictly followed. Like the writ of habeas corpus, the writ of injunction is a highly beneficial writ; but great care should be exercised in awarding it, lest it

be turned into an instrument of oppression and injury. See *State v. Vasquez* (Fla.) 38 South. 830.

It necessarily follows from what has been said that the court also erred in refusing to dissolve the injunction upon the coming in of the answers and the motion made thereon. As was said in *Wordehoff v. Evers*, 18 Fla. 339, text 340: "There can be no question that, if the bill contained no grounds for equitable relief, the injunction should have been refused in the first instance. This being the case, the court should seek the earliest opportunity to right itself. As a question of mere practice, it is provided by statute that in all cases the court may, on motion and due notice, either before or after answer filed, dissolve any injunction that may have been granted." See section 1467 of Revised Statutes of 1892. But, as we have seen, the motion in the instant case was based upon the sworn answers of the appellants, one of which had a demurrer incorporated therein. It is true that, at the hearing of the motion, affidavits from two of the appellees were produced; but we fail to see wherein their right to an injunction was strengthened thereby.

We recognize the principle, so frequently enunciated by this court, that, even where all the equities of the bill are denied by the answer, it is not a matter of course to dissolve the injunction; both the granting and continuing of injunctions resting largely in the sound judicial discretion of the court, to be governed by the circumstances of the case. *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Carter v. Bennett*, 6 Fla. 214; *Linton v. Denham*, 6 Fla. 533; *City of Apalachicola v. Apalachicola Land Co.*, 9 Fla. 340, 74 Am. Dec. 284; *Thebaut v. Canova*, 11 Fla. 143; *P. & G. and A. & G. C. R. Co. v. Spratt*, 12 Fla. 26, 91 Am. Dec. 747; *Scarlett v. Hicks*, 13 Fla. 314; *Sullivan v. Moreno*, 19 Fla. 200; *Randall v. Jacksonville Street R. R. Co.*, 19 Fla. 409; *Hayden v. Thrasher*, 20 Fla. 715; *Garnett v. J., St. A. & H. R. R. Co.*, 20 Fla. 889; *McKinne v. Dickenson*, 24 Fla. 366, 5 South. 34; *Fuller v. Cason*, 26 Fla. 476, 7 South. 870; *Indian R. Steamboat Co. v. East Coast Trans. Co.*, 28 Fla. 387, 10 South. 480, 29 Am. St. Rep. 258; *Campbell v. White*, 39 Fla. 745, 23 South. 555; *Bay v. Town of Lake City*, 44 Fla. 491, 33 South. 400; *Richardson v. Kittilewell*, 45 Fla. 551, 33 South. 984; *Baird v. Ellsworth Trust Co.*, 45 Fla. 187, 34 South. 565; *Bluthenthal v. Mohlmann* (Fla.) 38 South 709; *Suwannee & S. P. R. Co. v. West Coast Ry. Co.* (Fla.) 39 South. 538.

While this is true, if it is plainly apparent that the bill is without equity, an injunction should not be granted in the first instance, but, if granted, should be dissolved at the earliest opportunity by the court, and the bill ordered dismissed. *Sauls v. Freeman*, 24 Fla. 209, 4 South. 525, 12 Am. St. Rep. 190. The fact that the bill states no cause for equitable

relief distinguishes the instant case from *Baya v. Town of Lake City*, supra, *Richardson v. Kittellwell*, supra, and *Balrd v. Ellsworth Trust Co.*, supra.

We are forced to the conclusion that there was an abuse of judicial discretion both in issuing and retaining the injunction in force.

The case was set down for a hearing upon the bill and answers by the appellees, no replication having been filed and no testimony taken, yet a decree was rendered in favor of the appellees. This was manifestly erroneous. When the case is heard on bill and answers, all the averments of the answer are to be taken as true. *Garrison v. Parsons*, 45 Fla. 335, 33 South. 525; *City of Orlando v. Giles* (decided here at the present term) 40 South. 834. Moreover, the answer contained the usual general denial found in answers in chancery, and contained no admission of the insolvency of the Godwin estate. Therefore it was incumbent upon the appellees to prove that fact, as well as the matters denied in the answers. *Doke v. Peek*, 45 Fla. 244, 34 South. 896; *Parken v. Safford*, 48 Fla. 290, 37 South. 567.

It follows that all the errors are well assigned, and that the final decree appealed from must be reversed, with directions to dismiss the bill; and it is so ordered.

COCKRELL and WHITFIELD, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

MUGGE v. TATE, JONES & CO., OF LOUISIANA, Limited.

MUGGE et al. v. SAME.

(Supreme Court of Florida. June 11, 1906.)

COURTS — RULES OF DECISION — NUMBER OF JUDGES CONCURRENCE — DIVIDED COURT.

The concurrence of a majority of the members of the Supreme Court sitting as a body is necessary to a decision; but, where the members of the court sitting are equally divided, the judgment of the lower court should be affirmed on the authority of *State ex rel. Hampton v. McClung*, 37 South. 51, 47 Fla. 224.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 351, 352; vol. 3, Cent. Dig. Appeal and Error, § 4421.]

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Actions between Robert Mugge and Tate, Jones & Co., of Louisiana, Limited, and by Robert Mugge and others against the same. From the judgment, Robert Mugge and Robert Mugge and others being error. Affirmed by divided court.

J. J. Lunsford, for plaintiffs in error. C. C. Whitaker, for defendants in error.

PERCURIAM. In these causes the CHIEF JUSTICE, Mr. Justice COCKRELL and Mr. Justice WHITFIELD are of opinion that the

judgment should be reversed, while Mr. Justice TAYLOR, Mr. Justice HOCKER, and Mr. Justice PARKHILL are of opinion that the judgment should be affirmed. Under these circumstances, upon the authority of *State ex rel. Hampton v. McClung*, 47 Fla. 224, 37 South. 51, *Commercial Bank v. Towers*, 48 Fla. 250, 37 South. 742, and *Holton v. Patterson*, 49 Fla. 178, 38 South. 352, a judgment will be entered in each of the above-styled causes affirming the judgments to which the writs of error were taken. It is so ordered.

NEW YORK LIFE INS. CO. v. MILLS.

(Supreme Court of Florida, Division A. June 11, 1906.)

1. TRIAL.—INSTRUCTIONS.—UNDISPUTED FACT.

In an action on a life insurance policy, upon an issue as to whether the actual value of the insured's interest exceeded the loan value of the policy, where the only witness on the point testified that there was an excess, the court may properly so charge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 336.]

2. INSURANCE — CANCELLATION OF POLICY — EVIDENCE.

Upon an issue raised in an action on a life insurance policy, it being shown that upon making a loan to the insured the company reserved the option to cancel the policy, if the loan were not repaid, upon returning the cash surrender value, and instead of so canceling the company opened up negotiations looking to a new loan, pending which the insured died, the plaintiff, the beneficiary under the policy, is entitled to a verdict.

3. PLEADING — REPLICATION — REJOINDER — ISSUES RAISED.

When the replication ignores certain facts contained in a plea, taking issue only upon certain other facts therein, and the defendant files a general rejoinder to the replication, the facts so ignored cease to be issues in the cause.

4. INSURANCE.—EVIDENCE OF AGENCY.—RATIFICATION.

Agency to make a contract is sufficiently shown by a stipulation of counsel that the parties executed the contract by the ratification of the vice president of an insurance company or that it was entered into at his suggestion.

(Syllabus by the Court.)

Error to Circuit Court, Suwannee County; Bascom H. Palmer, Judge.

Action by Lizzie Mills against the New York Life Insurance Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Fred T. Myers and John W. Henderson (James H. McIntosh, on the brief), for plaintiff in error. Ira J. Carter, J. B. Johnson, and H. E. Carter, for defendant in error.

COCKRELL, J. Mrs. Mills declared on an insurance policy for \$1,000 upon the life of her husband, Charles L. Mills, issued by the New York Life Insurance Company in 1897, wherein she was named as beneficiary. The company filed three pleas. The first plea, that of the general issue, may be

disregarded. The other pleas are as follows:

"Second. And for a second plea defendant says: In the year A. D. 1897 it made and delivered its policy of insurance on the life of Charles L. Mills, and that by the terms of said policy the defendant agreed to pay one thousand dollars to the plaintiff, or, in the event of her death, to the insured's executors, administrators, or assigns, only upon the condition that the premiums thereon were duly paid on or before the respective dates when due, and that Charles L. Mills perform all the other conditions required in said policy to be performed by him; that said sum was to be paid at the home office in the city of New York, and that it should be incontestible after it should be in force one full year, provided the premiums had been duly paid. And defendant avers that said contract was made in consideration of the written application of the insured, which was made a part thereof, and in further consideration of the sum of twenty-seven and $\frac{10}{100}$ dollars to be paid in advance, and the payment of a like sum on the 24th day of November in every year thereafter during the continuance of said policy, and for no other consideration. The defendant further says that before the lapse of said policy hereinafter alleged, on, to wit, the 16th day of June, A. D. 1903, said Charles L. Mills obtained from said defendant a loan on said policy for the sum of \$55. That at the time of said default in the payment of said premium, on, to wit, November 24, 1903, said amount so loaned to said insured was still unpaid, and said loan of fifty-five dollars, made to the insured by the defendant as aforesaid, constitutes and was at the time of said default and at the date of the filing of this suit the entire value of said policy. The defendant further says that Charles L. Mills, the insured, did not perform or cause to be performed the conditions of said policy, and avers that said Mills failed, neglected, and refused to perform or cause to be performed the conditions of said policy to be performed by him, in this, to wit: that said Charles L. Mills failed, neglected, and refused to pay or cause to be paid the annual premium on said policy that became due and payable on the 24th day of November in the year A. D. 1903, or any part thereof, but defaulted in that behalf, and that by reason of said failure, neglect, and refusal to pay said premium, or any part thereof, said policy lapsed and became forfeited and void.

"Third. And for a third plea to plaintiff's declaration the defendant says that prior to the lapse of said policy, on, to wit, the 16th day of June, A. D. 1903, said Charles L. Mills obtained from said defendant a loan on said policy of the sum of fifty-five and $\frac{10}{100}$ dollars; that at the time of said default in paying said November, A. D. 1903, premium on said policy, said amount so loan-

ed to said insured was still unpaid, and said sum of fifty-five dollars constituted the entire value of said policy."

Replications, upon which issue was joined and trial had, were filed by the plaintiff as follows:

"And for replication to the defendant's second plea plaintiff says: That it is true that Charles L. Mills, on the 16th day of June, 1903, obtained a loan on the policy sued on from the defendant, in the sum of fifty-five dollars, and admits that on the 24th day of November, 1903, said amount so loaned was still unpaid, but denies that said loan as aforesaid was, at the time of said default and at the date of the filing of this suit, the entire cash value of said policy, and denies that said policy lapsed and became void and forfeited by reason of such default, but avers that the said loan of fifty-five dollars was based and allowed to the said Charles L. Mills on the value of said policy at and on the date of November 24, 1902; that on the said 16th of June, 1903, the premiums on said policy were paid up to November 24, 1903, thereby increasing the cash surrender value of said policy, over and in excess of the said fifty-five dollars loan to the extent of one year; that, in order that the said Mills might secure the said loan of fifty-five dollars, the said Mills and the defendant made and entered into a written contract and agreement, termed and designated as 'Policy Loan Agreement,' that said policy loan agreement, among other things, provided that in the event of default in payment of the interest on said loan, or any premium on said policy, for one month after they respectively became due, that the said defendant was permitted at its option to cancel said policy and its accumulations for the customary cash surrender value thereof then allowed by the defendant for the surrender of policies of this class, said defendant in that event being liable to the said Charles L. Mills for the return of the balance only of the said cash surrender value after deducting said loan and accrued interest; and the plaintiff avers that the said defendant did not exercise its said option to cancel said policy and its accumulations during the lifetime of the said Charles L. Mills, and had not exercised such option at the date of the death of said Mills, to wit, June 8, 1904; and plaintiff avers that at the time of the default of payment of November 24, 1903, premium, and continuously thereafter to the date of death of said Mills, the cash surrender value of said policy was in excess of said loan of fifty-five dollars and the accrued interest thereon, and the said defendant did not, nor has it ever, since the said default in payment, returned or offered to return the then cash surrender value of said policy then in excess of the said loan and accrued interest thereon, although the said policy was then and still remains in the possession of the said defendant; but on the contrary thereof

the said defendant, after default by the said Mills as aforesaid, has retained such excess and elected to treat said policy as valid in this: that the said defendant at divers times during the months of April, May, and June, A. D. 1904, communicated with the said Charles L. Mills, and offered and undertook to advance to him on the security of said policy an additional loan, and forwarded to him, the said Charles L. Mills, application for such loan, together with a loan agreement, same to be signed and executed by the said Mills; that said Mills executed said application for loan and loan agreement and returned them to the defendant, with the understanding between himself and the defendant that he would remit to the defendant such sums as might be found to be due on the November, 1903, premium, the amount of which sum to be remitted the said defendant undertook and agreed to inform and advise the said Charles L. Mills, but which it failed and neglected to do; and that pending the consummation of the said loan and the settlement of the said November, 1903, premium, and after the said Charles L. Mills had complied with all of the requirements of said defendant in that respect, the said Charles L. Mills, to wit, on the 8th day of June, 1904, died.

"And for replication to the defendant's third plea to plaintiff's declaration plaintiff says; Plaintiff denies that the said policy sued on lapsed as in said plea mentioned. Without this, she denies that the said loan of fifty-five dollars constituted the entire value of said policy at the time of the alleged default in the payment of the November, A. D. 1903, premium, but alleges and avers the truth to be that the said fifty-five dollars was the loan value of the said policy on the 24th day of November, 1902.

"Wherefore the plaintiff says that by reason of the premises the said policy, at the death of the said Charles L. Mills, became, was, and is a good and valid claim against the said defendant, and that she ought to have and maintain this her suit."

There was verdict and judgment for the plaintiff in the sum of \$955.96 as damages and \$225 as attorney's fee.

The pleadings are set forth at length, because in the mind of the court the issues thus raised are comparatively simple and render useless a reply to the many substantive points treated in the briefs of the plaintiff in error, which would lead us into the comparatively unexplored field of law peculiarly applicable to life insurance policies.

There was no evidence introduced by the company, which rested upon the supposed insufficiency of that adduced by the plaintiff. It first demurred to the evidence, and then objected to the affirmative charge given for the plaintiff. It is, to say the least, questionable whether the record properly incorporates the evidence into the demurrer; but substantially the same considerations would control

us in this case in passing upon the propriety of the affirmative charge, and it is immaterial, therefore, to determine the sufficiency of the demurrer.

The replication to the third plea, the legal sufficiency of which is admitted by the joinder of issue thereon, says merely that the loan of \$55 did not constitute the entire value of the policy in November, 1903, but was the loan value on November 24, 1902. This issue was fully proven. The amount was actually loaned by the company in June, 1903, before the maturity of the annual premium for that year; and it is further in evidence from the lips of the sole witness on the point that the cash value of a policy is greater than the loan value, but that the exact amount of the cash value is known only to the actuary of the company. It is, moreover, not unreasonable to assume that the company would not provide so that the insured, who is also a participator and investing member of the company, should be at liberty at any time to borrow the full limit of his interest in the concern without leaving a sufficient inducement by way of margin to in some slight degree induce him to an endeavor to continue that membership. The loan is made on the security of the policy and without reference to the solvency of the borrower. The policy is not purely and strictly a life insurance policy, with charges only sufficient to reasonably guard against the chances of death, but has many features of attractive investment, and creates and recognizes various advantages and options that this investment feature presents to the insured. Thus is created, after the third annual premium is paid, a valuable asset, a vested interest in the insured, which can be taken from him or forfeited only by clear and unmistakable terms in the contract.

We think, therefore, the evidence amply justified a charge based upon the assumption that the loan value did not constitute the entire value of the policy.

The replication to the second plea embraces the issue discussed above, and contains, further, as issues of fact the propositions that by the policy loan agreement, whereby the insured obtained from the company the sum of \$55 in June, 1903, the company reserved an option to cancel the policy if the loan was not repaid for its cash surrender value, returning to the insured the excess, which option was not exercised, but, on the contrary, negotiations looking to a new loan were pending between the insured and the company, which were stopped only by the death of the insured. These allegations of fact are fully warranted by the evidence.

This replication purported to be a complete reply to the whole plea, and yet it ignored the latter portion of the plea, wherein is set up a forfeiture by reason of a failure to pay the annual premium due in 1903. The prime object of the common-law system of pleading being the production of singleness of issue, each succeeding step narrows the issue.

When the plaintiff by his replication omitted any reference to the issue tendered as to failure to pay the premium, she challenged the company to an issue of law as to the materiality of that fact as a defense. Instead of accepting this challenge in some one of the ways our practice provides, the company abandoned any defense based upon this fact, and, by joining issue generally upon the replication, admitted that the issuable averments of fact therein were sufficient, if proven, to entitle the plaintiff to a recovery notwithstanding the issues tendered by its plea. We see no hardship worked upon the company by the application of this well-known principle of common-law pleading, as upon an examination of the policy in evidence we find provisions whereby, after the payment of three premiums—and here six have been paid—the interest acquired by the insured causes the company to extend the policy for stated periods, apparently much longer than the six or seven months that had elapsed in the instant case.

We see no difficulty in the questions presented in the objections to admissibility of the evidence in the matter of the authority of the agents in representing the company. These negotiations were opened up on the suggestion of the vice president of the company, and looked to a prevention of the exercise of a clear option on the part of the insured to stand upon his rights and demand his then interest in the policy, and to induce him to make further effort to increase that interest. As to the loan agreement of June, 1903, a stipulation of counsel was filed agreeing that it was executed by both parties; the clearest recognition of the agency.

Stress is laid upon certain decisions holding that, before the insured can exercise the option to take out paid-up or extension insurance, the original policy must be surrendered to the company. It is noted in the instant case that the policy was placed in the possession of the company when the loan was made, and still remains in its possession as security for the loan, and that the jury credited the company with the amount of this loan.

We find no error in the record, and the judgment accordingly is affirmed, at the cost of the plaintiff in error.

SHACKLEFORD, C. J., and WHITEFIELD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

BARNETT v. HICKSON.

(Supreme Court of Florida. June 19, 1906.)

1. EQUITY—JURISDICTION—REMEDY AT LAW. In cases where there is a plain, adequate, and complete remedy at law, a resort to a court of chancery is unnecessary and improper.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 151, 152.]

2. EXECUTION—INJUNCTION—GROUNDS—STAY BY COURT OF LAW.

A circuit judge, under the provisions of section 1198, Rev. St. 1892, has full power, either in term time or vacation, to stay an execution issued from and returnable to the circuit court in cases at law; and resort to a court of equity is unnecessary, where there is no independent equity apart from the execution.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 498.]

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Marion County; William S. Bullock, Judge.

Bill by Bion H. Barnett against L. T. Hickson, executor of William Hickson. Decree for defendant, and complainant appeals. Affirmed.

See 37 South. 210.

A. W. Cockrell & Son, for appellant.

MALONE, Circuit Judge. This is an appeal from an order of the circuit court for Marion county, sustaining a demurrer to a bill in chancery.

It appears from the allegations in the bill that William Hickson instituted in the circuit court for Marion county an action of assumpsit against J. Frank Thacker, as copartners under the firm name of Thacker Bros., on the 21st day of February, A. D. 1894, and caused a summons ad respondendum and a writ of attachment to be issued on the same day. This summons was never executed, but the writ of attachment was levied upon certain bundles of orange wrapping paper and other personal property.

Afterwards, on the 5th day of November, A. D. 1894, the M. J. Fitch Paper Company, a corporation, interposed a claim and got possession of said bundles of orange wrapping paper by delivering to the officer making the levy the affidavit and bond prescribed by statute; and the appellant was one of the sureties on this bond.

At the spring term, A. D. 1895, of the said circuit court this claim was tried by a jury, and a verdict returned against the claimant, the M. J. Fitch Paper Company, and a judgment for \$250, the estimated value of said orange wrapping paper, and \$50 damages and \$2.21 costs, was entered against the claimant and its sureties, W. B. Barnett and Bion H. Barnett, and in favor of William Hickson, the plaintiff in the action of assumpsit.

The claimant and its sureties then brought this judgment to this court by a writ of error, and on April 30, A. D. 1895, filed with the clerk of said circuit court a supersedeas bond in the penal sum of \$500.

At the June term, A. D. 1898, of this court, this judgment was affirmed.

Afterwards, on the 1st day of October, A. D. 1901, the appellee instituted a suit in the said circuit court, on the said supersedeas bond, against the appellant, and recovered a judgment therein, on the 11th day of November, A. D. 1902, for \$500, the penalty of said supersedeas bond.

It will be observed that the sole object of this bill is to get a stay of the execution on this judgment until the appellee shall recover a judgment in the action of assumpsit against Thacker Bros., the defendants therein; and the jurisdiction of the court of chancery is invoked to attain that object.

It is alleged in the demurrer to this bill that a court of law, and not a court of chancery, is the proper forum to grant the relief sought by the bill; and the circuit court sustained this demurrer. Was this error?

As far back as 1859 this court decided that "a circuit judge, under the provisions of the act of 1844, has full power, either in term time or vacation, to correct, restrain, and control the process of a court of law, and no resort is necessary to the powers of the court of chancery in such cases, unless arising from the operation of independent equities apart from the process." *Robinson v. Yon*, 8 Fla. 350.

This same principle was again announced in the case of *McKeown et al. v. Coogler et al.*, 18 Fla. 870, and is now settled law in this state.

The judge who rendered the judgment could, in the exercise of his powers at law, either in term time or vacation, have afforded the appellant full and perfect relief from the anticipated injury stated in his bill, by staying temporarily, or perpetually, the execution issued on said judgment or by revoking it altogether.

Therefore the appellant had a plain, adequate, and complete remedy at law, and a resort to a court of chancery under these circumstances was unnecessary and improper; and the circuit court committed no error in sustaining the demurrer.

The order of the circuit court must be affirmed, and the bill be dismissed, at the cost of the appellant.

SHACKLEFORD, O. J., and WHITFIELD and PARKHILL, JJ., concur.

COCKRELL and HOCKER, JJ., disqualified.

TAYLOR, J., absent on account of sickness, but concurred in the opinion when prepared.

MOTÉ et al. v. MORTON et al.

(Supreme Court of Florida. June 26, 1906.)

1. EQUITY—ACCOUNTING BEFORE MASTER—NOTICE TO PARTIES—NECESSITY.

It is the right of all parties in interest, in a cause not under default, upon a reference to a master, to have notice of proceedings in the master's office.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 832.]

2. INFANTS—GUARDIAN AD LITEM—POWERS.

It is an established rule that a guardian ad litem cannot admit or waive anything ad-

verse or prejudicial to the infant, and has no power to bind his ward by the admission or waiver of anything.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 242, 291.]

3. SAME—ANSWER.

The formal answer of the guardian ad litem should submit the rights of the infant to the determination of the court and leave the complainant to make out the facts of his case by strict proof.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 246, 281, 291.]

4. SAME—HEARING—REFERENCE—NOTICE TO GUARDIAN AD LITEM.

Even though the answer of the guardian ad litem admits the allegations of the bill of complaint to be true, the proper practice is to refer the cause to a master to take the proof and report thereon, and guardians ad litem should in all cases have notice of proceedings in the master's office and should attend and protect the interests of their wards.

5. EQUITY—REFERENCE TO MASTER—REPORT.

When a reference is made to a master to ascertain a fact depending upon testimony, his report should show the basis of his finding, so that the court may see the correctness of his conclusions; and the evidence upon examination before a master should be taken down by him, or some other person by his authority in his presence, and filed with his report.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 893, 901.]

6. SAME—EVIDENCE.

Testimony taken before a former master in a cause, at a time when certain minors, subsequently made parties, were not parties thereto, is not admissible as against such newly made minor parties in further proceedings before a second master appointed after such minors were made parties.

(Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Lake County; William S. Bullock, Judge.

Bill by Sallie Sims Morton and J. B. Morton against E. H. Moté and others. Decree for complainants. Defendants appeal. Reversed and remanded.

William Hocker, for appellants. R. L. Anderson, for appellees.

PARKHILL, J. This is the second appeal in this case. For a statement of the case upon the former appeal, see 46 Fla. 478, 35 South. 656.

On 30th day of January, 1901, appellees filed their bill to foreclose two mortgages given as collateral securities to a note made by Edwin H. Moté. One of the mortgages was executed by Olivia A. Lovell and her husband, Myron W. Lovell, and W. E. Vail and his wife, Olivia H. Vail. The other mortgage was executed by W. E. and Olivia H. Vail. A joint and several answer was filed by E. H. and Lottie H. Moté. A decree pro confesso was entered against M. W. and O. A. Lovell, A. H. Vail, and E. S. Newton, as executor.

A replication to the answer of E. H. and Lottie H. Moté was filed, and on the 6th day of September, 1901, J. W. Northup, having been appointed special master to take testimony and state an account, filed his report. On the 3d day of September, 1901, a

final decree was entered. The defendants appealed, and the cause was reversed by this court on the 1st day of January, 1904, because the heirs or devisees of William E. Vail, deceased, were necessary parties, and in the absence of such parties the decree of foreclosure was erroneous.

On the 13th day of May, 1904, the bill of complaint was amended by leave of the court by joining therein as parties defendant the following named persons, the devisees under the will of the said William E. Vail, to wit: Walter, Frederick, George, Carrie, and Vail Lovell, the children of Myron W. and Olivia Lovell; these children being under the age of 21 years.

A subpoena in chancery was duly served upon the infants, and L. W. Duval was appointed as guardian ad litem for them. On the 20th day of September, 1904, the guardian ad litem filed his answer to the bill of complaint, admitting the allegations therein set forth to be true. On the 27th day of January, 1905, one H. H. Duncan filed a report wherein he recites that he was appointed by order of the court, on the 22d day of November, 1904, as special master to take an account of the amounts due to the complainants. The order of the court is not set out in the record. Notice having been given the several parties of the application therefor, a final decree was entered on the 1st day of May, 1905. After a sale of the mortgaged property, and confirmation of the master's sale thereof, and the entry of a deficiency decree, and a motion to set aside and vacate the deficiency decree had been overruled, the defendants entered their appeal from the final decree of May 1, 1905, and the order confirming the master's sale, and from the deficiency decree and the order refusing to set aside the deficiency decree.

I. It is assigned as error "that the court erred in its final decree of 1st of May, 1905, wherein it adjudged, among other things, that the report of H. H. Duncan, special master, be confirmed, because there was no notice given by said master of the taking of the testimony." The record does not show that the cause was set down for hearing as provided for in rules 85 and 86 of the rules of the circuit court in suits in equity, nor does the final decree or anything in the record show that the appellants or their counsel had notice of the taking of testimony in the cause by the master, or of any of the proceedings before the master, or of the filing of the master's report in the clerk's office, although the clerk was directed by the appellants to copy in the transcript of record all notices of taking of testimony and service of same, if any such notices were given or service made, and although there was on file an answer by Mote and wife, to which a replication was filed, and although five of the parties defendant were infants. These defendants were entitled to notice of the taking of the testimony by the master, and

the record shows they did not have notice thereof.

In Henderson's Chancery Practice, Par. 186, it is said: "In all proceedings where the rights of a party are to be adjudicated upon, it is necessary that the party whose rights are to be affected should have due notice; hence it is a maxim of the law that 'every man is entitled to his day in court.' This right he is deprived of if proceedings are had affecting his interest without his knowledge or consent. This rule of notice extends to proceedings in the master's office, as well as to proceedings in court. A judge might as well proceed to enter judgment in a cause where there has been no service as for a master to proceed to pass upon the rights and interests of a party without due notice to him. It is, therefore, the right of all parties in interest, upon a reference to a master, to have notice of proceedings in the master's office. In the case of a reference to a master in a bill for accounting, notice of hearing before the master is absolutely necessary." The same author says (on page 267) that "not only is it the duty of the master to see that all parties entitled to notice are duly summoned and to preserve the notices with proof of service, but his report itself should show this fact." See, also, Wade on the Law of Notice, par. 1204. And so this court, in *Ballard v. Lippman*, 32 Fla. 481, 14 South. 154, said: "Appellants clearly had the right to notice and a hearing on the matters referred to the master, and in this case they were deprived of this right. The final decree was based upon the master's report, which was irregular, in that it denied appellants the right to be heard on matters specified in the report. Of this they now complain, and as a result the final decree must be reversed."

In this connection we call attention to what was said by this court in the case of *Cepero v. Hartridge* (decided at the last term of this court) 41 South. 192, upon the subject of notice of proceedings in the master's office.

The answer of the defendants Mote was not excepted to, but a replication was filed thereto. It is true that the answer of the guardian ad litem admits the allegation of the bill of complaint to be true; but this makes no difference. The proper practice is to refer the cause to a master to take the proof and report thereon, and guardians ad litem should in all cases have notice of proceedings in the master's office and should attend and protect the interests of their wards. Henderson's, Ch. Prac. pp. 172, 173, 197.

It is an established rule that a guardian ad litem cannot admit or waive anything adverse or prejudicial to the infant, and has no power to bind his ward by the admission or waiver of anything. 10 Am. & Eng. Ency. Pl. & Pr. p. 675. Infant defendants are entitled to the special protection of a court of chan-

cery, and the formal answer of the guardian ad litem should submit his rights to the determination of the court and leave the complainant to make out the facts of his case by strict proof. *Lucas v. Wade*, 43 Fla. 419, 31 South. 231; *Walker v. Redding*, 40 Fla. 124, 23 South. 565; *Wolcott v. Weaver*, 3 How. Prac. (N. Y.) 159.

As was said by this court in *Parken v. Safford*, 48 Fla. 290, 37 South. 567: "It is a general rule that an infant should not be prejudiced by any act, default, or admission on the part of his guardian ad litem—an infant being the ward of the court—and therefore the court is bound to protect the rights of the infant, notwithstanding the failure of the guardian ad litem to do so." Certainly, then, the failure of the master to give notice of the proceedings before him could not be waived or cured so far as the infant defendants are concerned, by the fact that the guardian ad litem had notice of the application for the final decree, and did not appear to resist the same. In this state of the pleadings, then, this cause should have been conducted in the orderly way provided by law and the rules of practice. *Lafin v. Gato* (Fla.) 39 South. 59.

II. It is assigned as error "that the court erred in its final decree, because it adjudged, among other things, that the report of H. H. Duncan, special master, be confirmed, because there was no proper testimony before said special master taken by him upon which to base said report."

Duncan, the special master, reported as follows: "I find in the records 11 sworn accounts paid by J. B. Morton to R. E. Dilday, reported by J. W. Northup, special master, on August 1, 1901, to amount to \$296.23. I find from the records from said same report of J. W. Northup the court has approved as a reasonable attorney's fee therein the sum of \$310." The report also states, that from vouchers marked and filed as Exhibits 12 to 41, sworn to by J. B. Morton, said Morton has paid out for improvement and cultivation of the orange grove located on lands described in complainant's bill, and paid out for taxes since the report of J. W. Northup, the sum of \$911.25, and certain amounts aggregating the sum of \$290.70, to be credited to the defendants. The master, Duncan, does not report any testimony as taken before him to establish these facts, nor do his findings on these points purport to be based upon any testimony taken before him.

Accompanying the report is a list of exhibits, beginning with Exhibit No. 12, \$56.18, Exhibit No. 13, account of Dilday, \$30.35, and concluding with Exhibit No. 41, personal expenses of J. B. Morton, \$32.

This statement, however, does not appear from the record to have been sworn to.

It was improper for Duncan to base his findings upon the report and findings of the former master, Northup. The infants were

not parties to the cause when testimony was taken and report was made by Northup, and the infants had a right to appear by their guardian ad litem upon the taking of testimony before Duncan and to cross-examine the witnesses. The testimony taken before the former master, Northup, was as to these minors taken in a cause to which they were not at the time parties, and consequently was as to them wholly *ex parte* and inadmissible.

In *Adams v. Fry*, 29 Fla. 318, text 330, 10 South. 559, we said: "The rule requires that the evidence upon all examinations before a master shall be taken down by him or some other person by his authority, in his presence, and filed with his report. * * * When a reference is made by a master to ascertain a fact depending upon testimony, his report should show the basis of his finding, so that the court may see the correctness of his conclusions."

The report of Duncan did not furnish a basis for a final decree as to the items herein mentioned, as it did not appear that the amounts reported were ascertained from evidence.

In view of the general reversal of the decree, we deem it unnecessary to say anything in reference to the other assignments of error.

For the reasons stated, the decree must be reversed, and the cause remanded, with directions to the court to take such further proceedings as may be agreeable to the rules and practice of the court and in accordance with this opinion.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and WHITFIELD, JJ., concur.

HOCKER, J., disqualified.

DANIELS v. STATE.

(Supreme Court of Florida, Division B. July 8, 1906.)

1. HOMICIDE—INDICTMENT.

In cases of murder, the homicidal act or efficient cause of death—that is, the infliction of the mortal wound—must be charged to have been perpetrated from a premeditated design to effect death, and the indictment will be fatally defective if it fails to so charge.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 199–202.]

2. SAME—DESIGN.

Where an indictment charges that C. D. "did unlawfully and from a premeditated design to effect the death of one C. G. make an assault on the said C. G., and a certain pistol, which then and there was loaded with * * * leaden bullets and by him the said C. D. had and held in his hand, he, the said C. D., did then and there unlawfully and from a premeditated design to effect the death of the said C. G., shoot off and discharge at and upon the said C. G., thereby and by thus striking the said C. G. with the said leaden bullets, inflicting on and in the body of the said C. G. one mortal wound," etc., the homicidal act or efficient cause of death is charged to have been perpetrated from a pre-

meditated design to effect death, although the words "from a premeditated design to effect death" are not repeated when the infliction of the mortal wound is charged, since these words, previously alleged, are connected with the mortal stroke by the words "thereby and by thus." The case of *Simmons v. State*, 13 South, 898, 82 Fla. 387, considered and disapproved.

(Syllabus by the Court.)

Error to Circuit Court, De Soto County; Joseph B. Wall, Judge.

Charles Daniels was convicted of murder, and brings error. Affirmed.

Forrester & Burton, for plaintiff in error. W. H. Ellis, Atty. Gen., and H. S. Phillips, for the State.

PARKHILL, J. Indictment, of which, omitting formal parts, a copy follows:

"The grand jurors of the state of Florida, inquiring in and for the body of the county of De Soto, upon their oaths present that Charles Daniels, late of the county of De Soto aforesaid, on the first day of July, in the year of our Lord one thousand nine hundred and five, at and in the county of De Soto aforesaid, did unlawfully and from a premeditated design to effect the death of one Charles Grant make an assault on the said Charles Grant, and a certain pistol, which then and there was loaded with gunpowder and leaden bullets and by him the said Charles Daniels had and held in his hand, he, the said Charles Daniels, did then and there unlawfully and from a premeditated design to effect the death of the said Charles Grant shoot off and discharge at and upon the said Charles Grant, thereby and by thus striking the said Charles Grant with the said leaden bullets inflicting on and in the body of the said Charles Grant one mortal wound, of which said mortal wound the said Charles Grant then and there died. And so the said Charles Daniels did, in manner and form aforesaid, unlawfully and from a premeditated design to effect the death of the said Charles Grant, kill and murder the said Charles Grant, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Florida."

To this indictment, March 13, 1906, the defendant pleaded not guilty, was tried and convicted of murder in the first degree, and afterwards moved in arrest of judgment upon the following grounds:

"First. The indictment, under and by virtue of which the defendant stands convicted, does not charge the crime of murder in the first degree.

"Second. The said indictment does not charge that the homicidal act therein alleged was done from a premeditated design to effect the death of the deceased."

The error assigned is the overruling of this motion and the holding thereby that the indictment was sufficient to charge murder in the first degree.

The objection which is urged to this indictment is "that the homicidal act is not alleged to have been done with a premeditated design to effect death." Undoubtedly the homicidal act or efficient cause of the death—that is, the infliction of the mortal wound—must be charged to have been perpetrated from a premeditated design to effect death, and the indictment will be fatally defective if it fails to so charge. Of course, this allegation that the homicidal act was perpetrated from a premeditated design to effect death could be made by repeating the words "from a premeditated design to effect the death of the said Charles Grant" in the clause which shows the giving of the wound, as is done in the form given in 8 Chitty's Crim. Law, 753, and as is contended for by counsel for plaintiff in error here. But, as was said by Hawkins in the second volume of his treatise of the Pleas of the Crown, on page 314: "It hath been adjudged that if, in the first part of an indictment of death, the assault be laid with malice prepense, etc., there is no need to repeat it in the following clause, which shows the giving of the wound, being joined with a copulative to the precedent sentence and laid at the same time and place with the assault."

The indictment before us charges the assault, the discharge and shooting off of the pistol by the defendant unlawfully and from a premeditated design to effect the death of Grant, the deceased. Although the words "from a premeditated design to effect death" are not repeated when the indictment charges the infliction of the mortal wound, yet these words, previously alleged, are connected with the mortal stroke by the words "thereby and by thus"; and the words "from a premeditated design to effect the death of" the deceased run through the subsequent allegations and are thus connected with the infliction of the mortal wound to which they are essential. Bishop is ample authority for holding that this manner of charging the infliction of the mortal wound from a premeditated design to effect death is sufficient. Indeed, the indictment in the instant case is taken from the form given by him in section 520, Bishop's Directions and Forms. In a note on this section, speaking of the clause in the indictment "thereby and by thus striking the said * * * with the said leaden bullet, inflicting," etc., "one mortal wound," Bishop says: "I have endeavored to avoid some of the common verbiage of this allegation, yet to omit nothing which any pleader would deem important." By the use of the words "thereby and by thus striking," in connection with the other allegations of the indictment before us, the pleader has clearly and fully, though briefly and succinctly, alleged that the defendant struck the deceased with the bullets fired from the pistol and gave the deceased a mortal wound, and that he so struck and

mortally wounded the deceased unlawfully and from a premeditated design to effect his death.

The word "thereby" in this indictment, signifies "by that means," or in consequence of the preceding allegations, and refers to all that precedes it, both as to the act of firing the pistol and to the premeditated design with which the pistol was discharged. *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52, text 54; *Lieuallen v. Mosgrove*, 33 Or. 282, 54 Pac. 200, 202, 664. This word "thereby" qualifies, and is to be read with, the subsequent clause "inflicting on and in the body of the said Charles Grant one mortal wound." The word "thus" means "in the way just indicated," and the clause "by thus striking the said Charles Grant with the said leaden bullets" likewise refers to the preceding allegations and charges a striking of the deceased with the leaden bullets. Giving to the indictment this reasonable interpretation, it means that the said Charles Daniels did then and there unlawfully and from a premeditated design to effect the death of the said Charles Grant shoot off and discharge the pistol loaded with leaden bullets at and upon the said Charles Grant, thereby and by thus striking (that is to say, by the means and in the manner just previously stated, including the premeditated design) the said Charles Grant with the said leaden bullets, inflicting, etc.; and, thus interpreted, it charges that the efficient cause of death was perpetrated from a premeditated design to effect the death of Grant.

In *State v. Haworth*, 24 Utah, 398, 68 Pac. 155, the information is drawn in the form given by Bishop; and, like the indictment before us, employs the words "thereby and by thus striking" to connect the words "feloniously," etc., previously alleged, with the infliction of the mortal wound. In that case the court said the contention of the appellant that the information does not charge him with murder in the first degree is untenable.

Speaking of the indictment set out in *Shepherd v. State*, 64 Ind. 43, and in which the word "thereby" is used, the court said: "It is well drawn and sufficient in every particular."

Other authorities hold that an indictment will be made good, notwithstanding it fails to allege that the wound was feloniously, willfully and of his malice aforethought, etc., given, provided that the words feloniously, etc., previously alleged, are connected with the mortal stroke by the words "and then and there"; for, in such case, the words "feloniously," etc., will run through the subsequent allegations and be thus connected with the mortal stroke. *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936; *State v. Herrell*, 97 Mo. 105, text 109, 10 S. W. 387, 10 Am. St. Rep. 289; 1 East, P. O. 346; 2 Hale, P. O.

184; *State v. Lakey*, 65 Mo. 217; *State v. Steeley*, 65 Mo. 218, 27 Am. Rep. 271; *State v. Sides*, 64 Mo. 383; *State v. Owen*, 5 N. C. 452, text 458, 4 Am. Dec. 571; *People v. Davis*, 78 Cal. 355, 15 Pac. 5; *People v. Davis*, 8 Utah, 412, 32 Pac. 670; *State v. Rice*, 149 Mo. 461, 51 S. W. 78.

In *State v. Owen*, supra, the Supreme Court of North Carolina refers approvingly to certain English decisions. Thus: "Where the indictment charges that A. feloniously and of his malice aforethought assaulted B., and with a sword," etc., "and then and there struck him," etc., "held the first allegation 'feloniously and of his malice aforethought,' applied to the assault, ran also to the stroke to which it is essential." And so where an indictment stated that the prisoner did willfully, feloniously, and of his malice aforethought mix poison, with the intent the same should be taken and eaten by the deceased, "and the said poison then and there delivered to the deceased," the indictment was held sufficient by all the judges, without the words "feloniously and of her malice aforethought," immediately preceding the allegation of delivering the poison; for they considered that these words ran by the word "and" and the words "then and there," and became applicable to the delivery of the poison.

We fail to see how the words "from a premeditated design to effect death," as first alleged, could be connected with the giving of the mortal wound by the words "and then and there" any more clearly and properly than by the words "thereby and by thus." Indeed, the latter expression carries the mind more easily, naturally, and forcibly back to the previous allegation of the premeditated design to effect death than is done by the former.

We have carefully considered the decision of this court in *Simmons v. State*, 32 Fla. 387, 18 South. 896. We think that the law is correctly stated in the headnote of that decision as follows: "In cases of murder, according to strict rule, it seems that the homicidal act, or the act which is the efficient cause of death, must be alleged to have been done with a premeditated design to effect the death of the deceased; and where this is not done the indictment is defective."

We differ, however, from the suggestion in the opinion that the indictment in that case was defective in not alleging that the efficient cause of death was from a premeditated design to effect death. In so far, therefore, as any expressions in *Simmons v. State* are in conflict with the views here expressed, the same are disapproved.

Finding no error, the judgment of the circuit court in said cause is hereby affirmed, at the cost of the county of De Soto; the plaintiff in error having been adjudged to be insolvent.

TAYLOR and HOCKER, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

LAWRENCE v. DOE ex dem. ALABAMA STATE LAND CO.

(Supreme Court of Alabama. June 30, 1905.)

1. ADVERSE POSSESSION—BURDEN OF PROOF.

Where, in ejectment, plaintiff establishes a complete chain of title to the land, defendant has the burden of proving the defense of adverse possession relied on.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 661.]

2. SAME—QUESTION FOR JURY.

Where, in ejectment, plaintiff established a complete chain of title, and defendant set up adverse possession, and plaintiff showed that defendant stated, a short time before the institution of the suit, that he claimed only 40 acres in a section which was not embraced in the suit, and defendant denied making the statement, the question whether defendant had title by adverse possession was for the jury.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 691-701.]

3. SAME—CONSTRUCTIVE POSSESSION.

The doctrine of constructive possession of lands, by the cultivation of a part accompanied by a claim of the whole tract under color of title, does not apply to large tracts of land not purchased for actual cultivation, nor where one maintains a few acres of land in an uncultivated township for the purpose of thereby claiming title to the entire township by the extension of his actual possession under his color of title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 547-574.]

4. SAME—INSTRUCTIONS.

An instruction that, if the evidence failed to show that a sufficient portion of the lands was within the inclosure of the party claiming title by adverse possession, that would attract the attention of a reasonably prudent owner that the inclosure included a portion of his land, such inclosure would not be sufficiently notorious to extend the possession to the lands outside the inclosure, was not erroneous, as going beyond the rule as to notoriety of the possession and the acquiescence of the owner to constitute possession sufficient to ripen into title by adverse possession.

5. SAME.

An instruction that to support a title by adverse possession the possession must have been actual, open, notorious, and continuous for a period of 10 years, and where the possession was of such a small portion of the land sued for that a reasonably prudent owner would not have notice from it that his lands were included, the possession would be insufficient to support a title by adverse possession outside the inclosure of the occupant, was not erroneous, as going beyond the rule as to the notoriety of the possession and the acquiescence of the owner sufficient to acquire title by adverse possession.

6. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

An instruction in a civil action, authorizing a verdict for one party unless the adverse party has satisfied the jury by a preponderance of the evidence of the existence of a particular fact, was erroneous, because requiring too high a degree of proof; it being necessary for the adverse party only to reasonably satisfy the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 548.]

7. SAME—MISLEADING INSTRUCTIONS.

An instruction, in ejectment defended by a claim of title by adverse possession, that unless

plaintiff, showing a complete chain of title, knew that defendant was setting up an adverse claim to the lands in controversy, a verdict must be rendered for plaintiff, unless defendant had satisfied the jury that the inclosure of a few acres within the tract in controversy, etc., gave notice of the adverse claim to the plaintiff as would have compelled it unless it willfully closed its eyes to the fact, was misleading, because leading the jury to infer that the acts of possession were not binding on plaintiff unless it had an opportunity to know, and failed to know by closing its eyes.

8. EJECTMENT—EVIDENCE—ADMISSIBILITY.

Where, in ejectment, defendant claimed title by deed from a third person and through possession by a third person prior to the execution of the deed and by himself since, it was competent to show on the cross-examination of the witness, who testified that the third person had claimed the land, and that others also claimed it.

9. EVIDENCE—DECLARATION OF OWNERSHIP—ADMISSIBILITY.

The rule permitting the introduction in evidence of declarations of ownership by a party in possession, for the purpose of establishing adverse possession, does not include acts of parties who have never been in possession.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1108-1120.]

10. SAME — EVIDENCE OF UNCOMMUNICATED REASONS—ADMISSIBILITY.

A defendant, claiming title by adverse possession, cannot, when sued in ejectment by a party showing a complete chain of title, testify why he did not pay taxes on the premises; for one cannot testify as to his uncommunicated motives.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 440.]

11. EJECTMENT—COSTS.

In ejectment for about 400 acres of land, defendant disclaimed possession as to 40 acres. Plaintiff recovered a judgment as to most of the land sued for. Held, that a judgment against defendant for all the costs was not erroneous.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 431-434.]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

"To be officially reported."

Ejectment for the recovery of about 400 acres of land by the Alabama State Land Company against Joel J. Lawrence. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Upon the trial, the plaintiff proved the legal title to be in it. The defendant claimed title by a deed from one John W. Norwood, executed to him on the 8th day of February, 1883, and through possession by said Norwood prior to that time, and by himself since. One E. J. Crider, a witness for the defendant, testified that he had been a justice of the peace in Tuscaloosa county continuously since 1859; that he knew the lands in controversy; that he knew the said John W. Norwood, and prepared and took the acknowledgment to the deed executed by him to the defendant; that said Norwood, when he executed the deed, claimed that he owned the lands described therein; and that witness had heard the lands spoken of as the "Norwood lands." The above deed was put in evidence, and it was also shown that for more than ten years prior to bringing the suit the

defendant had been in actual possession of from three to six acres of the land in suit. The land so occupied was inclosed by a fence, which also inclosed a larger tract owned by the defendant, not involved in this suit. Other facts, as far as necessary, are shown by the opinion. On the written request of the plaintiff the court gave to the jury the following written charges: "(1) The court charges the jury that the burden of proving adverse possession is upon the defendant; and, if the evidence fails to reasonably satisfy the jury that a sufficient portion of the lands in suit was within defendant's inclosure, that would attract the attention of a reasonably prudent owner that the inclosure included a portion of the land in suit, then such inclosure would not be sufficiently notorious to extend the possession to the lands outside the inclosure. (2) Unless the jury believe, from the evidence in this case, that the Alabama State Land Company knew that Lawrence was setting up an adverse claim to the lands involved in this suit, you must find for the plaintiff, unless the defendant has satisfied you by a preponderance of the evidence that the inclosure of the few acres within the field, otherwise on his own land, and such a getting of timber as Lawrence got, gave such notice of the adverse claim to the Alabama State Land Company as would have compelled it, unless the company or its agents willfully closed their eyes to the fact. (3) The court charges the jury that, in order to sustain the defense of adverse possession, the possession must have been actual, open, notorious, and continuous for a period of 10 years before suit brought; and, if the possession was of such a small portion of the land sued for that a reasonably prudent owner would not have notice from it that his lands were included in such inclosure, then the possession would be insufficient to sustain the defense of adverse possession of any of the lands sued for outside of the inclosure." The defendant requested, in writing, the general charge in his favor, which was denied. There was verdict and judgment for the plaintiff, including all costs.

Robinson Brown, Daniel Collier, and J. J. Mayfield, for appellant. Henry Fitts, for appellee.

ANDERSON, J. The plaintiff established a complete chain of title to the land, and the defendant set up adverse possession to all the land involved, except the portion as to which he disclaimed, and the burden of proof was upon him to establish his title by adverse possession, the essential elements of which are: "(1) The possession must be hostile and under claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. If any of these constituents be wanting, the possession will not effect a

bar to the legal title." *Chastang v. Chastang* (Ala.) 37 South. 799; 1 Am. & Eng. Ency. Law (2d Ed.) 795; *Murray v. Hoyle*, 97 Ala. 588, 11 South. 797; *Ross v. Goodwin*, 88 Ala. 390, 6 South. 682; *Eureka Co. v. Norment*, 104 Ala. 625, 16 South. 579; *Goodson v. Brothers*, 111 Ala. 589, 20 South. 443; *Normant v. Eureka Co.*, 98 Ala. 181, 12 South. 454, 39 Am. St. Rep. 45. There was evidence on the part of the plaintiff that the defendant stated, but a short time before the suit was brought, that he claimed only 40 acres in section 9 and which was not embraced in this suit. This alone was sufficient to make it a question for the jury as to whether or not the defendant's possession was hostile, in view of the fact that he denied having made the statement, even if all the other elements of adverse possession were established, but which we do not mean to concede. The general affirmative charge was properly refused.

Of course, there are instances where the actual possession of a part of the land will be extended by color of title to the whole tract described in the color of title, in the absence of any actual possession of any part of the tract by the true owner, and, in fact, such seems to be the general rule. There are exceptions, however, and instances where the actual possession of a part does not necessarily extend the adverse possession to the whole tract, as against the true owner who is not in the actual possession of any of it; it depending to a great extent upon the quality and character of the land, the nature and character of the possession, and the purpose for which the entry was made. The rule seems to have no application where a person takes and maintains a few acres of land in an uncultivated township, for the mere purpose of thereby gaining title to the entire township by an extension of his actual possession under his color of title to the exclusion of the rightful owner. *Chandler v. Spear*, 22 Vt. 388. Nor does the doctrine of constructive possession of lands by the cultivation of a part, accompanied by a claim of the whole tract under color of title, apply to large tracts of land not purchased for actual cultivation. *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276, 18 Am. Dec. 525. "And it has been held that, in order that that part of the land which is not actually possessed may be deemed constructively so, it must be for use with or subservient to the part of which the claimant has actual possession; in other words, constructive possession will extend only to such land as is used in connection with the land actually possessed, and to only so much as is reasonable and proper for the purpose according to the custom of the country. But the actual occupancy of only a part of a tract under color of title will give constructive possession of the remainder, if it is according to the custom of the country naturally subservient to and used in con-

nection with the part actually occupied." 1 Am. & Eng. Ency. Law (2d Ed.) 864.

In the case at bar it seems necessary for us to determine whether the possession of the few acres in the overlap extended the defendant's possession to all of the land described in the deed to Norwood, as there was evidence disputing the claim of adverse possession to all of the land including the overlap. So, too, the defendant proved acts of possession upon the land outside of the overlap, and we discuss the rule and exceptions therefrom in order that we may not create the impression that the actual possession of a small overlap under all conditions would necessarily extend the possession to all land described in the color of title. "The doctrine of adverse possession rests upon the presumed acquiescence of the party against whom it is held, and such acquiescence again presumes knowledge. All the law requires, therefore, is that the possession, or rather the acts of dominion by which it is sought to be proved, shall be of such a character as may be reasonably expected to inform the true owner of the fact of possession and adverse claim of title." *Foulke v. Bond*, 41 N. J. Law, 547; *Farley v. Smith*, 39 Ala. 44. It is sufficient if such owner has either knowledge or notice of such fact of possession and claim, which, as said by Baron Parke in *May v. Chapman*, 16 Mees. & Wel. 355, "mean not merely express notice, but knowledge, or the means of knowledge, to which the party willfully shuts his eyes." *Wells v. Sheerer*, 78 Ala. 142; *Woods v. Montevallo Co.*, 84 Ala. 560, 3 South. 475. 5 Am. St. Rep. 393.

Charges 1 and 3, given at the request of the plaintiff, did not go beyond the rule heretofore declared as to the notoriety of the possession and the acquiescence of the owner, and the trial court committed no error in giving them.

Charge 2 was faulty, and the court erred in not refusing it. It required too high a degree of proof, it required the defendant to satisfy the jury, and it was only necessary to reasonably satisfy the jury. *Torrey v. Burney*, 113 Ala. 497, 21 South. 348; *Prince v. State*, 100 Ala. 146, 14 South. 409, 46 Am. St. Rep. 28; *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311. It also requires that the possessory acts must have been such as "compelled" the plaintiff to know of the adverse claim, unless it or its agents willfully closed their eyes to the fact. While the rule is, that such acts are sufficient, if such owner has either knowledge or notice of such facts of possession and claim, not merely express notice, but knowledge or the means of knowledge to which the party shuts his eyes. From reading the charge the jury might infer that, even if the possessory acts were sufficient, the

plaintiff would not be bound thereby, unless said acts compelled it to know of the adverse claim unless its agents shut their eyes thereto. The acts may have been sufficient, yet insufficient to compel the plaintiff to know of the adverse claim under all conditions. The charge was at least misleading and confusing, and the jury might have inferred therefrom that the acts of possession were not binding on the plaintiff, unless it had an opportunity to know and failed to know by closing its eyes. The acts of possession may have gone on, the plaintiff may not have closed its eyes, yet have so conducted itself by neglecting to go upon the land as to not be compelled to know of the adverse claim.

It is needless to consider the act of the court in excluding the statement of Grider: "It was his information that Norwood claimed the land which he attempted to convey to the defendant by said deed"—as he subsequently testified that "Norwood claimed to him on the day the deed was made that he owned the land and that it was known as 'Norwood's land.'" Nor was there any error in permitting the plaintiff upon cross-examination to ask the witness "if it was not his information that the railroad was claiming the land at the time." The witness had just testified that "Norwood was claiming it and it was known as the Norwood land," and it was certainly competent to show that others were claiming it, and to get from the witness all the information he had on the subject.

While declarations of ownership by a party in possession can be shown in establishing adverse possession, we do not think the rule includes acts of parties who were never in possession; and the objection to the question to witness Dalley, "Did Norwood try to sell the land to any one else?" was properly sustained.

The action of the trial court in sustaining the plaintiff's objection to the question of the defendant, "Why did you not pay the taxes on the land?" was proper. A witness cannot testify as to his uncommunicated motive or reason. *Dent v. State*, 105 Ala. 14, 17 South. 94; *Ball v. Farley*, 81 Ala. 288, 1 South. 253.

The disclaimer related to only a small portion of the land, and we do not see how it affected the amount of cost. The plaintiff recovered a judgment as to most of the land sued for, which carried the cost, and there was no error in rendering judgment against the defendant for all the cost. *Buxbaum v. McCorley*, 99 Ala. 337, 13 South. 5.

For the error heretofore pointed out, the judgment of the county court is reversed, and the cause remanded.

MCOLELLAN, C. J., and DOWDELL and DENSON, JJ., concur.

D. P. HAYNES & BRO. v. W. O. GRAY & CO.

(Supreme Court of Alabama. May 29, 1906.)

1. CHATTEL MORTGAGES—CROPS—CONVERSION—RIGHTS OF MORTGAGEE—BURDEN OF PROOF.

In an action to recover for the conversion of a portion of a mortgaged cotton crop alleged to have been sold to defendant, the burden was on plaintiff to show that the cotton so sold was raised by the mortgagor.

2. SAME—LIABILITY OF PURCHASER.

Where a chattel mortgage is given on an unplanted crop, any person who converts it to his own use after it is gathered, with actual or constructive notice of the lien, is liable to the mortgagee in an action on the case.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 305.]

3. SAME—NOTICE OF MORTGAGE.

Where defendant purchased a portion of a cotton crop covered by a chattel mortgage, and the cotton purchased was evidenced by warehouse receipts issued to the mortgagor, such receipts and the registration of the mortgage were sufficient to charge defendant with notice that the cotton had been raised by the mortgagor and his tenants, and was subject to the lien.

4. EVIDENCE—RECOLLECTION OF WITNESS.

Where, in an action by a mortgagee for conversion of cotton, a warehouseman who had issued receipts therefor was asked if the cotton described in the receipts was taken out by defendants, his answer that that was his best judgment was admissible.

Appeal from City Court of Anniston; Thomas W. Coleman, Judge.

"Not officially reported."

Action by D. P. Haynes & Bro. against W. O. Gray & Co. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

James T. Green, for appellants. Matthews, Martin & Matthews, for appellees.

HARALSON, J. This was an action of trover brought by Haynes & Bro., appellants, against appellees, W. O. Gray & Co. for the conversion of 13 bales of cotton alleged to be the property of the plaintiffs.

The contention of plaintiffs proceeds on the theory, that the cotton was grown by W. W. Johnson in the year 1903, in Calhoun county, Ala., on which said Johnson had given mortgages to plaintiffs. The claim is rested also, on similar mortgages given to other parties, which had been transferred to plaintiffs.

The evidence tended to show, that Johnson grew or procured to be grown by tenants in the year 1903 in said county of Calhoun, quite a number of bales of cotton; that he gave two mortgages to plaintiffs on his crops of 1903, and another to the Anniston National Bank, which was transferred to plaintiffs. There was another mortgage on a mule to one Frye, transferred to plaintiffs and unnecessary to be noticed.

The evidence shows without conflict, that at least 11 bales of this cotton was delivered to the Oxford Warehouse Company, in the month of October, 1903, the receipts on their face showing, that the cotton was received

from M. W. Johnson. The defendant, W. C. Gray, testified that he purchased from W. S. Aderhold and others, a number of bales of cotton, in said warehouse, some of which were evidenced by warehouse receipts issued to said Johnson, and that he did not know of said Johnson having any connection of any kind with any of this cotton, further, than it appears from his cotton-book that Johnson's name appears on the warehouse tickets for all of it except one bale, where the ticket was issued to one Coleman.

There was no proof that defendants had actual knowledge that this cotton was covered by any of the mortgages owned by plaintiffs, nor that defendants knew that Johnson had any connection with said cotton, further than what appeared on said warehouse receipts. There was evidence from which the inference might have been indulged, that some of the cotton might have been raised by Johnson or his tenants. As to this fact, however, the evidence was not without conflict.

It was incumbent on the plaintiffs to show to the satisfaction of the court, trying the case without a jury, that the cotton was raised by Johnson, and unless that was done the plaintiffs had no right to recover. *Woolsey v. Jones*, 84 Ala. 88, 4 South. 190. The plaintiffs sought to discharge this burden, by introducing in evidence Johnson's mortgages, with the evidence of their record in the probate office.

In the case of *Rees v. Coats*, 65 Ala. 256, it was said: "When the mortgage is on an unplanted crop, any person who converts it to his own use after it is gathered, with actual or constructive notice of the lien, is liable to the mortgagee in an action on the case." In *Woods v. Rose*, 135 Ala. 302, 33 South. 41, approving what was said in *Rees v. Coats*, 65 Ala. 256, it was added: "The description of the property in the mortgage, though general, is sufficient to put on inquiry; and the defendant purchasing from the mortgagor, was bound to ascertain whether the cotton he purchased was the same conveyed by the mortgage. Registration of such mortgage in the proper office is constructive notice." "A person chargeable with constructive notice is as much bound thereby as if the notice were actual." 21 Am. & Eng. Ency. Law (2d Ed.) 582; 21 Am. & Eng. Ency. Law (2d Ed.) 584.

Here, the warehouse receipts gave the defendants notice that Johnson had connection with the cotton they purchased; the registration of plaintiffs' mortgage, gave notice of their claim on all cotton raised by Johnson or his tenants in 1903 and the plaintiffs being thus informed, by diligent inquiry might have ascertained whether any of the cotton was raised by Johnson or his tenants. Furthermore, the warehouseman, who issued the receipts, during the course of his examination, was asked by plaintiffs, "If the cotton described in the receipts was taken out by

defendants?" and he answered "that in his best judgment the cotton described in receipts was cotton taken out by defendants." An objection to this answer by defendants, was sustained by the court. This was but the statement in another form, of the witness' best recollection of the fact, which was pertinent, and was clearly admissible. *A. G. S. R. Co. v. Hill*, 93 Ala. 520, 9 South. 722, 30 Am. St. Rep. 65; *Elliot v. Dyche*, 80 Ala. 376.

The court was in error in deciding in favor of defendants, at least as to all of the cotton. Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and SIMPSON, JJ., concur.

BIRMINGHAM RY., LIGHT & POWER CO. v. RYAN.

(Supreme Court of Alabama. May 30, 1906.)

1. STREET RAILROADS—PERSONAL INJURIES—PLEADING—ALLEGATIONS OF NEGLIGENCE.

In an action against a street railroad company for personal injuries, an allegation that defendant's servant in charge of the car so negligently conducted himself as to run the car against plaintiff's intestate was sufficient, and not objectionable as a conclusion of the pleader, or for failure to set forth facts from which negligence could be inferred.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 224.]

2. SAME—INSTRUCTIONS.

In an action against a street railroad company for personal injuries, instructions that whether or not the motorman was guilty of negligence depended upon whether he acted as a reasonably careful motorman would have done under the same circumstances, and that if a motorman should, by reason of excitement or otherwise, do something or fail to do something which an ordinarily prudent motorman would not have done or failed to do under the circumstances, he would be negligent, while perhaps misleading, were not reversible error.

3. SAME.

In an action against a street railway company for personal injuries, an instruction that, even though deceased went on the track so near the car that the motorman could not stop in time to avoid knocking him down, yet if the motorman, after he became aware of the peril, could have avoided killing intestate, the act of the latter in going on the track would not be the proximate cause of the injury was correct in principal, and, if objectionable as abstract, was not cause for reversal.

4. NEGLIGENCE—WILLFUL AND WANTON MISCONDUCT.

In an action for negligence causing death, contributory negligence of deceased is no defense, if defendant was guilty of wanton or willful misconduct, and he may be guilty of such misconduct without any actual intention to inflict injury.

5. STREET RAILROADS—INJURY TO PERSON ON TRACK—FAILURE TO LOOK AND LISTEN.

If a person goes on a street railroad track in close proximity to an approaching car without stopping, looking, and listening, and is run over and killed by the car, it must be presumed that his conduct contributed to his death.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 207, 208.]

6. SAME—PROXIMATE CAUSE.

The mere fact that a person is guilty of negligence in going on a street railroad track in close proximity to an approaching car does not, as a matter of law, show that his conduct was the proximate cause of his being struck by the car.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 251, 253.]

7. TRIAL — INSTRUCTIONS — IGNORING EVIDENCE.

In an action against a street railroad company for negligence, causing the death of a pedestrian crossing the track, in which there was evidence that the car was operated at a rapid rate of speed over a populous crossing without signals of approach, and that the motorman knew the character of the place and the frequency with which people were accustomed to pass, charges ignoring the question of wanton and willful misconduct of defendant's motorman were properly refused.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"To be officially reported."

Action by D. O. Ryan, as administrator of Conrad Richwein, against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action by the administrator of Conrad Richwein, suing to recover damages for the negligent killing of the intestate by appellant. The complaint contained but two counts. Count 1 was in the following language: "Plaintiff claims of the defendant \$25,000 as damages, for that heretofore, to wit, on the 21st day of September, 1901, the defendant was operating a street car by electricity upon a railway upon and on grade with a public highway in the city of Birmingham, Ala., to wit, upon First avenue at or near its intersection with Twentieth street, in said city, and on said day defendant's servant or agent in charge of or control of said car, acting within the line and scope of his employment as such servant or agent, so negligently conducted himself that as a proximate consequence thereof said car ran upon or against said intestate upon said highway at or near its intersection with Twentieth street, in said city, and so injured him that he died." Count 2 contained the same allegations of negligence, but alleged that these injuries were wantonly, willfully, or intentionally inflicted.

The demurrers appear in the opinion. The defendant filed pleas 1, 2, and 3, which are the general issue, and special pleas 4 and 5, alleging contributory negligence, in that deceased stepped on the track immediately in front of a moving train of cars and as a proximate consequence sustained the injuries complained of, and that he negligently attempted to board a moving car. Afterwards defendant filed the sixth plea: "For a further answer to the first count of the complaint, defendant says that plaintiff's intestate was guilty of negligence which proximately contributed to his injury and death, in

this: that he negligently went upon or in close proximity to the defendant's said track without stopping or looking or listening."

The evidence for the plaintiff tended to show that the plaintiff was struck as he was crossing First avenue between Twentieth and Twenty-First street; that the car was running about 10 miles an hour; that plaintiff's intestate was almost across the track when the motorman halloeed, "Look out!" when intestate turned his face toward the car and was struck. There were two cars in the train, and they ran the distance of both cars after striking him. The evidence tended to show for plaintiff that the motorman did not ring the gong or try to stop the car until after it struck plaintiff's intestate. The evidence for defendant tended to show that the bell was ringing as the car approached, when defendant stepped up to the car and tried to board it with a bundle in his hand. He stepped almost in front of the car. And other evidence tended to show that the plaintiff's intestate attempted to cross the track immediately in front of the moving car, and other evidence tended to show that the motorman did all he could to stop the car after discovering the danger.

The plaintiff asked the following written charges, which were given: "(1) Whether a motorman was guilty of negligence or not depends upon whether he acted as a reasonably prudent and careful motorman would have done under the same circumstances. (2) If a motorman should, by reason of excitement or otherwise, do something or fail to do something which an ordinarily cautious and prudent motorman would not have done or failed to do under the same circumstances, then the doing or failing to do that thing would be negligence. (3) Even though the jury should believe from the evidence that Conrad Richwein did go on the track so near the car as that the motorman could not stop in time to avoid knocking him down, yet if the jury are reasonably satisfied from the evidence that after the motorman became aware of his peril the motorman, by the diligent and careful use of all the means at command, could have avoided the death of Richwein, then the act of Richwein in going or being on the track in front of the cars would not be the proximate cause of the death, and the plaintiff would be entitled to a verdict under the first count, or simple negligence count, if the jury are reasonably satisfied from the evidence that said first count is true. (4) Even if Richwein was guilty of negligence which proximately helped to cause his own death, then plaintiff would be entitled to a verdict if the jury are reasonably satisfied from the evidence that the second count is true. To prove the second count, it is not necessary to prove that the motorman had any actual intent to injure Richwein or anybody else. (5) It is not necessary to a recovery by plaintiff under either the first or the second count

of the complaint that the motorman should have had any actual desire to injure Conrad Richwein or any one else. (6) If the jury are reasonably satisfied from the evidence that the first count of plaintiff's complaint is true, which count charges simple negligence only, then plaintiff's case is made out, and the verdict of the jury must be for the plaintiff, unless the jury are reasonably satisfied from the evidence that Richwein was himself guilty of negligence which proximately contributed to his death. (7) The mere fact, if it be a fact, that Conrad Richwein was guilty of negligence in going or being on the track in close proximity to an approaching car would not necessarily as a matter of law be the proximate cause of his death; but the question as to what was the cause of his death is for the jury."

The following charges were requested by the defendant, and refused by the court: "(1) If you believe from the evidence that, as soon as Richwein got upon the track in front of the car, the motorman did all he could to stop the train or car, you must find for the defendant. (2) If you believe from the evidence that, as soon as Richwein got upon the track in front of the car, the motorman did all he could to stop the train of cars, that the train was then running two or three miles an hour, you must find for the defendant. (3) I charge you that under the undisputed evidence the plaintiff's intestate was guilty of contributory negligence. (4) If you believe from the evidence that, as soon as the motorman discovered Richwein on the track in front of the car, he made an effort in good faith to stop the car, and endeavored to do all he could to avoid injuring Richwein, you cannot find for the plaintiff under the second count of the complaint. (5) If you believe from all the evidence that, as soon as Richwein got upon the track in front of the car, the motorman did all he could to stop the car, you must find your verdict for the defendant. (6) I charge you that you cannot under the evidence in this case find that the motorman was guilty of simple negligence after Richwein got into a position of peril on the track in front of the car. (7) If you believe, after a fair consideration of the evidence, that the motorman did everything that he could do to stop the car as soon as Richwein got on the track in front of the car, it is your sworn duty to render your verdict in favor of the defendant." "(9) If you believe, after a fair consideration of all this evidence, that the motorman did everything that he could do to stop the car after Richwein got on the track in front of the car, you must render your verdict in favor of the defendant." "(12) If you believe, from all the evidence, that the motorman of the car did everything he could do to stop the car after plaintiff's intestate got on the track, you cannot find for the plaintiff under the second count of the complaint. (13) If you believe

from all the evidence that the motorman of the car did everything that he could have done to stop the car after plaintiff's intestate got on the track, you cannot find for the plaintiff under the second count of the complaint." "(19) If you believe from the evidence that Richwein went upon the track in front of the car when the car was so close to him that the car could not have been stopped before striking him and knocking him down and injuring him, you must find for the defendant." "(24) If you believe from the evidence Conrad Richwein got upon the track in front of the car four or five feet from the car, you cannot find for the plaintiff under the second count of the complaint. (25) If you believe from the evidence that Conrad Richwein got upon the track in front of the car four or five feet from the car, that it was then impossible for the train of cars to have been stopped before the said Richwein was struck down, you must find for the defendant." "(27) If you believe from the evidence that when Richwein got upon the track in front of the car there was not time to avoid striking him with the car and knocking him down, you must find for the defendant."

The court gave, among other charges, the following charge, marked 4, at the request of defendant: "(4) If you believe from the evidence that, as soon as Richwein got upon the track in front of the car, the motorman did all he could to stop the train or car, and that the car was then running two or three miles an hour, you must find for the defendant."

There was verdict for the plaintiff, and defendant appeals.

Tillman, Grub, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

HARALSON, J. The first count in the complaint is one averring simple negligence, and under our decisions it sufficiently avers the negligence of the defendant in killing the deceased, and was not subject to the demurrer interposed,—that the averment of negligence is a mere conclusion of the pleader, and fails to show what constituted the negligence complained of, or to set forth any facts from which that negligence can be inferred. *Glass v. M. & C. R. R. Co.*, 94 Ala. 588, 10 South. 215; *W. R. Co. v. Lazarus*, 88 Ala. 456, 6 South. 877; *Stanton v. L. & N. R. Co.*, 91 Ala. 384, 8 South. 798; *Russell v. Huntsville R. L. & P. Co.*, 137 Ala. 631, 34 South. 855.

Charge 1 for plaintiff was, perhaps, misleading, but this, if true, is not reversible error. It would have been better, for the court to charge the jury as to what were the duties of a motorman, when acting under the same circumstances that this one acted under, and leave it to them to determine whether the duty was not performed in a reasonably prudent and careful manner. These

observations apply with equal force to charge 2, which, at most, was misleading.

Charge 3 for plaintiff asserts a correct proposition of law, and if it be abstract, this would not operate to constitute reversible error.

The fourth and fifth charges for plaintiff appear to be proper instructions. Wantonness overcomes contributory negligence, and a party may be guilty of wanton or willful misconduct without having the actual intent to do the thing which causes the negligence. *Birmingham Ry. & Elec. Co. v. Pinckard*, 124 Ala. 372, 28 South. 880.

The sixth charge states a legal truism. As a matter of law, if one goes on the track of a railroad in close proximity to an approaching car without stopping, looking and listening, and is run over and killed by the car in the absence of an intervening cause, it must be presumed his conduct contributed to his death.

Charge 7 was correct. It is not always the case that negligence in going on the track is the proximate cause of injury. There may be subsequent negligence of the defendant that is the proximate cause.

Charges 1, 4, 5, 7, 9, 12, 13, 19, 24, 25 and 27, requested by defendant, were properly refused. These charges all ignore the evidence tending to show wantonness of defendant's servant in running the car at a rapid rate of speed over a very populous crossing, without signals of approach. *A. E. Denham*, witness for plaintiff, testified: "Lots of people cross along there. More people cross there, Saturday night, I believe, than any time in the week. I suppose, that it is the most populous thoroughfare in Birmingham. I never heard the motorman ring the bell before he struck Richwein. I never heard him ring at all. He did not ring any gong. He ran the car over First avenue over 10 miles an hour." There was other evidence corroborating that of this witness. The evidence also tended to show, that the motorman knew the character of the place and the frequency with which people were accustomed to pass. *Birmingham Ry. & Elec. Co. v. Jackson*, 136 Ala. 230, 34 South. 994; *Alabama G. S. R. Co. v. Guest*, 136 Ala. 348, 34 South. 968, and *Central of Georgia Ry. Co. v. Partridge*, 136 Ala. 587, 34 South. 927.

Charges 2, 8, 11, 14, 15 and 26, refused to defendant, were substantial duplicates of charge marked 4 on page 8 of transcript, and those marked 3 and 7 of page 9.

Charge 3, if technically correct, tended to mislead, in that it ignores all reference to the evidence tending to show wantonness or willfulness on the part of the motorman.

And the same thing is true of charge 6. If the jury might have found that the motorman was not guilty of simple negligence under the conditions hypothesized, yet, under the evidence, they might have found him guilty of wantonness or willfulness.

What has been said disposes of all the errors assigned, insisted on in argument.
Affirmed.

WEAKLEY, C. J., and DOWDELL and SIMPSON, JJ., concur

SMITH v. McCUTCHEN, Probate Judge.
(Supreme Court of Alabama. May 31, 1906.)

1. MANDAMUS — COUNTY WARRANTS — ISSUANCE — JUDGE OF PROBATE — MINISTERIAL DUTY.

When a claim against the county has been allowed, the issuance of a warrant therefor by the judge of probate, as required by Code 1896, § 1416, is a ministerial duty, the performance of which may be enforced by mandamus.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 217-219.]

2. COUNTIES—CLAIMS—AUDIT.

The entering into a contract between an architect and county commissioners for services of the architect and the entry of such contract on the minutes of the court did not constitute an audit or allowance of the claim of the architect for services rendered under the contract, within Code 1896, § 1417, so as to charge the probate judge with the duty of issuing a warrant under section 1416, declaring that after audit the judge of probate shall give the claimant a warrant on the treasury.

3. MANDAMUS—COUNTY WARRANT.

In order that mandamus will lie to compel a judge of probate to draw a warrant against the county for a claim against it, the sum for which the warrant should be drawn must be a definite sum, shown by the record of the court to have been audited and allowed as required by Code 1896, §§ 1416, 1417.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 217-219.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

"To be officially reported."

Mandamus by B. B. Smith against W. W. McCutchen, as judge of probate of Jackson county. From a judgment denying the writ, petitioner appeals. Affirmed.

Virgil Bouldin, for appellant. Billbro & Moody, for appellee.

DENSON, J. This is a proceeding by mandamus commenced by B. B. Smith against W. W. McCutchen, as judge of probate of Jackson county, by which it is sought by the petitioner to compel the respondent to issue him a warrant for \$875 claimed by the petitioner to be due to him from the county. The circuit court sustained a demurrer to the petition, denied the relief sought, and adjudged the costs against the petitioner. From the judgment this appeal was taken.

There are numerous grounds of demurrer assigned, but the first ground, we think, raises the only material question to be determined. It is that the petition fails to show that the claim of the petitioner was ever itemized and sworn to by petitioner and audited and allowed by the commissioners' court. There is no pretense that the claim was ever itemized or sworn to, but under

the facts of the case it is appellant's insistence that there was no necessity for that formality; and it is insisted that the facts under which the claim arose show the equivalent of an auditing and allowance by the commissioners' court of the claim. On April 13, 1904, the court of county commissioners of Jackson county made an order for the erection of a new courthouse for the county. Petitioner prepared and presented to the commissioners complete plans and specifications for such courthouse, which, on examination and consideration by the court of county commissioners, were accepted and adopted, and a contract was duly entered into, as is shown by the petition and exhibits attached, in words and figures as follows:

"State of Alabama, Jackson County. Scottsboro, Ala., April 13th, 1904. From Benjamin B. Smith, Architect, to board of County Commissioners of Jackson County: For a compensation of five per cent. (5 per cent.) of the total costs of the building, I, Benj. B. Smith, architect, of Montgomery, Ala., agree to make full and complete plans specifications, details, and superintend the construction of a two-story brick courthouse at Scottsboro, Jackson county, Ala., make all estimates, and audit accounts for the same, payments to be made me by the county as follows: Two and one-half per cent. (2½ per cent.) when the plans and specifications are delivered to said board of commissioners, one and one-quarter per cent. (1¼ per cent.) when the building is under roof, and the balance of the one and one-quarter per cent. (1¼ per cent.) when the building is completed and turned over to the county. The first payment is to be made on the estimate cost of the building; the other payments, on actual contract price; the entire compensation to be reckoned on the full costs of the building, including all stationary fixtures. The architect will make all estimates, audit all accounts, inspect the building during the construction, assist the owner in enforcing the terms of the contracts with the contractors; but his liability shall be that of agent only, and he will not be responsible in any way for the failure of the contractor to complete his contract. If the work upon the building be postponed or abandoned, the compensation for the work done by the architect is to be as such relation to the compensation for the entire work done as determined by the published schedule of fees of the American Institute of Architects. Benj. B. Smith, Architect.

"Accepted and approved Apr. 13th, 1904. E. B. Hicks. J. M. Walker. W. H. Stovall."

The contract was entered of record on the minutes of the court of county commissioners as a part of the order of the court. At the same time and as a part of the same order of the court, the court entered into a contract with Dobson & Bynum for the erection of the house at an agreed price of \$35,-

000. The plans and specifications adopted and accepted by the court were made a part of the contract with Dobson & Bynum. The entire order of the court, including the contract with petitioner as architect, and with Dobson & Bynum, builders, duly certified, is made a part of the petition. The cash payment of 2½ per cent., amounting to \$875, to be paid petitioner on delivery of plan and specifications, is the sum for which he demanded the issuance of a warrant, and on refusal of the demand this suit was begun.

The statute (Code 1896, § 1416) requires that all claims against the county must be audited, and every claim, or such part thereof as is allowed, must be registered in a book kept for that purpose; and the judge of probate is required to give the claimant a warrant of the treasury for the amount so allowed. It is well settled law in this state that, when a claim has been audited and allowed, the issuance of the warrant for it by the judge of probate is a ministerial duty, to compel the performance of which mandamus is the remedy. *Jeffersonian Pub. Co. v. Hilliard*, 105 Ala. 576, 17 South. 112. In mandamus proceedings the relator must show to the court that he has a clear legal right to the performance of the act or duty demanded. *Moses on Mandamus*, 204; *Speed v. Cocke*, 57 Ala. 215. The right of the relator in this case depends upon whether the claim was audited and allowed before the application for the mandamus was filed.

It is obvious to our minds that the entering into the contract with Smith by the commissioners and entering it on the minutes of the court was not intended by them as an auditing or allowance of any claim that Smith had against the county. This view is reinforced by the statute (Code 1896, § 1417), which provides that no claim against the county shall be passed upon or allowed by the county commissioners, unless it is itemized and sworn to, etc. It was the foundation for a claim, but we do not think that it can or should be held to be auditing and allowing within the meaning of the statute, such as charged the duty upon the probate judge to issue a warrant. If so, we would be met at the very threshold with the query, for what amount shall the warrant be drawn? And it will not suffice as an answer that the probate judge could take the contract and by easy calculation determine the amount for which the warrant should be drawn. That is precisely what the law has imposed upon the commissioners—to audit—to adjust the claim, and does not allow the judge to do it. And the amount allowed must be a sum certain and must be a matter of record, and the record or decree, to be operative, must be certain and complete in itself, without reference to anything else by which to ascertain its meaning. *Crenshaw Co. v. Sikes*, 113 Ala. 626, 21 South. 135. As was

said by this court in *Board of Revenue v. Barber*, speaking with respect of these statutory requirements: "These regulations prescribed by law for the protection could not be set aside either by the contract, or order of the court of county commissioners, which in such matters was not a judicial tribunal, but an administrative body, like a board of directors, whose duty it was to manage the affairs of the county according to law." *Board of Revenue v. Barber*, 53 Ala. 589. It was further said in the case cited: "The probate judge has no authority to issue a warrant upon any claim until it has been audited as required by the statute, nor for any other sum than for the amount 'so allowed.'" *Speed v. Cocke*, 57 Ala. 209; *Crenshaw Co. v. Sikes*, 113 Ala. 626, 21 South. 135; *Commissioners' Court v. Moore*, 53 Ala. 25; *Jack v. Moore*, 66 Ala. 184; *Marshall County v. Jackson County*, 36 Ala. 613.

Certainty is essential, that it may appear that the warrant of the judge of probate, when drawn, is supported by the proper authority. It is not certain from the record that the acceptance and record of the contract made with Smith discloses a clear legal right to any particular sum of money. The most that can be said for it is that it fixes the rule for measuring his compensation, and to finally arrive at the particular amount, even according to this rule, resort must be had to another contract between the commissioners and other parties than Smith. We are of opinion that, before mandamus will lie to compel the judge of probate to draw a warrant, the sum for which the warrant should be drawn must be a definite and fixed sum, and it must be shown by the record to have been allowed. Code 1896, §§ 1416, 1417; *Crenshaw County v. Sikes*, 113 Ala. 626, 21 South. 135. *Board of Revenue v. Barber*, 53 Ala. 589; *Speed v. Cocke*, 57 Ala. 209; *Shinbone v. Randolph County*, 56 Ala. 183. The facts of this case and the nature of the proceeding differentiate it from the case of *Tally v. Commissioners' Court* (Ala.) 39 South. 167, and the view we have here taken is not at variance with what was there incidentally said with respect of the contract with Dobson & Bynum.

Our conclusion is that the petition and exhibits attached do not disclose that the claim insisted upon by the petitioner has been audited and allowed by the court of county commissioners, and, of consequence, that no clear legal right to have the respondent drawn a warrant in favor of petitioner in the sum of \$875 has been shown. The judgment of the circuit court is in harmony with our views and conclusion, and its judgment will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

HILL v. STATE.

(Supreme Court of Alabama. May 31, 1906.)

1. HOMICIDE — SELF-DEFENSE — DUTY TO RETREAT.

Where one could have avoided the taking of the life of decedent by retreating, or could have overcome decedent otherwise than by taking his life, no necessity for the taking of his life existed.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 164-171.]

2. SAME—EVIDENCE—ADMISSIBILITY.

Where, on a trial for homicide, the state showed that decedent was without firearms and that he did not exhibit a weapon of any kind during the difficulty resulting in his killing, evidence that the feet of decedent had been so amputated as to leave only the stubs to walk on, and that he could not, without holding onto something, be still while standing erect, and that he could walk and remain erect so long as he was moving, was admissible on the issue of self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 397, 419.]

3. CRIMINAL LAW — EVIDENCE — DEMONSTRATIVE EVIDENCE.

Where, on a trial for homicide, the evidence showed that the feet of decedent had been so amputated as to leave only stubs to walk on and that he wore boots indicating the shape of the stubs, it was not error to allow the boots he wore at the time of the killing to be introduced in evidence, for the purpose of conveying an idea of the condition of the decedent's feet.

4. SAME — TRIAL — EVIDENCE—OBJECTIONS — SUFFICIENCY.

On a trial for homicide, evidence showing the condition of the feet of decedent being competent, the prosecuting attorney, for the purpose of showing such condition, asked a witness to state if there was anything the matter with the feet of the decedent. Accused objected to the question on the ground that it called for facts irrelevant and immaterial. The objection was overruled, and the witness answered that when decedent was a small child he had his feet so badly burned as to cause him to be badly crippled. A motion to exclude went to the entire answer. Held that, as a part of the answer was competent, the motion was properly overruled.

5. SAME — HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, on a trial for homicide, the evidence, without proper motion to exclude it, showed that decedent became crippled when a child, the error in overruling an objection to a question as to how long decedent had been crippled, which was answered that he had been crippled since he was a baby, was not ground for reversal, under Code 1896, § 4333, providing that a judgment of conviction shall not be reversed because of error, where the court is satisfied that no injury resulted to accused.

6. HOMICIDE—EVIDENCE—ADMISSIBILITY.

On a trial for homicide, it is competent to prove by the witnesses who examined the body of decedent as to where and when they first saw the body that it had wounds on it, together with the appearance and location of the wounds.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 375.]

7. CRIMINAL LAW — EVIDENCE — OPINIONS—BODILY APPEARANCE.

On a trial for homicide, a nonexpert witness may testify as to the character of the wounds examined and found by him on the body of decedent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1044.]

8. CRIMINAL LAW — APPEAL — HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

Where, on a trial for homicide, the undisputed evidence showed that the killing was done by accused with a knife, and that decedent was cut in the left side of the breast and under his left shoulder, the error, if any, in permitting a nonexpert witness to testify that there was a wound on the body of decedent, which appeared to have been made with a knife in the left breast and that there was a cut made on the left shoulder of the body of decedent just under the shoulder blade, made with a knife, was not ground for reversal, under Code 1896, § 4333, prohibiting the appellate court from reversing a judgment of conviction in a criminal case because of error, when it is satisfied that no injury resulted to accused.

9. SAME—EVIDENCE—CONCLUSIONS OF FACT.

A question asked a witness, on a trial for homicide, as to whether or not decedent was not joking when he made a certain statement, was not objectionable as calling for a conclusion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1041, 1042.]

10. SAME—HARMLESS ERROR—ERRONEOUS ADMISSION OF TESTIMONY.

Where, on a trial for homicide a witness, in response to a question as to whether or not decedent was not joking when he made a statement testified to by the witness, stated that he did not know whether decedent was joking or not, the error, if any, in overruling an objection to the question, was harmless.

11. WITNESSES — CROSS-EXAMINATION — DISCRETION OF COURT.

To permit a witness for defendant, on trial for homicide, to answer a question on cross-examination as to how far he lived from the home of the father of decedent, was within the discretion of the trial court.

12. CRIMINAL LAW — TRIAL—INSTRUCTIONS — REFUSAL TO GIVE INSTRUCTIONS EMBODIED IN INSTRUCTIONS GIVEN.

The court in a criminal case is not required to give a requested charge embodied in a charge given.

13. SAME — INSTRUCTIONS — OMISSION OF FACTS.

An instruction in a criminal case that the jury, in weighing the testimony of any witness, may look to the facts in evidence, if any, tending to show that the witness has sworn falsely and intentionally about any fact in the case, is erroneous for failing to hypothesize the materiality of the fact falsely and intentionally sworn to.

14. SAME—ARGUMENTATIVE INSTRUCTIONS.

An instruction in a criminal case that a reasonable doubt is such a doubt as will cause a careful, prudent man to hesitate before he acts, and that, if there is any such doubt in the minds of any one juror, accused must be acquitted, is erroneous because argumentative.

15. SAME.

An instruction, on a trial for homicide, authorizing the jury to look at the evidence showing that decedent was carrying a pistol and making threats of doing some one harm, in connection with all the circumstances in evidence, in determining whether or not decedent made demonstrations indicating a purpose of taking the life of accused, was erroneous, because argumentative.

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

"To be officially reported."

Cleveland Hill was convicted of manslaughter, and he appeals. Affirmed.

The following written charges were requested by the defendant, and refused: "(B) The court charges the jury that in weighing the testimony of any witness you will look to all the facts and circumstances in evidence, including any evidence, if any, tending to show that such witness has sworn falsely intentionally about any fact in the case. (C) The court charges the jury that a reasonable doubt is such a doubt as would cause a careful, prudent man to hesitate before he acts; and if there is any such doubt in your minds, or in the minds of any one juror, you must acquit the defendant or have a mistrial. (D) It was unlawful conduct on the part of John Henson to have a pistol concealed about his person and to talk of killing somebody before the sun went down, if he did so have said pistol and have said talk. * * * (E) The fact, if it be a fact, that the deceased had a pistol concealed about his person, is a circumstance to which the jury may look, in connection with all the other facts and circumstances in evidence, in determining the issue in this case. (G) The fact that the defendant had cartridges in his pocket, if he had cartridges in his pocket, together with such language as may have been shown by the evidence, in connection with all the facts and circumstances in evidence, in determining whether the defendant is guilty or not. * * * (I) The jury have the right to look at the evidence tending to show that the deceased was carrying a pistol about his person and making threats of doing someone harm before the sun went down, in connection with all the other circumstances in evidence, in determining whether or not the deceased made demonstration indicating a purpose of taking the life of the defendant, or of doing him some grievous bodily harm."

John A. Lusk, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The indictment charges manslaughter in the first degree. From a judgment of conviction the defendant appealed.

The killing occurred on a Sunday afternoon in June, 1904. The defendant, the deceased, and others, all barely grown and hardly in the 20's had been attending singing exercises at Mobbs' Schoolhouse. After the exercises were over they congregated in the road near the schoolhouse and engaged in "friendly scuffles and play," out of which grew the unfortunate difficulty in which the deceased lost his life at the hands of the defendant. The deceased was a cripple. In his infancy his feet were so badly burned that his toes and the front part of his feet were of necessity amputated, leaving him only stubs to walk on. He wore boots that indicated the shape of his stubs—the condition of his extremities; and the evidence tended to show that he could not, without holding to something, be still while standing

erect, but that he could walk and remain erect so long as he was moving. Some of the evidence tended to show that defendant stabbed the deceased once while deceased was retreating from the defendant, and that defendant overtook him, while the defendant's evidence tended to show that he was retreating and the deceased was pursuing him. There was evidence which tended to show self-defense, and the defense relied on was essentially that of self-defense. The appellant's counsel has made an assignment of errors on the record, and we shall consider the cause for the most part with respect of the errors assigned.

Evidence showing the condition of the deceased's feet, and the admission of the boots as evidence, was allowed over the objection of the defendant, and his motion to exclude the evidence was overruled. These rulings of the court against the defendant were excepted to and are presented for review by the grounds in the assignment of errors numbering 1 to 13, inclusive, and 28, 29, and 38. "The test of the relevancy of evidence," it is said by Wharton, is "whether it conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue." 1 Wharton on Ev. § 20. And Elliott, in his work on Evidence, says: "As a general proposition it may be said that any evidence that tends in any reasonable degree to establish the probability or improbability of a fact in issue, no matter how slight its weight may be, is relevant." Elliott on Ev. §§ 144, 145, 147; Whitaker's Case, 106 Ala. 30, 17 South. 456; Governor v. Campbell, 17 Ala. 568, 574. In this case the important and turning issue on the trial was whether the defendant, in taking the life of the deceased, did so in self-defense, as it is defined by the law.

An important inquiry in respect of this issue was as to the necessity for taking the life of the deceased. It must have been an imperious necessity, and if the defendant could have avoided the taking of life by retreating, it cannot be said in law that such necessity existed, nor could it be said to exist if the defendant could have overcome the deceased otherwise than by taking his life. The tendency of the estate's evidence was that the deceased was without firearms, and none of the evidence tended to show that he ever exhibited firearms or weapons of any kind during the difficulty. Suppose the deceased had been without legs; could it be doubted for a moment that evidence of the fact would have been relevant for the purpose of showing that the defendant could have easily escaped injury at his hands by keeping out of his way? Or, suppose the deceased had been a man of perfect and powerful physique, it could not be doubted, under the tendencies of the evidence for the defendant in this case, that this fact would have been

competent as tending to support the theory of self-defense—that a necessity existed for defendant to resort to a deadly weapon on account of the deceased's superior manhood. Kerr on Homicide, § 437. In *Gunter's Case*, the defendant was prosecuted for an assault with intent to murder, and the injured party, who was examined as a witness, was allowed to testify that he was about 18 years old at the time he was shot by the defendant. The court said: "This was a pertinent inquiry, as tending to show the relative conditions of the parties at the time of the assault." *Gunter's case*, 111 Ala. 23, 20 South. 632, 56 Am. St. Rep. 17. It seems to us that the condition of both parties, deceased and the defendant, was of the *res gestæ* of the killing; and, if age of a party is competent evidence, for a much stronger reason, it seems to us, should be evidence that one of the parties had no feet. This, in line with the state's evidence and theory, would tend to rebut any inference of great danger of death or of bodily harm to the defendant from the deceased. We are sure it is within the range of common knowledge that a man without feet has not the same power or rapidity of locomotion as one not so afflicted.

There is nothing in the case of *Griffith v. State*, 90 Ala. 583, 8 South. 812, to support the defendant's contention. There the defendant was tried for the murder of an infant, and it was sought to prove declarations of a midwife as to the condition of the infant. The court said the midwife should have been called to prove the fact, if relevant; that her statements were not part of the *res gestæ*. Nor is the citation by the appellant from Mr. Elliott's work on Evidence (section 1228) in point. The case cited by Mr. Elliott was one in which a husband had sued a railroad company for damages for the death of his wife, and it was held error to allow the introduction in evidence of a photograph of the wife, who appeared to be a handsome woman. *Smith v. Leigh Valley R. Co.*, 177 N. Y. 379, 69 N. E. 279. The appearance of the wife was not an issue in the case and could have shed no light on the negligence vel non of the defendant. We are of opinion that the court's ruling on the evidence with respect to the deceased's physical condition are free from error. Nor do we think there was error in allowing the boots of the deceased to be introduced in evidence. They were shown to be in the shape of the deceased's "stubs" on which he walked, and were worn by him at the time he was killed. This was object evidence, and perhaps conveyed to the jury a clearer idea of the deceased's condition than mere verbal description by witnesses could.

But appellant insists that proof of the fact that deceased was a baby when the misfortune that deprived him of his feet occurred, and how it occurred, was wholly irrelevant, and calculated to mislead and unduly prejudice the jury against him. The

argument is that it was sentimental. Without determining the relevancy or admissibility of the evidence, we think the court's action may be justified on a well-established rule of evidence. The solicitor's question which drew out the evidence was as follows: "State if there was anything the matter with deceased's feet." To the question objection was made on the grounds that it called for facts irrelevant and immaterial, and which would not tend to shed any light on the issues in controversy. The objection being overruled, the witness answered that "when deceased was a small child he had his feet so badly burned, causing him to be very badly crippled." We have seen that the condition of the deceased was competent and relevant evidence, so the objection was properly overruled. The motion to exclude went to the entire answer. A part of it at least was competent; hence the motion was properly overruled, and all the answer properly remained as evidence. The witness, after testifying to other relevant facts in regard to deceased's condition, was asked by the solicitor: "How long had he been this way?" To the question objection was made and overruled. The witness answered: "Ever since he was a baby." Now, if it should be conceded that the answer was open to the motion to exclude, yet we have seen that this evidence, substantially, had been given by this witness. It was before the jury without proper motion to exclude, and, if there was error in overruling this last motion to exclude, we are satisfied it was error without injury. Code 1896, § 4333.

It was competent to prove, by witnesses who examined and dressed the body of deceased, where and when they first saw the body, that it had wounds on it, the appearance and location of the wounds. Hence, there is no merit in exceptions to the court's rulings with reference to evidence of this nature and covered by the grounds numbered 14, 15, 16, 17, 18, 19, 20, and 21 in the assignment of errors.

Witness Charley Lowery, who examined the body of the deceased, testified that "there was a wound which appeared to have been made with a knife in the left breast of the deceased; looked like the knife blade struck and was immediately withdrawn, being stuck straight in." He further testified: "There was a cut made on the left shoulder of the deceased, just under the shoulder blade, with a knife." Objection was made to this evidence on the ground that the witness was not an expert or competent to testify to the character of the wounds examined and found by him. We think the evidence was properly admitted, and the case of *Fuller v. State*, 117 Ala. 86, 23 South. 688, is directly in point, both on the admissibility of the evidence and on the further proposition that, if it should be conceded that there was error in admitting it, under the statute (Code 1896, § 4333) we would not feel justified in reversing the

case on this point. The undisputed evidence showed that the killing was done by the defendant with a knife, and that the deceased was cut in the left side of the breast and under his left shoulder. There was no effort on the part of the witness to state the direction from which the blows were delivered as was done in the McKee Case, 82 Ala. 32, 2 South. 451, cited by the appellant, and that case is not in point.

Witness Frank Hipps, for the defendant, testified that about an hour before the difficulty he saw deceased with some pistol cartridges in his hands, and heard him say, with reference to them, "that he had some capsules; that he did not know but what some of the boys might want some, and, by God, he would have them ready." On cross the solicitor was permitted to ask the witness if deceased was not joking when he said this. This question called for a collective fact, and not a conclusion. Moreover the answer to the question was harmless. The witness stated that he did not know whether he was joking or not; that he used the language stated.

The state, on cross-examination and against the defendant's objection, was permitted to ask the defendant's witness, Willie York, and two other witnesses, how far they lived from Mr. Henson, the father of the deceased. If it be conceded that the question called for irrelevant and immaterial evidence, yet it was a question on cross-examination and one which was within the discretion of the court to allow. Noblin's Case, 100 Ala. 13, 14 South. 787; Amos's Case, 96 Ala. 120, 11 South. 424; Thompson's Case, 100 Ala. 70, 14 South. 878; Tobias v. Treist & Co., 103 Ala. 664, 15 South. 914; Rhodes Furniture Co. v. Weeden & Dent, 108 Ala. 252, 19 South. 318; Stoudenmeire v. Williamson, 29 Ala. 558; Martin's Case, 104 Ala. 71, 16 South. 82. For the same reason there was no error in permitting the solicitor to ask witness McClure, "when he told Mr. Hill, defendant's father, about witness finding the pistol." Nor in allowing the solicitor to ask the defendant on the cross-examination to "name one or two to whom he showed the knots on his head." And upon the same authorities and considerations we hold there was no error in allowing the solicitor to ask the defendant where he stayed at night while at Skidmore's.

The objection to the argument of the solicitor is without merit. Cross' Case, 68 Ala. 476; Hobbs' Case, 74 Ala. 39; Motes v. Bates, 74 Ala. 374; Cunningham's Case, 117 Ala. 59, 23 South. 693.

This brings us to consideration of written charges refused to the defendant. It is conceded by appellant that refused charge A is a duplicate of given charge 1; hence the court was under no duty to give charge A. 1 Mayfield's Dig. p. 174, § 209.

Charge B is bad for not hypothesizing the materiality of the fact falsely and intention-

ally sworn to. In the cases cited by appellant the fact or facts referred to were stated in the charge, and were material.

It is here insisted that charge C, refused to the defendant, should have been given, and the case of Carter v. State (Ala.) 40 South. 82, is relied on to support the insistence. The charge is a copy of the one involved in that case, with the exception that the word "such" is inserted before the word "doubt," thus exempting the charge from the particular criticism that was made on the charge in the Carter Case. It is true the court in that case simply said of the charge (5) that it "was properly refused, as it was hypothesized on 'any doubt' in the minds of the jury, and not on a reasonable doubt." The criticism was sufficient to condemn the charge and answered the purposes of the court on that occasion; but it does not follow that the charge was free from other vices. The charge might well have been condemned for the further reason that it was argumentative. And the charge in its amended form, as it appears here, must be condemned as being argumentative. Amos' Case, 123 Ala. 50, 26 South. 524; Nevill's Case, 133 Ala. 99, 32 South. 596; Roger's Case, 117 Ala. 9, 22 South. 666; Bowen's Case, 140 Ala. 65, 37 South. 233; Spraggin's Case, 139 Ala. 93, 35 South. 1000; Smith's Case, 137 Ala. 22, 34 South. 396.

Charges D, F, and I were arguments, and were properly refused. Charge G, besides being argumentative, is elliptical, and was properly refused.

George Henson was the only witness for the state that the evidence tended to show concealed the pistol and cartridges, or attempted to suppress or hide any fact connected with the case. In Charge 21 for the defendant he received full benefit of the proposition announced by refused charge E. Charge 21 was even more pointed, in that it named the witness, and the court was under no duty to give charge E.

Refused charge H was substantially given in charges 4 and 9, and, without determining whether the charge is, or not, vicious, the court was under no duty to give the charge. 1 Mayfield's Dig. p. 174, § 209.

We have found no error, and the judgment appealed from is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

ALLEN v. STATE.

(Supreme Court of Alabama. May 31, 1906.)

1. CRIMINAL LAW—EVIDENCE—FLIGHT—CONNECTING CIRCUMSTANCES.

In a criminal case, evidence of flight and of the facts connected therewith is admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 779.]

2. SAME—SURRENDER.

Where, in a prosecution for homicide, the state proved that defendant, a negro, when he cut deceased ran off, it was error for the court to refuse to permit defendant to prove by a white man in the neighborhood that defendant went from the scene of the difficulty to the house of the witness to whom he surrendered himself, and by whom he was carried and delivered to the sheriff.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 778, 779, 802.]

3. SAME—CURING ERROR.

That defendant was himself permitted to testify to such facts did not cure the error in excluding the evidence of the person to whom he surrendered to the same facts.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2122; vol. 15, Cent. Dig. Criminal Law, § 3146.]

4. SAME—INSTRUCTIONS—PROVINCE OF JURY.

An instruction that under the undisputed evidence accused bore a good character was properly refused as invading the province of the jury.

5. SAME—MISLEADING INSTRUCTIONS.

An instruction that words, whether opprobrious or otherwise, if used by defendant to deceased, did not warrant deceased in striking or attempting to strike defendant with a piece of wood, was properly refused as misleading.

6. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

An instruction that the burden of proof is on defendant to show self-defense, but if, on all the evidence, the jury have a reasonable doubt as to whether defendant acted in self-defense or not, he was entitled to an acquittal, was properly refused for failure to set out the elements of self-defense.

7. CRIMINAL LAW—RECORD—VENIRE—INDICTMENT—SERVICE ON WITNESS.

In a criminal case, the record should disclose that an order was made requiring the sheriff to serve a copy of the indictment and the venire on accused one entire day before that fixed for his trial, as required by Code 1896, § 5273.

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

"To be officially reported."

Surrey Allen was convicted of murder in the second degree, and he appeals. Reversed and remanded.

The defendant was indicted for the murder of Jim Allen by cutting him with a knife. He was convicted of murder in the second degree and sentenced to the penitentiary for 50 years. The facts necessary to an understanding of the opinion sufficiently appear therein. The defendant requested the following written charges, which were refused by the court: "(1) I charge you that under the undisputed evidence in this case the defendant bore a good character. (2) I charge you that words, whether opprobrious or otherwise, if used by this defendant to deceased, Allen, if you find he did, did not warrant or justify Jim Allen in striking or attempting to strike the defendant with the piece of wood referred to in the evidence, if you believe from all the evidence that deceased did strike or attempt to strike the defendant. (3) The burden of proof is upon defendant to show self-defense, yet if, upon all the evidence, the jury have a reasonable doubt as

to whether he acted in self-defense or not, he is entitled to the benefit of the doubt and to an acquittal." The evidence tended to show that the cutting took place in the lot of the deceased, and the difficulty arose over the refusal of the deceased to lend the defendant a mule to ride to camp meeting. The evidence for defendant tended to show that, after some conversation between defendant and deceased about the mule, deceased picked up a piece of wood and attempted to strike the defendant.

M. K. Clements, for appellant. Massey Wilson, Atty. Gen., and W. R. Walker, for the State.

DENSON, J. The defendant was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for 50 years.

It is plain law that flight may be given in evidence as a criminating circumstance against the defendant. It is also true that all the facts connected with the flight, either to increase or diminish the probative force of the fact itself, may be given in evidence. And it was said by this court in Bowle's Case, and reaffirmed in White's Case, that "the unfavorable inference against the prisoner [from proof of flight] would be lessened if he voluntarily returned and surrendered himself to answer the accusation." Bowle's Case, 58 Ala. 335; White's Case, 111 Ala. 92, 21 South. 330. The state proved by several witnesses that the defendant, when he cut the deceased, ran off. It cannot be doubted that this was evidence tending to show flight. The defendant is a negro. His counsel proposed to show that he went from the scene of the difficulty to the house of Mr. Gordon, a white man in the neighborhood, and surrendered himself to him, and that Gordon thereupon carried defendant to Athens and delivered him to the sheriff. On the authorities supra we are constrained to hold that the court erred in not allowing the proof to be made by Gordon. We must not be misunderstood. Proof of voluntary surrender is competent only in cases where proof of flight has been made and in response to such proof.

It is insisted by counsel for the state that the error in not allowing the proof to be made by Gordon was without injury to the defendant, as the defendant was subsequently allowed as a witness in his own behalf to testify to the facts offered to be proved by Gordon, and that there was no evidence contradictory to his on this subject. We cannot say that injury did not follow from the error. The jury may not have believed the defendant. At any rate, we cannot say that they accepted his testimony in this respect as the truth.

There was no error in the refusal to give the written charges requested by the defendant. Charge 1 is invasive of the province of the jury. Charge 2 is misleading. Charge 3 fails to set out the elements of self-defense.

The defendant is indicted for a capital offense, and we feel it our duty to call attention to the imperfect condition of the record. The record fails to disclose that an order was made requiring the sheriff to serve on the defendant one entire day before the day fixed for the trial a copy of the indictment and the venire. Code 1896, § 5273; *Spicer's Case*, 69 Ala 159. More care should be taken than is evidenced by this record to see that statutory requirements are complied with.

The judgment is reversed, and the cause remanded.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

JABELES & COLIAS CONFECTIONERY CO. v. BROWN.

(Supreme Court of Alabama. June 5, 1906.)

1. PARTY WALLS — CONSTRUCTION OF CONTRACT.

Where a contract between the owners of adjoining lots provided that, in consideration of the construction of a wall by one of the owners partly upon the lot of each, the other owner, when he built on his lot, would pay one-half of the cost of the wall, such owner, when he built, was liable for one-half of the cost of the wall, irrespective of whether he joined the building to the party wall or not.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Party Walls, § 30.]

2. SAME—AGREEMENT RUNNING WITH LAND.

Where a party wall is built by one of the adjoining owners under an agreement by which the other owner agrees to pay for part of the expense of the wall, and it is expressly provided that the covenant to make such payment, shall run with the land and be binding on the present or future owners, the covenant does run with the land and is binding on successive owners.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Party Walls, §§ 45-53.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"To be officially reported."

Action by the Jabeles & Colias Confectionery Company against W. S. Brown. From a judgment for defendant, plaintiff appeals. Reversed.

The appellant brought suit in the court below to recover \$1,250, the value of one-half of a party brick wall, setting out in full the contract between defendant and plaintiff's vendor. The terms of the contract are sufficiently set out in the opinion of the court. Demurrers were filed to the complaint on a number of grounds, but the material ones, and the ones discussed in the opinion, are: "(1) There is no averment to show that there was any consideration for the alleged agreement on the part of the defendant to pay the plaintiff \$1,250 for said half of said wall. (2) There is no averment to show that \$1,250 is one-half of the market value of the wall at the time of the bringing of the suit, or on the 12th day of October, 1903. (3) There is no averment to show when the defendant

agreed and promised to pay plaintiff \$1,250 for one-half of said wall. (4) There is no averment to show that plaintiff was not at the time of the bringing of this suit using and enjoying and retaining the right to use, have, hold, and enjoy the whole of said wall. (5) There is no averment to show that the defendant is using or enjoying the use of said wall." These demurrers were sustained, and, the plaintiff declining to plead over, judgment was rendered for defendant.

Powell & Blackburn, for appellant. E. J. Smyer, for appellee.

SIMPSON, J. This was an action brought by the appellant (plaintiff) against the appellee (defendant) to recover one-half the value of a partition wall, and is based upon the contract which is set out in the record. The arguments of counsel rest the case entirely upon the construction of this contract, while the case went off on the ruling of the court in sustaining a demurrer to the complaint in which such contract is set out. The argument of the appellee (defendant) is that, although the contract states that Mercer should pay for half of the partition wall when he began "to build or get ready to build," yet the evident meaning of the contract was that he was to pay for it only when he availed himself of the use of the wall by joining to it or building on it.

In the interpretation of contracts we must take the contract as it is written by the parties themselves, and we cannot infer that they intended anything other than that which is expressed or plainly indicated by the words of the contract. In this case, the contract starts out by stating that one party is about to build a wall and that both parties desired that the wall shall be built so that one-half of it shall rest on the lot of each party, and that it is to the interest of each of said parties to so build. This is a plain statement to the effect that each party considered it of some value to him that the wall should be erected in this way. The contract then goes on to state that, in consideration of the premises and the sum of one dollar, the wall shall be so built, and that Mercer (to whose rights and liabilities the appellee succeeds) should pay for half of this wall whenever he built on this lot or got ready to build. We cannot undertake to say what value he attached to the wall, nor why he considered it valuable to himself that the wall should be so built, while we might conjecture that, even if he did not build upon the wall or actually join his wall to it, yet he considered it valuable to him to have the wall there for the benefit of its lateral support to any wall which he might build, though not actually joined to it. However that might be, he has stated the fact that it was valuable to him and he has agreed to pay for it on that contingency, and not on the contingency of his joining to

It. It may be further stated that, in this case, the complaint to which the court sustained the demurrer does not state in the last count that "in erecting said building the defendant joined his building to and used said party wall." Without going into the various points that have been raised, and the divergencies on minor matters in regard to covenants running with the land, it is sufficient to state that the decided weight of authority, both in quantity and quality, sustained the proposition that when a party wall is built by one of the adjoining proprietors, under an agreement such as was made in this case, which contained a distinct agreement that the "covenant shall run with the land and be binding on the present or future owners," the covenant does run with the land, and is binding on successive owners, of both covenantor and cantee. *Mott et al. v. Oppenheimer et al.*, 135 N. Y. 312, 319, 31 N. E. 1097, 17 L. R. A. 409; *Roche v. Ullman* 104 Ill. 11, 19.

In Illinois, the case of *Roche v. Ullman*, 104 Ill. 11, was an agreement for building a party wall which was to "run with the land"; the suit being by the party who had built the wall against a successor to the other party to the covenant, who came into the property after several successive conveyances. The court held that the effect of this agreement was to give to each of the parties an easement on the other's lots "which became appurtenant to their several estates, and would pass to their respective assignees by any mode of conveyance that would transfer the land." Page 18. And in short the court determined that according to the "decided weight of authority" the last owner of the lot, upon which the burden of paying for one-half of the wall rested, "became bound for the performance of the covenant to pay one-half the cost of constructing the wall." Page 19. In the case of *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146, H. and A., being adjoining lot owners, made the party wall agreement. G. became a successor to H., the party who built the wall, and K., successor to A., the party who agreed to pay. K., desiring to build, filed a bill stating that H. (the original builder) and G. (his successor) each claimed the money, and praying that they be required to interplead. The court held that, while the obligation to pay passed to successive owners as appurtenant to the land, yet that as to the party who originally built the wall it became a debt due him, and did not pass, but remained a debt due to him, and gave the singular reason that otherwise each successive owner would be entitled to demand payment for half of the wall, although it had been previously paid to his predecessor. Page 208, 115 Ill., page 285, 3 N. E. (56 Am. Rep. 146). It is clear that no such result would follow. In referring to the case of *Roche v. Ullman*, supra, the court

recognizes the correctness of that decision to the effect that the last successive owner was liable to pay for one-half of the wall when the time for payment according to the agreement arrived. Page 211, 115 Ill., page 287, 3 N. E. (56 Am. Rep. 146). In Massachusetts, the case of *Joy v. Boston Penny Savings Bank*, 115 Mass. 60, was one in which the agreement in regard to the party wall merely authorized one lot owner to build on the line, and the other party agreed that he, his heirs, or assigns would pay for one-half the cost when they used it, and nothing was said about the agreement (which was not under seal) running with the land. The court held the contract to be a personal one; the court referring to the fact that it was nothing but "a simple contract," and that there was nothing in the deed to show an intent that the right to the payment should pass, although it seems to be admitted that the last owner who used the wall "might be held chargeable for the cost of the half so used." In a later case, the agreement did not state that the agreement (which was under seal) should run with the land, but merely that "this agreement shall bind ourselves, our heirs, assigns, and representatives, forever." The court held that the agreement "created mutual covenants running with each lot." The court drew the distinction between a merely personal agreement, and one creating "an easement of use and support in favor of each lot owner," and held that "the burdens and benefits were inseparably connected" and that the party could no more avoid paying than he could prevent the wall from standing. *King v. Wight*, 155 Mass. 444, 29 N. E. 644. The later case of *Pfeifer v. Mathews*, the court recognized the same principle, but held that in that case the person who owned the adjoining lot and built to the wall, became indebted for his half of the wall, and that the purchaser at mortgage sale, who came in thereafter, could not be made liable. The Supreme Court of Indiana held that the covenant to pay for half of a party wall ran with the land, while the question whether the right to receive payment also ran with the land depended "upon the contract," and, as in that case the original builder in conveying his lot specially reserved the right to receive the compensation, it went to him. *Conduitt v. Ross*, 102 Ind. 166, 26 N. E. 198. The Supreme Court of Missouri, in a case where the adjoining lot owners made a party wall agreement, with no mention of its running with the land, and not even mentioning heirs and assigns, the court held that the agreement could be enforced in equity between subsequent owners. *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433. In a previous case that court had decided, in a case where the party wall agreement made no mention of its running with the land and did not even mention heirs and assigns, that the contract

ran with the land, so as to make the owner of the adjoining lot at the time of joining to the wall liable; but, as the contract was merely personal, the right to receive payment did not pass from the original contracting party, as there was nothing in the contract to indicate that intention. *Huling v. Chester*, 19 Mo. App. 607. The Supreme Court of Minnesota held that it was competent for the parties to make the contract a mere personal obligation, and in the case before that court held that subsequent purchasers of the burdened lot took it with the obligation to pay for half of the wall when the condition happened, and that from the language of the contract the court gathered that the right to receive the money remained with the original builder of the wall. *Pillsbury v. Morris*, 54 Minn. 498, 56 N. W. 170.

A careful writer in an exhaustive examination of this matter states that "the general interpretation is that, if the builder sells his property before the adjoining lot owner builds, he conveys to his vendee title to the whole wall and the right to collect cost of half of the wall from the other when he builds." *Simms on Covenants*, p. 217. Our own court has not passed upon the exact question of a party wall agreement, but its deliverances on the subject of covenants running with the land indicate an agreement with the principle before stated. *Robbins v. Webb*, 68 Ala. 393; *Gilmer v. M. & M. Ry.*, 79 Ala. 569, 58 Am. Rep. 623; *M. & M. Ry. v. Gilmer*, 85 Ala. 422, 5 South. 138. It will be observed that, in all the agreements referred to in the various cases, the agreements provided for payment when the other party used the wall; but in this case that expression was carefully avoided, and the party was to pay whenever he determined to build on his lot. The demurrer was consequently erroneously sustained.

The judgment of the court is reversed, and the cause remanded.

TYSON, ANDERSON, and DENSON, JJ., concur.

EQUITABLE MFG. CO. v. HOWARD.

(Supreme Court of Alabama. June 6, 1908.)

1. APPEAL—SECOND APPEAL—SCOPE OF REVIEW.

Where, on a former appeal it was held that a demurrer to a plea should have been sustained, but on retrial it did not appear that any ruling was made on the demurrer, an assignment of error predicated on the former ruling was not available on a subsequent appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358-4363.]

2. CONTRACTS—PERFORMANCE—TIME.

Where as a part of a contract of sale the seller bound itself to give a bond to perform its part of the contract and file the same with a bank, but no time was fixed for the filing of the bond, the seller was bound to file the same within a reasonable time.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 944-956.]

3. SAME—EVIDENCE.

As part of a contract of sale, the seller, located in Iowa City, Iowa, agreed to file a bond with the bank in the buyer's place of business in Albertville, Ala. The contract was made March 14, 1901, and was received by the seller on March 16th. Two days thereafter the seller shipped a portion of the goods, and four days thereafter delivered the balance to a carrier for shipment to the buyer. The buyer claimed that a bond was mailed to the bank on April 3d, which the bank never received, and on May 2d, mailed to the bank another bond, which was received a few days later. *Held*, that the latter bond was not filed within a reasonable time and did not constitute a compliance with the seller's obligation.

4. SAME—QUESTION FOR JURY.

Where a seller agreed to file a bond to comply with its contract with a bank at the buyer's place of business, and offered evidence to show that the bond was mailed to the bank on a certain date, which the bank claimed never to have received, whether the bond was received by the bank was for the jury.

5. SAME—EVIDENCE.

Where, in an action for breach of a contract of sale, it was claimed that the seller did not file a bond as required by the contract within a reasonable time, and the evidence showed that letters passed between the buyer and seller, which were sent through the mail by which a bond not received was claimed to have been sent by the seller, evidence that it took three or four days for a letter to pass between the buyer and seller was admissible.

6. DEPOSITIONS—MOTION TO QUASH—GROUNDS.

A deposition was not subject to a motion to quash because no copy of certain papers referred to in one of the interrogatories had been served on the opposite party before the issuance of a commission and the taking of the deposition.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 221.]

7. CONTRACTS—PERFORMANCE OF CONDITIONS—QUESTION OF LAW.

Where, in an action for breach of a contract of sale, the seller had not filed a bond required by the contract within a reasonable time, an instruction that, if the bond was filed within such time as to afford the buyer all the protection he was entitled to under the contract, plaintiff was entitled to recover, was properly refused as submitting a question of law to the jury.

8. APPEAL—INSTRUCTIONS—PREJUDICE.

Where the contract of sale was alleged to have been broken by the seller by its failure to file a bond within a reasonable time as required, instructions that it was the seller's duty to see that the bond was filed within a reasonable time, and that the buyer's failure to advise the seller that the bond had not been filed would not furnish the seller an excuse for not filing it within a reasonable time, were not prejudicial to the seller.

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

"Not officially reported."

Action by the Equitable Manufacturing Company against J. M. Howard. From a judgment for defendant, plaintiff appeals. Affirmed.

This was an action by appellant to recover of appellee \$200, the purchase price of certain jewelry alleged to have been shipped by appellant to appellee under a written contract and order. The facts in reference to the pleadings sufficiently appear in the opinion. The terms of the contract

relied upon as a defense were that the said company failed to file bond as agreed to in the written contract guarantying the proper performance of the stipulations made by them in the contract. The contract was set out as an exhibit to plea 6. The interrogatories propounded to the witness Riddle had reference to the time of the filing of the bond with the bank mentioned in the contract, the First National Bank of Gadsden. It was shown in the interrogatories that Riddle was the president of the bank and made the indorsement as to the receipt of the bond and notification of the same to Howard. In one of the interrogatories a bond or paper and envelope was referred to as being attached thereto. Before entering upon the trial, the plaintiff moved the court to quash the interrogatories propounded to Riddle and his answers thereto on the grounds that they were incomplete, as no copy of the bond or paper and envelope referred to in the fourth interrogatory as being attached to the same was ever served on the plaintiffs before the issuance of a commission and the taking of said deposition. The other facts sufficiently appear in the opinion.

Charges 1 and 2 were refused to plaintiff. Charge 1 is the general affirmative charge. Charge 2: "The court charges the jury that, if the bond offered in evidence was filed in the bank within such a time as to afford defendant all the protection he was entitled to under the contract, you must find for the plaintiff." The court gave the following charges at the request of defendant: Charge 5: "The court charges the jury that it was the duty of the plaintiff to see to it that the bond was filed in the bank within a reasonable time." Charge 6: "The failure of the defendant to advise the plaintiff that the bond was not filed in the bank would not furnish the plaintiff with an excuse for not filing the bond in the bank within a reasonable time." There was verdict for the defendant, and the plaintiff appeals.

Street & Isbell, for appellant. John A. Lusk, for appellee.

TYSON, J. When this case was here on former appeal it was held that the demurrer interposed to plea numbered 5 should have been sustained. 140 Ala. 252, 37 South. 106. Upon the trial resulting in the judgment from which this appeal is prosecuted, the demurrer to this plea does not appear to have been ruled on, and the assignment of error seems to be predicated upon the former ruling of the trial court. That ruling is, of course, not revisable on this appeal. *Greely-Barnham Grocery Co. v. Cottingham* (Ala.) 39 South. 567.

The assignments of error based on the action of the court in overruling the demurrer to the sixth and seventh pleas is not insisted on. The defense invoked by the sixth plea is a breach of the contract on

the part of the plaintiff, whereby it bound itself to give a bond in the sum of \$200 to be filed by them in the First National Bank of Gadsden, Ala., conditioned that they would perform their part of the contract, and that defendant rescinded said contract and notified plaintiffs of his refusal to accept the goods.

On former appeal it was held, as no time was specified in the contract when the bond was to be filed, the law implies that plaintiffs had a reasonable time within which to file it. The contract was entered into on the 14th day of March, 1901, between plaintiffs' agent and defendant at Albertville, in this state, the latter's place of business, and was forwarded to plaintiffs at their place of business at Iowa City, Iowa, and received by them on the 16th day of the same month. Two days later plaintiffs shipped by freight the show case, and on the 20th, four days after the receipt of the contract, delivered to the express company for shipment to defendant the jewelry. By the terms of the contract the delivery of these goods to the common carrier was a delivery to the defendant. The testimony offered by plaintiffs tended to show that, on the 3d day of April following, they mailed a bond to the bank, but which, according to the tendencies of the testimony introduced in behalf of defendant, was never received. Whether the bond was received by the bank was a question for the jury. *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395. But, conceding that it was received, it may be seriously doubted whether it was filed with the bank by plaintiffs within a reasonable time as they obligated themselves to do.

On the 2d day of May, inferably, after defendant had notified plaintiffs that he would not accept the goods from the carriers on account of their failure to comply with the contract, they executed and mailed to the bank another bond which was received a few days later. This was clearly not within time, and therefore not a compliance with plaintiffs' obligation. And it may be so declared as matter of law. *Cotton v. Cotton*, 75 Ala. 345; 2 Mayfield's Dig. p. 776, § 377. The evidence showed that letters had passed between plaintiffs and defendant, which were sent through the mail. This being true, we cannot see any possible objection to defendant being allowed to testify that it took three or four days for a letter to go from Iowa City to Albertville. Besides, if this testimony was erroneously admitted, it is clear that it could not have been of prejudice to plaintiffs. There was clearly no merit in the motion of plaintiffs to quash the deposition of Riddle.

We are unable to determine with any degree of certainty from the record what answer is referred to in brief of appellant's counsel as being "the answer of said witness Riddle to the last question of fifth in-

terrogatory." The same may be said of the insistence with respect to the 6th interrogatory. The letter of defendant to plaintiffs of date April 29, 1901, was clearly competent to show his notification to them, as averred in the sixth plea, of his refusal to accept the goods.

Charges 1 and 2, requested by plaintiffs, were clearly properly refused. The first of these was the general affirmative charge, which, of course, should not have been given. The second clearly submits a question of law to the jury. Besides, the bond introduced in evidence, being the one received by the bank, was, as matter of law, not filed with the bank within time.

There was no error of which the plaintiffs can complain in the giving of charges 5 and 6 for defendant.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

WELLS v. STATE.

(Supreme Court of Alabama. June 6, 1906.)

1. CRIMINAL LAW — VERDICT — RENDITION — PRESENCE OF ACCUSED.

In all criminal cases the verdict must be rendered in open court and in the presence of the accused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1478-1480, 2083.]

2. SAME—FELONIES—RECORD.

In prosecutions for felony the record of conviction must affirmatively show that the prisoner was personally present when the jury returned their verdict.

3. SAME—RECEPTION OF VERDICT—RECESS.

In a prosecution for felony it is error to allow the verdict to be received by the clerk during a recess of the court in the absence of the prisoner, even though with the consent of his counsel.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1478-1480, 2083.]

4. SAME—ACQUITTAL.

Where, in a prosecution for either a felony or misdemeanor, the verdict was received in the absence of the defendant and the jury were discharged, such proceeding operated as an acquittal, and could not be cured by the reconvening of the jury after accused appeared in court and after they had dispersed, but before the verdict was read.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1480.]

5. SAME—WAIVER—MISDEMEANORS.

In a prosecution for a misdemeanor, accused may waive his right to be present when the verdict is returned.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1478-1480, 2120.]

Appeal from Madison County Court; W. T. Lawler, Judge.

"To be officially reported."

John Wells was convicted of disturbing an assemblage of people met for religious worship, and he appeals. Reversed and rendered.

The defendant was indicted at the February term, 1905, of the Madison circuit court

for disturbing an assemblage of people met for a religious worship. The case was returnable to the county court of said Madison county and was there tried. The facts are sufficiently stated, and it is admitted that these are the facts, in the following motion made by defendant: "Comes the defendant, John Wells, and moves the court to discharge him from custody for the following reasons: On August 5, 1905, after that a jury had been impaneled and sworn and accepted by both the state and the defendant, and after that the indictment had been read to the jury and the defendant had pleaded not guilty, and after that the evidence had been taken in the cause, attorneys had made their arguments, and the court had charged the jury and directed that they retire to deliberate upon the verdict, the hour of 12:30 having arrived, the court recessed until 2 o'clock. In the meantime the defendant and other persons who were in the courtroom desired to do so had left the courtroom get their dinners. The jury came into the courtroom with a verdict, which they sealed in an envelope and handed to the judge, which was by him handed to the clerk. When the verdict was handed to the judge, he instructed the jury not to make known the contents of the verdict, and told them to go to their dinners, and report back at 2 p. m. In a half hour after this the judge handed the verdict to the clerk. The defendant objected and excepted to this conduct of the court. The jury then dispersed. Various ones went to their dinners separately and mingled with the people generally. After court was convened at the hour of 2 o'clock the defendant moved the court by his attorney to discharge him on the ground that he had been acquitted; the jury having been allowed to separate without having returned a verdict into court in his presence." The defendant had not consented for the jury to be discharged in his absence. The court overruled defendant's motion to discharge him, and he duly excepted. After this motion was made, at the suggestion of the solicitor, the court called the jury from the audience, as they were not then sitting in the jury box, but were sitting promiscuously with the audience in the courtroom before him, and caused the clerk to take the verdict which had been handed to him quite a while before that and read in their presence. The jury said that that was their verdict, and each one of them said he had not talked about the verdict that had been rendered before any one. The defendant objected to this examination of the jury, and the court overruled his objections and permitted the solicitor to prove by the jurors that they had not talked about the verdict that had been rendered. The defendant moved to exclude the evidence of the jurors that they had not talked about the verdict, and the court overruled the motion, and the defendant excepted. John

Hertzler, one of the jurors, testified that the verdict had been agreed upon before they had separated. The defendant objected to this and moved to exclude it.

David A. Grayson, for appellant. Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. In all criminal cases the verdict of the jury must be rendered in open court and in the presence of the accused. In cases of felony the prisoner must be personally present when the jury return their verdict, and to support a conviction the record must affirmatively declare his presence. *Hughes' Case*, 2 Ala. 102, 36 Am. Dec. 411; *Eliza's Case*, 39 Ala. 693; *Waller's Case*, 40 Ala. 326. And in a case of felony it is error to allow the verdict to be received by the clerk during a recess of the court in the absence of the prisoner, even though this be done with the consent of his counsel. *Waller's Case*, *supra*. It would seem that when the verdict had been received in the absence of the defendant, and the jury is discharged, it is the equivalent of an acquittal. *Hayes v. State*, 107 Ala. 1, 18 South. 172; *Ned v. State*, 7 Port. 187; *Cook v. State*, 60 Ala. 3, 31 Am. Rep. 31. The action of the court in reconvening the jury after the defendant appeared in court and after they had dispersed, but before having the verdict read, did not cure the error.

The foregoing rule relates to the trials of misdemeanors, as well as felonies, except the defendant may waive the right to be present when the verdict is returned and other formalities connected with the return and reception thereof in misdemeanor cases. *Brown v. State*, 63 Ala. 97. But in the case at bar the record affirmatively shows that the defendant did not consent to an informal return and reception of the verdict, and, as the verdict was illegally received, it operated as a discharge of the defendant. The judgment of the county court is reversed, and one is here rendered discharging the defendant. Reversed and rendered.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

COWART v. STATE.

(Supreme Court of Alabama. June 14, 1906.)

1. CRIMINAL LAW—VERDICT—POLLING JURORS. In a criminal case the right of polling the jury is secured to either party.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2085.]

2. SAME—WAIVER.

The right of polling the jury in a misdemeanor case may be waived by the prisoner.

3. SAME—IRREGULARITIES IN VERDICT.

In a criminal case the jury, while the court was at recess, returned a verdict written upon the indictment, gave the indictment to the clerk and then dispersed. There had been no consent on the part of defendant or his counsel that the verdict might be so returned. *Held*, that

such action did not amount to an acquittal, but, the jury having dispersed, the verdict would not support a judgment of conviction.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2082-2084.]

Appeal from Circuit Court, Dale County; A. A. Evans, Judge.

"To be officially reported."

Jim Cowart was convicted of killing a hog, and he appeals. Reversed and remanded.

The defendant was indicted and tried for unlawfully or wantonly killing, disfiguring, or disabling a hog, the property of another, of the value of \$15. The bill of exceptions states that the case was tried during the morning session of the court, and after the evidence was all in, and the attorneys had addressed the jury, and the judge had charged them, and the jury had retired to consider their verdict, the court recessed for dinner; that no agreement was made between the solicitor and the defendant, or his attorney, that the verdict of the jury, when found, could be received by the clerk in the absence of the defendant and the court; that while the court was at recess the jury found a verdict and wrote the same upon the indictment and returned to the courtroom, in the absence of the court and the defendant, and delivered to the clerk of the court their verdict, which the clerk placed with the file. Thereupon the jury dispersed. Upon the reconvening of the court for the afternoon session, the clerk handed the verdict of the jury to the judge presiding, who from the bench read the verdict aloud. The judge then caused said jury to take their place in the jury box, and asked the jury what they meant by this verdict. The verdict was as follows: "We, the jury, find for the defendant and assess the value of the hog at \$6." The defendant objected to this question, assigning his grounds that the verdict of the jury had been returned to the clerk of the court as their verdict, and without the consent of the defendant or his counsel they had dispersed and gone to their homes, and that there was no consent on the part of the defendant or his counsel that the verdict might be put in form, and that by dispersing after rendering verdict they had done an act tantamount to an acquittal. The objection was overruled, and the foreman of the jury answered the court that the jury meant to find the defendant guilty and assess the damages at \$6. The court explained to the jury how to put their verdict in form to express what they intended, and that the law required that, if they found the defendant guilty, they should assess a fine against the defendant in double the amount they found the value of the property to be. The defendant objected to this, and excepted. The jury retired, and returned a verdict in conformity to the instructions of the court, and the court proceeded to pronounce judgment of guilty upon the verdict last returned.

ANDERSON, J. In all criminal cases, whether of felony or misdemeanor, the right of polling the jury is secured to either party. It is a right, however, like the right of trial by jury, which may be waived by the prisoner in case of misdemeanor. *Brown v. State*, 68 Ala. 97. The return of a verdict in the absence of the defendant and a dispersion of the jury is irregular, and would operate as a reversal of the case, unless it was a misdemeanor and it appeared that the defendant had consented to such a return. *Jones v. State*, 97 Ala. 77, 12 South. 274, 38 Am. St. Rep. 150; *Wells v. State* (Ala.) 41 South. 630. If the verdict is not received and recorded, it would not result in an acquittal of the defendant, and the unauthorized dispersion of the jury would be good ground for a new trial and for a reversal by this court when the point is properly reserved. *Jones' Case*, supra; *Hayes v. State*, 107 Ala. 1, 18 South. 172.

In the case at bar, the verdict was not received and accepted or recorded by the court, and did not work an acquittal; but, as the jury had dispersed before returning the verdict that was received, said verdict would not support a valid judgment of conviction, and the trial court erred in rendering judgment thereon over the objection of the defendant. The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

RAINEY v. RIDGWAY et al.

(Supreme Court of Alabama. June 6, 1906.)

1. WILLS—CONTEST—PARTIES INTERESTED.

Where contestant's husband was the sole heir of testatrix, and contestant was his sole heir, as well as his sole devisee and legatee, she was a "party interested," and entitled to contest the probate of testatrix' will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 550-554.]

2. SAME—SEPARATE CONTEST—FILING.

It was improper for an administrator to file a separate contest to an alleged will of his decedent while one contest was then in progress of trial; the administrator being entitled to join in that contest at his election.

Appeal from Probate Court, Tallapoosa County; James W. Strother, Special Judge. "To be officially reported."

Petition by E. B. Rainey for the probate of a copy of the last will of Martha Ridgway, deceased, to which Ella Ridgway and others filed objections. From an order denying probate of the will, petitioner appeals. Affirmed.

E. B. Rainey filed in the probate court of Tallapoosa county what purported to be a copy of the will of Martha Ridgway, alleging the loss of the original will. Ella Ridg-

way filed a contest, the allegations of which are sufficiently set out in the opinion. The administrator of the estate of Ella Ridgway's husband, P. A. Ridgway, also filed a contest on the same ground. The following demurrers were filed to the petition for contest: "(1) Contestant fails to show that she is interested in said will. (2) Contestant fails to show that, in case said Martha A. Ridgway, the testator, had died intestate, contestant would have been an heir or distributee of the estate of Martha A. Ridgway. (3) Contestant sets out and alleges in her contest a state of facts which show affirmatively that she is not interested in the will of the said Martha Ridgway which is proposed to be probated in this case, and that, if the said Martha Ridgway had died intestate, contestant would not be an heir or distributee of the estate of said Martha Ridgway. (4) Because said contestant fails to set out in her contest any valid objections to the probate of said will. (5) Because the contestant fails to set out in grounds 1, 2, 3, 4, 5, 6, and 7, as alleged in her contest, any valid objections to the probate of said will." The proponent also moved to strike the contest filed by the administrator of the estate of P. A. Ridgway, and also filed demurrers to the same. These demurrers and motions were overruled and order was entered denying probate of the will.

George A. Sorrell and Thomas L. Bulger, for appellant. Lackey & Bridges, for appellees.

SIMPSON, J. This is an appeal from a decree of the probate court on the contest of a will, and the sole question presented for the consideration of this court is the right of the appellees to contest the probate of the will, which is raised by demurrer and motions to strike.

The appellee Ella Ridgway (contestant) alleges that she is the widow of P. A. Ridgway, who was the son and only child of the testatrix (Martha A. Ridgway); that said P. A. Ridgway survived his mother; that he left surviving him no children, or their descendants, no father or mother, no brother or sister, or their descendants; that petitioner is his only heir, and the sole devisee and legatee under his will; also that, on the death of his said mother, her said husband took possession of all of the property, real and personal, left by his said mother, remained in possession until his death, and contestant has been in possession of the same ever since. In other words, contestant's husband was the sole heir of the testatrix, and contestant is his sole heir, and sole devisee and legatee; she is certainly the party interested, or the person who, standing in the place of her son, as his sole heir, who would be a distributee of the estate, if there were no will. In the case of *Lockard v. Stephenson*, 120 Ala. 641, 24 South. 996, 74 Am. St. Rep. 63, it was held that a creditor was not a "person interested there-

in," because he did not take an interest in the estate under and by virtue of the will. His was a claim against an interest in the estate, not an interest in it. In the present case, the appellee Ella Ridgway is the sole person interested in the estate. There is no analogy between this case and that of the widow, who has the personal right of dissenting from her husband's will, which cannot be exercised by her administrator. Donald v. Portis, 42 Ala. 29. In this case the widow, being the sole heir, owns the identical property which her husband held, which was an interest in the property left by his mother, and the right of contest is based on that interest.

It was improper for the administrator to file another separate contest, while one was in progress of trial. He could have joined in that contest, if he so desired. But this is immaterial, as both petitions together were considered by the court and acted on as one contest.

The degree of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

NICHOLS et al v. RAGSDALE.

(Supreme Court of Alabama. June 7, 1906.)

APPEAL—FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

Under Code 1896, § 3319 et seq., declaring that the finding in a case tried to the court shall have the same effect as a verdict, a general finding on oral testimony is not reviewable on appeal, where no special finding was requested or made.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

"Not officially reported."

Action between Rufus A. Nichols and others and John T. Ragsdale. From a judgment for the latter, the former appeal. Affirmed.

John B. Tally, for appellants. W. H. Norwood, for appellee.

TYSON, J. This is an appeal prosecuted from a judgment rendered by the court in a cause tried by the presiding judge without the intervention of a jury. The error assigned is that the court erred in the judgment rendered. This assignment is based upon the contention that the evidence is insufficient to support the judgment. No special finding of the facts was requested, and none appears in the record; nor was the cause tried upon an agreed statement of facts, but upon testimony offered orally in support of the issue of fact which was submitted to the trial judge for his determination and decision. It has been uniformly held by the court, in the absence of a statute authorizing the review on ap-

peal of the general finding, as here, that the court is without jurisdiction to do so: that such a finding must be treated as the verdict of the jury, and not reviewable on appeal. Section 3319 et seq. of the Code of 1896; McCarthy v. Zeigler, 67 Ala. 43; Gill v. Daily, 106 Ala. 323, 16 South. 932; Quillman v. Gurley, 85 Ala. 595, 5 South. 345; Wright v. State, 129 Ala. 123, 29 South. 864. The judgment must be affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

NASHVILLE, C. & ST. L. RY. v. ALLEN.

(Supreme Court of Alabama. June 7, 1906.)

DAMAGES—INJURY TO PROPERTY—INTEREST—RECOVERY—PLEADING—DEMAND FOR INTEREST.

Since damages suffered by plaintiff for the killing of his mare by a railroad company bear interest from the time of the killing to the date of the trial, plaintiff is entitled to recover such interest without claiming the same in his complaint.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 438.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

"Not officially reported."

Action by John W. Allen against the Nashville, Chattanooga & St. Louis Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Oscar R. Hundley, for appellant. J. H. Hackworth and Virgil Bouldin, for appellee.

TYSON, J. The complaint is for the recovery of \$200 damages for the negligent killing of plaintiff's mare. No interest is claimed in it on this sum. The verdict of the jury was for \$214.30. The \$14.30 was evidently awarded as interest upon the \$200 which accrued between the date of the killing of the mare and the rendition of the judgment. That the damages suffered by plaintiff bear interest from the time of the killing of his animal to the date of the trial is well settled. Georgia Pacific R. R. Co. v. Fullerton, 79 Ala. 298; A. G. S. R. R. Co. v. McAlpine, 75 Ala. 113. It was therefore unnecessary to claim interest in the complaint, as it may be recovered, although not claimed. McWhorter v. Standifer, 2 Port. 519; Elliott v. Smith, 1 Ala. 74; Bumpass v. Webb, 3 Ala. 109; Kennedy v. Young, 25 Ala. 563. The case of Jean v. Sandiford, 39 Ala. 317, relied on by appellant's counsel, has no application. In that case the damages recovered did not bear interest.

This being the only point insisted on in brief of appellants' counsel, the judgment must be affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

REDUS v. MILNER COAL & R. CO.

(Supreme Court of Alabama. June 7, 1906.)

1. EVIDENCE—OBJECTIONS—EXAMINATION—RE MOTENESS.

An accident, consisting of a derailment of a car, occurred in September, 1903, and a witness did not examine the track at the point of the accident until March 20, 1905. *Held*, that he was not then entitled to testify as the difference in the height of the rails where they joined; in the absence of proof that the conditions were the same when he examined the track as at the time of the accident, though there was some evidence that no changes had been made at all to repair the track since the wreck.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 402; vol. 9, Cent. Dig. Carriers, § 1301; vol. 34, Cent. Dig. Master and Servant, § 917; vol. 37, Cent. Dig. Negligence, §§ 250, 251.]

2. TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS.

Where a question had not been completed when it was objected to, and the witness did not answer so much of the question, but waited until the question was completed, the objection was ineffective as against the answer afterwards made, in the absence of a motion to exclude.

3. WITNESSES—EXAMINATION—QUESTIONS—CALLING FOR OPINION OR FACTS.

A question as to whether rails are ordinarily laid on switch tracks leading to and from mines and for slate dumps as heavy as rails on the main line of a railroad was not objectionable as calling for an opinion of the witness.

4. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS.

Where, in an action for injuries to a servant by the derailment of a car, it appeared that the car was emptied of its contents by "dumping," which was accomplished by pulling a lever, an instruction that, if plaintiff "emptied" the slate from the car at the place of derailment, he was guilty of contributory negligence, was sufficiently covered by the plea, which alleged that plaintiff "dumped the car."

5. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff had been ordered not to dump a slate car until he got orders to do so from the engineer, but violated such instructions and dumped the car while it was moving at some speed 1,400 feet before the dump was reached, resulting in the car being derailed and plaintiff being injured, plaintiff was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 759.]

6. SAME—RES IPSA LOQUITUR.

Where plaintiff, a servant, was injured by the derailment of a slate car, which he prematurely dumped in violation of orders, the fact that plaintiff was injured by being thrown from the car was insufficient in itself to establish defendant's negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 881, 898, 1003.]

Appeal from City Court of Birmingham; Charles H. Senn, Judge.

"Not officially reported."

Action by Henry Redus against the Milner Coal & Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action by appellant against appellee for injuries sustained by being thrown from a car on which he was riding, operated by the appellee. The cause was tried on the first and third counts, the substance of which is

set out in the opinion. The evidence in the case tended to show that the defendant was riding upon a slate car propelled backwards by an engine at about 10 miles an hour, when the car jumped the track and plaintiff either fell off or jumped off from the left-hand side and the car turned over. The evidence tended to show that the track was defective, in that it was laid with second-hand rails, and the joints were not even and plumb. It was shown that one Belcher was in charge of the engine. It was shown by the tendencies of the evidence that the track at the point where the accident occurred was reasonably safe for the purposes for which it was used. The evidence for the defendant tended to show that the train was running about 5 miles per hour, and that just previous to the accident and while the train was moving plaintiff pulled the levers on the slate car, which drew open the door and dumped the slate on either side in the track, and that the point where he dumped it was about 1,400 feet from where they had been formerly dumping the slate. The evidence further tended to show that the dumping of the slate caused the car to leave the track. The other facts sufficiently appear in the opinion.

The second assignment of error, referred to in the opinion, is in the following words: "The court erred in allowing the defendant, against plaintiff's objection, to ask the witness McKinna: 'Just put it under the most favorable conditions for attaining the speed with a switch engine weighing 19 or 20 tons pushing a car loaded with slate, the car 34 feet long, 6 feet high, and 4 feet wide.'" The defendant was permitted to ask the witness McKinna, over plaintiff's objection, the following question: "I will ask you whether or not on the tracks, where trains are handled ordinarily with not more than three cars—that is, tracks for the switching of cars to and from the mines, and from the slate dumps, handled by switch engines—rails are ordinary used that are as heavy as rails that are used on the main line of railroad where heavy trains pass with great speed and frequency."

At the request of the defendant the court gave the following charges: Charge 22: "If you believe from the evidence that the plaintiff emptied the slate from the car at the place of derailment, I charge you that he was guilty of negligence in so doing." Charge 11: "If the plaintiff emptied the slate on the track at the place of the accident, and the slate so emptied proximately contributed to the derailment in the slightest degree, then I charge you that the plaintiff cannot recover, even though you may also believe that the derailment would not have occurred if the track had been in perfect position and if the car had been running at a slower rate of speed." Charge 12: "If the plaintiff emptied the slate onto the track at the place of the accident, and the slate so emptied

proximately contributed to the derailment in the slightest degree, then I charge you that the plaintiff cannot recover." Charge 9: "If you believe from the evidence that the plaintiff emptied the slate from the car onto the track, then I charge you that he cannot recover." (6) The fact that the plaintiff was hurt by being thrown from a car on defendant's railroad is not evidence of negligence, and does not entitle him to recover in this suit. There was verdict for the defendant.

J. C. King, for appellant. Tillman, Grub, Bradley & Morrow, for appellee.

ANDERSON, J. This case was tried upon the first and third counts as amended; the negligence in the first count being predicated upon the acts of the engineer, and in the third upon the defective condition of the track. The defendant pleaded the general issue and contributory negligence to each each count and an assumption of risk to the third count.

The trial court did not err in sustaining the objection to the witness Raburn as to the difference in the height of the rails where they join. The accident occurred in September, 1903, and the witness did not examine the track until the 20th of March, 1905, about 18 months after the accident. This testimony was clearly inadmissible in the absence of proof showing that conditions were the same when he examined the track as at the time of the accident, which was not shown. The rails may have been even when the accident occurred, yet there may have been a difference in the height where they joined in March, 1905, caused by use, wear, sinking of one rail, or other causes. *Davis v. Alexander City*, 137 Ala. 206, 33 South. 863. The witness Davis does testify that that portion of the track had been laid by him before the accident, and that no changes had been made at all to repair the track since the wreck. This is not sufficient, however, to show that the condition of the rails as to where they joined were the same in March, 1905, as they were when the accident occurred.

We cannot put the trial court in error under the second assignment of error. The question seems not to have been completed when the objection was made, and the witness did not answer so much of the question only as had been objected to, but waited until the question was completed, and there was no motion to exclude the answer. The second objection to the question to the witness McKinna was without merit, as the question was not subject to the objection assigned. It called for a fact, and not an opinion.

There was no error in giving charge 22, requested by the defendant. Appellant contends that the charge is not covered by the plea of contributory negligence, in that it has reference to emptying the car, and the

contributory negligence set up in the plea is that plaintiff "dumped the car." It is true that a party setting up contributory negligence is confined to the negligence averred; but we think the words "dumped" and "emptied" are synonymous, as shown from the evidence in this case, since it shows that the car was emptied of its contents by what the witness terms "dumping," and which was done by pulling a lever. We think as a matter of law that, if plaintiff emptied the car at the place of the accident, he was guilty of negligence in so doing. It is true that he denied emptying the car, but the undisputed evidence is that the car was derailed 1,400 feet before they got to the place to dump, the car was going at some speed, and the plaintiff was not to dump the car until he got orders from the engineer; that he was familiar with the place, and knew that he had to be authorized by the engineer before dumping. What we say as to charge 22 relates also to charges 11 and 12, given at the request of the defendant.

There was no error in giving charge 9. It is true that the plaintiff denied emptying the car, yet the undisputed evidence shows that the slate caused the trucks to jump the track, and, if the plaintiff so emptied the car, then he was guilty of negligence which proximately caused his injury.

There was no error in giving charge 6. The fact that plaintiff was hurt by being thrown from defendant's car is not, in and of itself, evidence of negligence. This is not a case in which the plaintiff makes out a prima facie case by showing an injury. The burden of proof is upon him to show negligence.

The other assignments of error are not insisted upon by counsel for appellant.

The judgment of the city court is affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

JOHN v. SHARPE et al.

(Supreme Court of Alabama. June 7, 1906.)

1. ADMINISTRATORS — ACCOUNTING — CREDITS — LEGAL SERVICES.

Where an administrator, being an attorney, finds it necessary to institute a suit in behalf of the estate and associates another attorney with him, and he and the other attorney jointly render professional services to the estate, the administrator is entitled to a credit on the settlement of the administration in the probate court to the extent of the reasonable value of such services.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2068.]

2. SAME—VOUCHERS.

Where an administrator, who is an attorney, finds it necessary to institute a suit in behalf of the estate and associates another attorney with him, and they jointly render services in the institution and prosecution of the suit, the administrator having the money of the estate out of which the allowance of counsel

fees is to be paid in his own hands, it is not necessary for him to have actually paid the fee to himself and his associate, or to procure a receipt for himself and his associate, or from either, evidencing that the fee, or even the associate's part of it, has been paid, in order to obtain an allowance of the fee on his settlement as administrator.

Tyson, J., dissenting.

Appeal from Probate Court, Jefferson County; J. P. Stiles, Judge.

"Not officially reported."

Appeal by Sam Will John, as administrator, from a decree of the probate court disallowing an item for counsel fees, on objection of Harriet Sharpe and others. Reversed, for a restatement of the account in accordance with the opinion.

Sam Will John, in pro. per. George Hudson, for appellees.

MCCLELLAN, C. J. It is the opinion of a majority of the members of the court that where an administrator, being an attorney at law, finding it necessary to institute a suit in behalf of the estate, associates another attorney with him, and they—himself and such other attorney—jointly render professional services to the estate in the institution and prosecution of such suit, the administrator is entitled to a credit on the settlement of the administration in the probate court to the extent of the reasonable value of such services. The case is unlike those of *Marks v. Semple*, 111 Ala. 637, 20 South. 791, and *Teague v. Corbitt*, 57 Ala. 545, in which the trustee employed counsel to themselves represent the trust estate and himself as the trustee, not merely associating another attorney with himself as counsel for the estate. They are also of opinion that, as the administrator has the money of the estate out of which the allowance of counsel fees is to be paid in his own hands, it is not necessary for him to have actually paid the fee to himself and his associate, or to procure a receipt for himself and his associate, or from either, evidencing that the fee, or even the associate's part of it, has been paid. After the allowance of the fee to the administrator on his settlement, the assistant counsel must look only to the administrator individually for his share of the fee. These considerations lead to the conclusion that the court of probate erred in limiting the allowance for counsel fees to the administrator to the sum which he had actually paid to his associate counsel in the litigation, though the evidence showed that reasonable compensation for the services rendered by them jointly was considerably more than the amount so paid to associate counsel.

The judgment will be reversed, and a judgment will be here rendered allowing the credit to which the administrator was entitled, which on the evidence we find to be \$116.66, allowing also the credits which were allowed by the court below. The cause will be reversed for a restatement of

the account upon the principles of this opinion, and as above indicated, and for a proper decree of distribution.

PER CURIAM. This case has been considered in general conference by the court as at present constituted, and the majority adopt the foregoing opinion prepared by the late Chief Justice McCLELLAN as expressing their views upon the questions therein discussed. The majority are also of the opinion it sufficiently appears that in and by the credit in question the administrator was claiming an allowance of the joint fee for himself and Fulghum justly earned in performing legal services for the estate, and which was no greater than the amount that might have been properly charged if the services had been rendered by either alone. The administrator had actually paid his assistant more than one-half of the fee as here fixed, and the remainder, being retained in his own hands, may in a broad sense be considered as paid by himself. Items of credit in an administrator's account must not be too narrowly or technically construed.

Reversed; rendered, and remanded.

WEAKLEY, C. J., and HARALSON, DOWDELL, SIMPSON, ANDERSON, and DENSON, JJ., concur.

TYSON, J. (dissenting). Appellant in his account on final settlement claimed a credit of \$175 "cash paid Fred Fulghum, et al., attorney fee." The item was contested. The court allowed him a credit of \$62.50, being the sum which the evidence shows was actually paid by him to Fulghum for professional services rendered. It is true the record shows that, after the evidence had all been introduced and the argument of counsel closed, the administrator, appellant here, in the presence of the court had Fulghum to execute a receipt for \$175, reciting a payment to him of that sum as attorney's fees, which by leave of the court was placed in the file as a voucher. We apprehend that this was of no consequence, in view of the fact, clearly established by the evidence, that Fulghum had only been paid \$62.50, the amount allowed by the court. Doubtless the administrator was influenced in procuring the receipt, believing that it was sufficient to entitle him to the credit he claimed, by an expression used in *Bates v. Vary*, 40 Ala. 440. It is there said: "To allow an administrator a credit for professional or other services rendered by others for the estate or himself as its representative, without having paid the person rendering them, or at least obtained a receipt therefor, would be opening a door to fraud and imposition, which the law is studious and careful in keeping closed to every temptation or opportunity to make any profit out of the trust for himself and others." Whatever the words "or at least obtained a receipt therefor" may mean in

the connection in which they were used, it is entirely certain that the receipt obtained and filed in this case cannot be held to be proof of the fact of payment of the amount recited in it, in face of the established fact that only \$62.50 was really paid. The decisions of this court are clear to the point that an administrator cannot be allowed credit for counsel fees, other than those to himself, unless he shows that he has actually paid them, and, when paid, to the extent only that they are fair and reasonable. In *Bates v. Vary*, supra, the administrator had contracted to pay counsel fees which were shown to be reasonable, but had not paid them. The probate court refused to allow him a credit for them. This court affirmed the decree, holding that he "had the right to employ counsel, but was not entitled to an allowance for any part of the fee without payment of the same." The reasoning in part upon which this conclusion was based is in this language: "If the law were otherwise, an administrator might obtain a credit for the value of services rendered the estate by others, and never pay the parties entitled, or, if anything, such portion as he might see proper to pay before the credit was actually allowed, thereby giving him the advantage of any excess that might be allowed over the sum contracted to be paid." See, also, *Pearson v. Darrington*, 32 Ala. 263; *Modawell v. Holmes*, 40 Ala. 392; *Ditmar v. Bogle*, 53 Ala. 169, 171; *Teague v. Corbitt*, 57 Ala. 529, 545.

The court having allowed the proper credit in respect to the fee paid Fulghum, and the only credit to which the administrator could possibly have been entitled growing out of his employment of Fulghum, the action of the court in excluding what contract or agreement was entered into between them, if erroneous, was clearly without injury. Nor would the contract or agreement, no matter what it may have been, entitle the administrator to be compensated for professional services rendered by him in behalf of the estate, since no necessity is shown to have existed for his rendering any. Having employed Fulghum, who was shown to be a competent lawyer and to have rendered the necessary professional services, to recover the \$350 which constituted the entire assets of the estate, it would be unjust to impose upon the estate the burthen of compensation to the administrator to render the same service. Had the administrator alone rendered the professional services which the evidence shows was rendered by him and Fulghum jointly, undoubtedly he would have been entitled to compensation for them. The necessity for that character of service unquestionably existed, but it was relieved, on the facts shown by this record, when he employed Fulghum. Before proceeding, however, with a further discussion, in order to be more clearly understood, it may be well to

state that the correctness of allowing the credit of \$62.50 paid Fulghum is not here involved. John having induced the court to allow it upon the theory that Fulghum's employment was necessary to a due administration of the estate, he cannot now be heard to question the correctness of its allowance. Assuming, as we have the right to do, that Fulghum was entitled to fair and reasonable compensation for his services, the sole question we are called upon to deal with is John's right to compensation also.

The fact shown are these: After the administrator had employed Fulghum to represent him, or rather to assist him in the collection of the claim which constituted the entire assets of the estate, the administrator prepared the complaint with Fulghum's assistance; the remainder of the service necessary to its collection being rendered by Fulghum alone. Thus it is seen that the only professional service rendered by the administrator was the preparation of the complaint, which could and should have been done by Fulghum, his attorney. No necessity, in my opinion, therefore, existed for his performing any service whatever. It is of no moment, it seems to me, whether Fulghum was employed to assist him, or whether, after Fulghum's employment to collect the claim, he assisted Fulghum. The principle of law governing the matter of compensation to the administrator for professional services is the same, whether Fulghum was to assist him or whether he was to assist Fulghum. Whether the one or the other, no necessity, as I have said, existed for his service. The case is controlled by the principles declared and which governed in the case of *Marks v. Semple*, 111 Ala. 637, 20 South. 791, and *Teague v. Corbitt*, 57 Ala. 529. In both of those cases compensation to the administrator was disallowed upon the ground that no necessity existed for his rendering any service, because he had employed an attorney to represent him, and who did in fact represent him. It was said: "Having employed counsel, * * * and no necessity existing for any assistant or additional counsel, it would be unjust to impose upon the estate the burden of compensation to the administrator for an unnecessary service."

To permit an administrator to be compensated for professional services upon the theory that he employed counsel simply to assist him, when he would not be allowed compensation if he assisted his counsel, is to destroy the salutary principle requiring him to show that a necessity, not of his own creation, existed for his rendering services. And when this court announces such a rule. I confidently predict that thereafter counsel will in every instance be employed to assist where the administrator is himself an attorney. It will make a plain and smooth road to the trust fund, which cannot be reached in any other way known to the

law. I am unwilling to assist in opening the way or to subscribe to the doctrine that an administrator can create the necessity by his own act, by which he can get such compensation. The necessity spoken of in our cases authorizing an allowance for compensation upon proof of it for professional services rendered by an administrator in a case like this is one arising out of the duty of the administrator to enforce the collection of the claim by suit, and not out of any contract he may make with counsel to render him assistance in its collection. I do not doubt that a case can arise, owing to its intricacy, where the professional services of two counsel may be required; but, where the administrator is one of them, clearly the burden is upon him to prove the existence of that necessity, and, if he should fail to prove it, he should not be allowed compensation. Indeed, he cannot be allowed it. In this case no fact is shown, beyond the mere character of the claim and the suit upon it, tending in the remotest degree to show the necessity for the services of both Fulghum and John, the administrator. The nature and character of the claim and of the suit, which was never tried, do not, in my opinion, in view of the proof of Fulghum's competency as an attorney, establish the necessity for the services of both. Fulghum having been paid all that the administrator can be allowed a credit for, it is of no moment that it is less than reasonable compensation for the services rendered by him. *Teague v. Corbitt*, supra.

But it cannot be affirmed on the facts shown by the evidence that it was not full compensation for the services rendered by him, since the value of his services was not shown except in connection with those rendered by John. In other words, there was no evidence offered showing the value of the services of each; the value of their joint services only being shown. It will not do to say the value of their joint services is \$116.66, and that John may retain this sum for the benefit of himself and Fulghum. To do so would violate the principle declared in *Bates v. Vary*, upon which actual payment to another is required before the administrator can be allowed a credit. Fulghum has already been paid so far as the estate is concerned; and, if he had not been paid, John would not be entitled to a credit for the value of his (Fulghum's) services, no matter how valuable they may have been to the estate. And this principle, so often declared by this court and so thoroughly imbedded in our jurisprudence, cannot be circumvented by presenting a claim in behalf of Fulghum and the administrator jointly. Nor will it do to say that John is entitled to have the difference between the \$62.50 paid Fulghum and the \$116.66 for his services, since the value of his services is not shown. Furthermore, conceding the existence of a necessity for John's services, in the absence of all evidence of their

value, by what process of reasoning is he to be allowed to retain the sum of \$54.16? He presented no claim for this sum or for such services. The credit he claimed, to repeat, as shown by his account, was "for cash paid Fulghum et al., attorney fee, \$175." This was the item he moved the court to allow as a credit, and it was the disallowance of this item, except to the extent of \$62.50 paid Fulghum, that the exception by him was reserved.

John had not paid and could not pay himself. Had he presented his claim properly, his right to a credit depended upon whether the court would allow him to retain the value of his services, and not upon the theory he had paid himself. His right to compensation was necessarily distinct from his right to a credit for payments made to Fulghum, and it not appearing that he made on the trial either proof of the value of his services as separate from those of Fulghum, or that he ever made any claim on account of his own services otherwise than by insisting on the allowance of the item "for cash paid Fulghum et al.," the court should not be put in error for the ruling excepted to.

It follows, from what I have said, that I must dissent from the conclusion of a majority of the court reversing the decree.

JOHN v. PICKETT et al.

(Supreme Court of Alabama. June 7, 1906.)

Appeal from Probate Court, Jefferson County; J. P. Stiles, Judge.

"Not officially reported."

Appeal by Sam Will John, as administrator, from an order of the probate court refusing to allow a counsel fee on defense of Sallie Pickett and others. Reversed.

Sam Will John, in pro. per. George W. Huddleston, for appellees.

PER CURIAM. This cause was reversed, rendered, and remanded on the authority of the case of *John v. Sharpe et al.*, 41 South. 635.

TYSON, J., dissents.

ALABAMA GREAT SOUTHERN R. CO. v. BURKS.

(Supreme Court of Alabama. June 7, 1906.)

1. RAILROADS—INJURY TO LICENSEE—ACTION—PLEADING—VARIANCE.

Where, in an action for injuries, the declaration alleges plaintiff to have been a licensee upon defendant's railroad, but the evidence shows the relationship of master and servant, an affirmative charge should be given for defendant.

2. MASTER AND SERVANT—EXISTENCE OF RELATION.

One acting as a railroad brakeman, on an understanding with the railroad that he should receive no stipulated wages while learning the

duties of a brakeman, but should be given a position after becoming proficient, was a servant, and not a licensee.

Appeal from Circuit Court, Etowah County; W. W. Haralson, Judge.

"To be officially reported."

Action by Enoch Marvin Burks against the Alabama Great Southern Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

This was an action of damages by an employé, the plaintiff, against appellant, for personal injury alleged to have been sustained. The cause was tried on counts 2 and 4, which are as follows: Count 2: "Plaintiff claims of the defendant, a body corporate doing business in Etowah county, state of Alabama, \$25,000 damages, for that on, to wit, September 7, 1904, plaintiff, while a licensee upon defendant's railway, and while engaged in learning the duties of a brakeman with the defendant's consent, was injured at Crudup, in the county and state aforesaid, as follows: Plaintiff's right arm was seriously and severely crushed between the elbow and wrist, thereby causing plaintiff to endure very great physical and mental pain and suffering and permanently rendering plaintiff less able to earn a livelihood. Plaintiff avers said injuries to have been proximately caused by the negligence of defendant's servants or agents, whose names are unknown to plaintiff, while acting within the scope of their employment, which negligence consisted in this: The said servants or agents negligently caused a car to be moved whilst plaintiff was in the act of coupling the same." Count 4: "Plaintiff adopts all of count 2 down to and including the clause 'to earn a livelihood,' and makes the same a part of this the fourth count of the complaint. Plaintiff avers said injuries to have been proximately caused by the wanton, willful, or intentional conduct of the defendant's servants or agents, whose names are unknown to plaintiff, while acting within the scope of their employment, which wanton, willful, or intentional conduct consisted in this: The said servants or agents wantonly, willfully, or intentionally ran a car against cars which plaintiff was endeavoring to couple together, with the knowledge that plaintiff would probably be injured thereby and with reckless disregard of the consequences." The evidence is sufficiently set out in the opinion. The defendant requested the affirmative charge as to counts 2 and 4, which the court refused.

Goodhue & Blackwood, for appellant. Denson & Denson, for appellee.

ANDERSON, J. This case was tried upon counts 2 and 4, and to which the demurrers interposed by the defendant were overruled by the trial court. Conceding that these

two counts correctly proceed upon the theory that the plaintiff was a licensee, the evidence shows the relationship of master and servant, and charges 26 and 27, the affirmative charges, should have been given.

It appears from the evidence that the employer consented to plaintiff's services, and therefore exercised the right of selecting him, had the right to remove or discharge him, and to direct him in the rendition of the services which he had undertaken. The plaintiff was to receive no stipulated wages, but undertook to learn the duties of a brakeman, and was to be given a position after he had learned the duties. These facts showed the plaintiff to be a servant, rather than a mere licensee of the defendant. 20 Am. Eng. Ency. Law, pp. 1, 2; Heygood v. State, 59 Ala. 51; Dresser's Employers' Liability, p. 52, § 8; Drennen v. Smith, 115 Ala. 396, 22 South. 442.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

KING v. SOUTHERN R. CO.

(Supreme Court of Alabama. June 13, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ISSUES IN PROOF.

Where plaintiff alleged that he was injured by the negligence of defendant's superintendent in allowing or causing plaintiff's hand to be caught in the cogwheels of a machine, and by reason of defects in the ways, works, machinery, or plant, and the evidence showed that, when plaintiff was directed to start the fly wheel of the machine, he negligently placed a stool on which to stand so that he had to catch the cogwheel for support, whereupon his hand was mashed as the machine started, the evidence did not sustain the averments of negligence pleaded.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff's contributory negligence was the proximate cause of his injury, barring his right to recover.

3. APPEAL—RULINGS ON EVIDENCE—REVIEW.

A judgment will not be reversed for the exclusion of evidence on motion of either side, when the evidence is not competent, relevant, or material.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"Not officially reported."

Action by Gus. King against the Southern Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The plaintiff sought to recover damages for the loss of some fingers. The negligence in the first count is laid in one Oakley, alleged to be in the employment of defendant and whilst in the exercise of superintendence, negligently allowed or caused plaintiff's hand to be caught in the cog wheel. In the second count, the negligence is alleged as a proximate consequence of the defects in the ways, works, machinery or plant. Demurrers were overruled to the complaint and issue was joined on the general issue and

three pleas of contributory negligence setting up that plaintiff negligently placed his hand near the cog wheel so that it would be caught, and that he took hold of the cog wheel negligently knowing of the danger thereto when his hand was caught and mashed. The evidence tended to show that the plaintiff was working under Oakley who directed him to get up and start the fly wheel of the machine moving so as to move the machine, and that he let one hand rest on the cog wheel until it was caught and mashed. The evidence also tended to show that in getting up to the fly wheel he used a stool and placed it so negligently that he had to catch to the cog for support. Plaintiff's counsel asked witness Oakley the following question: "Assuming that it was not necessary for him to catch hold of the big cog wheel and hold on to it until his fingers were caught between the two cog wheels, I will ask you if a man standing up on a stool, catching hold of the fly wheel, and the stool should give way and fall, if it would not be likely for him to get his hand between the two cog wheels." Objection was sustained to this question, and plaintiff excepted. It was further shown by the evidence that Oakley directed plaintiff to start the fly wheel and directed him to use the stool to reach it. The court gave the general affirmative charge for defendant.

Bowman, Harsh & Beddow, for appellant.
James Weatherly, for appellee.

ANDERSON, J. The evidence in this case failed to support the averments of negligence in the complaint, and the general affirmative charge was properly given for the defendant. On the other hand, the injury was due to the manner in which the defendant set the stool, and therefore his injury was the proximate result of his own negligence.

The trial court did not err in sustaining the objection to the question to the witness Oakley, propounded by the plaintiff. It called for the opinion of the witness as to the consequential results of the stool giving way and the plaintiff falling, which was a conclusion or inference for the jury.

The answer of the witness Owens, "I heard of it in an indirect way once or twice," was brought out by the question of defendant's counsel, and he could not complain of same, and, if the court had refused his motion to exclude, the ruling would be upheld. But, while the trial court will not be reversed for refusing evidence so brought out, it will not be reversed for excluding evidence, on motion of either side, when the evidence is not legal, competent, relevant, or material. If it is not proper evidence, the action of the court in eliminating it will not be reversed.

The judgment of the city court is affirmed. All the Justices concur.

(117 La.)

No. 15,930.

PELLETIER v. STATE NAT. BANK.

(Supreme Court of Louisiana, June 4, 1906.
Rehearing Denied June 27, 1906.)

1. EXECUTION—THIRD OPPOSITION—DEFENSES BY CREDITOR.

Where a wife files a third opposition claiming the ownership of certain property which had been seized under a *fi. fa.* by a judgment creditor of her husband, together with damages for the seizure, and seeking an injunction against a sale under the writ, the seizing creditor has a legal interest in defending the legality of his own proceedings and resisting the claims of the wife by means of any legal defense, and evidence to which such a condition of things may give rise. He is not confined to any particular line of defense.

2. SAME—DATIION EN PAIEMENT.

Where the claim of the wife to the ownership of the property seized is based upon a transfer of the same to the wife under a *dation en paiement* of an alleged claim due to the wife, the seizing creditor has the right to contest such claim of ownership on the ground of the non-existence of the debt to the amount declared, or of its entire nonexistence, and on the ground that the value of the property given in payment did not bear a just proportion to the amount of the wife's claim. *Colvin v. Johnston*, 29 South. 274, 104 La. 655; *Freiburg v. Langfelder*, 15 South. 677, 46 La. Ann. 1418; *Hyman v. Schlenker*, 10 South. 623, 44 La. Ann. 108.

3. SAME—INSOLVENCY OF HUSBAND.

The right of the husband to make a transfer of property to his wife through a *dation en paiement* is an exceptional right, and can be exercised only under the circumstances and conditions fixed by the law. Unless so exercised no title passes to the wife. For resistance to the wife's demand under such circumstances it is not necessary that the seizing creditor make and prove all the allegations called for by a revocatory action. It is not necessary that it should be alleged and shown that the husband was insolvent at the time of the *dation en paiement*. The fact that though he was perfectly solvent the wife and husband concluded together to withdraw all the property of the husband from the payment of the husband's debts, when it was legally applicable thereto, may be (and is in this case), the ground of resistance of the wife's pretensions.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 337-346, 510.]

4. SAME—DAMAGES FOR WRONGFUL SEIZURE.

When the claims of the wife to the ownership of the property fell, the demand for damages for its seizure fell also.

5. SAME.

A wife has the legal right to pay the debts of the husband should she so desire. A payment made by her of a debt of her husband to prevent the sale of certain property under the erroneous belief that it belonged to her, will not justify her in recovering it from the person to whom the payment was made, when the effect of the payment was to cause the seizure of the property to fall and the writ of the seizing creditor to be returned. Civ. Code, art. 2310.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Payment, §§ 253-266.]

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Walter Byers Sommersville, Judge.

Action by James B. Pelletier against the State National Bank. Judgment for defendant on a reconventional demand against

plaintiff. On the issuance of a *fi. fa.* against plaintiff, his wife filed a petition of intervention and third opposition. Judgment for defendant against the third opponent, and she appeals. Affirmed.

See 38 South. 132.

E. A. O'Sullivan, for appellant Mrs. L. Pelletier. William Stirling Parkerson, for appellee State Nat. Bank. Dinkelspiel, Hart & Davey, for appellee H. B. McMurray, civil sheriff of the parish of Orleans.

Statement of the Case.

NICHOLLS, J. James B. Pelletier sued the State National Bank upon certain bank notes. The bank resisted the claim and set up a reconventional demand. The plaintiff obtained judgment in the district court which was eventually annulled and set aside, and judgment rendered in favor of the bank on the reconventional demand. That judgment became final on February 27, 1905.

On February 28, 1905, the civil sheriff acting under a writ of *fi. fa.* which, issued in the case, seized the contents of a certain store consisting of furniture, antiques, bric-a-brac, etc.

Prior to that seizure, Pelletier had, on the 10th of January, 1905, by act before Seymour, made a transfer of the contents of the store to his wife by way of a *dation en paiement* of an indebtedness of \$2,000, declared in the act to be due to the wife by the husband. On the 14th of January, 1905, the wife instituted and appointed her husband her agent, and from that time he had the active control of the store.

There was no community of acquets and gains between the spouses. They were separated in property by their marriage contract.

On March 4, 1905, Mrs. Pelletier filed a petition of intervention and third opposition in the case, claiming ownership of the property seized, in which she prayed for an injunction to restrain the sheriff from selling it.

The judge to whom the petition was presented fixed the amount of the injunction bond which she should furnish at \$3,000. The amount for which the *fi. fa.* issued was \$1,737.

Third opponent not being able to furnish the bond, she paid into the hands of the sheriff, under protest, the amount called for by the writ, declaring in the act tendering the money that she reserved all her rights against the sheriff and the seizing creditor for the illegal seizure of the property, and for all damages resulting therefrom; that the amount so tendered was not in payment, but in order to prevent an irreparable injury to herself and without waiving any of her rights in the premises.

On March 8, 1905, third opponent, with leave of court filed an amended and supplemental petition in which she recited her inability to give the bond which she declared

excessive, and which she had unsuccessfully sought to have had diminished and her reasons for paying the amount demanded, though not due by her. She reiterated all the facts and allegations of her original petition, and averring further that the bank and sheriff had acted most illegally and oppressively; that although the facts which she had sworn to and the excessive amount which had been required by the judge had been called to their notice, still persisted in dispossessing her of her property, she declared that in addition to the amount of damages originally claimed by her she was entitled to a return of the money so received by the sheriff, and to an increase of the damages to the sum of \$5,000. She prayed accordingly.

On the 20th of March, 1905, the bank, by leave of court, filed a supplemental and amended answer in which it averred that the pretended transfer by the husband of his stock and business to his wife was a fraud perpetrated to prevent the seizure by it of said stock and business in execution of its judgment; that the value of the property so attempted to be transferred was greatly in excess of the pretended claim of his wife; that she had not availed herself of her legal remedies; it prayed that the third opposition be rejected and for all and general and special relief, as the nature of the case required and law and equity could grant.

On issue so joined the case was taken up for trial on November 2, 1905, and evidence adduced. The testimony being closed, the case was continued for argument for November 13, 1905.

On November 6, 1905, the bank with leave of the court, filed an amended and supplemental answer, in which it averred that at the time of the alleged transfer of the property by petitioner to his wife it was an entire transfer of all his property, and that he had nothing else out of which it could make its judgment; that he was insolvent to the knowledge of his wife, and the transfer was made to defraud the bank and prevent it from executing its judgment.

When the case was called for argument, third opponent filed an opposition to this supplemental and amended answer and giving her grounds for opposing it. The court declared the proceeding to be good and according to law.

The district court rendered judgment, adjudging and decreeing that there be judgment in favor of the State National Bank and the civil sheriff, and against the third opponent Mrs. Pelletier, dismissing the suit so far as the injunction and the demand for \$1,737 with interest was concerned.

It further ordered, adjudged and decreed that the claim for damages in the supplemental petition for \$3,000 be dismissed, and that the demand for \$3,000 claimed in the original petition be dismissed as in case of nonsuit.

Third opponent moved for a new trial on the grounds:

First. That it was incumbent on the seizing creditor to allege and prove the insolvency of the vendor.

Second. That the seizing creditor cannot escape the proofs necessary in a direct, revocatory action by seizing the property transferred.

Third. That the court erred in decreeing that the bank had no interest and was no party to the suit by reason of third opponents having paid the judgment.

Fourth. That the payment of the judgment by third opponent under protest duly made, is as if, as far as its effect is concerned, no payment had been made.

The court refused the application, and Mrs. Pelletier has appealed.

In the brief filed in behalf of the third opponent, counsel referring to a question propounded to the witness Jackson, said:

"He was asked as to the value of the contents of the store transferred by J. P. Pelletier; then counsel for third opponent objected to any testimony to show value in excess of the price mentioned, on the ground:

"That the plaintiff in intervention, having proved that she had paid at least not less than \$400, that the defendant in intervention, the State National Bank has no interest in the cause one way or the other, on the following grounds, to wit:

"That no fraud is alleged in his answers, there is no insolvency alleged on J. B. Pelletier."

"That, in order to recover in the revocatory action, it is absolutely necessary and a condition precedent that the party who sold the property, the sale of which you attempt now to annul, must be proved by his creditor to be insolvent, at the time the sale was made; otherwise the creditor has no standing in court."

The court overruled the objection on the ground that there was not a revocatory action; that:

"Mr. Pelletier is no party to this suit at all.

"The suit is entirely between Mrs. Pelletier, the third opponent, and the State National Bank, and the bank is without interest in asking that the sale by Mr. Pelletier to Mrs. Pelletier be set aside. It has received the amount due it by Pelletier. There is no action whatever presented by the State National Bank against Mrs. Pelletier, revocatory or otherwise. It is simply a defense to a suit by Mrs. Pelletier."

A bill of exception was taken to the ruling.

Counsel argued to the same effect before this court.

Opinion.

When Mrs. Pelletier, by third opposition, came into the proceedings which had been inaugurated by the bank in execution of its judgment against her husband, claiming for herself the ownership of the property which had been seized, and opposing the sale of the same with damages for its seizure simultaneously demanding an injunction, the bank had clearly a "legal interest" in defending the legality of its own action and in resisting the attack made upon it by the wife. It was not limited to any particular line of defense.

Any defense which the nature of the case legally gave rise to was open to it.

If the property seized really belonged to its judgment debtor Pelletier, and if the title advanced by the wife had no legal existence, the bank was entitled to show it by any evidence legally admissible in support of those positions. Counsel of third opponent errs in the position which he takes that a dation en paiement made by a husband to his wife can successfully resist an attack, unless the dation be attacked upon the same allegations and the same evidence as would be necessary in order to maintain a revocatory action, and that in order to succeed the party attacking must allege and show that the husband was insolvent at the time of the transfer.

Our courts have to some extent protected against successful attack a transfer of property made by a husband to his wife in payment of paraphernal claims which are held against him. For instance, the mere preference and protection given thereby to the wife over other creditors of the husband, in case of his insolvency, cannot be urged, but this exemption from criticism falls far short of what counsel is here contending for. The creditors of the husband are expressly granted by article 2434 of the Civil Code the right to "object to the separation of property decreed between husband and wife and even executed with a view to defraud them."

They may even become parties to the suit for separation of property and be heard against it. That article does not pretend to disclose what the character of the fraud is from which the creditors have a right to protection. Evidently it is not fraud arising from the mere fact itself of insolvency, for that is the very condition of affairs which the law contemplates should give rise to action on the part of the wife adversely to her husband and his creditors. Civ. Code, art. 2425. So far from the bad condition of the husband's affairs giving rise to complaint by the creditor, an attempt of a wife to obtain a separation and transfer of property when her husband's affairs are prosperous, in order to gain an advantage over his creditors by withdrawing from them property legally applicable and more than sufficient to pay, not only the wife but all the creditors, would furnish one of the grounds for complaint. The right of the husband to make a sale or dation en paiement to his wife is an exceptional right which is to be exercised only when and to the extent which the law allows this to be done. If a wife, who, with a claim of \$500 should have had transferred to her by her husband property to the value of \$25,000, she should scarcely expect that the objection urged to that transfer by his creditors should be that he was insolvent at that time. On the contrary, the objection would be exactly the reverse of this; it would be that the husband having property amply sufficient to satisfy, not only the claims of his wife, but all other claims against him,

he and his wife had colluded together to withdraw the whole of his property from application to the claims of creditors by improperly, and without just cause, placing the legal title thereto in his wife, and that is precisely the complaint made here.

It is shown beyond question that the property transferred by Pelletier to his wife (assuming she had a legal claim of two thousand dollars) was much more than sufficient to pay both her and the bank; that the property so transferred was the only property held in Louisiana by the husband. The purpose of the transfer was clearly shown to withdraw it from legal pursuit by placing it under cover of the wife's name. The claim of \$2,000 of the wife against her husband rests upon her own testimony exclusively; it is not only not corroborated by other testimony as required by article 2277 of the Civil Code (Cutler v. Collins, 37 La. Ann. 95, Citizens' Bank v. Maureau, 37 La. Ann. 863), but it is weakened by testimony in the record. In the act of dation the husband acknowledges himself indebted to his wife in the full sum of \$2,000, which total sum of money he has made use of in his private affairs and business; said sum being her separate funds acquired prior to her marriage. Hyman v. Schlenker, 44 La. Ann. 108, 10 South. 623. The marriage contract is in the record. It makes no mention of any property being then owned by the wife. On the trial the wife testified to having given to her husband at one time \$400, and at another \$600. The first amount, she testified, consisted of paper money owned by her prior to her marriage which she had kept in her armoire until she turned the same over to her husband. The origin of the \$600 she does not give; she testifies to having earned some money during her marriage giving piano lessons, but from her own account the amount was trifling. According to her, the full benefit of her testimony she has turned over \$1,000 at the utmost, to her husband, while it is shown by her husband's testimony that between \$1,000 and \$1,800 of the contents of the store were sold between the date of the dation en paiement and the bank's seizure. A list of the things transferred to his wife is shown to have been attached to the act of dation, but it was not produced at the trial, and the wife testified that she did not think the value of those articles was given in it. Being asked whether she was satisfied with her purchase, she answered, "yes." Being further asked "whether it was excessive in her estimation," she answered:

"Well, I thought it was; well, yes, sir."

The following questions and answers followed:

"Q. Do you think it was much above \$2,000 or much below \$2,000?"

"A. I can't tell you; I couldn't very well, but I knew I had my money's worth."

"Q. Much more than your money's worth?"

"A. Well, I believe so, a little more."

"Q. How much more was it?"

"A. I don't know. I can't tell you. I am not in the business."

The deputy sheriff who made the seizure testified that, after he did so, James B. Pelletier told him the contents of the store were then worth \$12,000 to \$15,000. This question and answer were objected to, on the ground that the statement was that of the husband, but the objection was overruled, because it was shown that the husband was her agent at the time. That is true, but it was not shown that the declaration or admission was made by reason of anything called for or required by the agency. We disregard that statement of the husband; his wife did not authorize him to make admissions binding her.

It was testified to by both husband and wife that there were a number of articles in the store, some of considerable value, belonging to other parties which did not pass to the wife. The things transferred were set out as we have said, in a detailed list which was declared in the act of dation to be annexed to it but which was not produced. The act declared that the things sold were given on that list; "the same being the entire contents of the store without reservation."

Under the evidence the claim of the wife was not established beyond \$400 at the utmost, and the value of the articles transferred to her was much above any debt due to her. Under such circumstances the dation en paiement should not be permitted to stand. An essential to the validity of a dation en paiement to the wife in satisfaction of her paraphernal rights are "the just and honest claims of the wife," and the "just proportion of the value of the thing given to the amount of the wife's claim." Colvin v. Johnston, 104 La. 655, 29 South. 274; Freiburg v. Langfelder, 46 La. Ann. 1418, 15 South. 677; Hyman v. Schlenker, 44 La. Ann. 108, 10 South. 623.

The judgment of the district court setting aside the dation en paiement from James B. Pelletier to his wife was correct. With the setting aside of that dation and the rejection of the latter's claim of ownership to the property seized, the claims of the wife to damages and to a repetition of the amount paid by her to the sheriff fell. If her property was not seized, she was not in fact compelled by legal duress to pay the judgment of debt of her husband.

She had the legal right to pay her husband's debt if she thought proper. Assuming that she made the payment of her husband's debt in error, she cannot, when, as the result of that payment the bank has lost the benefit of its seizure, and had its writ returned, visit her error upon the bank. Article 2310, Civ. Code.

For the reasons assigned, the judgment appealed from is affirmed with costs.

PROVOSTY, J., concurs in the decree, not agreeing with the statement that the creditor of the husband has the right to interfere in the affairs of the husband without alleging insolvency.

MONROE, J. I concur in the view expressed by PROVOSTY, J.

(117 La.)

No. 15,926.

GARLAND v. WUNDERLICH et al.

(Supreme Court of Louisiana. June 18, 1906.
Rehearing Denied June 27, 1906.)

1. POSSESSORY ACTION—EVIDENCE—LIMITATIONS.

In a possessory action, it is incumbent on the plaintiff to prove possession, at the time of the disturbance complained of, and during the year preceding, and that the disturbance occurred within a year prior to the institution of the action.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, §§ 32-47.]

2. APPEAL—THEORY OF CASE.

This court is not at liberty, of its own motion, to deal with a possessory action as though it were petitory.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1053-1055.]

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas Moore Burns, Judge.

Action by George Pratt Garland against William Wunderlich and others. Judgment for plaintiff, and defendants appeal. Reversed.

Lewis Lovering Morgan and Stafford, Lambert & Robinson, for appellants. Henry L. Garland, Jr., for appellee.

MONROE, J. Plaintiff asserts ownership and actual possession in himself and his authors, for many years, of a tract of land in the parish of St. Tammany, and alleges that the defendants are slandering his title and otherwise disturbing his possession, and he prays that they be enjoined from so doing, and that he have judgment for damages. Defendants deny the alleged possession of the plaintiffs, set up title and possession in themselves, plead various terms of prescription (particularly that of one year as against a possessory action), and pray that the suit be dismissed. On the trial counsel for plaintiff offered and filed an act of sale from E. M. Cahn to plaintiff, of date January 30, 1905, and another from Nathan Page to Nicolas Claudel, of date August 10, 1875. He also offered acts of sale from Cook, tax collector, to Emma Heintz, of date August 23, 1883; from M. & J. Ingram to G. W. Medus, and from G. W. Medus to E. M. Cahn. The purpose of these offers was expressly limited to showing the extent of plaintiff's possession, and the three acts last mentioned, were,

apparently, not filed, as they are not in the transcript, and the clerk certifies that the transcript contains all documents filed save such as were omitted under the rule of this court. This suit was instituted in September, 1905, but we find no evidence in the record concerning plaintiff's actual possession, or that of his authors, within the year preceding that date. It is shown that Charles Heintz was the tutor of the minors Ingram; that the entire tract, of which the disputed territory forms part, belonged to his wards, and that he bought it at a tax sale, for account of his daughter, and held possession of it for a number of years; and it is also shown that a judgment has been rendered decreeing that the purchase so made inured to the benefit of the minors, so that, if it were shown that the plaintiff is the successor in title of the minors Ingram, it may be that the possession of Heintz would inure to their benefit, but, as has been stated, that link in the chain of title has been omitted, and the only title, in himself, which plaintiff exhibits, was not a year old when the suit was brought, and he has shown no possession since it was acquired.

The judge a quo reached the conclusion that the action is one of jactitation, and gave judgment enjoining defendants as prayed, and, also, ordering them to institute a petitory action within 30 days, or, in default thereof, to be prohibited from, thereafter, claiming the property. The defendants insist that the action is purely possessory, and plaintiff's counsel says that the evidence "enlarged the issues made by the pleadings and converted the action, practically, into one of boundary." It is not, we think, a jactitation suit, since plaintiff does not pray for the relief appropriate to an action of that character, and does not show the possession necessary to maintain one.

The judgment ordering the defendants to institute a petitory action is therefore, and to that extent, ultra petitionem. It can hardly be considered an action of boundary, since, according to the allegations of the petition, the estates of the plaintiff and defendants are not contiguous, and the plaintiff prays merely to be quieted in the possession of his own property, and that defendants be condemned in damages and for trespass.

Regarded as a possessory action, which we think it is, it must fail for lack of proof of the necessary possession. *Besse v. Aycock*, 5 La. Ann. 134; *Chinn v. Blanchard*, 6 La. Ann. 66; *Millard v. Richard*, 13 La. Ann. 572.

Counsel for defendants say in their brief: "While there is abundant evidence in the record of title, there is no consent of record to deal with the case as a petitory action." Plaintiff's titles were, however, offered merely to prove possession. If it were otherwise, and this court were at liberty of its own motion to deal with a possessory action as either a jactitation suit or as though it were

petitory, our decision would probably be different from that which, as the case is presented, we are constrained to render.

For the reasons assigned, it is ordered, adjudged, and decreed, that the judgment appealed from be annulled, avoided, and reversed, and that plaintiff's demand be rejected at his cost in both courts, without prejudice, however, to any other remedy which he may have with reference to his ownership and enjoyment of the land in dispute.

(117 La.)

No. 16,033.

CRILLEN et al. v. NEW ORLEANS TERMINAL CO.

In re CRILLEN et al.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 27, 1906.)

1. TAXATION—TAX SALES—SETTING ASIDE—PRESCRIPTION.

Where vacant, uninclosed lots belonging to a succession are adjudicated to the state for taxes, and are thereafter assessed to the deceased owner, and, later, to a purchaser, under Act No. 82, p. 104, of 1884, who does not comply with the terms of that act, and, still later, are sold by the Auditor and the heirs of the former owner in the meanwhile and during many years, pay no taxes, and take no steps to be put in possession, the fact that at one period the property may have been occupied by a third person with the alleged consent of such heirs will not prevent the running of the prescription against proceedings to set aside tax sales, where it appears that, for three years prior to the institution of such proceedings, the plaintiffs have not been in possession by corporeal detention and have paid no taxes to the state.

2. SAME—ASSESSMENT—PRESCRIPTION.

Though property may have been assessed in the name of one not the owner, a sale for taxes, predicated on such assessment, falls, nevertheless, within the meaning and operation of article 233 of the Constitution, and will not be set aside, save in the cases specially provided, unless the proceeding to annul be instituted within the time prescribed by the article.

(Syllabus by the Court.)

Action by John J. Crillen and others against the New Orleans Terminal Company. Judgment for defendant was affirmed by the Court of Appeal, and plaintiffs appeal for certiorari or writ of review. Application dismissed.

Francis Rivers Richardson, for applicant.
William Winans Wall and Miller, Dufour & Dufour, for respondents.

Statement.

MONROE, J. Plaintiffs sue for the recovery of three vacant lots in New Orleans of which they allege they are in possession, and pray that their ownership be recognized, and that the title of the defendant derived through mesne conveyances from the state of Louisiana be decreed null. Defendant alleges that it purchased the property from L. L. Stanton, with subrogation to his rights

of warranty, affirms the validity of its titles, pleads prescription, and calls in warranty the Aztec Land Company, Limited (Stanton's vendor); and that company alleges that it acquired title from the State Auditor, under Acts No. 80, p. 88, of 1888, and No. 120, p. 181, of 1896, and pleads the prescription of three years, under article 233 of the Constitution.

It is admitted that James Crillen, of whom plaintiffs are the heirs, acquired the property in 1861, and it appears from the evidence that he died on April 3d, and that his succession was opened on April 5, 1873; that the property in question was inventoried therein, and was again inventoried in the succession of his wife, who died in February, 1875; that in December, 1874, the property was forfeited to the state for the taxes of 1873, and in 1885 was adjudicated to the state for the taxes of 1882, and that in 1893 it was sold, under Act No. 82, p. 104, of 1884, to M. J. Larkin, who failed to comply with the law under which the sale was made, and in 1904 abandoned and quitclaimed the property to the plaintiffs, who, in November, 1903, obtained judgment, putting them in possession thereof as heirs of James Crillen and his wife. In the meanwhile (in 1902) the property was sold by the Auditor to the Aztec Land Company. It further appears that from 1869 to 1893, inclusive, the property was assessed to James Crillen, but that no taxes were paid on it, either to the state or the city; that from 1894 to 1904, inclusive, it was assessed to M. J. Larkin, and that no taxes, save those of 1903, were paid to the state, and none to the city—the taxes due the city, from 1898 to 1903, having apparently been canceled by judgment of a city court.

The substance of the testimony and our conclusion upon the question of possession are as follows:

It has not been shown that plaintiffs were in actual possession, by corporeal detention, of the property at the dates either of the forfeiture, in 1874, the adjudication, in 1885, the sale by the Auditor, in 1902, or the bringing of this suit, in 1904. W. G. Tebault, a witness examined on their behalf, testifies that some 10 or 15 years prior to, say May, 1905, he inclosed the lots in question and other lots belonging to himself, with a fence, and kept his horses within the inclosure, but, finding, subsequently, that the horses did not thrive, he removed them; after which, it does not appear that he ever saw the property until he visited it for the purposes of this suit, when he found that the fence had entirely disappeared. Being asked as to the circumstances under which he thus took possession of the lots, and for whose account he held them, his answers, whether considered by themselves or in connection with other testimony, leave it a matter of doubt whether he took possession by permission of the owners, previously obtained, or without such permission, but with the expectation of obtain-

ing it subsequently. Thus, in answer to the question, on direct examination, "Before building this fence, you obtained permission, as I understand, from Mr. Crillen," he answers, "Yes, sir," but, on cross-examination, he testifies as follows:

"Is it not a fact, Mr. Tebault, that you did not hold the property for anybody's account; that you simply needed it and had it fenced in? A. I asked permission. Q. What did he say to you at that time? A. He said, certainly, he was glad I had done so."

—From which it would appear that the permission was asked after the fence had been built, and that, prior to that time, the witness had been in possession without the knowledge of the owners, and, hence, had not been holding for their account. He was unable to say when the fence was built, save that it was 10 or 15 years prior to the time (May 29, 1905), at which he testified, and was equally uncertain as to the time at which he ceased to use the property. Thus:

"Q. It don't exceed five years, does it? A. Oh, no, sir. Q. You are positive it don't exceed five years? A. I don't think so. * * * Q. Are you able to swear positively that you have had no stock in that place within the last five years? A. No, sir; I could not swear it positively; I believe I have, but I could not swear it as a fact."

Being asked when he gave up raising stock, and whether he kept any one on the place after that, he replied to the first question that he could not remember, and to the second, "Oh, no; after I left it, I had no need for anybody." J. J. Crillen (plaintiff) being asked, "Who was in possession of the property last summer," answered, "I cannot say, except that I understand that the railroad company is in possession of it." A witness who was called on behalf of the defendant testified that there was no fence or other sign of occupancy about the property in November, 1902. It is admitted that Tebault paid nothing, and agreed to pay nothing, for the use of the property, and it is shown that he left it (as we are inclined to think that he entered upon it) without the knowledge of the plaintiffs; and it is neither alleged nor shown that he or they paid any taxes whilst he occupied it. On the other hand, though the testimony of Crillen suffices to show that plaintiffs did not consider themselves in possession, there is no pretense on the part of defendant or warrantor that either of them was ever in actual possession. The sales by the Auditor to the land company, by the latter to Stanton, and by Stanton to defendant are proved. This suit was instituted in June, 1904, and tried in May, 1905, with the result that there was judgment for defendant, which was affirmed by the Court of Appeal, and it is the judgment of affirmance which we are now called on to review.

Opinion.

When the present Constitution was adopted, the state held an apparent title to the prop-

erty here in question (resulting from the forfeiture, for the tax of 1873, and the adjudication for the tax of 1882), which, whatever may have been its defects, was not, so far as we are informed, obnoxious to the objections that it was based on either a dual assessment or an assessment for a tax which had been paid before the sale. It was, therefore, capable of being quieted and perfected, by prescription, under that provision of article 233 of the Constitution, which reads:

"No sale of property for taxes shall be set aside for any cause except on proof of dual assessment, or of payment of the taxes, for which the property was sold, prior to the date of the sales, unless the proceeding to annul the sale shall be instituted * * * within three years from the adoption of the Constitution, as to sales already made," etc.

The "proceeding to annul" which we are here considering was instituted more than six years after the adoption of the Constitution, and, by the terms of that instrument, is barred. It has been held that the law quoted is inapplicable (1) where the owner and tax debtor was at the time of the tax sale the actual possessor by corporeal detention of the property sold and has been allowed so to remain (*Carey v. Cagney*, 109 La. 77, 33 South. 89); and (2) where, after the sale, the state has continued to assess the property to the former owner, and to receive from him the taxes so assessed (*Pitre v. Scheslinger*, 110 La. 234, 34 South. 425). But in the case at bar neither of these conditions exists. It does not appear that the owner was in actual possession of the property here claimed, either when it was forfeited to the state, in 1874, or when it was adjudicated, in 1885, or that any one held such possession for 20 years after the forfeiture, and say 10 years after the adjudication, and, if the possession of Tebault be regarded as the possession of the owner, nevertheless, that possession had been abandoned for three years or more, prior to the institution of this suit. Nor does it appear that the state, after the forfeiture and the adjudication of the property, continued to assess it to the former owner, and to receive from him the taxes so assessed. It is true that for a number of years the property was assessed to James Crillen, but neither he nor any one else paid the taxes so assessed, and thereafter the assessments were made in the name of Larkin who had made an incomplete purchase, under Act 82, p. 104, of 1884, but who acquired no title, by reason of his nonpayment of the taxes assumed by him as required by the provisions of that act. For three years prior to the institution of this suit there was, therefore, no interruption of the prescription established against it by the Constitution, whether by reason of the fact that the property was corporeally detained by the owners, or by reason of any estoppel resulting from the assessment and collection of taxes against and from those owners.

As the sufficiency of the tax title, to serve as the basis of the prescription established by article 233 of the Constitution, does not depend on the validity of the assessment (quoad the name of the owner) upon the basis of which the property is sold, it is immaterial, for the purposes of this case, whether the forfeiture and subsequent adjudication of the property here in dispute were based on assessments in the name of a person deceased or in the name of the real owners, the essential fact in that connection being that there was an assessment; that is to say, a valuation of the property, without which the tax could not have been levied. *Terry v. Helsen*, 115 La. 1070, 40 South. 465.

It is therefore ordered, adjudged, and decreed that this application be dismissed at the cost of the applicant, and that the judgment which has here been made the subject of review remain undisturbed.

(117 La.)

No. 16,271.

MURPHY et al. v. POLICE JURY OF ST. MARY PARISH.

In re POLICE JURY OF ST. MARY PARISH.

(Supreme Court of Louisiana. June 22, 1906.
Rehearing Denied June 29, 1906.)

1. APPEAL—REFUSAL OF INJUNCTION—SUSPENSIVE APPEAL—EFFECT.

A suspensive appeal will lie from an order refusing to grant a preliminary injunction, but such an appeal will not suspend or postpone the trial of the cause on its merits. The legal effect of such an appeal, when no restraining order has issued, need not be determined.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2209.]

2. COURTS—SUPERVISORY POWERS—EXERCISE.

The extraordinary supervisory powers of this court over inferior tribunals will not be exercised in such a case on the complaint of the defendant, showing no injury beyond the ordinary delays of litigation.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3530-3540.]

(Syllabus by the Court.)

Action by John Murphy and George D. Palfrey against the police jury of the parish of St. Mary. Judgment for defendants, and plaintiffs apply for certiorari, mandamus, and prohibition. Application dismissed.

See 41 South. 216.

Foster, Milling, Godchaux & Sanders, for relator. Respondent Judge ad hoc (D. Caffery & Son, Henry D. Smith, Percy Saint and Charles Austin O'Niell, of counsel), pro se.

LAND, J. Relators, John Murphy and George D. Palfrey, taxpayers of the parish of St. Mary, instituted a suit against the police jury of said parish for the purpose of enjoining said body from erecting a new court-

house on the same grounds set up in the case of the State ex rel. Edward A. Hanson et al. v. Jury of St. Mary Parish (No. 16,101; recently decided by this court) 41 South. 321.

After hearing the parties on a rule nisi, the trial judge refused to grant the plaintiffs a preliminary injunction, and subsequently granted them a suspensive appeal from the judgment denying the relief sought.

The police jury, relator herein, complains that the action of the district judge in thus granting a suspensive appeal from his mere ex parte refusal to issue a preliminary injunction is without warrant of law, illegal, and oppressive.

We think that the relator is mistaken in this proposition.

In *Beebe v. Guinault*, 29 La. Ann. 795, this court held that a suspensive appeal lies from a judgment on a rule nisi refusing a preliminary injunction, saying:

"Appeals lie from final judgments. The judgment in this case refused the injunction.

"It will be difficult to find a judgment possessing a stronger element of finality than that." In *State ex rel. Becker v. Judge*, 31 La. Ann. 850, the court said this "is no longer an open question."

This dictum was cited and approved in the *Hanson Case*, supra, when we held in effect that the appropriate remedy was by appeal from the order refusing the injunction in *limine litis*.

Relator's apprehension that the appeal from the order refusing the preliminary writ in the instant case will suspend or postpone the trial of the cause on the merits is without any legal foundation.

The contrary was held in *State ex rel. Butchers' Union v. Judge*, 33 La. Ann. 436.

Relator pleaded other similar suits by other taxpayers as *lites pendentes* and *res judicata*. All the issues raised below can be reviewed on appeal, and there is no ground, beyond the mere ordinary delays of litigation, for invoking the extraordinary supervisory jurisdiction of this court. No restraining order was issued by the judge a quo.

What is the legal effect of a suspensive appeal in such a case need not now be determined.

It is therefore ordered that relator's application be dismissed, with costs.

(117 La.)

No. 16,179.

STATE v. RUFFIN.

(Supreme Court of Louisiana. June 18, 1906.
Rehearing Denied June 28, 1906.)

1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS.

The judge is without authority to sign bills of exception after the appeal has been lodged in the Supreme Court.

2. SAME—FORMER JEOPARDY.

The filing of an information for manslaughter does not preclude a subsequent indict-

ment for murder. Until jeopardy has begun, the prosecution is at liberty to nolle prosequi and begin over again, and the pendency of an indictment or information does not constitute jeopardy.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 326-329.]

(Syllabus by the Court.)

Appeal from Seventeenth Judicial District Court, Parish of Vermillion; William Pierrepont Edwards, Judge.

Sylvester Ruffin was convicted of manslaughter, and appeals. Affirmed.

William Benjamin White and Felix J. Samson, for appellant. Walter Gulon, Atty. Gen., and John Nugler, Jr., Dist. Atty. (Lewis Gulon, of counsel), for the State.

PROVOSTY, J. Defendant was tried for murder, and found guilty of manslaughter. His complaints are, first, that the indictment against him for murder was found after an information had been filed against him for manslaughter on the same facts, and nolle prosequi; second, that a certain newspaper containing the syllabi of the decisions handed down by this court on one of its decision days, and also one of the pamphlet numbers of the Southern Reporter were suffered to remain in the room in which the petit jury held its deliberations; third, that instead of being served with their meals in the courthouse, the jury were taken to a restaurant separated from a coffee house only by a thin partition, and were served by the waiters of the restaurant, instead of by the sheriff or his deputies, and were communicated with by said waiters; fourth, that the jury were brought into the court and admonished by the judge that the court had been during the entire forenoon, investigating their conduct.

All the questions here raised depend upon facts, save one. That one is as to the substitution of an indictment for murder to the information for manslaughter. There is nothing to it. It is well settled that until jeopardy has begun the district attorney may at any time nolle prosequi the information or indictment, and begin over again. *State v. Hornsby*, 8 Rob. 589, 41 Am. Dec. 314. And it is elementary that the pendency of an indictment or information does not constitute jeopardy.

The other questions depend upon facts, which could have been brought up only by bill of exception, and the record does not contain any. The judge refused to sign the bills of defendant on the ground that they were not presented to him until after the appeal had been lodged in this court, when, as decided in the case of *State v. Hauser*, 112 La. 313, 36 South. 396, he no longer had authority to sign them. Our learned brother says that this was "one" of his reasons for refusing to sign the bills. That one being entirely sufficient, we cannot but admire the

fine sense of the value of time which prompted him to forego the "19" others.

Judgment affirmed.

BREAUX, C. J. I concur in the decree.

(117 La.)

No. 16,125.

WELLS et al. v. BLACKMAN.

In re **WELLS et al.**

(Supreme Court of Louisiana. June 18, 1906.)

APPEAL—SUSPENSIVE APPEAL—PETITORY ACTION—BOND.

Act No. 22, p. 25, of 1904, provides that the pendency of a suit affecting title to real estate shall not be considered as notice to third persons unless notice of the pendency of such action shall have been registered. The only change made by this law is that, formerly, third persons had to take notice of the pendency of the suit without registry, whereas, now, they need take notice of it only after registry. It follows that the registry of a notice under this act does not have the effect of changing the legal situation as it has stood heretofore, according to which the bond for a suspensive appeal from a judgment dismissing a petitory action need not be for one-half over and above the amount sued for, but only in such sum as the judge may fix as sufficient to secure costs.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2235-2240.]

(Syllabus by the Court.)

Application by E. M. Wells and others for writs of mandamus and certiorari against W. F. Blackman. Writ granted.

Robert Persifer Hunter and Francis Rivers Richardson, for relators. Respondent Judge, pro se.

PROVOSTY, J. In this case the plaintiffs' petitory action having been dismissed, the judge of the lower court refused to fix the amount of the bond to be given by plaintiffs for a suspensive appeal, but left plaintiffs to furnish bond "according to law"; that is, to say in an amount exceeding by one-half the amount for which judgment was given. Code Prac. art. 575.

It is well settled that in such cases as this the amount of the appeal bond must be fixed by the court. *Day v. Wright & Bailey* (not yet officially reported), 41 South. 223.

But the learned judge a quo answers that, taking advantage of Act No. 22, p. 25, of 1904, the plaintiffs have recorded a notice of the pendency of this suit, and that this has created an incumbrance upon the property of defendant, and that the appeal, by suspending the effects of the judgment of dismissal, maintains this incumbrance in full force, and that, therefore, the amount of the appeal bond should be "according to law."

Section 1 of said act reads as follows:

"Sec. 1. Be it enacted by the General Assembly of the state of Louisiana, that, on and after January 1st, 1905, the pendency of an action in any court, state or federal, in the state of Louisiana, affecting the title or asserting a mort-

gage or lien upon immovable property, shall not be considered or construed as notice to third persons not parties to such suit, unless a notice of pendency of such action shall have been made, filed or registered, in compliance with this act."

Said Act No. 22 has brought no change in our law, except that, whereas, formerly, third persons dealing with property involved in litigation had to take notice of the pendency of the litigation without registry (article 2453, Rev. Civ. Code), now, under said act, they are not required to do so, unless the notice prescribed by the act has been duly recorded.

It follows that the plaintiff and appellant is entitled to have the amount of the bond for a suspensive appeal fixed by the court, as if said registry had not been made.

It is therefore ordered, adjudged, and decreed that a writ of mandamus issue commanding Hon. J. B. Lee, judge ad hoc, in place of Hon. W. F. Blackman, recused, as Judge of the Thirteenth judicial district court of Rapides, to fix the amount of the suspensive appeal bond in the case of E. M. Wells et al. v. W. F. Blackman, No. 6,316 of the docket of said court.

(117 La.)

No. 16,032.

S. D. MOODY & CO., Limited, v. SEWERAGE & WATER BOARD et al.

(Supreme Court of Louisiana. June 4, 1906.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—CERTIFICATE OF PERFORMANCE.

The paper issued in due form by the city before decision was rendered in Barber Asphalt Paving Co. v. Watt, 26 South. 70, 51 La. Ann. 1345, may be for larger amount than due under rule of computation as laid down in latter decision and yet hold good for less amount actually due.

Certificate was amended in conformity with the Watt decision.

2. SAME—COST OF IMPROVEMENT—STATUTORY PLEDGE.

Under Act No. 73, p. 116, of 1876, the lien for amount due remains "as such charge" on the property. The city has a full right and the property is sold subject to that right which primes all other. Under the terms of Act No. 85, p. 111, of 1888, the property passes to third persons, adjudicatees, subject to the statutory pledge.

It is different if it be adjudicated to the state under Act No. 80, p. 83, of 1888.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1220-1227.]

Provosty, J., dissenting.
(Syllabus by the Court.)

Certiorari to Court of Appeal, Parish of Orleans.

Action by S. D. Moody & Co., Limited, against the Sewerage & Water Board and others. Judgment for plaintiffs was affirmed by the Court of Appeal, and defendant applied for certiorari or writ of review. Petition dismissed.

Omer Villeré, for applicant Sewerage & Water Board. Henry Garland Dupré, Asst. City Atty., for applicant the city of New

Orleans. J. Zach. Spearing, for applicant Thornwell Gachet. Buck, Walshe & Buck, for respondent S. D. Moody & Co., Limited.

BREAUX, C. J. Plaintiffs brought this suit against the defendants to have their privilege recognized on property on which they made repairs in accordance with their contract with the city touching local assessment for improvement.

Said property was situated on both sides of Rendon street from Canal to Toulouse street, and the work consisted in the construction of the brick sidewalk on both sides of the street part of the way.

Originally the claim was for \$270.25. A certificate was issued by the city authorities to plaintiff for the amount on December 9, 1896, and was recorded the same month. After this certificate had been issued by the city authorities, the court held in Barber Asphalt Co. v. Watt, 51 La. Ann. 1345, 26 South. 70, that the method followed in calculating the amount due by abutting property owners should be modified. Another certificate, after said decision had been rendered, was issued by the city to the plaintiff and the rule laid down in the said cited case was complied with. Reduced under the rule, the amount due plaintiff was \$228.44.

Alexander Turegano and the Gulf State Land & Improvement Company were the owners of the property at the date the first certificate was recorded. Subsequently, the Sewerage & Water Board bought the property with this claim resting upon it.

Plaintiff sued the owners, the Sewerage & Water Board, for the amount. The latter denies that there was an incumbrance upon it. It avers that it had been bought by their vendor Thornwall Gachet, on the 10th of January at tax sale, made by the city of New Orleans on said date, to collect the unpaid taxes for the years 1893 and 1894, assessed in the name of Turegano, as owner. And defendant avers that the said tax sale operated a cancellation of all incumbrances on the property.

Defendants called their vendor Gachet in warranty.

Gachet answered the call in warranty, attacked plaintiff's pledge and privilege as null, because he averred the certificate of assessment was not made out properly and timely recorded; moreover, he averred, if it had been made at all in form, it was erased and canceled by the effect of the city tax sale made in 1898.

Turegano, whose name figures as owner, not having paid his taxes to the city for the years 1893 and 1894, the city had the property sold for taxes, and late in 1897 the property was adjudicated to Gachet, but the deed before mentioned was executed in 1898.

The property was sold for taxes under Act No. 85, p. 111, of 1888.

On appeal, our learned brothers of the Court of Appeal, in an able opinion, held that plaintiffs were entitled to judgment.

From that judgment defendants applied to this court under its supervisory jurisdiction to have the judgment of the Court of Appeal reviewed.

The first ground of discussion is that the "certificate of performance" issued under the provisions of Act No. 73, p. 116, of 1876, was null.

As relates to form, those who issued the certificate complied with all the requirements.

Defendant argues that the assessment for paying is virtually a tax, and that those who work for the city and for the front proprietors in order to acquire a right must follow the law closely and accurately.

We have found no decisions in our researches extending the rule touching tax assessment to local assessments for paying.

It is necessary to comply with the law; but if, owing to some slight mistake or oversight, the amount of the recorded claim should be overstated, it would hardly be just to hold that the whole claim is thereby lost. Here the latter amount includes the less. This question was considered and passed upon in the following cases: *Ellis v. Sims*, 2 La. Ann. 251; *New Orleans v. Ferriere*, 17 La. Ann. 183; *Bonnafe v. Lane*, 5 La. Ann. 225; *Succession of Pate*, 6 La. Ann. 242.

It would be different if this calculation had been adopted after the *Watt Case* was handed down. It was not. It was made out before. The certificate was duly and timely recorded. Plaintiff is entitled to the amount.

The error in good faith in claiming more than was due does not render the whole claim null. *Walden v. Grant*, 8 Mart. (N. S.) 565; *Mullan v. Creditors*, 39 La. Ann. 397, 2 South. 45.

To return for a moment to the *Watt Case*, it did not hold that a contractor could not reform his certificate so as to comply with its decree.

The consideration of defendant's complaint of insufficiency of description of the property has no merit. Moreover, the pleadings do not present that issue; on the contrary, defendants admitted that they purchased the property described in plaintiff's petition from *Thornwall Gachet*, and warrantor avers that he acquired the same property from the city at tax sale. It is fully and completely identified as relates to description.

It is next urged by defendants and warrantor that the tax sale made for the payment of city taxes for the years before mentioned had the effect of annulling plaintiff's claim.

Now as relates to security, the third section of Act No. 73, p. 117, of 1876, provides that the cost of the improvement shall be a real charge on the property and that "it shall be considered and treated as pledged for payment of the amount due; that it shall constitute a lien or privilege upon the abutting property."

Surely, under the terms of this statute, no one will deny that the contractor's claim is secured as laid down in the statute, and no further. There are no statutes amending or setting aside the provision of the act of 1876, as before stated. No one will reasonably deny that pledges and privileges and tax mortgages are the creatures of positive law. That as to taxes there are no securities for their payment except those provided in terms. Nothing as relates to taxes is left to uncertain implication.

The law-making power may provide that the property assessed for taxes and sold shall pass free of all mortgages and liens; but unless it thus provides they do not pass free of mortgages and liens. The law may also limit the extent to which the incumbrance shall remain on the property.

The cited act under which the property was sold provides, quoting:

"If not redeemed, such record in the conveyance or mortgage office shall operate as a cancellation of all conventional and judicial mortgages."

The pledge and privilege held by plaintiff was neither the one nor the other. How, then, can it be held that it can be canceled under the terms of the statute? Surely it will not be contended that this pledge is to be destroyed by mere implication.

The contention is, however, that these words, "conventional and judicial mortgages" are only illustrative, and not limitative, and that under these words other securities are struck down as well.

This in effect reads into the statute other words.

The rules relating to interpretation of contracts and of statutes are the same. *Liber's Hermeneutics*.

Suppose a person has acquired the right on the purchase of property to have the judicial and conventional mortgage erased, no one would have the temerity to contend for a moment that by implication he would have the right to have a statutory pledge on the property canceled.

There seems to be some method in the statute cited above for its thirty-third section (page 124) provides that the legal mortgage to secure payment of the taxes shall prime other incumbrances and preferences. It follows that the property must be sold without regard to subsequent claims such as may remain under section 63 (page 133) of the statute. And then again when the property has been sold directly for taxes, if adjudicated to a third person, it passes subject to the pledge in question. It is adjudicated to this bidder for an amount equal to the tax. If, however, no bidder chooses to pay the amount of the taxes it is adjudicated to the state. The tax collector is directed to thus adjudicate it. It falls within Act No. 80, p. 88, of 1888, adopted the same day that Act No. 85, p. 111, was

adopted. Act No. 80 is well known, and is a far-reaching act.

If the property has been adjudicated to the state, the state has the right to sell it, free from all incumbrances whatsoever. Section 5, Act No. 80, p. 90.

The whole proceeds of the sale will then belong to the state. It is her property; she has absolute ownership.

There is certainly a decided difference in regard to cancellation in these two acts. Each should be interpreted as it reads. The words are plain and unambiguous. In any event the tax debtor cannot escape from the payment of his debt. He is only given a little time before his pledge is struck down.

The state says in effect to the tax debtor and to his creditor: "The holder of a statutory pledge shall not be affected by the sale if a third person buys and pays the taxes due upon the property. If no third person chooses to accept those conditions the property shall become mine, and I will sell it free from all incumbrances."

The city is one of the contracting parties in matter of the local assessment. There was unusual delay in collecting her taxes. Years afterward she or those who held from her claim a cancellation of a pledge granted through her agency.

There are two remaining propositions that will be merely stated as they require no discussion:

If a statute directs that a conventional and judicial mortgage be canceled, it does not embrace pledges and privileges; on the contrary, it excludes them.

"*Expressum facit cessare tacitum.*"

Lastly, it is evident that the words were not used in a relative, generic, or expansive sense. When the lawmaker said, "judicial and conventional mortgages" he did not mean to say "and statutory pledge." It does seem that to thus hold would render all words ambiguous and uncertain in signification.

The following is an extract from the carefully prepared opinion of the court of appeal (Moore, J., was the organ of the court):

"Whether the purchaser at a tax sale takes only the interest of the owner in whose name the land is, or ought to have been assessed, burdened with all the incumbrances existing thereon at a given period prior to the sale; or whether the purchaser takes it free therefrom, is regulated by statute.

"There is no common-law rule which makes the levy of taxes *ex proprio vigore*, a lien on the property of the taxpayer, nor does it arise by implication from the power to tax, nor does the obligation to assess taxes give a lien on the property on which such taxes should be assessed. Such liens owe their existence wholly to statute, and their duration, limitation, and priorities must be determined by the statute creating them.

"As it is within the power of the Legislature to make the tax lien superior to any other security, mortgage, incumbrance or lien arising either before or after the assessment of the tax, so, also, is it within its constitutional power to declare that at once the property is adjudicated for taxes, or after a fixed and given

time in the future, and under such conditions as it may impose, the property passes to the purchaser free of all incumbrances of every nature; or that it passes subject to them; or that it passes subject only to a certain class or character of incumbrances; or that only a certain class and character of incumbrances shall be canceled by the sale.

"In the exercise of this power the Legislature of this state did, by section 33 of the revenue law of 1888 (Act No. 85, p. 124), approved July 12, 1888, this being the law under which the city taxes due on the property in question for the years 1893 and 1894 were levied and under which the property was sold by the city on September 25, 1898, enact: 'that from the day said tax roll is filed in said mortgage office it shall act as a lien on each separate piece of real estate thereon assessed, shall be subject to a legal mortgage after the 31st day of the current year for the payment of the tax due on it, but not for any other tax, which mortgage shall prime and outrank all the other mortgages, privileges, liens, incumbrances, or preferences, except tax rolls of previous years.'

"In section 63 of this act (page 133), and whether because the lawmakers conceived that, unless otherwise provided by statute, a tax title conveyed to the purchaser of the property sold for taxes nothing but the interests of the delinquent taxpayer, the recorded burdens on the property remaining extant thereon, desired, therefore, to make such sales operate as a cancellation of a certain class of recorded incumbrances on the property; or whether they believed that a tax title *ex proprio vigore*, and without legislative will, operated the cancellation of all incumbrances of every class, nature or kind, and therefore wished to limit and restrict the cancellation to only a specific class or character of recorded incumbrances, it is provided that after the expiration of the period of redemption, which is fixed at one year, beginning on the day the tax deed is filed for record in the conveyance or mortgage office in the parish in which the property is situated, the registry of such tax deed, if the property be not redeemed, shall operate as a cancellation of all conventional and judicial mortgages, and it shall be the duty of the sheriff or tax collector to notify the mortgage creditors 10 days previous to such sale.

"It is under this section of the act that the defendant and the warrantor base their contention that plaintiff's asserted lien and privilege was canceled as the result and by operation of the tax sale, *supra*.

"The argument on this branch of the case, to quote from the brief of the warrantor, is: 'That article 3296, Civ. Code, provides that there are three kinds of mortgages; i. e., conventional, legal and judicial. That a paving contract is clearly not a legal mortgage, nor is it a judicial mortgage, therefore, it must be conventional. That the very life and beginning of the asserted incumbrance is the contract between the plaintiff and the city; the latter acting for and on behalf of the owner of the property in question and those similarly situated. That being conventional, it comes within the letter and spirit of the statute, and was, therefore, canceled and wiped out by the tax sale.'

"The fundamental error of this argument is that it confounds a 'lien and privilege' with a 'mortgage.' There is a vast difference in law between them. Plaintiffs here are asserting no 'mortgage' on the property; therefore, no question arises as to the kind of mortgage which they have. What they claim is that, flowing from the nature of their contract with the city and from the law applicable thereto, they have a 'real charge in and upon the property,' a 'pledge' thereof, and a 'lien and privilege thereon,' and this is precisely what is granted to them by section 3, Act No. 73, p. 117, 1876, which provides, *inter alia*, * * * that the cost of said improvement, paying or repairing, grading

or regrading, due as aforesaid by the owner or owners of the abutting real property, shall be and is hereby constituted a real charge in and upon said real property, to whomsoever same may be transferred or conveyed, and the same shall be deemed, considered and treated as pledged for the payment of the said cost, etc.; that said cost of said improvement, etc., shall constitute a lien or privilege upon said abutting property until paid, * * *.

"As we have seen, the revenue act of 1888, supra, does not make the tax sale operate the cancellation even of all mortgages, but only of all conventional and judicial mortgages. The legal mortgage, it would appear, is excluded. *Harney v. Quaglino*, 1, Court of Appeal, 230, and beyond all doubt, 'pledges,' 'liens and privileges' are not included. '*Inclusio unius est exclusio alterius*.'

"To the argument that it is repugnant to the spirit of the law that a tax sale should not operate the cancellation of every burden or incumbrance on the property, the answer is that it is not so nominated in the law, quoad tax sales made under the revenue law of 1888, supra, and we are admonished that when a law is clear and free from ambiguity, as the section of the revenue law cited is, the letter is not to be disregarded under the pretext of preserving its spirit. Civ. Code, art. 13.

"However, it is manifest that the limitations in the revenue act of 1888 to the two specifically indicated character of the mortgages, which the act declares shall be canceled as the result of the registry of a tax deed to property sold for taxes under that act, was inserted and incorporated therein *ex industria* by the lawmakers. This is evidenced and made patent, at least, by analogy, when we come to consider similar and contemporaneous legislation concerning the sale of property, not under revenue acts for the collection of delinquent taxes, as in this case, but concerning the sale of property owned by the state; the title to which it had acquired as a result of forfeiture for the nonpayment of taxes. Such an act is the act which has come to be known as the 'Ironclad Act,' being No. 80, p. 88, of the Acts of 1888, and approved on the same day that the revenue act of that year was approved. This is an act providing for the sale of property bid in and adjudicated to the state for the taxes of 1889 and subsequent years. It provides that within two months after the expiration of the year in which property must be redeemed, the property so adjudicated to the state shall be offered for sale; but it also provides that the title which it will thus give to the purchaser shall operate to a far greater extent in the way of extinguishing and canceling burdens and incumbrances on the property so sold, than where the property is not owned by the state, but owned by the delinquent taxpayer is sold under a revenue act for the purpose of gathering the taxes due thereon. Here is the section referred to, section 5, p. 90: 'That all sales under this act shall vest in the purchaser an absolute and perfect title to the property conveyed in the deed of sale, without any claim thereto by any former owner and free of all mortgages, liens, privileges, and incumbrances whatsoever except all city and municipal taxes.'

"We need not inquire into the motive or reasons which influenced the Legislature in making this difference in the respective tax deeds under the two acts, supra; but if a consideration is to be sought for, it is to be found in the simple fact that in the sale by the state of property forfeited to it the purchaser may be required to pay the value of the land to the state, which may be far in excess of the amount of taxes and penalties for the nonpayment of which the land was forfeited. Therefore, in this event, the purchaser is fairly entitled to full protection. Whereas, when property is sold for the purpose of collecting the taxes due thereon, the sale cannot be made for any amount

whatsoever beyond and in excess of the taxes, penalties, and costs due thereon, which may be infinitesimally small as compared with the value of the land. In this event the same measure of protection, so far at least as incumbrances on the land are concerned, is and ought not to be given the purchaser."

This decision applies exclusively to statutory pledge in assessment matters. It is especially *sui generis*.

For these reasons the rule nisi is recalled, and the applicants' demand is rejected at their costs, and their petition is dismissed.

NICHOLLS, J., concurs in the decree.

PROVOSTY, J., dissents, and hands down a separate opinion.

PROVOSTY, J. (dissenting). I cannot subscribe to the doctrine that at a tax sale for state, parish or city taxes the property passes subject to all the mortgages, liens, privileges, pledges, antichresses and other incumbrances resting upon it, save only judicial and conventional mortgages. The effect would be that where the value of the property did not exceed the amount of these incumbrances the tax sale could not be made. I imagine it would take but a short time for such a doctrine to bankrupt the city of New Orleans. The fisc comes first in every country on the face of the globe, and every revenue law that has ever been enacted in Louisiana has expressly so provided; and by coming first is meant that payment may be enforced by the sale of the property regardless of what may be the consequences to claims of inferior rank. This is shown by a moment's reflection. A first mortgage or privilege that could not be enforced by a sale of the mortgaged property free of subsequent incumbrances would be such only in name. To give a first mortgage and to provide at the same time that in any sale made to satisfy it the mortgaged property shall have to pass subject to subsequent incumbrances, would be on a par with giving a piece of candy to a little boy, and at the same time enjoining upon him that he must not eat it. The Constitution and the revenue law require that at a tax sale the officer shall sell "the least quantity of property which any bidder will buy for the amount of the taxes, interest, and costs." How is this to be done, if the purchase is to be made subject to all mortgages, liens, privileges, pledges, antichresses, and other incumbrances resting on the property, saving only judicial and conventional mortgages? Shall we attribute to the constitutional convention or to the Legislature the simplicity of believing that any bidder would ever be silly enough to buy any least portion of property when it would have to pass to him subject to all incumbrances resting on the property as a whole, and to do it, too, without any certificate of mortgages being read at the sale to let him know what the incumbrances are?

Shall we accuse the Legislature of having intended that in every case known to the law, the property, when sold to satisfy a first incumbrance, shall pass free of subsequent incumbrances, except in the case of taxes alone? To my mind, and with all due deference I say it, the majority opinion does not interpret the revenue law as a whole and by applying all the rules of construction, but singles out one provision, and applies one rule of construction; and with the result, it seems to me, of disturbing seriously the revenue system of the state. I, therefore, respectfully dissent.

(117 La.)

No. 18,174.

STATE v. DARTEZ.

(Supreme Court of Louisiana. June 18, 1906.)
CRIMINAL LAW—APPEAL—JURISDICTION.

This court is without jurisdiction to reverse a conviction in a criminal case upon questions of fact.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3074-3084.]

(Syllabus by the Court.)

Appeal from Nineteenth Judicial District Court, Parish of Iberia; James Simon, Judge.

Aroncia Dartez was convicted of manslaughter, and appeals. Affirmed.

Anthony N. Muller and T. Don Foster, for appellant. Walter Gulon, Atty. Gen., and Edwin Sidney Broussard, Dist. Atty. (Lewis Gulon, of counsel), for the State.

Statement.

MONROE, J. Defendant, charged with murder and convicted of manslaughter, moved for a new trial, and presents her case to this court by means of a bill of exception to the overruling of the same.

Opinion.

The grounds set up in the motion relate exclusively to questions of fact, of which this court has no jurisdiction.

Judgment affirmed.

(117 La.)

No. 1,592.

Succession of GUILLEBERT.

In re GRENIER.

(Supreme Court of Louisiana. June 18, 1906.)

1. APPEAL—PARTIES.

Where a minor, after attaining majority, appeals from a judgment homologating a provi-

sional account filed by the natural tutrix, administering the succession of the deceased father and husband, the creditors, whose claims are recognized on such account and have been paid, and who have, therefore, an interest in maintaining the judgment of homologation, must be made parties to the appeal; otherwise, and if there is no prayer that they be cited, the appeal will be dismissed.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1822.]

2. EXECUTORS AND ADMINISTRATORS — ACCOUNTING.

In the instant case, the account in question is not regarded as an account of tutorship, but merely as in account of administration.

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Adolph Valery Coco, Judge.

In the matter of the succession of Constant Guillebert. On the homologation of the account of Marie Grenier, natural tutrix, Adele C. Guillebert appeals. Dismissed.

Coco & Couvillon, for appellant. William Hall, for appellee administrator. Adolph Jalmeus Lafargue, for appellees Mr. & Mrs. A. J. Meyer.

MONROE, J. Mrs. Marie Grenier, widow of Constant Guillebert, and wife by second marriage of Alfred J. Meyer, in her capacity as natural tutrix of the minor children, issue of the first marriage, administered the succession of Guillebert, and in February, 1891, obtained a judgment homologating a provisional account filed by her as natural tutrix, administering, etc. One of the minors, who is now married and who alleges that she attained her majority in March, 1905, appealed from the judgment so rendered and made the tutrix and co-tutor parties to the appeal; but she did not pray that any one else be cited, and none of the creditors whose claims are recognized on the account, and have long since been paid, are before this court. The tutrix and co-tutor move to dismiss the appeal upon that ground (among others), and the motion must prevail. Succession of Smith, 8 La. Ann. 57; Succession of McCrindell, 13 La. Ann. 231; Succession of Treadwell, 38 La. Ann. 260. We may say in this connection that we do not regard the account in question as an account of tutorship, but merely as an administrator's account.

It is therefore ordered, adjudged, and decreed that the appeal be dismissed, at the cost of appellant.

NICHOLLS, J., concurs in the decree.

(117 La.)

No. 15,920.

Succession of GUILLEBERT.**In re GRENIER.**

(Supreme Court of Louisiana. June 18, 1906.)

GUARDIAN AND WARD — PROVISIONAL ACCOUNTING—RIGHT OF MINOR TO APPEAL.

The appeal taken from the judgment of homologation of the account is dismissed.

(Syllabus by the Court.)

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; Thomas Overton, Judge ad hoc.

In the matter of homologation of provisional account of the succession of Constant Guillebert, Adele C. Guillebert appeals. Dismissed.

Coco & Comillon, for appellant. William Hall, for appellee administrator. Adolph Jalmens Lafargue, for appellees Meyer.

NICHOLLS, J. On the 2d of October, 1886, Marie Grenier, wife of Alfred J. Meyer, filed a petition in the district court in which she alleged that, as natural tutrix of her minor children, Adele and Camille Guillebert, issue of her marriage with Constant Guillebert, deceased, and as such administering his succession, she had filed a provisional account of said succession.

She prayed that the same be advertised as the law directed, that after legal delays and due proceedings the said tableau be homologated in all of its parts and particulars, that she be allowed to pay debts placed thereon and given credit on same, that all necessary orders in the premises be given, and for general relief. The court ordered on the same day the tableau to be advertised as the law directed, and that after legal delays had, if there be no opposition thereto and due proceedings had, that the same be homologated in all its parts and particulars.

Accompanying this petition was the account referred to, in which the petitioner set out the amount of the inventory and presented a list of debts and charges classified as law charges, funeral charges, expenses of last illness, and ordinary claims. She also gave a list of debts uncollectible and errors in the inventory.

The undertutor of the minors, George L. Meyer, filed an answer in which he declared that he had carefully examined said provisional tableau, and, finding the same correct, full and proper, recommended homologation of the same in all its parts and particulars.

On the 23d of October, 1886, the district judge rendered the following judgment.

"This case coming up to be heard in open court for homologation, and due proof having been made of legal advertisement of tableau of the waiver of the undertutor, and that all claims charged on the tableau as due by the succession, including both privilege and ordinary claims, are correctly placed thereon:

"It is, by reason of the law and the evidence being in favor of the homologation of said

tableau, ordered, adjudged, and decreed that same be fully homologated as to the classification of debts placed thereon and that tutrix be allowed and authorized to pay same in accordance with tableau.

"[Certain items of credit are here given.]

"It is further ordered, adjudged, and decreed that for other credits claimed, when no proof was made, that same be disallowed, reserving to tutrix the right to establish same in a subsequent tableau in proper form.

"It is therefore ordered, adjudged, and decreed that, with the exception of certain credits not allowed herein, the same provisional tableau be homologated in all its parts and particulars."

On November 18, 1905, Adele C. Guillebert, wife of A. T. Tillou Barbin (her husband joining his wife), filed a petition in which it was alleged that her father, Constant Guillebert, died in 1884, leaving a considerable estate; that his widow (petitioner's mother) qualified as her tutrix, and as such took possession of and administered her father's succession; that she later contracted a second marriage with Alfred J. Meyer, who by that fact became her co-tutor; that she attained her majority on the 13th of March, 1905; that on October 22, 1886, her tutrix and co-tutor filed a provisional account of their administration, which was on the same day homologated by the judgment of the court; that petitioner was aggrieved by said judgment and desired to appeal from same. She prayed for a devolutive appeal and for citation upon her tutrix and co-tutor.

An order granting such appeal was granted, and the transcript of appeal filed in this court on the 8th of December, 1905.

To this transcript was attached the certificate of E. A. Plauche, then clerk of the district court for Avoyelles, to the effect that the transcript contained a full, true, and correct transcript of all the proceedings had and documents filed and testimony adduced on the trial of the matter of the application of Marie Grenier, natural tutrix of Adele Constance Guillebert and Camille Guillebert, for the homologation of the provisional tableau filed by her in the district court for the parish of Avoyelles on the 22d day of October, 1886.

Preceding this certificate was a separate certificate, under date of the 23d of November, 1905, under the heading of "Minutes of Court," in which it was certified by the deputy clerk of the court that he had searched the minute records of that parish and failed to find the minutes from October 8, 1883, to June 11, 1887.

On May 8, 1906, Marie Grenier and her husband, Alfred J. Mayer, as natural tutrix and co-tutor of Adele Constance Guillebert, wife of A. T. Barbin, and Camille Guillebert, and as such administering the said estate (appellees), moved to dismiss the appeal taken in this proceeding for the following reasons:

For insufficiency of the transcript. The transcript is insufficient, and does not contain all the papers and documents offered in evidence on the trial of the matter of homolo-

gating the provisional account or tableau of classification of debts, appealed from, and upon which the district judge rendered his judgment homologating the said account.

Because the certificate of the clerk of court on said transcript is not correct, and is disproved by the record itself, which shows by the note of evidence that certain documents were offered in evidence and these documents do not appear in the transcript.

Because all the parties in interest are not made parties to this appeal. None of the creditors who have been paid under the judgment homologating this account have been cited and made parties to this appeal. In re Smith, 21 La. Ann. 183; Condon v. Samory, 12 La. Ann. 801. Succession of Treadwell, 38 La. Ann. 260; article 564, Code Prac.

Because the legal delays for appealing have expired, and the right to appeal has lapsed, and the judgment of the court homologating this account or tableau has become final by lapse of time and cannot be reviewed on appeal.

Because this is an appeal from a provisional account or tableau of classification of debts filed by the tutrix administering the estate of Constant Guillebert, deceased, in the year 1868, and the same was approved and homologated by the court, without opposition, contradictorily with the under-tutor of the minor children, who did not oppose or appeal same, and the appellant has no right to an appeal from the judgment homologating said account, and said account or tableau cannot be reviewed on appeal.

Because an heir, who is shown by the record to be a minor, must prove that he has attained his majority to give him any right to appear in court, and there is no proof in the record, and none can be offered, that the appellant has attained her majority.

Because an heir coming of age has no right to appeal from a judgment homologating a provisional account or tableau of classification of debts filed by a tutrix administering an estate. Such is not the remedy provided by law, if the heir has any rights.

Because the Supreme Court has no jurisdiction at this time and in this manner to review a provisional account or tableau of classification of debts filed and homologated over 15 years ago. It has no longer any jurisdiction of the subject-matter, if it ever had.

Because more than a year has elapsed since said account or tableau was homologated by judgment of court, said judgment being rendered over 15 years ago, and the right of appeal from said judgment is prescribed, which is a bar to the right of appeal, which appellees plead.

The greater part of the argument before this court was directed to a discussion as to whether the decree of homologation, rendered by the district judge, should be permitted to stand under the circumstances in which it was rendered. This discussion is

subordinated to the question whether the appeal itself is maintainable, taken in the manner and form it was as an appeal, separate and severed from the decision upon the final account of tutorship, which has been applied for by appellants and will be hereafter rendered. The judgment of homologation was rendered as far back as 1886, in a proceeding in which the minor, now the appellant, was represented by her undertutor, and in which he approved of and consented to the order of homologation.

Under such circumstances there was, of course, no appeal taken by the undertutor. It is not claimed by the tutor that the decree of homologation so rendered is conclusively binding as *res judicata* upon the minor, who has now reached majority. It is conceded that it is open to contest and that subject-matters declared to be homologated are still remediable. It is contended, however, that the appeal cannot be maintained as taken. The appeal of the appellant deals with the order of homologation, not as an interlocutory order made in the course of and as one of the successive steps taken in the tutor's administration, which as to its correctness is to be viewed as an entirety, but as a matter to be disposed of separately from and independently of the final account which was rendered by the tutor. The counter position is that the remedy of the minor is to be postponed until the tutor files his final account, at which time the minor is permitted to urge all objections she may have to any part of the tutor's administration, by way of opposition and subsequent appeal, if aggrieved; that the final account of the tutor covers the whole period of the tutorship of which the various provisional accounts form part and parcel or chapters, and so connected with it that when the final account is appealed from the provisional accounts go up with the main appeal, just as the correctness of the various interlocutory rulings and orders of court in any ordinary case are carried up for review, with the final judgment rendered; that the objection to the homologation can be as effectively and forcibly urged on opposition and subsequent appeal as they could be first by appeal and then later on opposition, and in fact that the practice of permitting separate, independent appeals from the various orders of homologation at the will and choice of the minor would lead to complications and consequences of most serious character and great injustice to the tutor. Appellant urges as her reason for having the order of homologation set aside that she would be freed on the trial of the final account from the burden of proof which would rest upon her, should she not have taken the intermediate step of having had the order of homologation set aside; but we think the burden of proof would be as great and imperative in order to set aside the order of homologa-

tion in the one case as in the other, the only difference being as to the time and place when the objections were urged. The statute declaring the order of homologation to be *prima facie* correct throws upon the minor seeking such tardy relief the burden of disproving in either mode the legal presumption affixed by the law itself to the order of homologation. The legal presumption of correctness covers the proceedings leading up to the order, as well as the conclusions of the court upon the matters submitted for adjudication. It was never contemplated by the lawmaker that this statute presumption should be borne down and overcome by a simple presumption resting purely upon the maxim or presumption "*de non apparentibus*," based upon the certificate of a recently elected district clerk, who, in the very nature of things, could not certify to an actual state or condition of things existing at the time of the rendition of the decree of homologation, but who at the utmost could certify to the state of the record as it existed at the time of giving the certificate over 15 years after the order was signed. The appellant seeks to have this court reverse the judgment of the district court through an appeal "on the face of the papers," in direct opposition to the legal statute presumption of correctness, and in opposition to the recitals of the decree itself, which recites that it was rendered by reason of the law and the evidence, also with consent and approval of the undertutor, the specially provided representative of the minor.

The proceeding in the district court was not *ex parte*, but taken "contradictorily" with the undertutor. It is to be supposed that the relief granted to the minor was granted under circumstances such as would enable the tutor by evidence to support the legal presumption of the law, and to resist any attack made upon the provisional account, and not allow him to set aside the decree simply on the face of the papers.

The minor is entitled, on reaching majority, to rule the tutor to a final account, which should be full and complete, covering the

entire period of the tutorship, supported by vouchers, which account the minor has the right at that time to question, and to sustain by appeal on the whole account. He is entitled at that time to only one single account and one single appeal, not 15 or 20. The article of the Code of Practice which appellant invokes (article 593, Code Prac.) in postponing the commencement of the running of prescription to the date of the "final judgment" indicates that all the issues between the minor reaching the age of majority and his tutor are to be submitted and determined at one and the same time. Rev. Civ. Code, arts. 356, 357, 361; Code Prac. arts. 593, 565, 566, 1004; Succession of Von Hoven, 46 La. Ann. 921, 15 South. 391; Succession of Francez, 49 La. Ann. 1739, 23 South. 254.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the appeal as taken herein be dismissed, under reservation of appellant's right to call her tutrix to a full, complete, final account of her entire gestion as tutrix, and on the filing of the same to question its correctness by and through oppositions to the same, and to sustain her objections, if not sustained by appeal.

BREAUX, C. J. I concur in the decree.

MONROE, J. I concur in the decree on the ground that the creditors who appear on the account in question are not made parties to the appeal and that said account is not an account of tutorship, but of administration.

LAND, J. I concur for reasons stated by MONROE, J.

PROVOSTY, J., concurs in the decree, but for the reason that, the account having been one, not of tutorship, but of administration of the succession, the creditors of the succession were parties to the judgment homologating it, and therefore should have been made parties to the appeal, and were not.

PHILLIPS et al. v. BRADFORD.

(Supreme Court of Alabama. June 6, 1906.)

1. PLEADING—AMENDMENT OF BILL—DEPARTURE.

A bill sought the cancellation of a note and mortgage on the ground that, while complainant was being pressed by creditors, defendant, her brother, in whom she reposed confidence and who managed her business, advised her to execute a bogus mortgage to him. By subsequent amendments such allegations were stricken from the bill and superseded by sections which omitted all statements as to complainant being pressed with claims, etc., but alleged that defendant advised her that, in order to protect her rights in the land and to preserve the same as a homestead for herself and her minor children, it would be necessary for her to give him a mortgage. By another amendment it was alleged that defendant unduly influenced complainant, and that it was not necessary for complainant to have given the mortgage in order to protect her rights in the land and to preserve the same as a homestead. *Held*, that the amendments did not constitute a departure, as the statements of the amendments were consistent with the idea that the claims did in fact exist, but that the mortgage was not necessary, either because the debts could be otherwise provided for, or because complainant could have protected her homestead under the statute.

2. EQUITY—FRAUD OF COMPLAINANT—EFFECT—EXISTENCE.

The bill was not demurrable under the principles of equity applicable to parties in pari delicto.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 185-187.]

Appeal from Chancery Court, Lee County; W. W. Whiteside, Chancellor.

"To be officially reported."

Suit by Mary L. Bradford against Clem Phillips, as executor, and others. From a decree overruling a demurrer to the bill, defendants appeal. Affirmed.

J. W. Strother and R. C. Smith, for appellants. George P. Harrison, for appellee.

SIMPSON, J. The original bill in this case seeks the cancellation of a note and mortgage made by the complainant (appellee) to the testator of defendant (appellant). Section 8 of the original bill alleges that, "while orator was being pressed on some indebtedness," her brother, Thomas L. Cobb, "in whom she reposed confidence and trust, and who was accustomed to aid and assist her in the management of her business, suggested and advised your orator to execute a bogus or false mortgage to him," which he told her would protect her against claims and threatened suits. The fourth and fifth sections relate to the execution of the bogus mortgage, that there was really no consideration for it, and she owed her brother nothing. By subsequent amendments said sections 3, 4, and 5 were stricken from the bill, and substituted by sections which omitted all statements about the complainant being pressed with claims, etc., but alleged that her brother, who attended to all of her business, "advised her that, in order to protect her rights in said

lot and to preserve the same as a homestead for her and her minor children, it was necessary for her to give him a mortgage on said lot, which he told her at the time would be a bogus or false mortgage, and this would completely protect her against any claim; that complainant was not only a widow, but unacquainted with business methods and wholly ignorant of her rights in the matter; that said Cobb was not only her brother, but a man of intelligence and education, engaged in active business, and advised complainant in all important matters, and in whom at that time she had great confidence." It is then alleged that said brother induced her to execute the mortgage, which he had prepared, "to secure a pretended indebtedness," and that he paid her nothing, and she was not indebted to him. The fourth section was again amended so as to allege that said Cobb "unduly influenced" complainant to make the mortgage, and that it "was executed as the result of undue influence" by him. Then another amendment was made, by adding to said fourth section a statement that "it was not true that it was necessary for complainant to have given the mortgage in order to protect her right in said lot and preserve the same as a homestead, and that she did not voluntarily or of her own accord execute said mortgage, but was misled and deceived by the representations of the said Thomas L. Cobb, and thereby induced to execute said mortgage."

The first point raised by the demurrers, and insisted upon in argument by the appellant, is that the amendments are clearly inconsistent with the original bill and constitute a departure in pleading. We cannot see that there was such inconsistency as to constitute a departure. The purpose of the entire bill and amendments was to obtain a cancellation of the mortgage, and the general reason, running through them all, why this relief is asked, is that it was improperly procured, without consideration, by said Cobb. The relief prayed is the same. In fact, the first amendment, while it omits the statement that complainant was being pressed by claims, yet it carries with it the clear intimation that there were claims which were to be avoided, and the last amendment, while it alleges that it was not necessary to make the mortgage to save the homestead, does not allege that there were no claims to be avoided. The statements of the amendments are entirely consistent with the idea that the claims did in fact exist, but that the mortgage was not necessary, either because the debts could be otherwise provided for, or because the complainant could have protected her homestead by the simple process of filing her claim as provided by section 2065 of the Code of 1896. *Park v. Lide*, 90 Ala. 246, 252, 7 South. 805; *Winston v. Mitchell*, 93 Ala. 554, 560, 561, 9 South. 551; *Berry v. T. & C. R. R.*, 134 Ala. 618, 621, 622, 33 South. 8.

The next point raised is that the evident purpose of the mortgage which is sought to be canceled was to hinder, delay, and defraud creditors, and that, the complainant and respondents' testator being in *pari delicto*, a court of equity will not exert its powers in favor of either party. This is a clear principle of equity, laid down by the text-writers and adhered to by our own and other courts. *Glover v. Walker*, 107 Ala. 540, 18 South. 251. There seems to have been some modification of this rule, as suggested by counsel for appellee. It is stated that "when a stronger mind takes advantage of a weaker, and by persuasion and influence procures the unlawful act, or when the parties stand in such a relation that undue influence will be presumed, the reason which denies relief ceases to be applicable. * * * If the superior should be allowed immunity under such circumstances, he would be permitted to take advantage of his own wrong, and therefore equity will not refuse aid to the inferior." 14 Am. & Eng. & Ency. Law (2d Ed.) p. 279. Mr. Pomeroy, also, notes several exceptions; one being when "both have not with the same knowledge, willingness, and wrongful intent engaged in the transaction"; also where "there are collateral and incidental circumstances attending the transaction, and affecting the relations of the two parties, which render one of them comparatively free from fault. Such circumstances are imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like as a means of inducing the party to enter into the agreement, or of procuring him to execute and perform it." 2 Pom. Eq. Jur. (3d Ed.) pp. 1717, 1718, § 942. Where a party to whom a deed was made to defraud creditors fraudulently had other lands than those intended to be conveyed included in the deed, relief was granted. *Clemmens v. Clemmens*, 28 Wis. 637, 9 Am. Rep. 520. This was based, however, on the fraudulent act of the defendant, not participated in by the plaintiff. *Id.*, 9 Am. Rep. 532. Where a husband represented to his wife that she was liable for certain debts (which was false), and induced her to convey property to him for the purpose of avoiding the debts, the deed was canceled, on account of the confidential relations and because there was a mutual mistake as to the facts; the court remarking "that the parties did not stand on equal terms." *Boyd v. De La Montagne*, 73 N. Y. 498, 29 Am. Rep. 197, 199. Where a feeble old man, harassed by suits for alimony, etc., and whose wife had contracted considerable debts without his consent, was persuaded to convey his property to his nephew's wife as trustee, the conveyance was canceled. The court notes that it was "not found that B. made the conveyances to avoid the threatened suit." *Nichols v. McCarty*, 53 Conn. 299, 23 Atl. 93, 55 Am. Rep. 105, 113. In another case an illiterate young man was induced by his uncle, by false representations

in regard to suits against the estate from which the young man inherited property, to have the property which the young man was purchasing conveyed to the uncle, the young man was granted relief against the uncle, because, first, of the confidential relations, and the defendant should not be allowed to profit by his own wrong; and, second, the statements being untrue, "there were no creditors to be defrauded." *Williams v. Collins* (Iowa) 25 N. W. 682, 683. In another case, where a client made a deed absolute on its face to his lawyer to secure advances amounting to much less than the value of the property, the deed was declared to be a mortgage, and the court says: "One of the purposes may have been to prevent other creditors from reaching it. We do not think, however, that under the circumstances there should be an application of that rule of equity which denies relief to one party against another when both have been engaged in a fraudulent transaction. The parties were not in *pari delicto*. One was the legal adviser, the other the client. * * * Equity will not tolerate the idea that an attorney may make use of his peculiar power over his client to procure a contract which is illegal and contrary to public policy, and to then invoke the aid of the law to enable him to retain that which he has obtained through his fraudulent artifices." *Herrick v. Lynch* (Ill.) 37 N. E. 221, 223. In our own court, relief was granted in a case where the facts were similar to those in this case; but the question of *pari delicto* does not seem to have been raised. *Cannon v. Gilmer*, 135 Ala. 302, 33 South. 659. While these cases are not all strictly analogous to the one before us, yet we gather from them and from the eminent text-writers cited, that in a case like this two maxims of the law meet—one that, where the parties are in *pari delicto*, no affirmative relief will be granted to him against the other; and the other that one party who occupies a confidential relation to another cannot profit by any conveyance from the other to him, without showing entire freedom from undue influence and a bona fide transaction on sufficient consideration. We gather, then, that where these relations exist the fact that the instrument that the weaker party was induced to make may have been illegal does not necessarily place her in *pari delicto* with the stronger party, who dominated her for his own profit.

On the subject of undue influence, under our decisions it is not "necessary to allege with particularity the *quo modo*, * * * but only that it was accomplished by undue influence exerted by named persons." *McLeod v. McLeod*, 137 Ala. 267, 270, 34 South. 228. Our decisions have also been very liberal to the weaker party in transactions of this character, holding that "the general principles which a court of equity applies to transactions between persons occupying fiduciary relations towards each other is not

confined to cases in which there is any formal or technical fiduciary relation, such as guardian and ward, parent and child, attorney and client, etc., but extends to all cases in which confidence is reposed by one party in the other and the trust is accepted under circumstances which show that the confidence was founded on the intimate personal and business relations existing between the parties which gave the party an advantage or superiority; and in such case the onus is on the party in whom the confidence is reposed to show that no fraud, undue influence, or other improper motives entered into the transaction." *Kyle v. Perdue*, 95 Ala. 579, 585, 10 South. 103; *Ryan v. Price*, 106 Ala. 584, 17 South. 734. See, also, 2 Pom. Eq. Jur. (3d Ed.) pp. 1748, 1749, § 956. We desire, also, to call attention to another principle laid down by Mr. Pomeroy, who, in speaking of these cases where parties are in *pari delicto*, says: "The maxim, rightly interpreted, does not require the condition of the parties, with respect to the subsisting executory contract to remain unchanged and undisturbed. The remedy of cancellation * * * is simply the equitable proceeding identical with setting up the illegality as a defense to defeat a recovery at law, and thus get rid of the contract as a binding executory obligation." 2 Pom. Eq. Jur. (3d Ed.) p. 1714, § 940. According to the allegations of the bill, as amended, the confidential relations existed, and the undue influence was used, the necessity to make the mortgage to secure the homestead did not exist, according to the statement in the bill, and the statutes of Alabama, in place of branding as fraudulent the saving of the homestead for the use of the mother and children encourages the same and has made special provisions by which this widow might have kept her homestead intact, and still remained in Auburn to educate her children. Section 2069, Code 1896. We hold that this is not a case where the doctrine of *pari delicto* should prevent the reparation of the wrong, if the mortgage was an attempt to defeat the claims of creditors contrary to law, it could never be enforced, and there seems no good reason why it should remain as a cloud on the title, and the remedy by cancellation, as Mr. Pomeroy says, was just accomplishing the same and as defeating the enforcement of it; so that, in either aspect of the case, the demurrers to the bill were properly overruled.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

BROOKSIDE DRY GOODS CO. v. CITY FURNITURE CO.

(Supreme Court of Alabama. June 7, 1906.)

1. APPEAL — PRESUMPTIONS — FACTS NOT SHOWN BY RECORD.

Where the court rendering judgment against a garnishee was one of general jurisdiction, the fact that the record was silent as to the affida-

vit required by Acts 1894-95, p. 415, did not, on appeal by the garnishee, create a presumption of want of jurisdiction.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3686-3688.]

2. GARNISHMENT — ANSWER OF GARNISHEE — CONTEST — SUFFICIENCY.

A garnishee denied liability, and a contest was filed on the ground that the answer was untrue, that the garnishee paid the defendant money after the service of the garnishment, that the garnishee was indebted to plaintiff between the service of garnishment and the answer, and that the answer was made by an officer of the garnishee corporation who had no knowledge of the transaction. Demurrers were filed to the contest—that the contest failed to point out in what particular the answer was untrue; that the declarations raised the question of the proper officer to make the answer, which could not then be put in issue; that the declarations failed to deny the details of the employment set up in the answer, and failed to show the amount claimed to have been paid; and that declaration failed to set out the facts upon which indebtedness to defendant was claimed. *Held*, that the contest was not demurrable.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 293.]

Appeal from City Court of Birmingham; Chas. W. Ferguson, Judge.

"Not officially reported."

Action by the City Furniture Company against K. Seigel; The Brookside Dry Goods Company, garnishee. From a judgment against the garnishee, it appeals. Affirmed.

The appellee sued K. Seigel in a justice court and procured garnishment to issue against appellant, who is supposed to be indebted to defendant. Garnishee (appellant) answered, by and through its secretary and treasurer, denying indebtedness. Contest was filed to this answer, first, because said answer is untrue, in that garnishee was indebted to defendant; second, because the garnishee paid the defendant money or other things of value after the service of the garnishment; third, because garnishee was indebted to plaintiff during the period between the service of garnishment and the answer; fourth, because the answer was made by an officer of the corporation who did not have knowledge of the transaction. Demurrers were filed to this contest, because the contest fails to point out in what particular the oral answer is untrue; second, the declaration raises the question of the proper officer to make the answer, which cannot now be put in issue; third, the declaration fails to deny the details of the employment set up in the answer and fails to show the amount it claims was paid or the amount due; fourth, the declaration fails to set out the facts upon which indebtedness to defendant is claimed. These demurrers were overruled, and issue was made up under the contest, and judgment was rendered against garnishee. It does not appear that any action was taken on the garnishment issued against Steiner Bros.

Powell & Blackburn, for appellant. Kerr & Haley, for appellee.

ANDERSON, J. This case was removed from the justice court to the city court by the statutory writ of certiorari, and which was in effect an appeal. The record of the proceedings in the justice court is somewhat confused, as it sets out affidavit and writ of garnishment as against Steiner Bros., but no affidavit for garnishment against these garnishees. There is shown the service of a writ of garnishment on these garnishees of date August 4th, and which was prior to the rendition of a judgment against the garnishee, as shown by the transcript sent up by the justice. Again, the record discloses no objection or pleas to the process or jurisdiction in either of the lower courts, and the judgment entry of the city court recites that a judgment had been rendered against the defendant.

The court rendering the judgment against the garnishee is one of general jurisdiction, and we do not think the silence of its records as to the affidavit required by Acts 1894-95, p. 415, creates a presumption of want of jurisdiction. *White v. Simpson*, 107 Ala. 386, 18 South. 151. We think the contest presented a sufficient issue, and that the demurrers to same were properly overruled.

Counsel for appellant insists that there was no service on the corporation until after the money was paid out. As there is no bill of exceptions in this case, we are at a loss to know when the money was paid to the defendant by the garnishee.

The judgment of the city court is affirmed.

TYSON, SIMPSON, and DENSON, JJ., concur.

SMILEY v. HOOPER et al.

(Supreme Court of Alabama. June 7, 1906.)

1. WITNESSES—CROSS-EXAMINATION—DISCRETION OF TRIAL COURT.

In an action against a sheriff and another for selling under execution against a third person wood belonging to plaintiff, a witness having testified to buying the wood for plaintiff as his agent, the latitude to be allowed defendants in cross-examining such witness for the purpose of testing the accuracy of his memory, his truthfulness, and controverting the fact that the wood was bought for plaintiff, was largely within the discretion of the trial court.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 923-930.]

2. EVIDENCE—RELEVANCY—MATTER EXPLANATORY OF FACTS IN EVIDENCE.

In an action against a sheriff and another for selling under execution against a third person wood belonging to plaintiff, defendants raised a question as to whether plaintiff was simply acting, when he purchased the wood, as agent of a certain iron company, and plaintiff offered to prove that when he settled with the iron company no credit was allowed him on account of wood not delivered. *Held*, that such testimony was relevant to show the nature of the transaction between plaintiff and the iron company.

3. SAME—HEARSAY.

In an action against a sheriff and another for selling under execution against a third

person wood belonging to plaintiff and claimed by plaintiff to have been purchased for him by S. as agent, it was not competent to prove by declarations of the superintendent of a certain corporation that S., in purchasing the wood, was representing the corporation.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1185.]

4. EXECUTION—WRONGFUL LEVY—ACTION—EVIDENCE.

On an issue as to whether wood levied on under execution against another was the property of plaintiff, it appearing that the wood had been purchased by S., whom plaintiff claimed was his agent, it was proper to admit evidence as to contracts made by S. with other persons and as to marks placed by him on wood bought for other parties.

5. TRIAL—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

In an action against a sheriff and another for selling under execution against a third person wood belonging to plaintiff, an instruction that before there could be a recovery by plaintiff he must "prove with a reasonable certainty by credible testimony" was erroneous as exacting too high a degree of proof; it being sufficient if the evidence satisfies the jury.

6. SALES—RIGHT TO SELL—SELLER'S TITLE.

Though one cut wood and put it on the railroad under a contract with a corporation, the contract having been such that the wood did not become the property of the corporation until delivered at another place, a sale by him to another before shipment passed title to the purchaser.

7. EXECUTION—WRONGFUL LEVY—DEFENSES.

In an action against a sheriff and another for selling under execution against a third person wood belonging to plaintiff, proof that plaintiff has bought the wood as agent for another party was sufficient to defeat recovery.

8. PRINCIPAL AND AGENT—EXISTENCE OF RELATION—EVIDENCE—DECLARATION OF AGENT.

Agency cannot be proved by the mere statement of the agent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 40.]

9. EXECUTION—WRONGFUL LEVY—INSTRUCTIONS.

In an action against a sheriff and another for selling under execution against another wood belonging to plaintiff, it was proper to instruct that, unless the jury were reasonably satisfied from the evidence that the legal title was in plaintiff, they should find for defendant.

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

"To be officially reported."

Action by T. M. Smiley against A. R. Hooper and others. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded.

This was an action against Hooper and the sheriff brought by plaintiff for the conversion of certain wood alleged to be the property of the plaintiff. Hooper had a judgment against one Entrican, and procured execution to be issued on it which execution was levied upon certain wood as the property of Entrican. The wood was sold under said execution. The evidence tended to show that Stewart, as the agent of the plaintiff, had bought this wood from Entrican and other parties, and had paid them for the same, and it had been delivered

ed before the levy of the execution. The court permitted the witness Malone to state, over the objection of the plaintiff, that in the fall of 1902 Entrican tried to employ him to haul some wood, and told him that he would have to wait for his pay, and that he had to ship his wood to Attalla in order to get pay for it, and that at that time Entrican had hauled some wood for the railroad. The witness Coleman was permitted to testify that he had had a conversation with McClane about Stewart, and that McClane said that he was the agent of the Eagle Iron Company, and was buying wood for the Eagle Iron Company, along the line of the Nashville, Chattanooga & St. Louis, and that McClane said that Stewart was authorized to buy wood and pay for it, and that he was authorized to make contracts for the company; also to state that witness was in the employ of the Eagle Iron Company; also that Stewart said he was buying wood for the Eagle Iron Company when he made a contract for wood; also that witness and Stewart worked together; also that he had a contract with the Eagle Iron Company, made with Stewart, and that McClane said a contract made with Stewart for the Eagle Iron Company was good. Witness Bohanan was permitted to testify over the objection of the plaintiff that he had never heard McClane say that Stewart was representing Smiley. McCord was permitted to testify to practically the same state of facts as the witness Coleman.

The court, at the request of the defendant, gave the following written charges: "(1) Before there can be a recovery by the plaintiff, he must prove with a reasonable certainty by credible testimony. (2) The court charges the jury that, if the wood sued for was cut and put on the railroad by Entrican under the written contract made by him and McClane on October 5, 1902, then you must find for the defendants, and it would make no difference in that case, if it be a fact, that Smiley, or Stewart, or the Eagle Iron Company had paid to Entrican \$1.50 per cord on the oak wood and \$1.25 per cord on the pine wood. (3) The court charges the jury that if Stewart was the agent of the Eagle Iron Company, and bought the wood sued for as such, then you must find for the defendant. (4) Agency may be proved by circumstances, and, if the evidence reasonably convinces you that Stewart was the agent of the Eagle Iron Company in the purchase of the wood in question, then your verdict must be for the defendant. (5) The court charges the jury that, while an agent may purchase property for an undisclosed principal, yet if, when he makes the purchase, he represents that he is the agent of a certain person, then the law presumes that such contract

is the contract of that person; and, if it is claimed that it is in fact the contract of some other person, the burden of proving this is on the party so claiming. (6) Unless you are reasonably satisfied from the evidence that the legal title to the wood in question is in Smiley, you must find for the defendant."

J. A. Lusk, for appellant. Street & Isbell, for appellees.

SIMPSON, J. This was an action of trover for the conversion of 200 cords of wood, brought by the appellant (as plaintiff) against the appellees (defendants), being the plaintiff in execution and the sheriff. The defendant pleaded justification; the supposed act of conversion being the levy on the wood under an execution against one Entrican. There are 29 exceptions to questions to the witness Stewart and to the overruling of motions to exclude the answers to the same. These were all asked by the defendant on cross-examination. The witness professed to have bought the wood for Smiley, the plaintiff, and the defendant was evidently trying to test the witness as to his accuracy, his recollection, or his truthfulness, and controverting the fact that the wood was bought for Smiley and was his property. The law allows great latitude in cross-examination for these purposes, and it is a matter which rests largely in the discretion of the trial court as to the extent to which the cross-examination may be allowed. We cannot see that there was any abuse of the discretion by the trial judge in regard to these questions and answers. *A. G. Rhodes Furniture Co. v. Weeden & Dent*, 108 Ala. 252, 257, 258, 19 South. 318; *Tobias v. Treist*, 103 Ala. 664, 15 South. 914; *Noblin v. State*, 100 Ala. 13, 14 South. 767. The same principles apply to assignments of error numbered from 30 to 38, inclusive, relating to the cross-examination of the witness Entrican; also to assignments from 39 to 44, inclusive, relating to the cross-examination of the witness Wildman and the plaintiff.

Referring to the forty-fifth assignment, the plaintiff had testified in his own behalf that he was furnishing the wood which he bought to the Eagle Iron Company, that they paid him always just 10 cents per cord more than he paid for the wood, and when they notified him to put down the price of the wood he did so, etc. The plaintiff then offered to prove by him that when he settled with said company, and was charged by them with all the money received by them, and credited with wood, "no deduction or credit was made or allowed to him on account of wood which was not delivered." The defendant objected to this testimony, and the court sustained the objection and excluded the testimony. In this the court erred. The evident tendency

of questions allowed to the defendant on cross-examination as to the transactions between the plaintiff and the Eagle Iron Company was to raise the question whether or not plaintiff was simply acting as the agent of that company in purchasing the timber, so that said company was the owner of the timber, and the matter here proposed to be proved by the plaintiff was relevant to show what the real transaction was between them, as going to show who was the owner of the wood, and should have been allowed, in view of the evidence already admitted.

The objections of the plaintiff to the several questions to the witness Coleman, and motions to exclude the answers, should have been sustained. It was not competent to prove who Stewart was representing by what McClane, the superintendent of the Eagle Iron Company, said. This was clearly hearsay testimony. The same is true with regard to the statements by the witness McCord as to what McClane said. The contracts made by Stewart with other parties, and as to the marks placed by him on the wood bought for other parties, were properly admitted as having some relevancy as to the question whose wood it was that was levied on. The fact that Entrican had hauled some wood to the railroad was relevant, but his statements made to the witness Malone should have been excluded. There was error, also, in allowing the witness Bohanan, over the objection of plaintiff, to relate what McClane said about whom Stewart represented.

Charge 1, given at the request of the defendant, exacts too high a degree of proof. It is sufficient if the evidence reasonably satisfies the jury. *Moore v. Heineke*, 119 Ala. 629, 632, 640, 24 South. 374. The court erred in giving charge 2, on request of the defendant. According to the contract therein referred to, the wood purchased by Entrican for the Eagle Iron Company would not become the property of that company until delivered "f. o. b. cars" at Attalla, Ala., for them, so that, though Entrican may have cut it and put it on the railroad under that contract, yet, if he sold it to Smiley before shipping it to the said company, it was Smiley's wood.

Charges 3 and 4, requested by defendant, were properly given. The burden being on the plaintiff to show that the wood sued for belonged to him, proof that it was bought for another party would defeat his recovery.

Charge 5, given on the request of the defendant, should have been refused. It cannot be said that, because a party purchasing property states that he is buying for another party, the law presumes that the contract is the contract of that party. Agency cannot be proved by the mere statement of the agent.

Charge 6 was properly given on request of the defendant; the burden being on the plaintiff to prove that he was the owner of

the property for the conversion of which the suit was brought.

The judgment of the court is reversed, and the cause remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

MATTHEWS v. SOUTHERN RY. CO.
(Supreme Court of Alabama. June 12, 1906.)
APPEAL—DISMISSAL—DEFECT IN PROCEEDINGS IN LOWER COURT.

Code 1896, § 3320, provides, where special findings are made by the court, a statement of the facts found shall be entered upon the minutes of the court. *Held*, that where, on appeal, it did not appear by the record that a statement of the facts found was entered on the minutes, but it did not appear that the judge's attention was called to the omission, and it appeared that, if the statement in the bill of exceptions had been entered on the minutes, the facts found were sufficient to support the judgment, the appeal will not be dismissed for the failure of the record to show an entry.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

"Not officially reported."

Action by S. M. Matthews against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. A. Bilbro, for appellant. Humes & Speake, for appellee.

TYSON, J. It seems to be conceded by appellant's counsel that the finding of the facts cannot be reviewed on this appeal for the purpose of determining whether the facts found are sufficient to support the judgment, because it is not made to appear by the record that a statement of them as found was entered upon the minutes of the court as required by section 3320 of the Code of 1896. It is therefore insisted that the judgment should be reversed because of the failure of the judge to comply with the direction of the statute in this respect. If it be conceded that the statute imposes such duty on the presiding judge trying the cause, it by no means follows that his omission to do so is revisable on appeal. It is clearly a mere clerical duty, and not a judicial one. It involves no adjudication and judgment from which an appeal will lie under the statutes. Besides, if it were otherwise, it does not appear that the judge's attention was called to the omission, and a ruling invoked thereon, and an exception reserved to his refusal to enter or to cause to be entered the statement upon the minutes. Furthermore, if the statement, which appears in the bill of exceptions, had been entered upon the minutes, it is clear that the facts as found are sufficient to support the judgment rendered. *Chandler & Jones v. Crossland*, 126 Ala. 176, 28 South. 420. Without determining the question whether it is necessary for the

statement to be shown on the minutes for the purpose of review, we have stated our conclusion on that point, in order that appellant may know that he has not been deprived of any substantial right by the omission, which could be corrected by proper proceeding, if he was injured thereby.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

EAGLE IRON CO. v. BAUGH.

(Supreme Court of Alabama. June 14, 1906.)

1. PRINCIPAL AND AGENT — EXISTENCE OF AGENCY.

The authority of an agent cannot be established by the statements or admissions of the alleged agent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 416-419.]

2. SAME.

On an issue as to the existence of an agency, any declaration by the agent as to his authority is admissible, when other evidence exists from which authority may be inferred.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 416-419.]

3. SALES—BREACH OF CONTRACT—DAMAGES—EVIDENCE.

In an action for breach of a contract to purchase a quantity of wood, evidence as to the sum received by the seller for wood which the buyer refused to take under the contract was admissible on the question of damages.

4. PARTIES—STRIKING OUT.

Where, in an action on a contract against the other party thereto and the agent through whom the contract was made, the evidence showed no individual liability of the agent, it was proper to permit plaintiff to amend by striking out the agent's name as party defendant.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 101.]

5. PLEADING—PLEAS IN ABATEMENT—TIME FOR FILING.

Code 1896, § 3271, provides that, when any joint cause of action exists and the defendants reside in different counties, a summons may issue from the court having jurisdiction of any of the defendants. Section 4205 provides that all actions on contracts must be brought in the county in which the defendant or one of the defendants reside, and section 4207 declares that a corporation may be sued in any county in which it does business by agent. Circuit court rule of practice 12 (Code 1896, p. 1197) declares that no plea in abatement shall be received unless filed within the time allowed for pleading. A suit against a corporation and another on a contract was commenced in the county in which the individual defendant resided, and in which the corporation had no place of business. During trial plaintiff dismissed as to the individual defendant. *Held*, that defendant corporation was then entitled to plead in abatement to the jurisdiction.

6. EVIDENCE—TRIAL—BURDEN OF PROOF—DEGREE OF PROOF REQUIRED.

In a civil case, issuable facts need not be proved with "reasonable certainty," but only by a preponderance of the evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2448-2448.]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

"To be officially reported."

Action by Jack Baugh against the Eagle Iron Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action by appellee against appellant for failure to take 500 cords of oak and pine wood, which appellant had contracted to take from appellee, and which appellee had tendered to defendant. The disputed question was whether or not Stewart was the agent of appellant with authority to make the contract for the purchase of the wood, and there was conflict in the testimony as to the value of the wood and of the cost of putting it on the line of railroad. The action was begun against appellant and one Stewart jointly. Stewart resided in the county in which the suit was brought, while the appellant corporation had no place of business there, but had its works and other things in Etowah county. After the testimony was in, plaintiff was allowed to amend his complaint by striking Stewart as a party defendant. The Eagle Iron Company then asked leave to file plea in abatement setting up the fact for want of jurisdiction of the court to try the cause in the absence of Stewart.

The court, at the request of the plaintiff, gave the following charge: Charge 3: "The court charges the jury that the burden of proving that H. J. Carville delivered 425 cords of wood on the contract sued on is on the defendant, and it is not sufficient for the defendant to show merely that 425 cords of wood were sold and delivered to defendant; but it must be proven by defendant with reasonable certainty that the wood was put in on this contract, and not on some other contract." Charge 6, requested by the defendant, was the general affirmative charge.

J. A. Lusk, for appellant. Street & Isbell, for appellee.

ANDERSON, J. "The authority of an agent, where the question of its existence is directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. The agent cannot confer authority upon himself. Evidence of his own statements or admissions, therefore, is not admissible against his principal for the purpose of establishing, enlarging, or renewing his authority; nor can his authority be established by showing that he acted as agent or that he claimed to have the powers which he assumed to exercise." *Mechem on Agency*, § 100; *Galbreath v. Cole*, 61 Ala. 140; *Wharton on Evidence*, § 1184; *Scarborough v. Reynolds*, 12 Ala. 252; *Postal Co. v. Lenoir*, 107 Ala. 640, 18 South, 266; *L. & N. R. Co. v. Hill*, 115 Ala. 334, 22 South 163. Any declaration of the agent as to his authority would be admissible, when other evidence had been shown from which authority to do the thing may be inferred; or, if the trial court improperly admitted declarations

of the agent, the error would be cured by evidence subsequently introduced from which authority might be inferred, and in case such evidence was introduced the question of authority would become one of fact for the determination of the jury. *Birmingham R. R. Co. v. Tenn. Co.*, 127 Ala. 137, 28 South. 679. There was evidence from which the jury could infer that McClane, the superintendent, had authority to contract for and buy wood for the defendant, and to delegate the authority to others, and that Stewart was its agent, independent of the acts and declarations of McClane and Stewart. There was evidence from which it could be inferred that these men were held out as agents with authority to buy wood, and also of a ratification by the defendant of their acts. The trial court committed no reversible error upon the rulings on evidence relating to the authority of Stewart to contract for the wood. The trial court erred in not permitting the defendant to show what plaintiff got for the nine cords of wood sold by him. Plaintiff had shown, as a part of his damage, the value of this wood and the defendant's refusal to take it. If plaintiff sold it, the sum that he got for same should have been deducted from the amount of damages sustained. We need not consider the other rulings on the evidence, as they were either correct or innocuous to defendant if erroneous.

The evidence having disclosed no individual liability against Stewart upon the contract, there was no error in permitting the plaintiff to amend by striking his name out as party defendant.

While rule 12 (page 1197 of the Code of 1896) requires that pleas in abatement must be filed within the time allowed for pleadings, and ordinarily such a plea should not be entertained at a subsequent term of court, yet the plea should have been permitted in the case at bar. The corporation was sued jointly with Stewart, and in Marshall county, where Stewart resided, and under sections 4205 and 3271 the question of venue was not open to the Eagle Iron Company so long as Stewart was a joint defendant; but, after the plaintiff eliminated Stewart from the suit, the corporation became the sole defendant, and had the right to then question the venue of the action. Section 4207 applies to suits against corporations when they are sole defendants, and does not conflict with sections 4205 and 3271 in reference to suits against two or more defendants.

Charge 3, given at the request of the plaintiff, required too high a degree of proof of the facts postulated. In civil cases facts are not required to be proved with reasonable certainty. To the reasonable satisfaction of the jury is sufficient. *Anniston Co. v. Southern Ry. Co.* (Ala.) 40 South 965; *Battles*

v. Tallman, 96 Ala. 403, 11 South 247; *Mayfield's Dig.* pp. 597-598.

There was no error in refusing charges requested by the defendant.

The judgment of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

SOUTHERN RY. CO. v. CITY OF AT-TALLA.

(Supreme Court of Alabama. June 14, 1906.)

1. TROVER AND CONVERSION—RIGHT OF ACTION—RIGHT OF POSSESSION OF PLAINTIFF.

To support an action of trover, the right to property, general or special, and possession, or an immediate right of possession, must concur in the plaintiff at the time of the conversion.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 119-147.]

2. SAME—COMPLAINT—ALLEGATIONS—SUFFICIENCY.

A complaint for the conversion of water, which alleges that plaintiff put water into a tank belonging to a railroad pursuant to a contract between plaintiff and the railroad binding plaintiff to furnish the railroad with water for its exclusive use, and that defendant converted the water, sufficiently shows the ownership and possession of the water by plaintiff until converted.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 197.]

3. ELECTION OF REMEDIES—GROUNDS—INCONSISTENCY OF REMEDIES.

To make a case for the application of the doctrine of election of remedies, the party must have actually two inconsistent remedies.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Election of Remedies, §§ 1, 3.]

4. MONEY RECEIVED—CONVERSION—WAIVER OF TORT.

An owner of personalty converted by another cannot waive the tort and recover for money had and received, unless there has been a sale of the property by the latter.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 203.]

5. TROVER AND CONVERSION—DEFECTS—ELECTION TO WAIVE TORT—PLEADING—SUFFICIENCY.

A plea in an action for conversion, which alleges that plaintiff had previously instituted a suit in assumpsit in which it treated defendant as a purchaser of the property alleged to have been converted, but which fails to allege that defendant sold the property before the institution of the suit in assumpsit, is fatally bad, as one cannot recover for money had and received, based on a conversion, unless there has been a sale by the wrongdoer.

6. APPEAL—RULINGS ON DEMURRER—PRESUMPTION.

Where the record shows no ruling on a demurrer to a pleading, the court on appeal must assume that the demurrer was abandoned.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 8709.]

7. TROVER AND CONVERSION—ACTION—PLEADING—EVIDENCE.

Where, in conversion, defendant pleaded the institution by plaintiff of a prior suit in

assumpsit, in which defendant was treated as purchaser of the property alleged to have been converted, the summons and complaint in assumpsit was admissible.

SAME—RIGHT OF ACTION.

A city contracted with a railroad to furnish it with water for its exclusive use. Pursuant to the contract it furnished water. Defendant used the water so furnished and paid the railroad company therefor. *Held*, that the city was not deprived of its right to recover for a conversion by defendant of the water used by it.

Appeal from City Court of Gadsden; John H. Disque, Judge.

"To be officially reported."

Action by the city of Attalla against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action brought by the city of Attalla against the Southern Railroad Company for water alleged to have been taken by said railroad company from the tanks of the Alabama Great Southern Railroad Company, which water had been placed in said tank by the city for the use of said Alabama Great Southern Railroad Company only. There were three counts in the complaint. The first count alleged the wrongful taking of 50,000,000 gallons of water, and the damages are laid in the sum of \$3,000. The second count alleged the conversion of 50,000,000 gallons of water. The third count sets up the contract between the city of Attalla and the Alabama Great Southern Railroad Company to furnish said railroad company with water for its exclusive use, the erection of tanks by the Alabama Great Southern Railroad Company for the reception of this water, and the taking therefrom by the Southern Railroad of 50,000 gallons per day for a period from the 1st day of October, 1899, to the 1st day of March, 1903, and a failure on the part of said Southern Railroad to pay for the same. Demurrers were interposed to the complaint, and overruled.

The defendant filed two pleas of the general issue, and the following special plea: "(3) Further answering the complaint, defendant says that the plaintiff, with full knowledge that defendant had taken or drawn said water from said tank and pipe and used and consumed the same, as alleged in the complaint, elected to waive the tort, and its action against defendant for the conversion of said water, by bringing and prosecuting its action in assumpsit in this court for the value of said water alleged to have been converted, which said action was brought and prosecuted prior to the bringing of this suit." Demurrers were interposed to this plea, but the record fails to show any action of the court taken from said demurrers. The defendant filed the following additional special pleas: "(4) Defendant says that plaintiff, before the bringing of this suit, and on, to wit, November 4, 1903, filed its suit in indebitatus assumpsit against defendant in the city court

of Gadsden, a court of full and complete jurisdiction of the parties and subject-matter of said suit, in which it treated the defendant as a purchaser of said water alleged to have been converted by the defendant, and for the conversion of which it seeks to recover in this case, and in which said first-mentioned suit it sought to recover of defendant the amount due from it to plaintiff for said water, and that at the time plaintiff filed said first-mentioned suit it had full knowledge of all material facts and of the facts that defendant had taken and converted to its own use said water as alleged in said complaint in this suit. Wherefore defendant says plaintiff cannot maintain this action. (5) Defendant adopts plea 4 down to, but not including, the words 'Wherefore defendant says,' etc., and adds thereto the following additional averment: 'That plaintiff prosecuted said suit first brought to the settlement of the pleading therein, and the trial of the cause and development of the testimony, after which and before the court pronounced judgment in the cause, plaintiff took a nonsuit in said cause. Wherefore defendant says plaintiff cannot maintain this action.'

The plaintiff interposed the following demurrers to pleas 4 and 5: "Because it does not appear how and in what manner the plaintiff is precluded in this action by having previously filed an action in assumpsit against the defendant. Because it does not appear from said pleas of defendant that the subject-matter of said suit is the same as of this action, or that the parties are the same. Because it does not appear that the action of assumpsit complained of and which was previously brought was prosecuted to judgment. Because from all that appears from said plea of defendant, the plaintiff took a nonsuit in said action of assumpsit. Because it does not appear from said plea of the defendant that said action of the plaintiff, brought in assumpsit, was ever prosecuted to final judgment. Because, if all alleged in said plea of defendant should be proven true, then this would be no bar to this action." And to plea 5 this additional ground: "Because it appears from said plea that plaintiff took a nonsuit in said action before final judgment." Demurrers were sustained to pleas 4 and 5.

The evidence tended to show a taking by the defendant of water from the tanks of the Alabama Great Southern Railroad Company which had been placed there by the plaintiff. It further tended to show a contract between the plaintiff and the Alabama Great Southern Railroad Company, whereby the plaintiff was to furnish at a stipulated price water to the tanks of the Alabama Great Southern Railroad Company for the exclusive use of said railroad company. It was admitted that defendant had not paid plaintiff for any of the water taken. It was attempted to be

shown by the defendant that defendant had paid the Alabama Great Southern Railroad Company for all the water taken from its tanks, but objection was sustained to this testimony. The summons and complaint, together with the judgment entries and other record evidence, of the suit in assumpsit by the plaintiff against this defendant for the price of water taken, begun by plaintiff against defendant in the city court of Gadsden, was offered in evidence by the defendant, and excluded by the court on motion of plaintiff. There was judgment for plaintiff in the sum of \$268.63.

Burnett, Hood & Murphree, for appellant.
Boykin & Brindley, for appellee.

ANDERSON, J. While it is true that, to support an action of trover, the right of property, general or special, and possession, or an immediate right of possession, must concur in the plaintiff at the time of the conversion, we think the complaint avers such an ownership and possession as will support the action. The third count claims that the water put by the plaintiff into the tank of the Alabama Great Southern Railroad Company was for a limited and specific purpose, and that it was converted by the defendant, and thus diverted from the use or purpose for which it was there put. It shows an ownership in the plaintiff and possession until used or converted by the Alabama Great Southern Railroad Company. The third count was in trover, and states a good cause of action, and was not subject to any of the grounds of the demurrer. "In its technical and more restricted sense, election of remedies is the adoption of one of two or more existing remedies, with the effect of precluding a resort to the others. The remedies here intended are known as exclusive or alternative remedies." 7 Am. & Eng. Ency. Pl. & Pr. 361. To make a case for the application of the elective principle, the party must have actually at command two inconsistent remedies. *Morris v. Rexford*, 18 N. Y. 552; *McNutt v. Hilkins*, 80 Hun (N. Y.) 235, 29 N. Y. Supp. 1047; *Kinney v. Kiernan*, 49 N. Y. 164. There are cases wherein the owner may waive an action for the conversion of his property and bring assumpsit, and by so doing he might be precluded from subsequently maintaining trover. In order, however, for it to have that effect, both remedies must have been open to him when he made the election. In our state the owner of personal property is put to his action for a conversion

and cannot recover in assumpsit for money had and received, unless there has been a sale and the reception of money, or of things as money, as the price or value of plaintiff's property. *Smith v. Jernigan*, 83 Ala. 256, 3 South. 515; *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318; *Crow v. Boyd's Adm'rs*, 17 Ala. 51; *Pike v. Bright*, 29 Ala. 332. These views are not in conflict with the rule laid down in the case of *Hickman v. Richburg*, 122 Ala. 638, 28 South. 136, and cases there cited. There the plaintiff had the right to confirm the sale and recover the price, or to disaffirm the sale and recover the property; but in the case at bar the plaintiff could not maintain assumpsit, and could not be precluded from an action for conversion, upon the doctrine of election, by bringing an action that could not be maintained.

The third count does not aver that the defendant had sold the water, nor is this fact set up in the pleas; and without such an averment the pleas set up no bar to the action and the demurrers to pleas 4 and 5 were properly sustained. A demurrer was interposed to the third plea, and which said plea is subject to what has been said of pleas 4 and 5; but the record shows no ruling of the court on the demurrer to said third plea, which we must assume was abandoned by the plaintiff. So long as the third plea was in, the defendant had the right to introduce evidence in support of same, and the trial court erred in sustaining an objection to the summons and complaint in the former suit, and for this error the judgment must be reversed.

There was no error in sustaining objections to the questions to the witness Frost as to what was done on the former trial. The contract made with the Alabama Great Southern Railroad Company provided for water for its own use only, and did not license other roads to use water thereunder, nor authorize said Alabama Great Southern Railroad Company to let water to the defendant, and thus preclude the plaintiff from recovering for same. That the defendant paid the Alabama Great Southern Railroad Company for this water is a question between the two roads, but that fact does not deprive the plaintiff from recovering for a conversion by the defendant of its property.

The judgment of the city court must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, O. J., and TYSON and SIMPSON, JJ., concur.

FOWLER et al. v. PRICHARD et al.

(Supreme Court of Alabama. June 14, 1906.)

1. JUSTICES OF THE PEACE — REMOVAL OF CAUSE TO COURT OF RECORD—FORCIBLE ENTRY—SEPARATE TRIAL OF ISSUES.

Code 1896, § 2147, gives the defendant in forcible entry and detainer the right to remove the cause from a justice to the circuit court by making an affidavit that defendant entered peaceably and under claim of title, and not under any agreement or understanding with plaintiff or his predecessors in interest, and that petitioner in good faith desires to contest plaintiff's title to the land. Section 2149 declares that "on the trial" of such case the plaintiff must recover on the strength of his legal title, unless defendant entered under contract or agreement or by force, in which latter case no inquiry can be had as to the relative strength of the legal title of the parties. *Held* that, where such a cause is removed to the circuit court under such sections, defendants are not entitled as of right to a separate trial of the issue of force vel non.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 243-245.]

2. APPEAL—EVIDENCE—EXCLUSION.

Where, in forcible entry and detainer, the jury found that defendants' entry was not by force or under any contract or agreement with plaintiff or those under whom he claimed, the exclusion of a memorandum of service of notice to quit on one of the defendants was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4187-4193.]

3. EVIDENCE—DECLARATIONS OF THIRD PERSONS—RES GESTÆ.

Where, in forcible entry and detainer, there was no pretense that witness had anything to do with the entry, but came on the property after the others had entered, evidence as to what he said at the time was inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 351-368.]

4. FORCIBLE ENTRY AND DETAINER—STATUTES—ISSUES AND PROOF.

Under Code 1896, § 2149, declaring that in forcible entry and detainer plaintiff must recover on the strength of his legal title, unless he can prove that defendants entered under some contract or agreement between plaintiff or those under whom he claimed or by some use of force, the only issue is as to the manner of defendants' entry, and not as to how he held possession after he entered.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, § 156.]

5. APPEAL—INSTRUCTIONS—OBJECTIONS AT TRIAL.

Where plaintiff did not call the trial court's attention to the fact that a refused request to charge had been marked "Given," he could not complain thereof on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1309.]

6. EVIDENCE—DECLARATIONS BY THIRD PERSONS.

In forcible entry and detainer, evidence of a conversation between witness and a third person with reference to the property was inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1051, 1174.]

7. SAME—BEST EVIDENCE.

Where, in forcible entry and detainer, the commencement of a prior suit was a mere collateral matter, it was not necessary that it should be established by the record as the best evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 528, 536.]

8. FORCIBLE ENTRY AND DETAINER—PRIOR SUIT—EVIDENCE—RELEVANCY.

Where, in a suit for forcible entry and detainer, the fact that a previous suit had been brought for the property had no bearing on the forcible entry or on the title to the land in controversy, it was irrelevant.

9. SAME—INSTRUCTIONS—ISSUES.

Where, in forcible entry and detainer, the only issues presented were whether defendants entered by force and as to which party had title or was entitled to possession, a request to charge that the possession of the property obtained by defendant was a scrambling possession, not obtained in good faith, and that if the jury believed it was so when obtained they should find for plaintiff, was properly refused as presenting no question within the issues.

10. SAME—FORCIBLE ENTRY AND DETAINER—ELEMENTS.

The mere opening of a gate on entering premises is not such force as in law will constitute a forcible entry.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, § 15.]

11. TRIAL—ABSTRACT INSTRUCTIONS.

Where there was no evidence that any part of the consideration of a deed was the future support of the grantor, an instruction that if he had sufficient mental capacity to comprehend the nature of his act when he made the deed, and that it was procured without fraud, the jury should find for plaintiff, though they might further believe that one of the considerations was a contract to support the grantor, which was subsequently broken, was properly refused as abstract.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-612.]

12. FORCIBLE ENTRY AND DETAINER—INSTRUCTIONS.

In forcible entry and detainer, a charge that, if the grantor of the property had mental capacity to comprehend the nature of his act when he made a deed to his brothers, the verdict should be for plaintiff, though the jury might also believe that the procuring of the deed was a fraud on the grantor, and that if he had such capacity to comprehend the nature of his act both he and his heirs were barred by limitations to claim that the deed was fraudulent, was properly refused for failure to hypothesize knowledge of the frauds and facts necessary to constitute adverse possession.

13. LIMITATION OF ACTIONS—PERSONS UNDER DISABILITY.

Where an entry on real estate was made under a deed executed during the incompetency of the grantor, the statute of limitations would not run in favor of the entrymen during the period of his disability.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 413, 414.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by Laura Fowler and others against Irene Prichard and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

This was an action of forcible entry and detainer begun in the justice court by appellants against appellees. The defendants in the justice court filed their petitions and affidavits as required by sections 2147, 2148, Code 1896, and thereupon the cause was removed to the circuit court. The plaintiff made a motion in the circuit court to try first the issue as to whether or not the entry

was made upon the premises by the defendant by force. The court overruled this motion and required the trial to proceed as in an action in the nature of ejectment. A great many assignments of error were based upon the introduction of evidence. The first assignment of error relates to the refusal of the court to permit the introduction of the return on the notice to quit of the bailiff as to Mrs. Loretta Fowler, one of the defendants. The evidence shows that notice was served on the other two defendants, but the bailiff did not know whether service was perfected on Mrs. Fowler or not, but testified that it was on some lady. George Norris testified that the day after the defendant moved on the premises he went there to see Mrs. Pritchett, and found a chain around the top of the gate. "There was a man standing there, a big stout fellow. I afterwards found his name was Broadus. I did not know who he was, and stepped in there; and he said, 'You cannot go in here,' and I said, 'Why not?'" Defendants objected to the conversation between Norris and Broadus. Plaintiffs stated to the court that they expected to show by this conversation that this man Broadus was a guard retaining the property by force under the authority of the defendants. The court sustained the objection and excluded the testimony. Mrs. Loretta Fowler, testifying, said that she was a daughter of John P. Fowler, and that he was living in 1888 on the place in controversy and became paralyzed. She was asked by defendants' counsel what was the condition of his mind at that time. Plaintiffs' counsel objected to the question, and to the entering into the question of the insanity of John Fowler at this time, because it relates rather to the issue concerning the title of the parties than the possession, and is therefore irrelevant, incompetent, and immaterial. The other facts sufficiently appear in the opinion.

The plaintiffs requested the following written charges, which the court declined to give: "(1) The court charges the jury that the possession of the property in controversy which was obtained by the defendants was a scrambling possession, not obtained in good faith. (2) The court charges the jury that if they believe from the evidence that the defendants' possession of the lands in controversy was a scrambling possession when obtained, they ought to find a verdict for the plaintiffs." (3) General affirmative charge. "(4) The court charges the jury that the force necessary to open an unlocked, but closed, gate is force within meaning of the law; and, if the jury believe from the evidence that the defendant had to shove open or move gates to get into possession of the property in controversy, such taking or possession was by force and would entitle plaintiff to recover. (5) If the jury believe from the evidence that said John Fowler had sufficient mental capacity to comprehend the nature of

his act when he made the deeds to his brothers George and Cornelius, and that the same was procured to be made without any fraud upon said John, the jury ought to find a verdict for the plaintiff, although the jury further believe from the evidence that one of the considerations therefor was a contract to support said John, which was subsequently broken in whole or in part, if it was broken. Such breach of contract, if any breach occurred, would not invalidate said deed in this court, which is a court of common law.

(6) The court charges the jury that, if they believe that John Fowler had mental capacity to comprehend the nature of his act when he made said deed to his brothers, George and Cornelius, they ought to find a verdict for the plaintiff, although they may also believe from the evidence that the procuring of said deed to be made was a fraud upon said John. If he had such capacity to comprehend the nature of his act in making said deed, both said John and his heirs are barred by the statute of limitation of one year and ten years to claim that the same is fraudulent. (7) The court charges the jury that it is without conflict in this case that the plaintiffs, or one of them, was in possession of the property in controversy immediately prior to the entry thereon by these defendants; and if the jury believe from the evidence that the defendants are guilty of a forcible entry and detainer thereof, as defined by the court, you ought to find a verdict for the plaintiff, regardless of the question whether John Fowler had sound mental capacity or not, and regardless of whether said deed from him to his brothers, George and Cornelius Fowler, was fraudulent or not." As to this charge the court marked the same "Given," but inadvertently handed the same to the clerk with the refused charges, telling the clerk that these were refused charges, which the clerk put in an envelope and filed away, and the same was never given to the jury. Plaintiffs' counsel was ignorant of the fact that this charge was marked "Given," and reserved an exception to the court's action in refusing to give the same to the jury.

The court, at the request of the defendant, gave the following written charges: "(A) If the jury should believe from the evidence that, at the time of the purported execution of the deed offered in evidence by the plaintiffs as having been made by John Fowler was then insane—that is to say, of unsound mind to such an extent or degree as to incapacitate him from knowing and understanding the ordinary affairs of life or of transacting any business—and if he continued in that condition until his death, then the possession of George Fowler during such incapacity of John Fowler could not be adverse to John Fowler, and he could not claim adversely to John Fowler during the time of his incapacity by reason of his mental condition. (B) If the jury should believe from the evi-

dence that, at the time of the making of the purported deed offered in evidence, John Fowler was insane—that is, of unsound mind to such an extent as not to know and comprehend at the time that he was signing a deed conveying his house and lot—then said deed would be absolutely void; and, if George Fowler entered into possession of the land under that deed, he could not claim the benefits of the statute of limitations or of adverse possession under that deed as color of title during the time John Fowler may have continued insane, and the statute of limitations or adverse possession would not begin to run in favor of George Fowler, or of his heirs, until the death of John Fowler.”

R. W. Stoutz, for appellants. L. H. & E. W. Faith, for appellees.

SIMPSON, J. This was originally an action before a justice of the peace, brought by the appellants against the appellees for forcible entry and detainer and unlawful detainer. The defendants (appellees) filed their petition in accordance with section 2147 of the Code of 1896, and the case was removed to the circuit court.

The first assignment of error insisted upon is that the court erred in overruling a motion made in the circuit court by the plaintiff to try first the issue made up as to whether the entry of the defendants upon the lands sued for was by force, “before any inquiry is had * * * as to the respective strength of the legal title of the plaintiffs or defendants.” Section 2147 gives the defendant the right to have the case removed to the circuit court, by making the affidavit stating “that the defendant entered upon the land sued for peaceably and under claim of title thereto, and not under claim of any agreement contract or understanding with the plaintiff, or those under whom he claims, and that the petitioner bona fide desires to contest with plaintiff the title to said land.” Section 2148 provides for the removal of the case into the circuit court on petitioner entering into bond to pay costs and damages. Section 2149 provides that “on the trial” of such cases “the plaintiff must recover on the strength of his legal title, as in statutory action in the nature of an action of ejectment, unless he can prove that the defendant, or those under whom he claims, entered on the said lands under some contract or agreement between plaintiff or those under whom he claimed, or by use of force, in which latter case no inquiry can be had as to the respective strength of the legal title of the plaintiff or defendant.” There is no requirement in the statute for a separate trial on the single issue of force vel non before going into the question of title; but, on the contrary, the statute speaks of but one trial, thus: “On the trial” the plaintiff must recover on the strength of his legal title, “unless he can prove,” etc. In other words, it is simply a question of proof on the same trial. We cannot see any-

thing in the statute which gives to either party the privilege as a matter of right to demand that there be a separate trial on each issue. That matter can be regulated by proper instructions to the jury. The argument as to the inconveniences resulting from trying both issues in one case addresses itself more particularly to the Legislature than to this court. The statute seems to provide for only one trial, and such cases seem to have been heretofore tried in that way. *Mallon v. Moog*, 121 Ala. 303, 25 South. 583; *Fearn v. Belrne*, 129 Ala. 435, 29 South. 558.

As to the exclusion of the memorandum of service as to the defendant Laura Fowler, without referring to other reasons, the exclusion was without injury, as the jury by their verdict found that the entry was not by force, or under any contract or agreement with the plaintiff, or those under whom he claims. Consequently, it is immaterial, whether the notice to quit was served on Laura Fowler.

There was no error in the refusal of the court to allow the question as to what the witness Broadus said, as there is no pretense that he had anything to do with the entry, but came there after the parties had entered. It will be observed that the issues in this case are not exactly the same as if the action was tried regularly under section 2126 of the Code of 1896, for that section defines what forcible entry and detainer is, and includes therein, not only the forcible entry, but also a peaceable entry followed by an unlawful refusal by force or threats, while section 2149 states that the plaintiff must recover on the strength of his legal title, unless he can prove that the defendant entered “under some contract or agreement between the plaintiff, or those under whom he claimed, or by some use of force.” So that the only issue is as to the manner of his entry, and not as to how he held possession after he had entered.

As to charge 7, the plaintiffs, not having called attention to the “inadvertence,” cannot complain of it now. *Barnewall v. Murrell*, 108 Ala. 306, 18 South. 831.

The several assignments of error based on the admission of testimony under the ejectment alternative of the case are shown by what has been said in the first part of this opinion to be without merit. There was no error in the overruling of plaintiffs’ objection to the question to the witness Cornelius Fowler as to what the circumstances were under which the deed was made. There was no motion to exclude the answer to the question. There was no error in sustaining the objection by defendants to the introduction of a conversation between the witness Mrs. Daisey Norris and the Malones, as such conversation with a third party could have no legal bearing on the issues in this case. The ground of objection by the defendant to the question to the witness Irene Prichard: “Did you not institute a suit for this property

through Mr. Faith in the chancery court in 1897?" to wit, that the record was the best evidence, was not sufficient to authorize the exclusion of the evidence, as it was a mere collateral matter, and for certain purposes the mere fact that a suit was brought could be proved otherwise than by the record. *Griffin v. State*, 129 Ala. 93, 29 South. 783; *Allen v. State*, 79 Ala. 34. But the matter inquired of was irrelevant to the issues in this case. The fact that a previous suit had been brought for this property did not have bearing upon the forcible entry or on the title to the land, consequently the court cannot be placed in error for excluding the testimony.

Charges 1 and 2, requested by the plaintiffs, were properly refused. Said charges present no question involved in either of the issues presented in this case, to wit: First, whether the defendants entered upon the possession of the plaintiffs by force; second, as to which party had the legal title to the land, or was entitled to the possession thereof.

The court properly refused to give the general charge requested by the plaintiffs. As there was conflict in the evidence and upon the facts, as detailed by the witness, this court cannot say that there was an entry by force. Nor can we say as a matter of law that the defendants entered under or by collusion with the tenant, as some of the evidence tends to show that they did not enter under or by collusion with the tenant, but simply remained in the house after the tenant left.

Charge 4, requested by the plaintiffs, was properly refused. The mere opening of a gate on entering premises is not such force as in law would constitute a forcible entry. 19 Cyc. 1134, 1136; 13 Am. & Eng. Ency. Law, 761. The definition of forcible entry and detainer given in section 2126 of the Code of 1896 requires more than a mere opening of a door to constitute that offense, and under section 2149 the distinction was drawn between a peaceable entry and an entry by force, and the burden is on the plaintiff to show that the defendant entered by force. The word "force" carries with it necessarily the idea of violence exercised, and it may include a putting in fear by threats; but it certainly cannot include a mere entry by the ordinary means of entrance without any breaking and without any threat of violence to the person.

Charge 5, requested by plaintiff, was abstract, as there was no evidence that any

part of the consideration of the deed was the future support of John Fowler. Consequently the court cannot be placed in error for refusing to give it.

There was no error in the refusal of the court to give charge 6, requested by the plaintiff. This is not a suit to set aside a deed as fraudulent, and, even if the principle invoked by the appellant were applicable, there is no hypothesis of knowledge of the fraud. If the intention of the framer of the charge was to claim that the plaintiffs had acquired title by ten years' adverse possession, the facts necessary to constitute adverse possession should have been stated in the hypothesis. If the defendants merely remained there as the guests, either invited or permissive, of the Malones, and only took possession the next morning after the tenancy had expired and the tenants moved out, then the intrusion was on the possession of plaintiffs.

Charges A and B, given at the request of the defendant, were properly given. The statute of limitations could not run against John Fowler during the period of his disability. *Taylor v. Forsey*, 56 Ala. 426, 438. The decisions referred to by counsel for appellant, to the effect that a void deed may furnish color of title, have no reference to the question of capacity of the person against whom the adverse possession is claimed to run. The case of *Riggs v. Fuller*, 54 Ala. 141, does not by any means assert the doctrine that the statute can run against the party who is under the disability, so that the period may expire during the disability, but only that the statute is not suspended during the disability, so as to give him the entire ten years after it ceases, but that only "three years shall remain to the person laboring under them after their removal." Page 148 of 54 Ala. In other words, he is protected during the disability and for three years thereafter. Even if it be admitted that the effect of the statute would be to give to the person who succeeds to the interest of the infant or non compos the same time which he would have, yet in no case could the time be shorter than the ten years, and in this case the proof is very meager as to the adverse character of the possession, and does not run back further than to June, 1896, while the proof shows that the defendants entered November 1, 1904.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

**BRENNARD MFG. CO. v. CITRONELLE
MERCANTILE CO.**

(Supreme Court of Alabama. June 30, 1906.)

1. SALE — RESCISSION BY BUYER — MISREPRESENTATIONS.

A purchaser of chattels may not rescind the contract for misrepresentations as to the place where the goods were manufactured; there having been no misrepresentation as to the manufacturer, and the misrepresentations not being shown to be material.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 288.]

2. EVIDENCE—VARYING CONTRACT BY PAROL.

A written contract of sale of silverware, complete in itself, and providing that the sale was made "under inducements herein expressed and no others," may not be varied by parol evidence that at the time of the negotiations it was orally agreed that the seller would not sell a similar line to competing local merchants, and that the seller would furnish a catalogue for the purpose of facilitating exchange, authorized by the contract.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"Not officially reported."

Action by the Brennard Manufacturing Company against the Citronelle Mercantile Company. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

This action was to recover the purchase price of certain articles sold, and was in the common counts for goods, wares, and merchandise; also money paid, etc.

The defendant filed the following special pleas:

Plea 4: "That the goods alleged to have been sold by plaintiff to defendant were contracted for under a special contract, which provided, among other things, that plaintiff would not sell the same or any similar goods to any other merchants, in competition with defendant, either in Citronelle, Dwight, Deer Park, or Vinegar Bend, Ala.; but, notwithstanding said agreement, plaintiff sold similar goods to one Newell, in Citronelle, a merchant in competition with defendant. And defendant avers that upon ascertaining the fact of such sale to said Newell it refused to accept the said goods, returned all the jewelry, and notified plaintiff that the remaining goods, to wit, one show case, was held by defendant subject to plaintiff's order, and said show case is still held subject to plaintiff's order."

Plea 5: "That the contract for goods which forms the basis of this suit was obtained by misrepresentation of a material fact, to wit, that the jewelry so contracted for was made at Providence, R. I., and defendant avers that the said jewelry was not made at Providence, R. I., and that as soon as it learned said fact it rescinded said contract, returned all of said jewelry, and notified the plaintiff that it held all the balance of the goods contracted for, to wit, one show case, subject to plaintiff's orders."

Plea 6: "That the goods for which compensation is claimed in this suit were delivered to defendant under special contract and

not otherwise; that as a part of said special contract plaintiff agreed to deliver to defendant a certain catalogue of goods kept by it for sale, whereby defendant could exchange any of the goods, so contracted for, for other goods as provided in said contract in said catalogue, which exchange plaintiff bound itself so to make in and by said contract; and the defendant avers that the said plaintiff has wholly failed to deliver such catalogue to these defendants."

There were demurrers to these pleas, but it is not necessary to set them out.

Thornton & Inge, for appellant. Fitts & Stoutz, for appellee.

HARALSON, J. The cause was tried in the court below upon the plea of the general issue and special pleas numbered 4, 5 and 6.

On the former appeal in this case we considered the rulings of the court below on the demurrers to the fifth plea and to the special replication thereto. We then held that this plea, while sufficient as against the ground of demurrer assigned thereto, was not sustained by the evidence. *Brenard Mfg. Co. v. Citronelle Mercantile Co.*, 140 Ala. 602, 37 South. 500.

The misrepresentations which warrant a rescission of a sale of chattels for fraud, so far as applicable to the case, were fully defined in the former opinion, and need not be again considered.

The evidence in the present record may warrant the inference that a portion of the goods were not manufactured at Providence, R. I., as represented, but it further tends to show that they were manufactured by the same concern at its Eastern or Western factory or both. There is nothing in the evidence tending to support the averment or the plea that the misrepresentation as to the place or manufacture was as to a material fact—one upon which the purchaser could have reasonably relied as an inducement to the purchase and to his prejudice. It is not a case where the identity of property purchased is involved. The fifth plea is not sustained, and the instruction to so find should have been given.

The contract of purchase was in writing. It sets forth the full invoice of the goods sold, fixed the price and terms of payment, and was signed by both parties. It contained warranty and exchange obligations and a further stipulation that the sale was made "under inducements herein expressed and no others." The contract was complete within itself.

The fourth plea avers that as a part of the special contract of purchase, it was stipulated and agreed that plaintiff would not sell a similar line of jewelry to competing merchants in the town of defendants or neighboring points. In support of this plea the court admitted parol evidence, against the objections of plaintiffs, tending to support the plea. This evidence related to negotia-

tions contemporaneous with the making of the written contract. It was not admissible. The obligations and rights of both parties were fixed by the contract. The evidence offered sought to interpolate into the contract a new obligation on the part of the seller. All such negotiations, when the contract was signed as the chosen memorial of the transaction, were merged in the contract or else waived. *Town of Brewton v. Glass*, 116 Ala. 629, 22 South. 916; *Green v. Casey*, 70 Ala. 418; *Wurtsburger v. Anniston Rolling Mills*, 94 Ala. 640, 10 South. 129; *Crescent Brewing Co. v. Handley*, 90 Ala. 486, 7 South. 912.

The same rule must be applied to the evidence admitted in support of the sixth plea. The contract is silent as to the alleged agreement by plaintiff to furnish a catalogue showing the various kinds of jewelry carried in stock by plaintiff for the purpose of facilitating the exchange of articles purchased for more salable ones.

The exchange clause in the written contract is in these words: "Jewelry can be exchanged for new jewelry in plated, filled or solid gold at any time within twelve months from date of invoice. Jewelry cannot be exchanged for watches." If it be conceded that there is any ambiguity in this provision, the evidence received does not in any way explain such ambiguity. The evidence merely seeks to add to and enlarge the duties imposed on the seller. It is not a case where the written contract is signed by one party and defines his duties and obligations alone, leaving it open to prove the obligations of the other party by parol, as in *Vandegrift v. Abbott*, 75 Ala. 490; *Main v. Radney* (Ala.) 39 South. 981.

Neither is it a case of a separate collateral agreement as in *Sayre v. Wilson*, 86 Ala. 157, 5 South. 157. As we view the case at bar the written contract is the complete and full evidence of the terms of the sale. The evidence admitted in support of the fourth and sixth pleas was in effect to alter and vary the terms of that contract by adding new stipulations resting in parol and contemporaneous with the writing.

The general affirmative charge should have been given as requested by plaintiffs.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

BAILEY v. GARY, KENNEDY & CO.

(Supreme Court of Alabama. April 12, 1906.
Rehearing Denied June 30, 1906.)

APPEAL—HARMLESS ERROR—ERRORS IN CASES OF DECISIONS CORRECT ON MERITS.

Where, on the evidence, plaintiff was entitled to the general affirmative charge, on appeal by defendant, the rulings of the trial court on special pleadings and on objections to parts of the testimony will not be reviewed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4034-4036.]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

"Not officially reported."

Action by Gary, Kennedy & Co. against C. B. Bailey. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. M. Miller, Canterbury & Gilder, and H. F. Reese, for appellant. A. D. Pitts, William Cunninghame, and Pettus & Jeffries, for appellee.

SIMPSON, J. In this case the defendant took the stand and in his testimony admitted that he contracted the indebtedness as claimed and testified to by the witnesses for plaintiffs; that he executed the notes sued for, and that he paid the various amounts, as stated in the complaint and testified to by the witnesses for the plaintiff and has made no other payments; and that he did not give any directions as to the appropriation of payments. It is shown by the testimony, and uncontroverted, that Gary, Kennedy & Co. is the successor of Gary & Kennedy, to whom the notes were made, and own all the notes and accounts that were due to that firm, and the notes are produced by the plaintiff, indorsed in blank and put in evidence. On this testimony the plaintiff was entitled to the general affirmative charge, and the court will not "examine into the correctness of the rulings of the primary court, the special pleadings," and objections to parts of testimony. *Leonard v. Storrs*, 31 Ala. 488; *McTyer v. McDowell*, 36 Ala. 39; *Gilmer & Taylor v. City Council of Montgomery*, 26 Ala. 665; *Medlin v. Wilkerson*, 81 Ala. 147, 7 South. 37; *Mitchell v. Pitts*, 61 Ala. 219; *L. & N. R. R. Co. v. Johnson*, 128 Ala. 634, 30 South. 580; *Steele v. May*, 135 Ala. 483, 33 South. 30; *Hill v. McBryde*, 125 Ala. 542, 28 South. 85.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

COLLINS v. STATE.

(Supreme Court of Alabama. June 30, 1906.)
CRIMINAL LAW—APPEAL—JUDGMENT BY CONFESSION FOR FINE AND COSTS.

Under Code 1896, § 4313, providing that any person, convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the Supreme Court, may appeal from a judgment of conviction to the Supreme Court, a judgment by confession for a fine and costs will not support an appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2583.]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

"Not officially reported."

Joe Collins was convicted of an offense, and appeals. Appeal dismissed.

Defendant was indicted, tried, and convicted of the offense of selling spirituous, vinous,

or malt liquors. The judgment entry is in the following language: "This day came Oscar L. Gray, Esq., solicitor for the First judicial circuit of Alabama; and also comes the defendant in his own proper person and by attorney, and, being arraigned and charged upon the bill of indictment, for his plea thereto says he is not guilty as charged. * * * Thereupon came a jury of 12 good and lawful men, to wit, J. E. Griffith and 11 others, who were duly sworn according to law, upon their oaths do say: We, the jury, find the defendant guilty as charged in the fifth count of the indictment and assess a fine of \$50. Again comes the defendant, with A. D. Wilburn and George Pegram, and confesses judgment in open court for the fine of \$50 and the cost of prosecution. It is therefore considered, ordered, and adjudged that the state of Alabama, for the use of Marengo county, have and recover of the defendant," etc.

C. K. Abrahams and Charles G. Brown, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The only judgment in this case is one by confession for the fine and costs. It has been many times held by this court that such a judgment will not support an appeal. Therefore the appeal must be dismissed, and such will be the order. *Ayers' Case*, 71 Ala. 11; *Joyner's Case*, 78 Ala. 448; *Nichols' Case*, 100 Ala. 23, 14 South. 539; *Campbell's Case*, 123 Ala. 72, 26 South. 224; *Bridges' Case*, 124 Ala. 90, 27 South. 474; *Mayer's Case*, 40 South. 653; Code 1896, section 4313.

The appeal is dismissed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

RYALL v. PEARSON BROS.

(Supreme Court of Alabama. June 30, 1906.)

1. DETINUE—PLEADING—GENERAL ISSUE.

A plea of the general issue in detinue is the equivalent of a plea of non detinet at common law, and puts in issue the plaintiff's right of recovery.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, §§ 28-33.]

2. SAME—GROUNDS.

For plaintiff to recover in an action of detinue, he must show that at the commencement of the action he had a general or special property in the goods sued for, the right to the immediate possession, and that defendant had possession.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, §§ 4-12.]

Appeal from Circuit Court, Marengo County; John C. Anderson, Judge.

"Not officially reported."

Action by J. S. Ryall against Pearson Bros. From a judgment in favor of defendants, plaintiff appeals. Reversed.

41 SO.—43

Canterbury & Gilder, for appellant. Miller & Herbert, for appellees.

DOWDELL, J. This is an action of detinue for the recovery of a horse. The cause was tried on the plea of the general issue. As was said in *Carllale's Case*, 122 Ala. 446, 26 South. 115, this plea in an action of detinue is the equivalent of a plea of non detinet at the common law, and puts in issue the plaintiff's right of recovery.

For the plaintiff to recover in an action of detinue, it is incumbent upon him to show that at the commencement of the action he had a general or special property in the goods sued for, and, secondly, the right to the immediate possession; and it must also be shown that at the commencement of the suit the defendant had the possession of the property. *Henderson v. Felts*, 53 Ala. 590; *Lightfoot v. Jordan*, 63 Ala. 224. In this case all the above facts were shown in evidence and without dispute.

The court erred in refusing to give the general affirmative charge requested in writing by the plaintiff, and in the giving of a like charge at the instance of the defendant. For the error pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

J. D. BELOTE & SON v. WILCOX.

(Supreme Court of Alabama. May 30, 1906. Rehearing Denied June 30, 1906.)

1. PLEADING—PLEA OF SET-OFF—SUFFICIENCY.

A plea that at the time of bringing the action plaintiffs were indebted to defendant in a certain sum for work and labor done and money paid by defendant for plaintiff was not demurrable on the ground that it was indefinite and stated no facts showing the grounds of set-off.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 293.]

2. SAME.

In an action against brokers for the proceeds of a sale of potatoes, a plea set up a contract for the sale of potatoes by the barrel by plaintiff to defendant, a shipment of potatoes, that the weights were short under the provisions of the contract, a refusal of defendant to accept, and a subsequent contract whereby defendant agreed to handle the potatoes on account of plaintiff; and defendant offered to set off the reasonable profits which he would have made under the first contract, together with the expense of storing and rebarreling the potatoes, against the amount of plaintiff's claim. Held, that the plea was not demurrable on the ground that it did not allege a rejection of the shipment and as containing the defense of "reclamation and breach of warranty."

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 293.]

3. SALES—BREACH BY SELLER—MEASURE OF DAMAGES.

In an action by the purchaser of potatoes sold by the barrel against the seller for failure to deliver barrels of proper size, wherefore the purchaser rejected the shipment, the measure of damages was the difference between the pur-

chase price and the market price at the time and place of delivery.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1174-1177.]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"Not officially reported."

Action by J. D. Belote & Son against M. P. Wilcox. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

This was an action by appellants against appellee on the common counts for account due and for goods and merchandise sold by plaintiff to defendant. The pleas were the general issue, payment, recoupment, and set-off. The third plea was in words and figures as follows: "That at the time of the bringing of this suit plaintiffs were indebted to defendant in the sum of \$250 for work and labor done and money paid by the defendant for the plaintiffs, which said sum the defendant offered to set off or recoup as against the demands of the plaintiff, and claimed judgment for excess." The fourth plea sets up a contract for the shipment by plaintiffs to defendant of a car load of sweet potatoes in barrels, to weigh 165 pounds net, at \$1.30 per barrel; the shipment, in an attempt to comply with the order, of a lot of potatoes in barrels weighing not more than 115 or 120 pounds; the payment of \$110.70 freight before a discovery of the shortage in the weight of the potatoes; a notification by defendant to plaintiffs' brokers of a refusal to accept the potatoes without a reduction of 15 cents per barrel; the reply of the broker that he would communicate with plaintiffs and let him know; an unreasonable length of time before reply, and a notification by defendant to plaintiffs that he would not accept the shipment at all, and that the potatoes were subject to his order; later an agreement between defendant and Brame, one of plaintiffs' brokers, that the defendant would handle the potatoes to the best advantage he could, but only for account of plaintiffs and not under contract of purchase; an agreement to so handle; the separating of the sound from the unsound, rebarrelling and storing the sweet potatoes, and the freight on them, which is alleged to be reasonably worth \$138.70; and the reasonable profit which defendant would have made had the potatoes been shipped in accordance with the contract—all of which

he offers to set off against the sum due realized from the sale of the potatoes under the last contract, which is alleged to be \$133.75. Demurrers were interposed to these pleas and overruled. On the trial before the court without a jury there was verdict and judgment for the defendant in the sum of \$32, from which this appeal is prosecuted.

Hugh Nelson, for appellant. Crum & Well, for appellee.

WEAKLEY, C. J. The third plea was not subject to the demurrer interposed. It was a plea of set-off, and alleged an indebtedness to defendant for work and labor done and money paid by defendant for the plaintiffs. It was, therefore, neither indefinite nor open to the criticism that it stated no facts showing the grounds of set-off. The fourth plea entered very much into detail, but this did not make it defective. It did not contain "the defense of rescission and breach of warranty," as appellant contends. Properly interpreted, it seeks to set off or recoup a claim for damages for failure to deliver barrels of potatoes of the size purchased, and also the amount claimed by defendant as due him for freight paid, and for work done in and about handling the potatoes that were shipped; such handling having been done under a new contract, after the shipment was rejected as not having been a compliance with the contract of purchase. The plea was not subject to the demurrer. It did aver a rejection of the shipment, and did not show an acceptance thereof.

The amount of profit that defendant could have realized from a resale of the potatoes, being the difference between the purchase price and the market price at the time and place of delivery, was recoverable for a failure to comply with the contract of sale. The defendant had a right to prove such market value, and hence no error was committed in allowing a witness to testify on that subject. No question is made as to the authority of the brokers to make the contract of sale on behalf of the plaintiffs. No argument is made to show that the trial judge erred in his conclusion on the facts, and we are unable to discover an error in that regard.

Affirmed.

HARALSON, DOWELL, and DENSON, JJ., concur.

GOULD v. CATES CHAIR CO.

(Supreme Court of Alabama. June 30, 1906.)

1. APPEAL—HARMLESS ERROR—RULINGS ON EVIDENCE.

Where, in an action for goods sold, plaintiff claimed that the balance due was \$90, and defendant contended that by reason of agreed discounts he owed only \$81, and the jury found in accord with defendant's contention, on defendant's appeal, error in rulings on the admissibility of evidence in support of plaintiff's claim was not prejudicial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4033, 4153.]

2. EVIDENCE—OPINION OF WITNESS—PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

A witness may testify that the authority of a traveling salesman of a corporation was limited to his taking orders subject to approval by the corporation.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2175, 2178.]

3. SALES—CONTRACT—WHEN COMPLETED.

A traveling salesman of a manufacturer, authorized to take orders subject to approval, sold a bill of goods to a buyer, as indicated by an order specifying the goods and the price to be paid therefor, and signed by the salesman. *Held*, that the order did not constitute a contract, in the absence of acceptance by the manufacturer.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 44-46.]

4. SAME.

A traveling salesman of a manufacturer, with authority to take orders subject to approval, sold a bill of goods to a buyer in April, which the manufacturer approved and filled. In September following, the salesman sold other goods to the buyer, as evidenced by a written order signed by the salesman, which designated the goods and the price to be paid therefor. The manufacturer held the order until November following, without indicating to the buyer whether it would accept or reject the order. *Held*, that the silence on the part of the manufacturer did not constitute an acceptance of the order.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 44-48.]

5. SAME.

The manufacturer, in November, in reply to a letter of the buyer written in that month, stated that the order must be declined in consequence of the price fixed by the salesman as shown by the order. *Held*, that the letter sufficiently showed nonacceptance of the order.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 44-48.]

6. CUSTOMS AND USAGES—KNOWLEDGE OF CUSTOM—PRESUMPTIONS.

It cannot be presumed that a manufacturer domiciled in North Carolina had knowledge of a custom in Alabama.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs and Usages, §§ 24, 41, 44.]

7. SAME—EVIDENCE—ADMISSIBILITY.

Proof of a custom among traveling salesmen alone is inadmissible as affecting the principals of such salesmen.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs and Usages, §§ 42-45.]

8. PRINCIPAL AND AGENT—POWERS OF AGENT—EVIDENCE AS TO AUTHORITY—DECLARATIONS OF AGENT.

Whether a traveling salesman employed by a manufacturer, with authority to take orders subject to approval, told a buyer at the time he took an order that he was merely taking a bid

from him, and that he would have to send it to the manufacturer for acceptance or rejection, was incompetent as against the manufacturer.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 416, 417.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by the Cates Chair Company against A. L. Gould. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant interposed several pleas—the first being the general issue; the second, plea of tender of \$33.42; the third, a plea of set-off for damages growing out of the breach of the contract between the parties in the sum of \$48.67; and the fourth was the plea of set-off for damages for breach of contract, expressed in somewhat different terms, except as to the amount of damages, and coupled with it an offer or tender of the difference between the amount claimed to be due and the amount claimed as damages for breach of the contract, which is alleged to be \$33.42, and which sum was paid into court. The facts sufficiently appear in the opinion, except the order referred to, which is in words and figures as follows: "Order No. —, 9/2/1903. Cates Chair Co., Shipped to A. L. Gould, at Mobile, Ala. How ship, —. When, —. Terms: 10 & 5 off 60. 30 doz. No. 25 chairs, \$6.75. 3 doz. No. 26 R. chairs, \$9.00. Ship 10 doz. chairs and 2 doz. rockers on order of 4/11, and 10 doz. chairs and 2 doz. rockers 30, 60, and 90 to complete this and back order. [Signed] J. L. Smathers."

Fitts & Stoutz, for appellant. Hamilton & Thornton, for appellee.

DENSON, J. There are many grounds in the assignment of errors, which, on account of undisputed facts in the case, it will not be necessary for us to consider. The plaintiff was a corporation in the state of North Carolina, doing business as a manufacturer and seller of chairs. It had in its employ one Smathers as a traveling salesman of its products. Smathers, in April, 1903, in the course of his employment as such salesman, took from the defendant, who was engaged in the furniture business in Mobile, Ala., an order for a bill of chairs amounting to \$270. This order stipulated that the chairs were to be shipped in installments. It was forwarded by Smathers to the plaintiff. It is conceded that the plaintiff accepted this order and made shipment on it of all the chairs stipulated for in it. It was also conceded by the plaintiff that the defendant had, before the commencement of this suit, paid all that was to be paid on the order except \$90. The defendant contended that by reason of discounts agreed to be allowed he owed only \$81, and the verdict of the jury is in accord with this contention. So that, so far as the

amount due on the plaintiff's claim is concerned, if there was error in the rulings of the court on the admissibility of evidence to support plaintiff's claim, certainly it was not prejudicial to the appellant.

But the defendant pleaded a set-off. His contention on the trial was that on the 2d day of September, 1903, he gave to Smathers, the salesman of plaintiff, an order for chairs; that the plaintiff received the order, but never shipped the chairs, and declined to do so. Defendant insisted that this order, when given to Smathers, was a completed contract, binding plaintiff to ship the chairs, and the plaintiff breached it. The defendant contends that, after Smathers received his last order, chairs such as were specified in the order advanced in price, and he, on account of plaintiff not shipping the chairs on the last order, was damaged in the sum of \$48.67; that being the difference between the price named in the order and the price when the order, according to his insistence, should have been filled. At the conclusion of defendant's evidence the court, on motion of the plaintiff, excluded all of the evidence offered by the defendant, and at the request of the plaintiff in writing charged the jury, if they believed the evidence, they should find a verdict for the plaintiff. The question for consideration, in connection with defendant's contention, involves the authority of the salesman and its extent. The plaintiff's contention in this respect was, and is, that Smathers was only a soliciting agent, and that orders taken by him were never binding on it until they were approved and accepted by plaintiff. The witness Cates testified (and it was competent evidence under *Bensberg v. Harris*, 46 Mo. App. 404) that Smathers was plaintiff's traveling salesman, with authority to take orders on commission subject to plaintiff's approval. In the case of *Simon & Son v. Johnson*, 101 Ala. 368, 13 South. 491, one phase of the authority of a traveling salesman was considered and determined by this court; the precise question there determined being that a traveling salesman of merchandise, making sales by sample on a credit or for cash to be paid on receipt of the goods or the invoice of them, has no implied authority to collect the money agreed to be paid from the purchaser.

The precise question presented by this record has not been determined by this court. In the case of *Clough v. Whitcomb*, an order was taken for goods by a salesman having authority similar to that with which the salesman in this case was clothed. The trial court charged the jury: "If Clark (the salesman) made the contract with the defendant for the goods, and the plaintiff agreed to give Clark a commission on said goods, then Clark was his agent to sell said goods." The appellate court, in holding the instruction bad, said: "A commission al-

lowed to one who solicits orders upon sales effected through such orders does not constitute him or prove him to be an agent with authority to make absolute contracts of sale." *Clough v. Whitcomb*, 105 Mass. 482; *Bensberg v. Harris*, 46 Mo. App. 404; *Finch v. Mansfield*, 97 Mass. 89; *Burbank v. McDuffee*, 65 Me. 135. So in this instance Smathers "did not sell the goods, or even contract to sell them. When the defendant had completed his transaction with Smathers, there had been no binding contract made, or any sale, absolute or conditional. The defendant could have countermanded his order at any time before the goods were shipped, and the plaintiff could have refused to accept the order. Neither party had become bound by anything then done. The order of the defendant was a mere proposal, to be accepted or not as the plaintiff might see fit, and he could have withdrawn it before its acceptance. The minds of the parties had not met, and there had been no mutual assent or *aggregatio mentium*." *Benj. on Sales*, §§ 40, 70; *Johnson v. Filkington*, 39 Wis. 62; *McKindly v. Dunham*, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; *Bensberg v. Harris*, 46 Mo. App. 404; *Deane & Co. v. Everett*, 90 Iowa. 242, 57 N. W. 874; *McCormick Harvesting Co. v. Richardson* (Iowa) 56 N. W. 682; *Stensgaard v. Smith* (Minn.) 44 N. W. 669, 19 Am. St. Rep. 205; *Eskridge v. Glover*, 5 Stew. & P. 264, 26 Am. Dec. 344. In the light of elementary principles and of the adjudged cases, it seems clear that the order or writing in question does not constitute a contract, in the absence of acceptance or of any action under it by the plaintiff. It does not purport to be a contract between the parties. "By it plaintiff was not obligated to do anything on its part. Plaintiff does not undertake, by the terms of the writing, to ship the chairs on the proposed terms. It is no more than a request by the salesman that the plaintiff should ship to defendant the goods named. It may be said to be an order, but it lacks an essential element of a contract—mutual assent. Being only a request or order, which required acceptance by plaintiff to give it the force of a contract, it follows, as has already been stated, that it might be withdrawn or countermanded at any time prior to its being so accepted."

We do not say, however, that the acceptance must be a formal one. It is insisted that, the plaintiff having accepted and filed the previous order given to the plaintiff's salesman and having held the last order from some time in the early part of September until November 12th, the plaintiff must be held to have accepted the order, and that it is estopped from urging nonacceptance. Estoppels must be mutual, or they are not effectual. As we have seen, there is no time, from the time such an order is received until it is accepted, that the person giving the

order cannot countermand it. It is plain that mere silence on the part of the plaintiff after receiving the order, without any act tending to show an acceptance, would not cut off the right of defendant to countermand. If not, then it cannot, with show of reason, be insisted that silence alone should constitute an acceptance of the order on the part of the plaintiff. Plaintiff said nothing about the order, and did nothing with regard to it, until on the 12th of November, 1903, in reply to a letter of the defendant written on the 10th of that month, plaintiff wrote the defendant as follows: "Referring to your order of 9/2, we find it reads 10 plus 5 off in 60 days, for ten doz. shipments, which we must in justice to ourselves decline, as this would not give us cost of production on this particular number, being our cheapest chair. Number 25 is worth to-day \$7.25 per doz., as you will see by the enclosed price list. However, if you wish the chairs, we are willing to accept the order at \$6.75 and \$9.00 per dozen, subject to 10 per cent. for cash in 10 days, or 60 days net. Please advise your wishes in the matter, and oblige." Having the right to decline acceptance of the order it would seem that it would be a matter of no importance upon what ground the declination was pleaded, or whether any ground was stated, the letter accentuates the fact that plaintiff had not favorably considered the order, and this letter, written in answer to defendant's, makes positive announcement to the defendant of that fact, and we can get no more than that out of it.

The court properly excluded the evidence of custom that was offered by the defendant. Without conceding that evidence of custom would be competent to supply mutuality, the plaintiff in this instance was domiciled in North Carolina, and it cannot be presumed that it had knowledge of the custom in Mobile, Ala.; and this on the face of the evidence offered was the limit of the territory of the custom. Moreover, the custom offered to be proved was a custom amongst travelling salesmen, and did not embrace the principals of such salesman. *Simon & Son v. Johnson*, 101 Ala. 368, 13 South. 491; *German-American Insurance Co. v. Commercial Fire Insurance Co.*, 95 Ala. 469, 11 South 117. 16 L. R. A. 291; *Deane & Co. v. Everett*, 90 Iowa. 242, 57 N. W. 874. Whether Smathers told defendant or not, at the time he took the order, that he was merely taking a bid from him, and he would have to send it on to the house for acceptance or rejection, was not competent evidence against the plaintiff.

It results from the foregoing considerations that no error prejudicial to the defendant was committed by the trial court, and the judgment will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

LEE v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

INDICTMENT AND INFORMATION—ISSUES—VARIANCE—MATTERS UNKNOWN TO GRAND JURY.

Though Code 1896, § 4901, dispenses with the necessity for stating in an indictment the precise time of which the offense was committed, where an indictment for failure to work a public road alleged the offense to have been committed in a certain month, on proof by the state of an offense during another month, it was error not to permit defendant to show that as to such offense there was no evidence before the grand jury.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 530, 574.]

Appeal from Hale County Court; W. C. Christian, Judge.

"To be officially reported."

Lucius Lee was convicted for failing to work the public roads, and he appeals. Reversed.

Defendant was indicted, tried, and convicted for the offense of failing to work the public roads. The testimony showed that in 1902 and 1903 that defendant was apportioned to a certain road. The solicitor was permitted to ask the witness, over the objection of defendant, "Did you, in November, 1902, warn the defendant to work the public road?" The witness answered: "I gave the defendant three days' warning to work the road, telling him where to meet me. I warned him on Monday to work on Friday. He did not come." The defendant moved to exclude the answer to witness on the grounds that the grand jury had indicted the defendant for an offense alleged to have been committed in March 1903, and asked the court to limit the testimony to the offense charged in the indictment. The court overruled the objection and refused to limit the testimony. The defendant offered to prove that the grand jury which found the indictment on which defendant was being tried had before it no testimony as to any offense committed by defendant, except in March, 1903. The court refused to permit this testimony. It was shown that the road overseer on the 24th day of March, 1903, returned a complaint against defendant for failure to work the roads, and that this was the only complaint returned against him. In his argument to the jury the solicitor said: "If the defendant had worked ten days in 1902, he would have told you about it." The defendant objected to this statement and moved to exclude it. The court overruled the objection, and defendant excepted.

The defendant requested the following written charges: "(1) The court charges the jury that, if they believe the evidence in this case beyond a reasonable doubt, they must acquit the defendant. (2) Unless the jury are satisfied from the evidence in this case beyond a reasonable doubt that the defendant was

indicted by the grand jury for a willful refusal or failure, to work the public road in October or November, 1902, they must acquit the defendant."

De Graffenreid & Evans, for appellant.
Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. While the statute (section 4901 of the Code of 1896) dispenses with the necessity for stating the precise time at which the offense was committed, the law requires that all indictments must be found on legal evidence; and when an indictment charges an offense, it means the one testified to before the grand jury, and not one that may have been committed by the defendant at some other time, and which was not considered by the grand jury. While the indictment in the case at bar did not have to aver the precise time the offense was committed, it did charge the defendant with the commission of the offense (meaning, of course, the one testified to before the grand jury), and the law does not authorize the conviction for an offense which was never thought of nor considered by that body.

The question involved in this case is not one which attacks the indictment, but is really one of *allegata* and *proбата*. The indictment must of necessity charge the defendant with the commission of the offense as disclosed by legal evidence before the grand jury, and the state is not authorized to prove an offense different from the one for which the defendant was indicted, although similar in its character. If, therefore, there were two separate and distinct offenses on the part of the defendant, the state could ask for a conviction only for the one for which he was indicted, being the one considered by the grand jury; and, after proving the other default, the defendant had the right to show that it was not the one for which he was indicted. We do not concede that such evidence is violative of public policy, because permitting proof of what transpired before the grand jury, as defendants have been permitted in other instances to show certain facts presented to the grand jury. For instance, when the indictment avers a fact "unknown," the defendant has the right to show that it was known. But public policy cannot be considered when to do so would interfere with the constitutional right of a citizen. When a person is tried and convicted for an offense different from the one charged in the indictment, he has been denied his constitutional right. The case of *O'Brien v. State*, 91 Ala. 25, 8 South. 560, is not in conflict with this opinion. There the attempt was to show that certain witnesses testified to different offenses from the one for which the defendant was tried; but the defendant did not attempt to show that the indictment under which he was being tried was not found on legal evidence. Nor is the case of *Sullivan v. State*, 68 Ala. 525,

in conflict with this opinion. There the defendant was tried under an affidavit.

It is contended that, if a defendant be permitted to go behind an indictment upon the trial, it will lead to much confusion and embarrassment in the administration of the criminal law. If such be true, we cannot subordinate the constitutional rights of the most obscure citizen to an expedition of trials. There can be little cause, however, for a resort by the defendant to evidence of this character, when the state only attempts to convict a defendant of the offense for which he has been indicted.

So much of the argument of the solicitor as was objected to was improper; but whether the defendant took the proper action to eliminate it or not we need not decide, as this case must be reversed for the reason above indicated.

The trial court committed no error upon the other rulings. The judgment of the county court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur.

A. J. CRANOR CO., Limited, et al. v. MILLER
et al.

(Supreme Court of Alabama. June 14, 1906.
Rehearing Denied July 6, 1906.)

1. CORPORATIONS—FOREIGN CORPORATIONS—
NONCOMPLIANCE WITH STATUTE—EFFECT.

One performing a contract of sale entered into with a foreign corporation by a delivery of the property sold to the corporation cannot set up as a ground for setting aside the sale the failure of the corporation to comply with the Constitution and Code 1896, § 1316, requiring foreign corporations, before engaging in any business in the state, to file an instrument designating an agent and place of business in the state.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2510, 2536-2548.]

2. SAME—CONTRACTS BEFORE INCORPORATION—
CONSTRUCTION.

The owner of a sawmill outfit and timber rights contracted to sell the same to a company in consideration of its organizing a stock corporation for the manufacture of lumber. It was stipulated that the corporation should be capitalized at \$10,000 one-fourth of the stock to be owned by the mill owner, and three-fourths to be owned by the company. *Held*, that the contract contemplated, not only the organization of a corporation, but that the company would contribute something of value to it in consideration of three-fourths of the stock which should be issued to it.

3. SAME.

An owner of a sawmill outfit and timber rights contracted to sell the same to a company in consideration of its organizing a stock corporation for the manufacture of lumber. It was stipulated that the corporation should be capitalized at \$10,000, one-fourth of the stock to be held by the owner, and three-fourths to be held by the company. At the time the company procured the property of the owner, it had no intention to pay for the stock of the corporation, the organization of which was a fraudulent scheme to get the property. *Held*, that the owner was entitled to maintain a suit against the company and the corporation for

the purpose of having his rights in the sawmill outfit and timber rights restored to him.

4. SALES—PURCHASERS FROM BUYER—NOTICE OF EQUITIES.

A purchaser of property sold to a company in consideration of its organizing a stock corporation, who has knowledge of the equities of the seller, is liable to the seller.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 681, 682.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

"To be officially reported."

Suit by Charles G. Miller and another against the A. J. Cranor Company, Limited, and others. From a decree for complainants, defendants appeal. Affirmed.

The bill in this case was filed by Charles G. Miller and C. T. Rogers, as complainants, against the A. J. Cranor Company, Limited, the Russell Lumber Company, Limited, and John Jackson, seeking to avoid a contract made between these parties and to have property rights in certain machinery and timber land restored to complainants. The facts made by the bill are that the complainants and A. J. Cranor Company, Limited, entered into a contract the provisions of which are as follows: That the complainants are the owners of a sawmill outfit consisting of a 35 horse power boiler and a 30 horse power engine and sawmill, with edger saw and other connections, situated on the land of the Mobile & Chattanooga Railroad Company, near Russell, in Mobile county, Ala., and that they have certain timber interests in lands and options on stumpage for pine timber to be cut. That the machinery was bought from Adams Machine Company by complainants, and that complainants were due on said machinery between \$500 and \$800, with retention of title in the machinery to the said machine company until the purchase price was so paid. The complainants sold and delivered all their right, title, and interest to all pine timber stumpage options and timber rights held by them, together with the machinery and appliances, to the A. J. Cranor Company, Limited, upon the consideration that the A. J. Cranor Company would pay off and discharge the amount due the Adams Machine Company for the unpaid balance on the machinery, and would form a stock company for the manufacture of lumber within 60 days from the date of the contract, capitalized at \$10,000, one-fourth (or \$2,500) of the said stock to be held and owned by Miller and Rogers, and three-fourths (or \$7,500) of capital stock to be held and owned by the A. J. Cranor Company. In the event of the failure on the part of the A. J. Cranor Company to fulfill this contract within the 60 days, the property rights and machinery should revert to and become the property of the complainants. The bill further alleges the delivery of the property by complainants to the A. J. Cranor

Company; the formation of a stock company under the laws of the state of Louisiana, with an ostensible capital of \$10,000; that said stock company was organized under the name of the Russell Lumber Company; that said A. J. Cranor Company has failed to subscribe for the stock according to agreement, or, if they have subscribed, they have failed to pay for said stock, either in money, labor done, money borrowed, or property actually received by said company, as is required by the laws of Louisiana, but that this company has caused to be issued \$7,500 of the said stock of the Russell Lumber Company to the said A. J. Cranor Company without payment therefor in any amount; that said stock was issued in fraud of complainants and for the purpose of obtaining control and the right of disposition over property of complainants; that A. J. Cranor Company has failed and refused to pay to the Adams Machine Company the purchase money still due on the machinery, except a small part thereof, to wit, about \$95, and that the Adams Machine Company are making demands upon complainants for the balance due on said machinery; that at the time of making the agreement said A. J. Cranor Company had no intention to pay any sum of money or any other consideration for the stock of said Russell Lumber Company, and the proposed organization of the said Russell Lumber Company was a fraudulent scheme to deprive complainants of their property as aforesaid; that all of the stockholders of the said Russell Lumber Company, except complainants, are officers of said company, and that neither the A. J. Cranor Company, nor the Russell Lumber Company, nor John Jackson have sufficient assets within the state of Alabama to satisfy any judgment at law which might be rendered against them or either of them; that said sawmill is not now being operated and no insurance is carried on the same; that said property is depreciating in value; that the Russell Lumber Company has begun dismantling it, and that there is great danger of it being destroyed or moved beyond the jurisdiction of the courts of this state and lost to orator; that John Jackson claims to have purchased the machinery and is dismantling it and removing it; and that the purchase was made by him with full knowledge of complainants' equity and rights in the premises. The bill further alleges that at the time of the making of the agreement above set out the A. J. Cranor Company was a foreign corporation and had not complied with the statutes of the state of Alabama with respect of foreign corporations doing business in this state. The same allegations were made with reference to the Russell Lumber Company. An injunction was issued as prayed. Demurrers and answers were filed to the bill, but they are not necessary here to be set out, as they

sufficiently appear from the discussion of them in the opinion. The facts also sufficiently appear in the opinion.

Roach & McMillan, for appellants. Mitchell & Tonsmire, for appellees.

ANDERSON, J. This bill was filed to cancel a contract for the sale of a mill outfit and certain timber rights, and after a delivery of the property by the complainants to the respondents, and seeks to have the contract declared void ab initio, because made in violation of section 1316 of the Code of 1896, or, if valid in its inception, that it be canceled upon the ground of fraud practiced upon complainants by the vendee, the Cranor Company. We do not think that a failure of the foreign corporation to comply with the constitutional provisions and section 1316 is available to these complainants, as the contract has been fully performed by them by a delivery of the property sold. *Gamble v. Caldwell*, 98 Ala. 577, 12 South. 424; *Farrior v. New Eng. Mtg. Co.*, 88 Ala. 275, 7 South. 200; *Kindred v. New Eng. Mtg. Co.* 116 Ala. 192, 23 South. 56. Since the complainants are not entitled to relief upon their theory of the bill, it is needless to consider the action of the chancellor upon the demurrers proceeding upon this feature of the case.

We think the contract contemplated, not only the organization of a corporation, but that the respondent the Cranor Company would contribute something of value to the concern; that is, do more than merely issue three-fourths of the stock to themselves, but that the same was to be paid for. Otherwise, we would have a case of one party furnishing all the capital and getting one-fourth of the stock, and the parties furnishing nothing getting three-fourths of the stock. The bill avers that the Cranor Company procured the complainants' property without a valuable consideration therefor, and that the said com-

pany at the time had no intention to pay anything of value for the stock of the corporation, the organization of which was a fraudulent scheme to get complainants' property, and therefore contained equity. "The general rule is that the relation of the promoter to the corporation and its members is one of trust, and he must act in all things fairly and openly." *Yale v. Wilcox* (Conn.) 25 L. R. A. 90, and note. "Promoters who acquire property to be used by the corporation wholly at the cost of those who pay for their shares, and retain for themselves a majority of the stock, which cost them nothing, will be required to pay to the defrauded subscribers the damages caused by such action." *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498.

As a rule the remedy of a defrauded subscriber is against the defrauding promoter, and not the corporation; but in the case at bar the respondent the Cranor Company and the complainants constitute the corporation, which seems to have been formed by the Cranor Company as an attempted literal compliance with their contract, and there are no intervening rights of other stockholders to be affected by a cancellation of the sale. The evidence clearly shows that the Cranor Company did not intend at the time of the execution of the contract to put anything of value into the new corporation, and that it was a scheme to get the control and management of complainants' property, and the chancellor properly granted the complainants relief. *Dean v. Oliver*, 131 Ala. 634, 30 South. 865. The bill avers that Jackson had full knowledge of complainants' rights and equities when he bargained for the property, and the demurrers interposed by him were properly overruled.

The decree of the chancellor is affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

DAVIS v. STATE.

(Supreme Court of Alabama, December 23, 1904. Rehearing Denied July 6, 1906.)

1. CONTRACTS — BUILDING CONTRACTS — CONSTRUCTION — RIGHT TO TERMINATE.

A contract employing a contractor to repair a dwelling stipulated that the owner, on the architect's certifying that the refusal of the contractor to comply with the contract was sufficient ground for the owner to terminate it, should be at liberty to terminate it and to enter on the premises and take possession to complete the work. *Held*, that the owner was authorized to absolutely terminate the contract on the architect giving the proper certificate.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 1006-1009.]

2. TRESPASS — CRIMINAL RESPONSIBILITY — TRESPASSER AFTER WARNING.

Where a contract employing a contractor to repair a dwelling was terminated by the owner in the manner specified by the terms of the contract, and the owner, after terminating it, warned the contractor not to go on the premises, and the contractor disregarded the warning and entered on the premises, he was guilty of a criminal trespass.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Tresp., § 171.]

Appeal from City Court of Mobile; O. J. Semmes, Judge.

"To be officially reported."

Henry V. Davis was convicted of trespass, and he appeals. Affirmed.

R. P. Roach and Gregory L. & H. T. Smith, for appellant. Leslie B. Shelton, R. O. Gordon, Jas. E. Webb, and Massey Wilson, Atty. Gen., for the State.

McCLELLAN, C. J. The evidence is without dispute as to the ownership of the land upon which it is alleged the defendant trespassed after warning. It was the land of Mrs. S. H. Smith. It is also shown without controversy that the defendant went upon this land immediately after being warned not to go upon it by Mrs. Smith through her authorized agent. It only remains to be considered whether the defendant had the right to go on the land notwithstanding the facts just stated. His only claim of such right is based solely upon the fact that he had entered into a written contract with Mrs. Smith to alter, enlarge, and repair a dwelling house thereon, had entered upon the performance of this contract, and continued therein up to and through the day preceding the morning on which he was warned not to go on the land and went on it, and that he went on the land that morning to continue the execution of this contract. The reply of the state to this defense, in the first place, was that said contract provided for a renunciation of it by Mrs. Smith upon a certain contingency therein named, that this contingency transpired, and that thereupon before said warning and entry after warning she had renounced and put an end to the contract, as she had a right to do, and informed the defendant thereof, and that thereupon all rights of the de-

fendant under the contract were avoided and ceased, and, further, that, whether Mrs. Smith had a right under the contract to terminate it as and when she did or not, she in fact did then terminate it, and that, while the defendant may have had a cause of action against her for a breach of the contract by such termination or renunciation, he was, after such termination, wholly without right to proceed with its execution or to enter upon the premises for that or any other purpose.

Article 5 of the contract is as follows: "Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect, or failure being certified by the architects, the owner shall be at liberty, after three days' written notice to the contractor to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but, if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties." Under these provisions of the contract the architects on April 27, 1904, wrote as follows to Mrs. Smith: "We enclose you herewith a copy of notice that we have this day mailed Mr. H. V. Davis, the contractor for the remodeling of your residence. We also wish to notify you that in our opinion Mr. Davis has neglected and failed to furnish the materials of the quality specified and that the workmanship is not of the proper quality, and that is sufficient ground for you to proceed according to the terms of your contract and notify him that if the same are not forthcoming in three days as stipulated in your

contract that you will be justified in taking the matter in hand and providing the materials and labor and completing the building." Thereupon, on April 29, 1904, Mrs. Smith wrote as follows to Davis: "Having been notified by my architects, Messrs. Watkins & Hutchisson, that their opinion your refusal and neglect and failure to provide a sufficiency of properly skilled workmen and materials of the proper quality for the remodeling of my residence is sufficient grounds to justify me in terminating your employment as contractor, I hereby notify you that unless within three days, as provided in article 5 of your contract, you remove all work and materials, and replace with work and materials of property quality, that I shall take possession of the premises and complete the work, as set forth in your contract. I regret having to do this, but your apparent intention to violate the contract in every branch of the work make it a necessity."

It is thus made to appear that the contract between Mrs. Smith and Davis authorized the former absolutely to terminate it upon a certain certificate or statement of the architects, that this certificate was made by the architects, and that acting upon it Mrs. Smith elected to terminate the contract and duly notified Davis that, unless he did certain things within three days, she would take possession and do the work, etc., stipulated in the contract, herself. The evidence shows that the things referred to were not done by Davis, and that at the end of that time she took possession, and warned Davis not to go upon the premises. The facts stated constituted an abrogation of the contract, and with it all right of entry Davis had had under it. Apart from the contract he had no right of entry. Having at the time of the entry for which he is prosecuted no right under the contract, and the warning to him not to enter being proved without controversy, as were the other facts to which we have adverted, the court properly gave the affirmative charge for the state. The same conclusion might possibly be rested on the mere fact that Mrs. Smith put an end to the contract, even though her refusal to allow Davis to proceed with its performance had been unauthorized by the instrument and of consequence wrongful. *Davis v. Bronson*, 2 N. D. 800, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. Rep. 783, and notes.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

THEODORE LAND CO. v. LYON.

(Supreme Court of Alabama. April 28, 1906.
Rehearing Denied July 6, 1906.)

1. EVIDENCE—ADMISSION OF SECONDARY EVIDENCE—PROOF AS TO POSSESSION OF INSTRUMENT.

A question asked a witness as to whether he had a certain map in his possession was

competent for the purpose of establishing the predicate for the introduction of secondary evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 638-641.]

2. TRIAL—EVIDENCE—OBJECTIONS—SUFFICIENCY OF OBJECTIONS.

An objection to two questions asked a witness, one of which was proper, was properly overruled.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 223-225.]

3. APPEAL—HARMLESS ERROR—RULINGS ON EVIDENCE.

The error in overruling an objection to a question asked a witness calling for a statement as to the contents of an instrument was harmless, where the witness stated that he did not know the contents.

4. TRIAL—OBJECTIONS TO EVIDENCE—TIME TO MAKE.

A witness on direct examination testified to a fact. On cross-examination it was shown that the only way he knew anything about the fact testified to was that somebody had told him about it. The cross-examiner thereupon moved the court to exclude the testimony of the witness as hearsay. *Held* that, as the cross-examiner had availed himself of the first opportunity to have the evidence excluded, the motion should have been sustained.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 242-245.]

5. EJECTMENT—TRIAL—INSTRUCTIONS.

In ejectment, on the conclusion of the evidence, defendant withdrew its defense to a section of land, being a part of the land in controversy. At the beginning of the trial defendant had entered a disclaimer as to part of this section, but not as to all of it. *Held*, that the court committed no error in charging that if the jury believed the evidence they should find for plaintiff.

6. TRIAL—INSTRUCTIONS—INSTRUCTIONS ON EFFECT OF EVIDENCE.

In ejectment, defendant entered a disclaimer as to a part of the land and at the conclusion of the evidence withdrew its defense to another part of the land. As to the other land in controversy there was evidence showing that defendant held title thereto under adverse possession. *Held*, that an instruction directing the jury to find for plaintiff for the lands sued for was erroneous as a charge on the effect of the testimony, in violation of Code 1890, § 3326.

7. ADVERSE POSSESSION—CONFLICTING EVIDENCE—QUESTION FOR JURY.

Where, in ejectment, defendant relied on adverse possession, and the evidence on the issue of adverse possession was in conflict, the question of adverse possession must be submitted to the jury.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 691-701.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"Not officially reported."

Ejectment by Emily O. Lyon against the Theodore Land Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

On conclusion of the testimony the court gave the following charge at the request in writing of the plaintiff: "If the jury believe the evidence, they must find for the plaintiff." The court then *ex mero motu* stated to the jury that they must find for the plaintiff for the lands sued for in the complaint.

McIntosh & Rich, for appellant. Erwin & McAleer, for appellee.

DOWDELL, J. There are four assignments of error. The first and second relate to the rulings of the court on the introduction of evidence. The third and fourth relate to instructions of the court given to the jury.

In regard to the first assignment of error, the bill of exceptions shows that two questions were asked the witness Lombard in reference to a map; the first question calling for a statement as to the contents of the map, and which the witness could not or did not answer, except by saying that he did not know, and the second question interrogating the witness as to whether he (witness) had the map. The bill of exceptions then recites: "Defendant objected to these questions, the court overruled the objection, and the defendant then and there duly excepted." It does not appear from this statement that the questions were separately objected to in the order in which they were asked. The second question was clearly competent towards establishing the predicate for the introduction of secondary evidence. There was no error, therefore, in the ruling of the court on the objection. Moreover, the answer to the first question was entirely harmless to the defendant.

This witness on his direct examination testified that Mr. Hieronymus had Mr. Anderson's land leased, "and he gave Mr. Shaw permission to get logs off of Mr. Anderson's land in return for the logs he cut off of this land"—meaning the land in controversy. On the cross-examination of this witness it was developed that the only way he knew anything about the logs being cut off this land and about the permission that Hieronymus had given Mr. Shaw was that somebody told him so. The defendant thereupon moved the court to rule out the above testimony of the witness on the ground of its being hearsay. The court overruled the motion, and the defendant excepted. The evidence was clearly hearsay, and the defendant had availed himself of the first opportunity to have it excluded. The motion should have been sustained, and the evidence excluded, and in refusing to do so the court committed error.

Upon the conclusion of the evidence in the case the defendant stated that it withdrew its defense to the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, section 17, this being a part of the land described in the complaint. At the beginning of the trial the defendant had entered a disclaimer as to a part of this land, but not as to all of it. On this statement of the defendant the court committed no error in giving the general charge requested in writing by the plaintiff in the form in which it was asked. The court, however, went a step further, and *ex mero motu* stated to the jury that they must find for the plaintiff

for the lands described in the complaint. In this the court committed error, as the complaint contained other lands than those above mentioned, as to which the defendant stated that it withdrew its defense. As to the other lands described in the complaint, there was evidence on the part of the defendant that it and those under whom it claimed had been in the open, notorious, and adverse possession of the lands under color of title and claim of ownership continuously for a period of more than 10 years prior to the commencement of this suit. Indeed, some of the witnesses for the defendant, without objection, testified in terms to this state of facts. The *ex mero motu* statement of the court to the jury was a charge on the effect of the testimony, which can never be done by the court, "unless required to do so by one of the parties." Section 3326, Code 1896. Moreover, on the evidence in this case, the question of adverse possession by the defendant of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 7, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 17, was one that should have been left to the jury, since clearly there was a conflict in the evidence in regard to the same. For the errors pointed out, the judgment appealed from must be reversed and the cause remanded. Reversed and remanded.

HARALSON, ANDERSON, and DENSON, JJ., concur.

FLEMING & HINES v. LOUISVILLE & N. R. CO.

(Supreme Court of Alabama. May 10, 1906.
Rehearing Denied July 6, 1906.)

NEW TRIAL—DISREGARDING INSTRUCTIONS.

The granting of a new trial because of the jury disregarding instructions that plaintiff could only recover nominal damages, is proper, without regard to whether the instructions were erroneous.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 132-134.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by Fleming & Hines against the Louisville & Nashville Railroad Company for injury to a live stock shipment. From an order granting defendant a new trial, plaintiffs appeal. Affirmed.

R. W. Stoutz, for appellants. Gregory L. Smith and Joel W. Goldsby, for appellee.

ANDERSON, J. The only question we are called upon to determine on this appeal relates to the action of the trial court in granting a new trial. The court charged the jury that plaintiff could only recover nominal damages, and the jury, in disregard of the instructions, brought in a verdict for \$265, and the trial court properly set the verdict aside. It is essential to an orderly administration of justice that juries should obey the instruc-

tions of the court. If the court is in error in giving instructions, the jury should, nevertheless, obey the instructions, and the injured party would have recourse by appeal to this court, which is the proper forum to pass upon the actions of the trial court.

Affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

ANDERSON v. FULLER et al.

(Supreme Court of Florida, Division B. June 11, 1906.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — AWARD OF CONTRACTS TO LOWEST BIDDER.

Where the charter or incorporating act requires the officers of a city to award contracts for public works to the lowest bidder, a contract made in violation of its requirements is illegal and void, and neither the municipality nor its subordinate officers can make a binding contract for such work, except in compliance with the requirements of the law.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 862.]

2. SAME.

The intention of the law in requiring such contracts to be let or awarded to the lowest responsible bidder for the work is to secure the public improvement at the lowest reasonable cost to the taxpayers. Therefore the incorporation into the advertisement for bids, or into the specifications of the work, upon which such bids are predicated, of illegal or unauthorized conditions or obligations upon the contractor, compliance with which on his part will necessarily and illegally increase the cost of the work, is not a letting of such contract to the lowest bidder within the meaning of the law, and will render the contract illegal and void.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 857, 868.]

3. SAME—DAMAGES.

When a municipal corporation confines itself within the limits of its power and jurisdiction, it is not liable to an action for consequential damages to private property or persons (unless such liability is imposed by special constitutional provision or by statute), where the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the Legislature, and there has been no want of reasonable care or want of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable.

4. WATERS AND WATER COURSES—MUNICIPAL WATER SUPPLY—WATER COMPANY—RIGHTS IN STREETS—INTERFERENCE WITH MAINS.

While municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety, and convenience, notwithstanding the same may interfere with legal franchise rights. Thus a water company placing its pipes in the streets under a franchise contract with the city does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets whenever and

wherever the public interest demands; and if in consequence of the exercise of this right the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account thereof. And the city in such a case has no authority voluntarily to burden itself or its taxpayers with the payment of damages necessarily consequent upon the reasonably careful and skillful execution of its authorized public works.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 279.]

5. MUNICIPAL CORPORATION — ILLEGAL CONTRACTS — PAYMENTS — INJUNCTION BY TAXPAYER.

The law is well settled that a taxpayer in a city can properly maintain a bill to restrain public officials of the city from paying out public moneys upon a void and unauthorized contract.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 2163.]

(Syllabus by the Court.)

Appeal from Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Action by J. B. Anderson against W. R. Fuller and others. From an order denying the appellant's application for an injunction, he appeals. Reversed and remanded.

On the 27th day of September, 1905, the appellant, alleging that he was a citizen and taxpayer upon real and personal property in the city of Tampa, Fla., filed his bill in equity in the circuit court of Hillsborough county against the appellees W. R. Fuller, Robert Mugge, S. J. Drawdy, and B. M. Balbontin, as members of the board of commissioners of public works of said city of Tampa, and against the appellees George C. Warren and Fred T. Warren, alleging therein, among other things: That the said board of commissioners of public works, being thereunto duly authorized, published a notice calling for bids for furnishing the material and labor necessary to construct a sewerage system in certain streets, alleys, and avenues of the said city of Tampa, a copy of which notice is attached an exhibit to the bill. Said notice for bids refers to certain specifications in the hands of the engineer of the board that are to be made the basis of such bids, and a copy of such specifications is also attached as an exhibit to the bill. That on the 1st day of August, 1905, the defendants George C. Warren and Fred T. Warren submitted to and filed with the said board of commissioners of public works a bid for furnishing the material and the performance of the labor necessary to carry out the said contract; that afterwards, in August, 1905, the said board of commissioners of public works accepted said bid of the said George C. and Fred T. Warren, and afterwards, on the 31st day of August, 1905, attempted to enter into various written contracts with the said Warrens for the carrying out of the work provided for in said plans and specifications and the bid made by them, the exact number

of contracts so entered into being unknown to your orator, but alleges that all of said contracts were identical in their provisions, except as to differences in the amounts bid on different streets as shown in their different bids. A copy of such contracts is attached as an exhibit to the bill. That said Warrens, with whom the said contracts were so entered into, were not in fact the lowest responsible bidders for the said contract, but that there was submitted to and filed with said board at the same time a bid on the part of Joseph E. and George W. Bryan, partners as Bryan & Co., which was in fact a lower bid than that of the said Warren & Warren by approximately the sum of \$6,000 and that said Bryan & Co. are and were responsible bidders, able to carry out and perform the said contract, and that said board of commissioners were fully satisfied as to the responsibility of the said Bryan & Co., notwithstanding the fact that they awarded the contract to the said Warren & Warren. That said contracts entered into between the said board of commissioners of public works and the said Warren & Warren are upon their face utterly null and void, among other reasons, for the reasons hereinafter mentioned:

(a) That the said contracts do not conform to the advertisement for bids and the plans and specifications therein referred to.

(b) That said contracts reserved to the said board of commissioners of public works the power to increase or diminish the work, to make any changes in the line, grade, plan, form, position, dimensions, and material of the work, either before or after construction.

(c) That the said specifications required and the said contracts provided that the contractor at his own expense should remove all gas pipes, water pipes, and conduits forming an obstruction to the line or grade of the sewer.

(d) That said specifications required and the said contracts provided that the contractor shall be responsible for all the damages to buildings, bridges, railroads, street car lines, pipes, culverts, or other property on the line of the work, and for all injury to gas or water pipes, and for all waste of gas or water due to the execution of the work.

(e) That said contracts provided that the price bid by the said contractor should include the replacing of all water courses and drains, or proper rearrangement and reconstruction of any drain, water pipe, gas pipe, telegraph, telephone, or electric poles, pipes, or any conduit of any nature or description which may be encountered and injured, or which may interfere with the line or grade of the work; also the maintaining of travel over any railroad or street car line which may be liable to obstruction by reason of said work, and the proper repair of any injury to the same.

(f) That said specifications required, and the said contracts provided, that the con-

tractor should assume liability for all damages occasioned by doing the work therein provided.

(g) That in and by the said contracts the said board of commissioners abdicated their functions in favor of the city engineer and invested him with powers and duties not authorized by law.

(h) That the said contracts and the specifications made a part thereof constituted an unlawful delegation of the authority of the board of commissioners of public works in respect to duties imposed upon them by law, and incapable of delegation.

(i) That the notice calling for bids by requiring separate bids on each street violated the provisions of the city charter of said city which requires all contracts to be let to the lowest responsible bidder.

(j) That said specifications upon which bids were called for did not sufficiently apprise bidders of the nature, extent, and character of the work, so as to comply with the city charter requiring all contracts to be let to the lowest responsible bidder.

(k) That the said contracts are illegal and void.

That the said city of Tampa is not itself the owner of any gas or water pipes in the streets of said city, or of any telegraph, telephone, or electric poles, pipes, or conduits of any nature, or railroad or street car line operated within the city of Tampa, and that all of the same are owned by private corporations doing business in the city of Tampa under franchises or licenses from said city, and that said city has no power or authority, either directly or indirectly, to appropriate money of the city or impose an expense on the taxpayers of the city for the benefit of the said private corporations or any of them, all of which hold their franchises or licenses subject to the power of the city to require the construction of a sewerage system in the streets of the said city in the interest of the public health of said city, and that some of the instruments or agencies of the said private corporations will be encountered, and that the installment of the said sewerage system will render it necessary to remove or change the same in the performance of the said contracts.

That said contracts are further illegal and void for the reason that in the proposed form of agreement furnished by the said board of commissioners of public works to some or all of the bidders on the said contract as a basis upon which bids should be submitted, and particularly to the said firm of Bryan & Co. there was included a clause in the following words: "Payments for the above work under this contract may be made with cash or certificates of indebtedness for paving and sewers as the board of public works may elect," while in the said contracts as entered into in writing and executed by the said board of commissioners of public works and the said Warren & Warren

there is no such clause or provision. That all of the said contracts for doing the entire work specified in the said advertisement have been executed by the said board of public works and the said Warren & Warren, and that your orator is informed and believes that the said Warren & Warren are now preparing to enter upon the performance of the said contract, and if they are permitted to do so, and the said board is permitted to pay out moneys under the said contract, the moneys of the said city will be illegally diverted to a purpose not authorized by law, and an illegal burden thereby imposed upon the taxpayers of said city.

The prayers of the bill were that the said contracts and each of them, separately and as an entirety, be decreed to be null and void and to have no binding force or obligation upon the city of Tampa or the officers thereof; that the defendants, and each and every of them, their agents, servants, and employes, be enjoined and restrained from carrying out the terms of the said contracts and each of them, or attempting to enforce them, or either of them, in any manner, shape, or form, and particularly from paying out or attempting to pay out any moneys thereunder to the said Warren & Warren or to any one in their behalf; that if any moneys have been heretofore or shall be hereafter paid out to the said Warren & Warren, or either of them, or to any one in their behalf, on account of the said alleged contracts, an accounting shall be taken thereof by and under the direction of the court, and that the said defendants W. R. Fuller, Robert Mugge, S. J. Drawdy, and B. M. Balbontin be decreed to restore and pay to the city of Tampa any and all moneys so unlawfully diverted by them; and for a temporary injunction, for subpoena, and for general relief.

The defendants answered the bill, admitting all of the material averments thereof as to the terms and provisions of the advertisement for bids for said work, and as to the terms of the specifications for such work that were the basis for the bids, and as to the terms and provisions of the contracts entered into for such work, but allege by way of demurrer that such averments of the bill, if true, do not affect the validity of such contracts. They deny that Warren & Warren were not the lowest responsible bidders, and deny that the bid of Bryan & Co. was lower than that of Warren & Warren. The answers seek to avoid the allegation of the bill that said contracts and specifications for the work on which they are based unlawfully obligate the contractors under the terms of their bid to remove and replace at their cost all water pipes, gas pipes, and telegraph, telephone, and electric light poles, pipes, and conduits, and street railway tracks that may come or stand in the way of laying said sewers, by alleging that none of such things were as a matter of fact in the way of such sewers as planned to be laid, and none thereof

would in fact have to be moved and replaced in consequence of the laying of said sewers. They deny that said board of public works in and by said contracts abdicated its functions or illegally delegated its functions and powers to the city engineer in the matter of constructing such sewers, or thereby clothed him with duties not authorized by law, or that were exclusively to be performed by said board. Said answers further seek to avoid the allegations of the bill to the effect that said contracts illegally impose the burden directly upon the contractor and indirectly upon the city of the cost of the removal and replacement of all telegraph, telephone, and electric light poles, pipes, and conduits, and gas and water pipes, drains, and conduits, street car tracks, etc., that may come within the line of laying said sewers, by averring that, though said provisions were contained in said specifications and contracts based thereon, yet it meant nothing, as it had always been and was so understood that, notwithstanding such provisions were in said contracts, yet the public authorities of said city uniformly construed it, and the gas, water, electric light, street railway, and telephone companies in said city uniformly construed it, to the effect that whatever removals or rearrangements were necessary to be made by the said respective private corporations in consequence of sewerage work were always to be made by and at the expense of the corporation so affected, and not at the expense of the city contractor or the city of Tampa, and that such has been the universal construction and practice since 1897 and up to the present time; the contracts in each instance since 1897 having been the same as these contracts that are complained of. The separate answers of the defendants Warren & Warren were practically the same as that of the board of public works. Upon the bill with its exhibits, answers, and ex parte affidavits filed on behalf of the defendants sustaining the averments of fact in their answers, application was made by the complainant to the circuit judge for a temporary injunction as prayed in the bill. After argument the application was denied by an order made December 30, 1905, and from this order denying the injunction the complainant below has taken his appeal to this court.

Macfarlane & Glen and John P. Wall, for appellant. Sparkman & Carter, Peter O. Knight, and C. C. Whitaker, for appellees.

TAYLOR, J. (after stating the facts). Chapter 5363, p. 558. Laws of 1903, provides for the election by the people of the city of Tampa of a board of commissioners of public works for said city from among the registered voters who are freeholders. By section 21 of this act such board is given exclusive power and control over the construction and repairing of all sewers. By section 24 of said act it is empowered to employ an

engineer and such other employés, officials, and assistants as may be found necessary. This section also provides that the contracts made by this board shall be made in the name of the city of Tampa, and that any improvements which shall involve an expenditure of more than \$300 shall only be let or made after advertisement thereof, and shall be let to the lowest responsible bidder therefor, upon such terms and secured by such bond as the board may require. Section 28 of said act provides that, whenever any sewer or drain shall have been heretofore or may hereafter be constructed or repaired in said city, the city council shall, as soon as the cost of such improvement shall have been certified to them by the commissioners of public works, assess against the abutting property two-thirds of the cost of such improvement in proportion to the frontage of such abutting property on said street, alley, park, or highway so improved. Section 29 of said act provides that all such assessment shall constitute a prior lien to all other liens, except taxes and those for the construction of sidewalks, with which liens they shall have equal dignity upon the real estate assessed. Section 30 of said act provides that, when at any time the city council shall decide to construct or repair any sewer, such council shall pass a resolution or ordinance ordering the same done, and thereupon the commissioners of public works shall advertise for bids for making said improvements. Section 31 of the act provides for the issuance by the city council of certificates of indebtedness for the amounts of the assessments against the abutting property, a separate certificate to be issued against each tract of land assessed containing a description of such land, the amount of the assessment, together with the general nature of the improvement, and shall be made payable to bearer in one, two, and three years in equal annual installments, with interest to be fixed by the city council at a rate not greater than 8 per cent. per annum, payable annually, from the date of the issuance of such certificate.

The rule is well settled that, where the charter or incorporating act requires the officers of a city to award contracts for public works to the lowest bidder, a contract made in violation of its requirements is illegal and void, and that neither the municipality nor its subordinate officers can make a binding contract for such work except in compliance with the requirements of the law. 1 Dill. on Mun. Corp. (4th Ed.) § 466; *Fulton v. City of Lincoln*, 9 Neb. 358, 2 N. W. 724; *Brady v. Mayor of City of New York*, 20 N. Y. 312; *Nash v. City of St. Paul*, 8 Minn. 172 (Gil. 143); *Maxwell v. Board of Supervisors*, etc., 53 Cal. 389. The purpose and intent of the law in requiring such contracts to be let or awarded to the lowest responsible bidder for the work is to secure the public improvement at the lowest reasonable cost to the taxpayers. Therefore the incorpora-

tion into the advertisement for such bids, or into the specifications for the work upon which such bids are predicated, of illegal or unauthorized conditions or obligations upon the contractor, compliance with which on his part will necessarily and illegally increase the cost of the work, is not a letting of such contract to the lowest bidder and will render the contract illegal and void. *California Imp. Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802; *Stansbury v. White*, 121 Cal. 433, 53 Pac. 940. In the published notice for bids for the performance of the public work involved herein bidders were referred to the office of the engineer of the board of public works for specifications of the work and materials to be used therein. In the specifications thus referred to are the following provisions:

"In digging about water pipes, gas pipes, and sewer or drain pipes, workmen must exercise special care, and such pipes shall be properly supported on timbers or chains, and the cost of such work and of repairs made necessary by injury to said pipes shall be paid by the contractor, and is included in the price bid for the sewer. When such pipes or conduits form an obstruction to the line or grade of the sewer, the contractor shall, at his own cost and in the manner prescribed by the engineer, make such removals, alterations, or rearrangements as may be required by the engineer."

"The contractor shall be responsible for all damages to buildings, bridges, railroads, street car lines, culverts, or other property on the line of the work, and shall replace and make good all macadam or other pavement, cross-walks, etc., disturbed during the progress or in consequence of construction. The contractor shall be responsible for all injury to gas or water pipes and for all waste of gas or water due to the execution of the work. The contractor shall provide for the uninterrupted flow through all water courses and drainage ways in the line of the work."

"The prices bid shall include * * * the relaying of all pavements and cross-walks, the protection and repairing of all gas pipes, water pipes, sewers, drains, and other conduits."

The contracts entered into by the board with the defendants Warren & Warren in pursuance of these specifications and of their bids based thereon contained the following provisions, in consonance with such specifications, but going still further, viz.: "And the party of the second part [the contractor] further agrees that the prices above named shall include the cost of * * * the replacing of all water courses and drains, the proper rearrangement and reconstruction of any drain, water pipe, gas pipe, telegraph, telephone, or electric light poles, or pipe, or conduit of any nature or description which may be encountered and injured, or which may interfere with the line or grade of the work under this contract; also the maintain-

ing of travel over any railroad or street car line which may be liable to obstruction by reason of said work, and the proper repairing of any injury to same."

Another rule well settled in the law of municipal corporations is that such a corporation, when it confines itself within the limits of its power and jurisdiction, is not liable to an action for consequential damages to private property or persons (unless it be given by special constitutional provision or by statute), where the act complained of was done by it or its officers under and pursuant to authority conferred by a valid act of the Legislature, and there has been no want of reasonable care or want of reasonable skill in the execution of the power, although the same act, if done without legislative sanction, would be actionable. 2 Dill. Mun. Corp. (4th Ed.) § 987 et seq. And while municipalities may by ordinance grant to individuals and corporations the privilege of occupying the streets and public ways for lawful purposes, such as railroad tracks, poles, wires, and gas and water pipes, such rights are at all times held in subordination to the superior rights of the public, and all necessary and desirable police ordinances, that are reasonable, may be enacted and enforced to protect the public health, safety, and convenience, notwithstanding the same may interfere with legal franchise rights. A water company, placing its pipes in the streets under a franchise contract with the city, does so in subordination to the superior rights of the public, through its duly constituted municipal authorities, to construct sewers in the same streets whenever and wherever the public interest demands; and if in consequence of the exercise of this right the water company is compelled to relay its pipes, in the absence of unreasonable or malicious conduct, it has no cause of action against the corporation for reimbursement on account thereof. *McQuillin, Mun. Ord.* § 521; *National Water Works Co. v. City of Kansas (C. C.)* 28 Fed. 921; *Kirby v. Citizens' Ry. Co.*, 48 Md. 168, 30 Am. Rep. 455; *Elliott on Roads and Streets*, § 476; *New Orleans Gas Co. v. Drainage Com.*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831. The city of Tampa was, therefore, not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing of the water pipes, gas pipes, telegraph, telephone and electric light poles, drains, or conduits, or railway tracks that might necessarily have been interfered with in laying its sewers in the streets. And that these contracts did indirectly undertake to cast such burden upon the city there can be no doubt, since bidders for the work, being advised in advance that they would be required to bear the cost of such removal and replacement, would increase their bids sufficiently to cover such cost, thereby casting an unauthorized and illegal burden upon

the taxpayers, and defeating the purpose and object of the law in having the contracts for such work awarded to the lowest responsible bidder. These provisions in these contracts, and in the specifications of the work upon which the bids for the contracts were submitted, requiring the contractors at their cost to remove and replace all water and gas pipes, telephone, telegraph, and electric light poles, pipes, drains, and conduits, and all railway tracks that interfered with such sewers go to the vitals of such contracts, and render them null and void upon their face. Particularly is this true when the city is authorized by its charter to assess the cost of such work against the abutting property. *Chippewa Bridge Co. v. City of Durand*, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; *Inge v. Board of Public Works*, 135 Ala. 187, 33 South. 678, 93 Am. St. Rep. 20; *Colwell v. City of Waterbury*, 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218. On the general subject see *Diamond v. City of Mankato*, 89 Minn. 48, 93 N. W. 911, 61 L. R. A. 448. That the complainant as a taxpayer in said city can properly maintain the bill filed to restrain the paying out of public moneys upon void and unauthorized contracts there can be no question. *Frame v. Felix*, 167 Pa. 47, 31 Atl. 375, 27 L. R. A. 802; *City of Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989; *Peck v. Spencer*, 26 Fla. 23, 7 South. 642.

There are numerous other grounds for objection urged against the contracts involved herein; but, as the objection discussed is fatal to the validity of such contracts, it becomes unnecessary for us to pass upon the others.

It follows, from what has been said, that the circuit judge erred in denying the complainant's application for injunction. The order appealed from is therefore hereby reversed, at the cost of the appellees, and the cause remanded, with directions to grant the injunction as prayed for in the bill.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

(117 La.)
No. 16,138.

STATE v. POINTDEXTER et al.

(Supreme Court of Louisiana. June 19, 1906.
Rehearing Denied June 30, 1906.)

1. HOMICIDE—EVIDENCE.

The accused, indicted for murder, and found guilty, appeals, relying upon various bills of exception.

2. CRIMINAL LAW — CHANGE OF VENUE—PREJUDICE THROUGHOUT THE PARISH.

The testimony did not support the motion of accused for a change of venue. *State v. Gonsoulin*, 38 La. Ann. 459.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 243.]

3. INDICTMENT—MOTION TO QUASH—OBJECTION NOT SUSTAINED BY FACTS.

Bills set forth that a motion to quash was filed on the ground of illegality of the proceedings by reason of the fact that the back of the indictment does not show that the accused were indicted for the crime charged in the body of the indictment. Further, in the same bill of exception that the presentment of the grand jury does not contain the name of "Diamond Rigby" one of the accused. The answer is:

(a) That the title written on the indictment substantially included the names of both accused and the nature of the crime, indorsed as follows: "Indictment for Murder." "A true bill. [Signed] N. W. Nuse, Foreman." Besides, indorsement of the nature of the crime is not necessary to the validity of the indictment.

(b) Question of Identity. Touching the objection that the name of accused was "Rigby" and not "Rigley." The accused must have been identified. There is no contention that he was not identified.

It cannot be determined from the record whether the name is Rigby or Rigley. The "b" is written so that it may be taken for "l" or "b." Idem sonans. Moreover the rule idem sonans applies. *State v. Turner & Reed*, 25 La. Ann. 575; *State v. Johnson* (recently decided) 41 South. 117.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 140; vol. 36, Cent. Dig. Names, §§ 13, 14.]

4. CRIMINAL LAW — APPEAL — REVIEW — NO SPECIAL MERIT.

The next exception in the order the exceptions are argued in the brief is passed without comment, as it is decided in deciding other points.

5. SAME—REFUSAL TO CONTINUE.

Insufficiency of time to prepare the defense. Accused were represented by four attorneys.

Fifteen days elapsed from the day that they were arraigned to the day of the trial. The court state in the per curiam "No legal cause was shown for a continuance." The record does not show that in this statement the court erred.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1316, 1317.]

6. SAME—COPY OF INDICTMENT AND COPY OF VENUE.

No service of either is the complaint. This is sufficiently met by the per curiam of the trial judge.

The sheriff's return shows that a true copy of the indictment and of the venue was served.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1399-1408.]

7. JURY—REMOVAL OF JUROR FOR PREJUDICE—ASSERTED HOSTILITY TO ACCUSED.

Touching the removal of a juror from the panel, the judge, in the per curiam states: "Before the jury was impaneled, he, after a careful investigation and examination of witnesses being satisfied that the juror" was prejudiced against the accused "and hostile to them" removed him.

The clerk's minutes are to the same effect; i.e., that the juror was removed. It follows that accused had not been placed in jeopardy.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 524-540.]

8. SAME—STRIKING OFF A JUROR—FORMER JEOPARDY.

Now, as relates to cause of removal. The removal was made at the instance of and on information from the district attorney, and the judge states he satisfied himself that the juror would not be impartial, but would be hostile to the accused. The jury must be composed of men competent to pass upon the case. An obnoxious juror may be removed without affording to the accused ground to sustain the plea of

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former jeopardy or other irregularity in the proceedings. The ruling was in *favorem vitæ* and leaves scant reason for objection.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 301-303.]

9. GROUNDS NOT SUFFICIENT TO DISTURB VERDICT—CRIMINAL LAW.

The seventh and eighth bills of exception were passed, as it was not proved that they presented grounds of merit sufficient to be specially discussed.

(Syllabus by the Court.)

Appeal from Twenty-First Judicial District Court, Parish of Iberville; Calvin Kendrick Schwing, Judge.

Robert Pointdexter, alias Bull Dafney, and others, were convicted of murder, and appeal. Affirmed.

Alex. Hébert and William Joseph Gahan, for appellants. Walter Gulon, Atty. Gen., and Albin Provosty, Dist. Atty. (Lewis Gulon, of counsel), for appellee.

BREAUX, C. J. The grand jury of the parish of Iberville found an indictment against Diamond Rigley, alias "Black Diamond," and Robert Pointdexter, alias "Bull Dafney," charging them with having killed and murdered Frank Bueno and Vincent Bueno in this parish, on the 26th day of February, 1906.

The accused were found guilty as charged.

The indorsement on the indictment shows that it was an indictment for murder. The names of witnesses, also, are written thereon; that of the district attorney and the name of the deputy clerk with date of the filing of the indictment.

The minutes show that the accused were arraigned and pleaded to the indictment, and the case was assigned for Thursday, April 19, 1906, and on the motion of the district attorney, it was ordered that the copy of the indictment be served on the accused.

The sheriff's return sets forth that a copy of the indictment was served on April 6, 1906.

On the 18th of the same month, through counsel appointed by the court on that day, defendant applied for a change of venue in which they stated that there was, against them, prejudice, ill feeling, and dislike, which proof of their innocence would not overcome.

The motion for a change of venue was overruled.

A bill of exception was taken to the refusal of the court to grant the motion.

This bill of exception brings up before us the first ground of defense presented for our consideration.

The grounds are not sustained by the testimony to such an extent as would justify the court in setting aside the verdict.

There was indignation expressed at the time against the crime committed, and against the accused, as the asserted perpetrators. It appears to a limited extent that it was assumed that they were the guilty parties. The feeling against them was not general. The testimony, on the motion for a change of venue,

does not give rise to the impression that the feeling was general, and that a jury could not be found that would be free of all bias and prejudice.

The witnesses questioned touching bias all testified that an impartial jury could, without difficulty, be impaneled. The presiding judge was of that impression. The record does not disclose that either the witnesses or the judge were in error.

A bill of exception was taken to the overruling of a motion to quash, and it presents the second ground of defense.

The grounds of this bill of exceptions are that the finding of the grand jury was not indorsed on the bill of indictment; that the names of both defendants are not indorsed on the indictment; that the name of Diamond Rigby, one of the defendants, is not written in the indictment.

There is little merit in this contention, based on the fact that as to names indorsed on the indictment, those of Robert Pointdexter, alias Bull Dafney, et al., do not, as defendants urge, mean the accused.

Both the crime charged and the names of the defendants are indorsed to an extent reasonably sufficient, particularly in view of the fact that this court has repeatedly held: That indorsement only is not a part of the indictment; that the indorsement of the offense for which a true bill is found is not essential to the validity of the indictment. *State v. Smith*, 5 La. Ann. 341; *State v. Rohfrisch*, 12 La. Ann. 382; *State v. McGinnis*, Id. 743; *State v. Mason*, 32 La. Ann. 1018; *State v. Russell*, 33 La. Ann. 135.

It is sufficient to set forth title of suit on the back of the indictment, and the nature of the offense. This was done. But the indorsement is not essential to the validity of an indictment. *State v. Aucoin*, 50 La. Ann. 49, 23 South. 104.

The other ground set forth by defendant in this bill of exception is that the name of the accused (Rigby) is not contained in the indictment.

The name in the copy of the indictment before us may be taken either for "Rigley" or "Rigby." It remains that either name, with the alias, is identification of the person. Both accused were arraigned and pleaded to the names as written in the indictment.

No good reason suggests itself to hold that the name, as written, is "Rigley." But if it should be, although all the circumstances are to the contrary, the rule *idem sonans* would justify holding that the name was sufficiently set forth.

In that case on the authority of *State v. Turner & Reed*, 25 La. Ann. 575, and *State v. Johnson et al.* (not yet officially reported) 41 South. 117, the ruling of the trial judge is sustained. But really the name, it seems to us, is "Rigby," as written.

One of the defendants severed in one of his grounds of defense, and in a separate motion to quash, renewed in the main, the

grounds upon which we have just passed; that is:

"That the so-called indictment brought against him is no indictment at all, for it does not contain his name to its body, nor on its back, nor to, nor on, any part of it."

We have already decided this ground of defense. It would serve no useful purpose to go over that ground again. It has no merit.

This brings us to the defense that counsel for the accused did not have time to prepare themselves to properly present the grounds relied upon by the accused.

Defendants recite in the bill of exceptions:

"That the counsel appointed by the court to represent them herein, on account of their private, personal, and professional business during the present term of court, and, also, on account of the brief period between the date of the indictment, charging them with a most serious crime, and the date fixed by the state, through the district attorney for their trial on the charge of said crime, have not had sufficient time to prepare their defense in the proper and complete manner necessary on account of the serious character of the crime that they were charged with. And that by order of court changes were made in their counsel on April 18, 1906, the day before that fixed for trial."

We have already stated the date on which the accused were arraigned, and counsel appointed by the court to represent them. Attorneys were appointed to represent them. One of the attorneys asked to be relieved of the appointment. Other attorneys represented them during the 13 intervening days between the date of their arraignment and the day fixed for trial.

The *per curiam* shows the following:

Counsel appointed by the court, four in number, had ample opportunity, and did fully prepare the defense. No legal cause was shown for a continuance. The district attorney admitted that all of the absent witnesses, if present, would testify, as stated by counsel in this motion for a continuance, and no bill was reserved.

It is stated that a change had been made at the last moment by order of court in the attorneys appointed to represent the accused.

We have already referred to the change which had been made touching one of the attorneys who asked to be relieved. There is nothing about the circumstances which shows that the accused had been prejudiced by the change.

They were represented by at least two attorneys from the date of the arraignment.

The Attorney General states in the brief that the accused were represented by four attorneys during the whole of that time; i. e., from the arraignment to the present time. This is not denied by defendant's counsel. Four members of the bar appeared on this appeal as their attorneys.

It does not appear that defendant was not amply represented, and that attorneys had not sufficient time to prepare their defense.

It is not shown that any of defendants' witnesses were absent.

Continuance is largely left to the discretion of the trial court. It does not appear that the court abused its discretion. *State v. Brette*, 6 La. Ann. 658; *State v. Vigoreux*, 13 La. Ann. 309; *State v. King*, 31 La. Ann. 179; *State v. Finn*, Id., 408; *Rogers v. Goldthwaite*, 32 La. Ann. 1049; *State v. Wilson*, 33 La. Ann. 261; *State v. Fulford*, 33 La. Ann. 679; *State v. Hornsby*, 33 La. Ann. 1110; *State v. Chevallier*, 36 La. Ann. 81; *State v. Kane*, 36 La. Ann. 153; *State v. Johnson*, 36 La. Ann. 852; *State v. Foster*, 36 La. Ann. 877; *State v. Clark*, 37 La. Ann. 128; *State v. Redmond*, 37 La. Ann. 774; *State v. George*, 37 La. Ann. 736; *State v. Duffy*, 39 La. Ann. 419, 2 South. 184; *State v. Primeaux*, 39 La. Ann. 673, 2 South. 423.

Another defense brought up by a bill of exception is that no copy of the indictment was served, nor a list of the venire.

The per curiam of the court shows: "A true copy of the indictment was served as required by law." The sheriff's return sets forth that he served copy of both the indictment and venire for the term.

It only remains for us to state that there was no merit in the objection, and pass on to a consideration of the next ground, which relates to the removal of a juror from the panel.

This juror was removed on the statement of the district attorney. After the statement, the judge called the juror from the jury box, and asked him if he had made the statement which the district attorney said he had heard. The juror denied that he had made statements prejudicial and unfavorable to the accused, and stated he could give them a fair and impartial trial.

The court stated in the per curiam that he investigated and examined witnesses, and that being satisfied that the juror was prejudiced against the accused, and that "He [juror] had made statements a short time before he was called and accepted as a juror, hostile and prejudicial to the accused, informed counsel representing the defendants of the fact and offered to permit them to re-examine the juror and to challenge him for cause. There being absolutely no doubt that the juror had expressed a very hostile opinion against the accused, and had stated he desired to get on the jury for the purpose of hanging the accused," he properly removed the juror, and the accused suffered no injury.

The deceased was not in jeopardy at the time that the juror was removed from the panel.

True, counsel for the accused earnestly and commendably representing the defendants, particularly in view of the fact that they represent them on the court's request, and in accordance with the court's appointment, stated that the jury had been completed, impaneled, and sworn. Such is not

the statement of the judge who recites in the per curiam:

"Before the jury was impaneled the court, after a careful investigation and examination of witnesses, thinking that the juror was obnoxious, discharged him from the panel."

This statement of the trial judge is repeated in the clerk's minutes of the proceedings.

The defense does not advance the idea that the jeopardy begins before the jury is impaneled and sworn, and the case opened before the jury by reading the indictment, but they invoke the statement of counsel that it was after that time that the juror was excluded. That statement of counsel above given cannot prevail against that of the trial judge, there being no testimony save statements before mentioned before the court upon that subject. But though the question of the time when jeopardy begins has scarcely been presented by the pleadings, we will here state that according to eminent commentators and many well-considered decisions, it never begins before the jury has been impaneled, and the case opened before the jury, as was held in the case of *State v. Nash & Barnett*, 45 La. Ann. 1137, 1138, 13 South. 732, 734.

Now, as relates to the reasons which prompted the trial judge to remove the juror from the panel:

He had become convinced that the juror, because of his hostility to the accused, was a hostile juror. He called attention of their counsel. They did not choose to act. They remained silent. They made not the least attempt at investigation into the hostility. We gather that the court concluded for these reasons that the juror should be removed. In the first place, because it was the right thing to do not to let the accused be tried by a jury in which there was an obnoxious juror to them, to the extent before stated; and, in the second place, because, as the court states, counsel refused to act, "for the reason that they preferred to take chances with the juror, so that in the event of conviction it would be necessary for the court to grant a new trial."

Under that state of facts the trial court, in the exercise of its discretion, could exclude the jurors.

The court was not bound to suffer the case to proceed; the trial judge being invested with some discretion, having been informed of facts going to the disqualification of a juror, the juror could be excluded at the time he was excluded.

The discretion must be properly, and not arbitrarily, exercised.

We have no reason to infer that there was an arbitrary exercise of power. On the contrary, the power was exercised in order to afford to the accused the fair trial to which every accused is entitled.

The jury must be composed of competent

men, and to that end the court is invested with considerable power in passing upon the qualification of jurors.

Section 1 of Act No. 135, p. 216, of 1898.

In our and other jurisdictions the discretion given to the trial judge in well-considered decisions is not denied, when it appears that it has been exercised with the view of protecting the public and the rights of the accused. This was the view expressed in the following decisions: *State v. Nash & Barnett*, 45 La. Ann. 1137, 1138, 13 South. 732, 734; *State v. Costello*, 11 La. Ann. 283; *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105; 12 Am. & Eng. Enc. of Pleading & Practice, p. 644.

The bill of exception before the last, presents no serious ground of defense. It was as follows:

The district attorney propounded a question to witness which rendered it necessary to follow it up with another question in order to get at the facts.

The ruling in permitting him to continue in examining the witness was entirely proper.

In the last bill of exception, the only objection was that the verdict was contrary to the law and the evidence; an objection general in terms, which does not greatly commend itself on appeal, it has been frequently held.

We have taken up the different grounds, and considered them.

We have arrived at the conclusion that the verdict of the jury cannot be disturbed on any of the grounds which we have had under consideration.

For the reasons assigned, it is ordered, adjudged, and decreed that the verdict of the jury and judgment of the court are affirmed.

(117 La.)

No. 16,052.

MURPHY et al. v. HUSSEY.

(Supreme Court of Louisiana. June 21, 1906.
Rehearing Denied June 30, 1906.)

1. LANDLORD AND TENANT—LEASE—OPTION FOR SALE.

The contract of lease contained an option or promise of sale of the property leased which was accepted by lessees.

2. SAME—ENFORCEMENT—DEFENSE.

The lessor does not by preponderance of testimony sustain his defense which was that he had signed the contract not knowing that it contained a clause covering an option to sell the property.

3. SAME—PLEADING—FRAUD.

The pleadings set forth no charge of fraud or deception.

4. SAME—KNOWLEDGE OF CONTRACT—READ OR HAVE IT READ.

It is incumbent upon a person signing a contract to read it carefully or to have it read; to stop and listen and take no chances touching the contents of the act.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 155-159; vol. 11, Cent. Dig. Contracts, §§ 415-419.]

5. SAME—TENDER—IN MORA.

The defendant was sufficiently placed in mora the cash portion of the price was tendered, as also the notes representing the credit portion, which defendant refused to accept.

6. SAME—DEPOSIT.

In order to complete the tender there was no necessity under the circumstances of consigning the amount tendered.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 344.]

7. SAME—OTHER AMOUNTS.

The debtor need not tender other amounts he owes; in this instance the indebtedness which defendant claims should have been tendered, is to be settled under the terms of the decree.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 345.]

8. EVIDENCE—PAROL EVIDENCE—FRAUD—TESTIMONY EXCLUDED.

Conversation of witnesses between themselves at the moment of signing is not admissible, especially as fraud had not been alleged. What was said by the two parties themselves at the time was admitted.

(Syllabus by the Court.)

Appeal from Civil Judicial District Court, Parish of Orleans; Walter Byers Somerville, Judge.

Action by N. W. Murphy and others against John Hussey. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Carroll & Carroll, for appellant. Dinkelspiel, Hart & Davey, for appellees.

BREAUX, C. J. Plaintiffs claimed an option to buy certain property from defendant of which they were the lessees.

On September 1, 1904, they became defendant's lessees of a distern factory, and the building in which the machinery of the factory is, on Canal street in this city, for the term of one year, at \$50 per month.

The contract of lease contained a number of conditions, among them was the option or defendant's promise to sell for the sum of \$30,000, to be paid, one-third cash, and the balance in one, two, and three years, with interest at 7 per cent.

A few months after plaintiffs had gone into possession they claimed the execution of the option; they called on defendant to sell to them the property in accordance with his promise; he refused. Thereupon plaintiffs tendered him the cash portion of the price and their notes as made to appear by the notary's procès verbal, through whom the tender was made.

Defendant interposed the exception of no cause of action. The exception was overruled. He then pleaded in answer that he was ignorant, unable to read or write; that he is dependent on others to read and explain to him the contracts that he signs; that he had never sold the property; never so understood; that he did not expect that the contract of lease contained any offer to sell the property; that he signed the contract in absolute ignorance of the least offer to sell;

that if it contained any stipulation to sell as that which was claimed he never understood it.

He in effect sets up in his answer that it was a mere speculation on the part of the plaintiff, for in May of the following year Murphy, who had bought the right under the option from his partners, sold to Paillet for the price of \$40,000, making in a very short time the handsome profit of \$10,000 in the deal. That it was a short time thereafter that the defendant was informed that his promise to sell was accepted.

Defendant further avers that when called upon by the notary, who went through some sort of a form of making a tender, he did not understand what was meant. Defendant also avers that the plaintiffs failed to pay their rent note for May, 1905, and that he availing himself of his rights had notified them that he had canceled his lease.

On defendant's motion the case was tried, before a jury, whose verdict was against the defendant.

On this verdict the judgment condemned plaintiffs to pay the price of \$30,000, and defendant to receive the cash portion of the price, \$10,000, less what may be necessary to clear the property of incumbrance; to pay costs and rent at the rate of \$60 per month, from May 27, 1905, until final delivery of the property to plaintiffs; less also a proportionate amount of the city and state taxes for 1905, and covering a part of the year from January 1st, to May 27th.

The defendant was condemned to deliver to the plaintiffs their four rent notes of \$50 each, which matured on May 31st, June 30th, July 31st, and August 31st, upon the plaintiffs paying to him the sum of \$45 rental accruing between May 1, and 27, 1905; he was condemned to receive the three notes deposited by the plaintiff the whole aggregating \$30,000. The judgment further provided that if the notes matured before final judgment then they were to be relieved from the payment of the interest.

The question of no cause of action will be easily disposed of, for it is evident that there was a cause of action alleged.

Plaintiffs under their allegations, taken as true for the purpose of the exception, had the right to call on the defendant for the title.

There is here no question of forcing the defendant to sign anything. It is only a question of ownership. If the plaintiffs have the right to the title, it will be so decreed and defendant will be condemned to sign the deed. If he refuses to sign then as decided in *Barfield v. Saunders* (No. 15-728) 116 La. —, 40 South. 593, the decree will be the title. It follows that the exception of no cause of action was properly overruled.

The next ground of defendant's defense is that tender was necessary. The ready an-

swer to this was that a tender was made on May 27, 1905, and that defendant refused to accept it.

This brings us to the objection of defendant based upon the insufficiency of tender. Touching this it appears that plaintiffs offered the whole of the cash portion of the purchase price. It was comparatively a large amount from which it was proposed to deduct a small sum to clear the property of all incumbrances for which defendant was bound.

It will be borne in mind that the defendant never objected, did not at the time, and really does not, now, save incidentally, to the tender as to its insufficiency; his ground is that he is not bound at all under the contract which plaintiffs set up.

Now this was a contract to do; to perform something which defendant actively refused to perform.

It does seem that under the circumstances a tender in good faith, such as it appears has been made, was all that was required. It was nothing but just to deduct from the price an amount due by plaintiff which bore on the property.

We have said before the whole objection centered upon the allegation that the defendant did not propose to be bound.

He positively declined to deliver the property or to consider himself bound by the stipulation touching option.

Delivery of a thing is an obligation which a vendor cannot deny when his vendee has complied with all that can be expected of him. Civ. Code, arts. 2450, 2567.

A vendor's refusal to deliver the property leaves him scant ground upon which to insist that his vendee must offer to pay to the very last penny, not only the price, but must correctly state the amount to be deducted to satisfy mortgages or other claims on the property bought for which the seller is bound.

The issue was directly presented to the court; why should not the amount (which should be deducted from the price) be deducted.

Right here we will state as it may serve to illustrate as well as fix rights of parties, that \$97 were reserved for taxes. Defendant says that, at least \$9 of this amount was over the amount which plaintiff could claim. It is mere matter of calculation. The defendant owes his proportion of taxes for the years up to the date of sale.

Plaintiffs having tendered the cash portion of the price, the taxes due by defendant were to be deducted.

It is the same regarding the other items to be deducted from the price.

One of defendant's contentions is that plaintiffs failed to establish their right to retain \$463.21 for an alleged incumbrance in favor of the Union Development & Construction Company.

We have not found that the judgment decrees that this amount must be deducted; it only directs that there shall be deducted from the price what may be necessary to clear the property of incumbrances, including costs of certificate.

Of course there must be a restitution of the *sum cuique*, but the amount is not so fixed as that defendant can be made to pay more than actually necessary to clear the property of claim due by defendant.

We are of opinion that plaintiffs have complied with all needful to sustain their action. The court can decide touching the extent of the respective obligations of plaintiffs and defendant. In the words, substantially, of one of the decisions cited by learned counsel for defendant: "Everything has been done by plaintiffs which was needful."

That is all the law requires. *Gilbert et al. v. Cooper et al.*, 4 Rob. 162.

The fact that the amount tendered has not been deposited is another of defendant's grounds. Plaintiffs cannot be required to deposit an amount which a defendant has positively refused to accept. *Beck v. Fleitas*, 37 La. Ann. 492.

Deposit is not always necessary to put the defendant in default.

Another of the contentions of defendant presented by learned counsel is that defendant's property is tied up and beyond his control; that plaintiffs on the other hand have nothing tied up; they are not bound to anything.

That may be true. Defendant has no one to blame but himself. As one chooses to bind himself he must be held bound.

An agreement conquers law.

It is not in this case as in the matter of the payment of debts, regulated by article 2167 of the Civil Code.

The contract here is commutative; it involves the delivery of property upon payment of the price, the want of consignment cannot successfully be urged. *Zimmermann v. Langles*, 36 La. Ann. 67.

The French commentators upon the articles of the French Code (1258 and 1259) corresponding with our own leave the question in great part to the discretion of the court, for the reason, doubtless, that there might cases arise of a speculative or fraudulent nature, requiring a different solution. Here there is no such question.

From *Baudry-Lacantinerie*, we excerpt and translate the following:

The court may, in the absence of the consignment of the tender, hold the party to whom the tender is made bound. Vol. 2, p. 634.

A similar view is expressed in *Dalloz*, *Nouveau Code Annote*, vol. 3, p. 173, No. 245.

In our own Civil Code, article 2167, as it is in the French Code, provides that the sum tendered may be consigned.

If a legal tender has been made of the

amount due as alleged, defendant owes no interest thereon although the amount was not consigned. *Frey v. Fitzpatrick-Cromwell Co.*, 108 La. 125, 32 South. 437.

From the record, we infer that plaintiffs were able and willing to pay the amount at any time. Plaintiffs gave defendant notice of their acceptance of the option.

They called on defendant to sign the deed, accept the cash portion of the price, and accept the note. They brought suit within reasonable time to compel performance.

Another ground of defense is that the contract could not include such an option to sell as was claimed; that the asserted option had no consideration; that plaintiffs should have tendered the amount of the rent note which they owed on the day that the tender was made.

1. The question of option will be considered in a moment.

2. Touching the ground urged by defendant that the option had no consideration.

In our view there was consideration. The lease of the property was consideration.

There was mutuality and consideration. *Frank v. Stadford* (Wyo.) 77 Pac. 134, 67 L. R. A. 571.

3. This indebtedness was not part of the price, although the clause formed part of the act. The debtor need not tender all he owes; that is, he need not tender other amounts than those which form part of the price. *Ency. of Law*, vol. 28 (3d Ed.) 19.

This brings us to the real merits of the controversy; that is whether or not the defendant sold the property to plaintiffs.

We have no difficulty in arriving at the conclusion that the contract of lease contained a promise of sale, as three interested witnesses have sworn positively that such was the intention, and with that testimony before us we do not consider that it is possible to arrive at any other conclusion. The option was formal enough.

The three plaintiffs testify that the option was contained in the contract of lease, and that the matter had been fully discussed, before the lease was signed.

They, in their statements, agree fairly well, touching the essentials of a sale; they disagree in regard to certain minor details. Their testimony does not create the impression that they sought to cook up a story; if they had thus attempted to impose upon the court there would have been less difference in their account of the transaction.

Defendant's contention, on the other hand, is that he is absolutely unlettered; that he never understood that the contract of lease contained the promise to sell the property leased.

On this point one of the plaintiffs, *Murphy*, testified that the contract was written out in duplicate, and that one of the copies was handed to the defendant some time before it was signed; that he insisted upon certain

changes in the contract which were agreed to after some discussion, but the contract was read and reread, and not the least attempt was made to conceal the fact that it contained the option clause.

This witness says that he read the contract to defendant, and that it was also read by the son of defendant.

McAvoy, another plaintiff, testified that he was present when it was read to the defendant. He also testified that there were some changes made in the contract. He saw Murphy hand a copy to the defendant. He says that the son of defendant read it aloud.

Bates, the other plaintiff, testified that the matter of option was discussed with the defendant on two occasions in his presence. The parties appeared before witnesses; the contract was signed in their presence. One of the witnesses asked the defendant in substance if he knew the nature of the contract he was signing, and upon his affirmative answer signed it. True, the defendant only in answer said it was a lease, but he did not ask that the contract should be read or intimate that it should be read to him.

Now, as to defendant's testimony in denial that a sale was passed.

The defendant at times as a witness is emphatic in denying the clause in question of the contract, and at other times he is not quite so positive.

Defendant testified that he signed the lease; that he had some little schooling, that he could only sign his name, but that he did not read the lease. When questioned as to whether he had sold the property he denied it and said that it was worth \$50,000. "My property is worth it, and I want big money for it; Murphy cannot buy it."

The lease containing the option was signed in September, 1904; the testimony just quoted was given in February, 1906.

It appears that defendant made certain corrections in the lease; he substituted one year as the time for renewal in the place of three years as it had been written by one of the plaintiffs. He made other changes in the terms of the lease, which show that he was not as ignorant about the text as he seems to imagine.

The testimony in regard to the change in the terms of the lease is not confined to the testimony of the plaintiffs; the son of defendant as a witness testified that changes were made in the contract of the lease by one of the plaintiffs at the instance of the defendant, his father.

There is another feature of this case to which we will allude in passing. Fraud was not pleaded by defendant. Oral statements of what transpired before or at the time that the contract was signed cannot be of great weight in opposition to a written contract. In such a case it must appear clearly that there was deceit or fraud. *Allen v. Whetstone*, 35 La. Ann. 846; *Watson v.*

Planter's Bank, 22 La. Ann. 14; *Moore v. Rush*, 30 La. Ann. 1157.

The testimony of defendant and of his son did not convince the jury.

The contract contained a promise to sell which defendant seeks to repudiate by the contention that it was not understood by him. The weight of the testimony shows that it was read to him.

Moreover if the defendant could read, it devolved upon him to read it; if he could not read then it devolved upon him to have it read to him, and to listen attentively while it was being read to him.

Defendant, through his learned counsel, says that the court refused to allow Price, one of the witnesses, to state that which was said to him by Reynold, another witness, at the time Price signed the instrument; that defendant and plaintiff were present.

On objection of plaintiff, the conversation between witnesses was properly excluded. The statements of the parties at the time were testified to by the witnesses and properly admitted in evidence. What was said as between the witnesses was not admissible, unless for the purpose of showing fraud or deceit which are not here alleged.

But defendant urges that the clause of promise to sell (option) was without consideration. The following decision of the subject is pertinent: A lease is in some respects consideration for a contract giving the lessees a right to purchase the property during the continuance of a lease. The option cannot be withdrawn by the lessor during that time. *Frank v. Hancock (Wyo.)* 77 Pac. 134, 67 L. R. A. 571.

There was by the terms of the agreement consideration for the option.

The offer to buy was made during the term of the lease, followed by a placing in default.

There is no question had the amount tendered been deposited, that it would have been at the expense and risk of defendant. Code Prac. arts 414, 415.

The defendant earnestly complains of mistakes committed by the judge in his charge to the jury, and on that account he asked that the case be remanded.

The error charged by defendant was that the court charged the jury that the filing of the suit itself was a sufficient placing in default; that the court also committed error in instructing the jury in regard to the waiver of tender.

The charge taken as a whole agrees in the main with our conclusion.

There is no necessity for this court to agree with all the views expressed by the district court in the charge.

If a verdict appears correct touching the facts the case will not be remanded in order to afford an opportunity to the court of first instance to remodel the charge as relates to law; moreover, when the evidence is be-

fore the Supreme Court, the error in the judge's charge nas no importance as it cannot affect the decision on appeal. Schlater v. Wilbert, 41 La. Ann. 406, 6 South. 127.

Again, on the same subject, although the judge may have charged improperly if the evidence could not authorize a different verdict it will be upheld. Stackpole v. Wickham, 7 La. Ann. 678; New Orleans, O. & G. W. R. Co. v. Lagarde, 10 La. Ann. 150; Starns et al. v. Hadnot et al., 45 La. Ann. 318, 12 South. 561; Howell v. Railroad Co., 22 La. Ann. 603; Bach v. Miller's Syndic, 16 La. Ann. 44; Regan & Balcom v. Express Company, 49 La. Ann. 1579, 22 South. 835.

We infer from the rulings of the district judge, of which there is written evidence, that he was not inclined to let the decision rest alone with the jury; that he followed the testimony; was familiar with the facts and agreed with the jury.

The finding comes to us, as we understand, with his special approval. True, nine of the jurors concurred in the verdict and three were of a different view. Under the circumstances it does not weaken the finding. The discussion resulted in a difference in which the preponderance was for plaintiffs.

We have arrived at the conclusion that the evidence before us is full enough to affirm the verdict and the judgment, and it follows that defendant's reconventional demand is rejected.

For reasons assigned, the judgment is affirmed.

(117 La.)

No. 15,891.

CAMPBELL et al. v. J. I. CAMPBELL CO.
(GILMER et al., Interveners).

(Supreme Court of Louisiana. Feb. 26, 1906.
On Rehearing, March 26, 1906. On Further Rehearing, June 18, 1906.)

1. PARTNERSHIP—WHAT CONSTITUTES.

Where officers and members of a mercantile corporation, created by the law of another state with a capacity to exist and do business only in certain named counties in that state, attempt to establish the corporation under another name in the state of Louisiana, the effect, so far at least as third persons are concerned, is the establishment of a mercantile partnership composed of the parties to such attempt, and where it appears that such partnership, in its own name, has acquired property and contracted debts, such property will be devoted to the payment, by preference, to the debts so contracted.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 56–58.]

2. MARSHALING ASSETS—CREDITOR HOLDING SECURITIES.

A creditor holding collateral security for his debt may be required to exhaust such security before being allowed to participate in the distribution of a common fund which is insufficient to pay in full the debts of the common debtor, and a reasonable time may be allowed him for the discussion of such security, during which the distribution of so much of the common fund as is

tentatively attributed to the payment of his debt may be suspended.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marshaling Assets and Securities, §§ 1–4.]

On Rehearing.

3. MARSHALING ASSETS—DISCUSSING COLLATERALS.

The two companies are separate and distinct.

One was the maker of a note and acceptor of drafts, and primarily liable. The other was the transferor and secondarily liable.

The creditor of each was not obliged to discuss the collaterals deposited by the latter in order to receive its proportional share of the assets of the former and insolvent concern.

4. TRIAL—DISMISSAL—WANT OF EVIDENCE.

An intervener who dealt with another corporation as its debtor, who fails to support its claim by proof, must be dismissed. Under the exceptional circumstances of this case, costs are charged to the mass.

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Dennis Miller, Judge.

Action by J. L. Campbell and others against the J. I. Campbell Company. A. Gilmer and others intervened. Judgment for plaintiffs, and certain defendants and interveners appeal. Amended and affirmed.

L. B. Moody and Winston Overton, for appellant First Nat. Bank of Houston. Pujo, Moss & Sugar, for appellants A. Gilmer, Litcher & Moore Lumber Co., Long Bell Lumber Co. and Continental Lumber Co. McCoy & Moss, for appellees Lake Charles Nat. Bank, Calcasieu Nat. Bank, Kelley, Weber & Co., Limited, George W. Ford, Charles Pecorina and D. A. Kelly. Sompayrac & Toomer, for appellee receiver. Coleman & Abbott, for appellees Campbell and others.

Statement.

MONROE, J. This matter comes before the court upon appeal from a judgment amending and homologating an account of a receiver and ordering the distribution of a fund in which the appellants, as creditors of the J. I. Campbell Company and of the Lake Charles Lumber Company, respectively, are asserting somewhat conflicting rights. The facts, as we find them, from the evidence in the record, are as follows, to wit:

The J. I. Campbell Company was incorporated, for the purposes of a timber business, in Harris county, Tex., in February, 1904, by J. I. Campbell, I. L. Campbell, and Y. W. McNeil. The charter provides that:

"The place of business * * * shall be at the city of Houston * * * but its saw mills, planing mills, and other factories may also be established in the counties of Montgomery, Tyler, Polk, and San Jacinto, in the state of Texas, and agencies for the disposal of its products may be established in the above counties, and in the following counties, in the state of Texas; Lampasas, Llano, Mason, McCulloch, Mills, San Saba, Bell, McLennan, Dallas, Limestone,

Galveston, Dewitt, and Lavaca. * * * The business of the corporation shall be managed by a board consisting of five directors, and the names and residences of those who are appointed for the first year are as follows: J. I. Campbell, I. L. Campbell, Y. W. McNeill, and A. F. Sharpe, Jr., all of Houston, and L. W. Campbell, of Dallas, Tex."

We infer that J. I. Campbell was the capitalist of the enterprise, and that I. L. and L. W. Campbell were his sons. Certain it is that the Campbells owned more than 95 per cent. of the stock of the company, and that, after the death of J. I. Campbell, which must have occurred soon after its organization, the affairs of the company were directed by I. L. Campbell and that Sharpe & McNeill, who seem to have been the only other stockholders, were employed by the company; the one as secretary, and the others as superintendent, or in some such position.

During the year 1904, I. L. Campbell concluded that it would be advisable to buy or lease a mill, and establish a branch, or agency, at Lake Charles, La., and he testifies that it was agreed between him and Sharpe that the latter should take charge of it, and should receive \$250 a month (being the same salary that he was getting in Houston) and 40 per cent. of the profits of the business. It was further agreed that the business at Lake Charles should be conducted under the name of the "Lake Charles Lumber Company"; the purpose, as testified to by Campbell and Sharpe, being to keep the business separate merely as a matter of bookkeeping. W. H. Norris, a lumber man of considerable experience, who is at present one of the receivers of the J. I. Campbell Company, in Texas, assigns another possible reason. Being asked whether it is usual for such corporations to do business at different places under different names, he testifies that it is a common practice in Oklahoma, Kansas, and Texas, and, being asked, "Why is this done?" he testifies:

"Sometimes they do it for a blind, they do not want people to know who owns the business; and sometimes the farmers are prejudiced against corporations, and they just use a local name, putting a local man in there as manager."

Beyond this the evidence in this record shows conclusively that by such an arrangement; i. e., the establishment under different names of what were held out to be different business concerns, independent of each other, the parties concerned were enabled to obtain a credit to which they are not entitled. Thus, the Lake Charles National Bank, having already discounted more or less paper for it, refused to discount a particular offering made by the Lake Charles Lumber Company, whereupon Sharpe, the manager, informed the bank that the company was perfectly solvent, and furnished what purported to be a statement of its assets and liabilities, showing a balance of assets amounting to \$6,480.89, and, among its liabilities, an indebtedness to

the J. I. Campbell Company amounting to \$12,293.48. The cashier of the bank testifies:

"It was my understanding that the Lake Charles Company was a separate business from the J. I. Campbell Company."

Being asked from whom he obtained the information which led him to that understanding, he answers:

"I was talking to Mr. Sharpe last fall with regard to selling the company some timber lands in which I am interested. I got the understanding from him that the Lake Charles Company belonged to or was run by himself and Mr. Campbell."

And similar representations were made by Campbell to the First National Bank of Houston, Tex., which institution, having already loaned to the J. I. Campbell Company a large amount of money on mortgage security, was requested to discount for said company certain acceptances of the Lake Charles Company, which request was granted upon the faith of a statement, furnished by I. L. Campbell, purporting to be a statement of the affairs of the Lake Charles Company, showing a balance of assets amounting to \$8,359.34, and also showing that said company was a separate concern from and was indebted to the J. I. Campbell Company in the sum of \$27,737.13. Testifying concerning these transactions, the cashier of the First National Bank says:

"My information was that it [the Lake Charles Company] was a separate concern."

Being asked whether at the time that the Lake Charles Company paper was discounted, the bank believed that company to be a separate concern, he answers, "That was our belief." Being asked whether the bank relied on that belief in accepting the paper and discounting it, he answers:

"We would not have accepted them [the acceptances] if we had known they were the same concern, because the amount [referring to the amount which the bank had already loaned to the J. I. Campbell Company] was already excessive."

There were, possibly, some persons who were informed of the true condition of affairs, but they were few and far between, and they are not among those who are now before the court claiming as creditors. Upon the other hand, as, in addition to the particular representations made to the two banks, as stated, the Lake Charles Company set itself up in business, bought and sold, employed labor, issued commercial paper, borrowed money, kept bank accounts, etc., in that name; it was commonly accepted as an independent concern, the relations of which to the J. I. Campbell Company were unknown, and not inquired into, and we entertain no doubt that it was the purpose of those by whom it was started upon its business career that it should be so accepted. On February 14, 1905, the J. I. Campbell

Company was placed in the hands of a receiver, by the district court of Harris county, Tex., and on the following morning Sharpe caused an entry to be made on the books of the Lake Charles Company as of date January 23d, crediting himself, and the J. I. Campbell Company, with 49 per cent. and 51 per cent. respectively with certain fictitious profits—his statement as a witness being, that the profits of the Lake Charles business were to be divided in that proportion, and not in the proportion of 40 per cent. and 60 per cent., as stated by I. L. Campbell. On February 17, following, I. L. & S. M. Campbell filed a petition in the district court for the parish of Calcasieu, alleging that they own more than 95 per cent. of the stock of the J. I. Campbell Company, that said company had been incorporated under the laws of and had been engaged in business in Texas; and that it had also been engaged in business in Calcasieu, under the name and style of the "Lake Charles Lumber Company"; that it had been placed in the hands of a receiver in Texas; and that, being largely indebted to citizens of Calcasieu, it was necessary that a receiver be appointed "to take immediate possession of all property and assets of said corporation and said Lake Charles Lumber Company situated in the parish of Calcasieu." To this petition the J. I. Campbell Company, through I. L. Campbell, its president, and the Lake Charles Lumber Company, through A. F. Sharpe, manager, answered, admitting all that is alleged, and the court thereupon appointed S. C. Tevis "receiver of the J. I. Campbell Company and the Lake Charles Lumber Company," and, thereafter the receiver, having reduced the assets which had come into his hands to cash, filed an account showing cash on hand, \$19,939.02, and proposing to distribute the same among privileged creditors, holding claims to be paid in full amounting to \$9,904.13, and ordinary creditors, holding claims to be paid pro rata amounting to \$15,574.83. In the meanwhile, i. e., between the date of the appointment of the receiver and that of the filing of the account, certain persons and corporations had filed interventions which were converted into or regarded as oppositions, on the filing of the account, to which were added the oppositions of other persons and corporations, and, after trial upon the issues thus presented, there was judgment decreeing that the account be amended in certain particulars, as the result of which the privileged debts, not including the costs of court, are recognized as amounting to \$8,651.30, and the supposed balance of the fund on hand is ordered to be distributed pro rata among certain ordinary creditors holding claims for recognized amounts—the judgment concluding as follows, to wit:

"It is further ordered that the pro rata share coming to each of the above named ordinary creditors out of the aforesaid sum of \$11,287.72 ordered pro rated among them, be paid to each one of said creditors excepting the following

Alex Gilmer, Continental Lumber Company, Lutchter & Moore Lumber Company, and Long Bell Lumber Company, and it is ordered that Samuel C. Tevis, receiver, retain in his hands the pro rata of said sum allotted to the debts of each of said last-named creditors until final judgment on distribution of assets or proceeds of assets in suit No. 35,694, in the district court of Harris county, Tex. Fifty-fifth judicial district, entitled 'I. L. Campbell et al. vs. J. I. Campbell Company et al.' It is further ordered that if creditors residing in the state of Louisiana are permitted to share with all other creditors according to rank, without discrimination as to residence or domicile of said Louisiana creditors who file their claims in accordance with law in said proceeding, then, the pro rata share allotted to the debts of Alex Gilmer, Continental Lumber Company, Lutchter & Moore Lumber Company, and Long Bell Lumber Company, shall be paid to each of said creditors; otherwise, the pro rata share allotted herein to each of said for named creditors shall be distributed pro rata among the other ordinary creditors recognized in this judgment. It is further ordered, adjudged, and decreed that the opposition of the First National Bank of Houston, Tex., be rejected and dismissed at its cost, and that the opposition of the H. W. Miller Grocery Company, be carried as a privileged creditor, be rejected and dismissed at its costs."

The aggregate amount of the debts of the ordinary creditors thus recognized is \$81.16. The claims of Alex Gilmer, Continental Lumber Company, Long Bell Lumber Company, and Lutchter & Moore Lumber Company amount to \$24,025.29. The claims of the First National Bank of Houston, Tex. (which is rejected) is for \$6,000. The opponents thus named have appealed, and have also the Calcasieu National Bank, the Lake Charles National Bank, and Kelley Weber & Company, Limited, whose claims are recognized by the judgment.

The claims of Alex Gilmer, Continental Lumber Company, Long Bell Lumber Company, and Lutchter & Moore Lumber Company arise out of business, between the J. I. Campbell Company and those who transacted elsewhere than in Louisiana with which the Lake Charles Lumber Company had no connection. The claim of the First National Bank of Houston arises out of the discount, at Houston, Texas, for J. I. Campbell Company, of commercial paper issued by the Lake Charles Lumber Company. The claims of the other appellants arise out of transactions between those opponents and the Lake Charles Lumber Company (whether directly or indirectly) at Lake Charles, La. The fund to be distributed consists, respectively, of the proceeds of assets sold and standing in the name of the Lake Charles Lumber Company."

Opinion.

Under the law of its creation, the Campbell Company was confined, as principal place of business, to Houston as to its saw mills, planing mill, and factories, to the counties of Montgomery, Tyler, Polk, and San Jacinto, and as agencies for the disposal of its produ-

the counties mentioned, and to those of Lampasas, Llano, Mason, McCulloch, Mills, San Saba, Bell, McLennan, Dallas, Limestone, Galveston, Dewitt, and Lavaca, all in the state of Texas. Telephone Co. v. Railway Co., 108 La. 691, 32 South. 958. Under the Constitution and statute law of Louisiana (even though it were so authorized by the law of its creation), the corporation was prohibited from engaging in business in this state save upon compliance with certain conditions, which were not complied with. Const. arts. 284, 273; Acts No. 149, p. 188, of 1890.

Under the law of its creation, as also under the law of Louisiana, the company was without legal capacity to engage in business anywhere under any other name than that by which it was established; the name of a corporation being as essential to its existence as any other franchise conferred upon it.

It follows from these premises that if all the officers and stockholders of the company in question had agreed to establish for it, under its proper name, places of business, mills or agencies, in territory other than that specified in the charter, or had agreed to do so for it, under some other name, a corporation of business, mill, and agency (all in territory so specified, or in any other, particularly, in territory the law of which prohibits such establishment, the agreement would have been impossible of legal execution, and the result of the attempt to execute it would have been, the establishment of a business concern, or legal entity, the obligations of which, and of the members of which, to third persons dealing with it, would have been those of commercial partners. Cincinnati Cooperage Co v. Bate et al. (1874) 26 S. W. 538, 49 Am. St. Rep. 300, and the authorities there cited; Baldey & Light v. Brackenridge, 39 La. Ann. 662, 2 South. 410; Williams v. Hewitt, 47 La. Ann. 17 South. 496, 49 Am. St. Rep. 394; Knapp v. Knapp et al., 48 La. Ann. 1148, 17 South. 674. And the proposition so stated is equally true whether the agreement mentioned should have included all or only a portion of the officers and stockholders of the corporation. In the instant case, therefore, when J. I. Campbell, officer and stockholder of the J. I. Campbell Company, proposed to A. F. Sharpe, officer (or employé) and stockholder of the same company, the establishment of a business enterprise at Lake Charles, La., to be conducted as the business of the J. I. Campbell Company, but under the name of the Lake Charles Lumber Company, and the proposition was accepted and acted upon, the effect was the creation of an unincorporated juridical entity, composed of the stockholders and officers of the J. I. Campbell Company who participated in or assented to the agreement; and, whether A. F. Sharpe is to be regarded as also occupying the position of an employé, whose compensation was to be measured in part by the

profits of the business, is immaterial, since the litigants before the court are not so much interested in the personnel of the firm as in the facts that it existed, and that it acquired property and contracted debts. For present purposes, the things that are important are that the Lake Charles Lumber Company was established in a commercial business; that it acquired property, and contracted debts; and that its creditors are demanding to be paid from the proceeds of the property so acquired, by preference over certain creditors of the J. I. Campbell Company, who assert that the Lake Charles Company and the J. I. Campbell Company are one and the same. For the reasons which have been stated, however, that assertion is not and cannot be made good. The proposition that a corporation, which, by the law of its creation, has a particular name, and, as to its existence and business, is confined to certain counties in a particular state, can masquerade under another name, in foreign territory, and still preserve its identity and existence as a corporation, is untenable. Beyond this, it does not much matter for the purposes of the present case, what may be the legal relations existing between the two concerns. If the J. I. Campbell Company were held to be a partner in the Lake Charles Lumber Company (a difficult, if not impossible, supposition), the creditors of the partnership must be paid from the partnership assets before anything can inure to the partners from which their individual creditors can be paid. If the J. I. Campbell Company advanced to the individuals who established the Lake Charles Company, the funds with which that concern started into business, it is the creditor of those individuals, and not of the company. If the J. I. Campbell Company advanced money to the Lake Charles Company after the company last mentioned was formed, it is the creditor of that company; but, it is not here asserting such rights. If it could be regarded as having created and endowed the Lake Charles Company merely that the latter might act as its agent, it, nevertheless, brought into existence an independent juridical personage, capable of acquiring property and of contracting debts, and whose property must go, by preference to the payment of the debts so contracted. What may be the rights of the creditors of the Lake Charles Company, quoad any balance that may be due them after the property of the company has been exhausted, as against the J. I. Campbell Company (regarding the latter as an undisclosed principal), is a question that need not be here considered.

Our conclusion, then, is that the money offered for distribution, being the proceeds of property acquired and held by and in the name of the Lake Charles Lumber Company, a commercial partnership, should be devoted (after paying the costs of this receivership) to the payment of the debts contracted by and in the name of said partnership,

and that the creditors of the J. I. Campbell Company are not entitled to participate in such distribution; from which it follows, that the demands for recognition as creditors of Alex Gilmer, the Continental Lumber Company, the Lutch & Moore Lumber Company, and the Long Bell Lumber Company should be rejected, and that the similar demand of the First National Bank of Houston should be recognized and allowed. This bank, however, holds in pledge to secure the amount here claimed (together with a much larger amount due by the J. I. Campbell Company, the pledgor), collaterals for a large amount, and we are of opinion that it ought to be required to exhaust that special resource before being allowed to deplete the fund in court, which is the common resource of all the creditors.

Proceeding upon this idea, the judge a quo rejected the demand of the bank, entirely, but we are not satisfied that the collateral held by it will pay its debt in full, and if there should be a balance remaining due, after the discussion of the security, the bank ought to be allowed to participate in the distribution of the common fund, since it did not cut itself off therefrom by taking security which its co-creditors failed to take. The learned counsel for the receiver argues that because the bankruptcy act (July 1, 1898, c. 541, § 57, 30 Stat. 560 [U. S. Comp. St. 1901, p. 8443]), requires the secured creditor to surrender his security or stay out of the concursus, the same rule should be applied here. We think not; for the reasons (1) that the security was not given to the bank by the Lake Charles Company, but by the J. I. Campbell Company; and (2) that such is not the rule of our law under which the creditor is entitled to hold his security until his debt is paid, subject to the right of the creditors or the syndic of the common debtor to force a sale thereof (provided the property bring enough to satisfy the debt for which it is pledged), and thereby secure the surplus. *Renshaw v. Creditors*, 40 La. Ann. 37, 8 South. 403; *Receiver v. Syndics*, 52 La. Ann. 1613, 28 South. 158. In the instant case, the pledged property consists of notes secured by mortgage on real estate in Texas, which real estate is the property of certain corporations; the stock in which is owned by the J. I. Campbell Company, or its members. The creditors of the Lake Charles Company can, therefore, hardly force the sale; but we imagine that the bank may be able to do so, and we are of opinion that a reasonable time ought to be allowed for that purpose.

For the reasons thus assigned, it is ordered, adjudged, and decreed that the judgment appealed from be amended in so far as that it is now held, for all the purposes of the issues involved in the present appeal; that the fund offered for distribution is

to be regarded as belonging exclusively to a commercial partnership known as the "Lake Charles Lumber Company," and, after paying the costs of this receivership, as being liable for the debts contracted by and on behalf of that concern; that said judgment be further reversed and amended in that the demands of Alex Gilmer, the Continental Lumber Company, the Lutch & Moore Lumber Company, and the Long Bell Lumber Company, are now rejected, and the amounts allowed those interveners are now stricken from the account; that said judgment be further amended in that the First National Bank of Houston, Tex., is now recognized as an ordinary creditor of the Lake Charles Lumber Company in the sum of \$6,000, and the receiver is ordered to place it on his account for that amount, subject, however, to the following conditions, to wit: That the pro rata amount which may be attributed to the debt in question be retained by the receiver for such time as may, in the opinion of the trial judge afford the bank reasonable opportunity to realize upon the collateral held by it as security for said debt and for debts due by the J. I. Campbell Company; it being the purpose and meaning of this decree that the bank shall discuss said collateral and appropriate the same to the payment of its debt before being allowed to participate in the distribution of the common fund now in the hands of the receiver, and that it shall then so participate only for such balance as may be due.

It is further adjudged, and decreed, should the application of said collateral to the payment of its debt be delayed, through the fault or inaction of said bank, beyond such reasonable limits, then, that the pro rata of the fund in the hands of the receiver attributable to said debt, be distributed among the other creditors of the Lake Charles Lumber Company.

It is further adjudged, and decreed that the judgment appealed from be further amended, in that it is now ordered that, after paying the claims recognized by said judgment as privileged, and after paying the costs of this receivership, the receiver distribute the balance in his hands (whatever that balance may be) among the ordinary creditors, in the manner directed by said judgment as hereby amended.

It is further adjudged and decreed that the costs of this appeal be borne by the mass.

On Rehearing.

In this case, it is ordered that the judgment heretofore rendered be now set aside, and that a rehearing be granted upon the questions: (1) Whether the Perkins-Miller Lumber Company, Limited, should be recognized as a creditor of the Lake Charles Lumber Company; and (2) whether any conditions, other than such as are imposed with

respect to the payment of the claims of the ordinary creditors, in general, of the Lake Charles Lumber Company, should be imposed with respect to the payment of the claim of the First National Bank of Houston, Tex., and, if so, what conditions should be so imposed.

On Rehearing.

BREAUX, J. After having considered the application for a rehearing, we determined to reopen the case to further consider the questions whether the First National Bank of Houston should share proportionately with other creditors the assets of the Lake Charles Lumber Company; and, in the second place, to consider whether the Perkins-Miller Lumber Company, Limited, is the creditor of the Lake Charles Lumber Company.

With reference to the first question stated, the fact remains as heretofore stated, to wit: The Lake Charles Lumber Company is a different corporation from the I. C. Campbell Company.

It being settled that the Lake Charles Lumber Company was an independent firm, it remains, as a further fact, that it made its promissory notes to the order of the I. C. Campbell Company. The I. C. Campbell Company transferred them before maturity to the First National Bank of Houston.

It is further in evidence that the I. C. Campbell Company, Limited, drew drafts against the Lake Charles Lumber Company. They were accepted by the drawee, who became thereby the acceptor.

Before maturity, these drafts were transferred by the I. C. Campbell Company to the First National Bank of Houston, so that notes and drafts went into the hands of the First National Bank in due course.

The bank now alleges that the Lake Charles Company, as maker of the notes in question, and as acceptor of the drafts, is primarily its debtor; that these notes were deposited and pledged by the I. C. Campbell Company, as security for valid consideration.

The receiver of the Lake Charles Lumber Company insists that the bank should have first discussed the notes it holds in pledge, and that until then, it cannot be permitted to share in any part of the proceeds of the insolvent; i. e., the Lake Charles Lumber Company.

It will be borne in mind that the paper held by the bank against the Lake Charles Lumber Company was deposited by the I. C. Campbell Company, pledgor.

No question but that the Lake Charles Lumber Company (an independent firm as heretofore held) is liable before any other debtor.

The collateral paper before mentioned secures the bank in the order of preference before mentioned.

The bank cannot very well be called upon to discuss its collateral security at all. The bank, as the holder, is free from any obli-

gation of deducting the amount to be realized on these securities as between it and the lumber company.

In the vicissitude of business, strangely enough, the bank is the holder of paper primarily due by an apparent unknown concern; but it may be after all that the officers of the bank had foresight enough to accept collateral security, so as to secure the obligation of the I. C. Campbell Company as transferors, and retain a primary security against the Lake Charles Lumber Company. In other words, it dealt with the Lake Charles Lumber Company as primarily indebted, and the I. C. Campbell Company, as secondarily indebted, to it, with collateral securing the latter's indebtedness, and thereby the whole indebtedness was secured.

It remains that the bank is protected by the commercial law.

The collaterals have been deposited by the I. C. Campbell Company to secure its own indebtedness, separate and distinct from that of the Lake Charles Lumber Company. This debt was not contracted by nor for the account of the Lake Charles Lumber Company.

We leave the question of this indebtedness and security to take up the claim of the Perkins, Miller Lumber Company, Limited.

There is a failure of proof as relates to this company; it has not made good its claim; the evidence does not show that it sold lumber to the Lake Charles Lumber Company; it dealt with the I. C. Campbell Company, and cannot be permitted to exercise its right as a creditor against both concerns. It has already chosen its debtor, the I. C. Campbell Company; and it will have to look to it for whatever amount it may be entitled to. Under the limitations of our judgment heretofore rendered, we do not think we should look into the issue further.

That of costs must remain as heretofore decreed.

It is therefore ordered, adjudged, and decreed that the right of the First National Bank of Houston, Texas to share in the assets of the Lake Charles Lumber Company, without discussing the collateral the said bank holds of the I. C. Campbell Company, Limited, is recognized and made executory.

It is further ordered, adjudged, and decreed that the First National Bank of Houston is to take part with the ordinary creditors of the Lake Charles Lumber Company on the same terms and conditions as the other creditors of the Lake Charles Lumber Company, to wit: To the amount of its claim of \$6,000, with legal interest from maturity, to wit: It is to be paid its pro rata on the full amount of its said claim, same as other creditors.

It is further ordered, adjudged, and decreed that the opposition and intervention of the Perkins-Miller Lumber Company, Limited, be, and the same is, hereby rejected; and that the mass pay the costs of its opposition.

It is further ordered, adjudged, and de-

creed, that our original judgment be reinstated and made the judgment of this court, save and except to the extent that it is amended and changed by this amended decree.

(117 La.)

No. 15,765.

CAMPBELL et al. v. J. I. CAMPBELL CO.
(GILMER et al., Interveners).

(Supreme Court of Louisiana. June 18, 1906.)

APPEAL—LAW OF THE CASE—COSTS.

With reference to costs of intervention and opposition, the rule heretofore laid down must remain. They are assessed against the receiver of the Lake Charles Lumber Company.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358-4368.]

(Syllabus by the Court.)

On rehearing.

For former opinion, see 41 South. 696.

BREAUX, C. J. In matter of the two cases, 15,765, and the other 15,891, 41 South. 696, touching costs, it has been decided in the first decision handed down that they should be paid by the receiver of the Lake Charles Lumber Company, insolvent. The questions involved, since decided, have become the law of the case. There remains only the question as to who should pay the costs. The costs of their opposition must be paid by the receiver.

It is therefore ordered, adjudged, and decreed that our decree remain unchanged as to costs, including the Perkins-Miller Lumber Company.

Their opposition and intervention are dismissed at costs of the mass.

With this addendum our former decree remains unchanged.

(117 La.)

No. 16,102.

STATE v. JAMES COUNTY.

(Supreme Court of Louisiana. June 18, 1906.)

1. LARCENY—ARREST OF JUDGMENT—DEFECTIVE VERDICT.

Defendant was indicted under two counts: (1) For burglary; (2) for larceny. In the count for larceny he was charged with having stolen certain articles of clothing valued separately and collectively. The total value of the articles stolen being charged to have been in the aggregate \$41. The jury returned a verdict: "We the jury find the accused 'Guilty of larceny.'" No objection was made to the form of the verdict until after the jury had been discharged.

Defendant unsuccessfully moved to arrest the judgment on the ground that he could not be sentenced under that verdict, as the jury had found him "guilty of larceny," and the value of the property stolen would have to be taken by intentment and nothing could be so taken against him.

Held, the court did not err. The indictment charged the defendant with having stolen arti-

cles to the value of \$41. The jury found him guilty of larceny which was the crime charged. The verdict being an unqualified one, obviously and necessarily referred to the charge as it was made in the indictment of having stolen \$41. Had the jury intended to depart from the charge as made, it would have brought in a modified or special verdict. If the accused supposed that an error had been committed as to substance, he, being present, should have taken some step at that time to have the fact of error ascertained and the verdict modified. He had no right to remain silent until after the jury had been discharged.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 205.]

2. CRIMINAL LAW—APPEAL—PRESUMPTIONS—TRIAL—COMMUNICATIONS BETWEEN DISTRICT ATTORNEY AND WITNESSES UNDER EXCLUSION.

The fact that by consent of counsel for the state and the defendant, the witnesses for both sides had been ordered to be kept where they could not hear the testimony given on the trial, did not have the effect of preventing the district attorney communicating with the state witnesses. It will not be presumed that the state's officer, while holding such communication, was guilty of any misconduct.

3. SAME—REMARKS OF COUNSEL.

The remarks of the district attorney in his argument to the jury were not prejudicial to the accused.

(Syllabus by the Court.)

Appeal from Fifth Judicial District Court, Parish of Winn; George Wear, Judge.

James County was convicted of larceny, and appeals. Affirmed.

Wallace & Wallace, for appellant. Walter Guion, Atty. Gen., and Orin Medicus Grisham, Dist. Atty (Lewis Guion, of counsel), for the State.

Statement of Case.

NICHOLLS, J. The defendant was indicted under two counts: First, for burglary; and, second, for larceny.

In the count for larceny he was charged with having stolen certain described articles of clothing valued separately and collectively, and amounting in the aggregate to \$41.

The jury returned a verdict against him as follows:

"We the jury find the accused guilty of larceny."

Defendant filed a motion for a new trial on the ground that the verdict of the jury was not responsive to the law and the evidence adduced on the trial. The motion was overruled. Subsequently, suggesting that the verdict of the jury rendered in the case charging him with larceny was not borne out by the law and the testimony, and was not such a judgment as he could be sentenced under to any fine or imprisonment whatever; that the finding of the jury simply finds him guilty of larceny, and that he could not be sentenced under such judgment as the value of the property stolen would have to be taken by intentment, and nothing can be so taken against the accused as it was contrary to law—he prayed that the judgment of sentence be arrest-

ed, and the verdict of the jury set aside, and the accused be granted a new trial.

The court overruled the motion, and sentenced the defendant to hard labor in the state penitentiary for two years; the judgment reciting that he had been convicted of the crime of larceny of property of a value more than \$20.

It appears from the transcript that, at the request both of the prosecution and the defense, the witnesses in the case were ordered to be kept separate. It is urged by defendant, through a bill of exception, that after the testimony for the state had been introduced, and that of the defendant was being taken, it was testified to by three witnesses for the defense that the principal witness for the prosecution stated that Cupp, a deputy sheriff had agreed, upon the payment of \$15, to get him out of the trouble; the said witness having been first charged along with the accused in the commission of the offense, and that the said Cupp would return back to him \$5 of the money if he would testify in the case against County, the accused. The district attorney went to the said witness, Cupp, and informed him that the witnesses had sworn to this state of facts, and Cupp was thereby put on his guard, and was afterwards brought back and placed upon the stand to rebut the statement referred to; that defendant objected to his being sworn by reason of the said facts and of his having received the information stated while he was under the rule of the court; that, thereupon, the district attorney admitted that he had had such conversation with Cupp, but insisted upon his being sworn; that the court overruled defendant's objection and permitted Cupp to testify, and defendant reserved a bill.

The bill of exceptions being submitted to the district attorney, he stated that the facts set up therein as to his having had a conversation with the witness Cupp while under the rule, and then offering him to rebut evidence about which he had talked to him, was correct, but the other statements and deductions in the bill were only surmises.

The judge in his per curiam of the bill says:

"The counsel for the defendant assumes that, because the counsel for the state spoke to his witness Cupp, that he must necessarily have told him what defendant's witnesses had testified to, and thereby placed the witness Cupp on his guard, intimating that the counsel for the state had or would have his witness prepared to contradict the statements of the defendant's witnesses whether such contradicting the statements were true or untrue. This is a mere assumption on the part of defendant's counsel, with no evidence whatever to sustain it. That the counsel for the state had the right to talk with their witnesses even though the witnesses were under the rule of the court, there can be no question. The rule invoked by defendants applies to witnesses who have acquiesced, who, on violation of the rule, subject themselves to punishment, but it is no reason for the exclusion of their testimony. As was said by the

Supreme Court in the case of the State v. Revelle, 34 La. Ann. 382, 44 Am. Rep. 436: 'The judge did not err, as charged in allowing one of the state witnesses to remain in the courtroom after he had testified, and after the judge had ordered all of the witnesses in the case to be separated. All orders touching the separation of witnesses are peculiarly within the discretion of the judge, with which the appellate court will not interfere. 1 Bishop on Crim. Proc. (2d Ed.) §§ 1086-1088.' See, also, the case of the State v. Gregory et al., 33 La. Ann. 737."

Defendant complains that the district attorney in his argument to the jury should have used the following language:

"There are three modes of determining a solution of this case: First, the testimony from the mouths of the witnesses; second, the circumstances; third, the lies which Jim County, the accused, has sworn to."

In the bill it is stated that defendant's counsel objected to this language, and the court sustained the objection after the statement had gone to the jury, and instructed the jury to disregard what the district attorney had said.

The bill states that exception was taken to the statement, for the reason that it was bound to have its effect with the jury, and it would be hard to eradicate it from their minds, even if the court had instructed them to disregard it; that it was not permissible to use such language on the trial of a criminal case in the presence of the jury.

In the per curiam to the bill, the judge says:

"It is true that the language charged in the bill of exception was used by the district attorney; it is also true that counsel for defendant did object to the language, 'third, the lies which Jim County has sworn to.' But the district attorney, at the same time, stated to the jury that he relied upon the evidence to establish his proposition, and that if it did not do so they were to find what was proven, and not take his assertion for it.

"That while the court was of opinion that the remark of the district attorney quoted above had no prejudicial effect upon the jury, nor that any injury had been done the accused by said remark, out of abundance of caution, it instructed the district attorney to refrain from the use of such language, and upon its own motion and without request of the defendant it instructed the jury to disregard the remark of the district attorney, and not to consider it.

"The accused was indicted for burglary and larceny charged in the same bill, in separate counts, and was tried upon both counts. The evidence in the case, the facts and circumstances shown on the trial were sufficient in the opinion of the court to have warranted the jury in finding a verdict against the accused of guilty on both counts of the indictment. The jury, however, found the accused guilty of larceny, thereby negating the idea that they were influenced or prejudiced by the remark complained of.

"It was a deduction of the district attorney drawn from the evidence. Whether or not correctly drawn, the jury were capable of and had the right to determine.

"These are matters left largely within the discretion of the trial judge, and the court is of the opinion that no injury was done. See State v. Meche, 114 La. 231, 38 South. 152; State v. Young, 114 La. 686, 38 South. 517."

Opinion.

The complaint urged to the form of the verdict of the jury is not well grounded. There were two counts to the indictment: One for burglary; the other for larceny. No objection was raised as to the indictment, and none as to the verdict until after the jury had been discharged. When the jury determined to acquit the accused upon the first count, and to convict him upon the second, it properly declared that "it found him guilty of larceny," which was the crime which was charged against him in the second count. The verdict being an unqualified one of "Guilty of larceny" obviously and necessarily referred to the charge as it was made in the indictment, which was that the accused had stolen \$40. Had the jury intended by the verdict to depart from the indictment, it would have brought in a modified or special verdict.

The "form" of the verdict being unobjectionable, if the accused supposed that an error had been committed as to substance he (being present when it was returned) should have taken some step at that time to have the fact of error ascertained and the verdict modified. He had no right to postpone taking action until after the jury had been discharged.

We find no error in the ruling of the court in permitting the witness Cupp to testify. The order of a court ordering the witness to be kept out of the courtroom where they would be unable to hear the testimony as is given, does not extend so far as to prevent the district attorney from holding communication with the state witnesses. It cannot be assumed that the state's prosecuting officer should have made use of communication with them for an improper purpose. Besides, the state should not be made to lose the benefit of the testimony of a witness who may have been guilty of indiscretion, imprudence or even fault. The most which should result from a violation of the court's order would be to subject the witness himself to punishment and to affect the weight of his testimony when given.

We find no reversible error in the remarks made by the district attorney. The court did all that it could do under the circumstances even if the remarks of the district attorney were objectionable. We have no reason to suppose that they worked any injury to the accused. There is nothing complained of which would warrant a reversal of the judgment appealed from, and it is hereby affirmed.

SWEETSER et al. v. LADD et al.

(Supreme Court of Florida, Division A. July 17, 1908.)

APPEAL—REVIEW—FINDINGS OF FACT.

Where the testamentary capacity of a testatrix and alleged undue influence over her in making a will are adjudged by the county judge on evidence taken before him, and the will is sustained for probate, and such adjudication is, on appeal, affirmed by the circuit court, and the evidence, without reference to the burden of proof, fully sustains the adjudication in favor of the validity of the will, this court will not, on appeal, disturb such adjudications. (Syllabus by the Court.)

In Banc. Appeal from Circuit Court, Duval County; Rhydom M. Call, Judge.

Action by Charles H. Sweetser and others against Simeon Ladd and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Alex St. Clair-Abrams and Gibbons & Maxwell, for appellants. Axtell & Rinehart, for appellees.

PER CURIAM. Mrs. Abbie R. Dodge, a childless widow, died in Jacksonville on the 28th day of March, 1904. By a will executed January 22, 1903, after making specific bequests to various relatives, she devised the rest of her large estate, which she had acquired chiefly, if not wholly, by her own efforts, to A. M. MacDonald, who had been for several years the pastor of her church. The will was executed in proper form and was duly probated by the county judge of Duval county, Fla. A petition was filed by certain of her heirs, praying the revocation of the will, alleging that the testatrix was mentally incapable of executing a will and that the will was procured by the undue influence of MacDonald. Voluminous evidence was taken upon the issues thus raised, and the county judge denied the petition. An appeal was taken to the circuit court for the Fourth judicial circuit, and this action was affirmed. The contestants thereupon appealed to this court and pray a reversal of both courts.

Irrespective of where the burden of proof may lie in such cases, and blotting out the fact that two capable judges, who are probably well acquainted with the majority of the witnesses in the case, one of whom had them before him, have separately upheld the will as against the assaults made upon it, we are confident, after a most careful study of the record, not only that Mrs. Dodge had at the time of making the will the requisite mental capacity, but that her mind was above the average in strength and clearness and that she was not unduly influenced by Mr. MacDonald. For the courts to set aside a will upon the facts in this record would be to unduly impair the power given by the Legislature to make wills.

We find no reversible error in the admission or rejection of evidence. A broad—in

41 SO.—45

fact, a too liberal—latitude was allowed the contestants in the introduction of their evidence; but as to this they cannot complain.

Had the courts found other than they did, we would have felt called upon to interfere; but, as they found correctly, the decree of the circuit court, affirming the order or decree of the county judge, is itself affirmed.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

STATE ex rel. ELLIS, Atty. Gen., v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida. July 3, 1908.)

1. CARRIERS—UNJUST DISCRIMINATION.

Where a railroad company, a common carrier, is engaged in voluntarily transporting and delivering between stations on its line employees and freight for one incorporated public telegraph company and refuses similar services to others, without giving sufficient excuse for such refusal, the railroad company as a common carrier is guilty of unjust discrimination, and may be compelled to perform like services, for a reasonable compensation, for another incorporated public telegraph company, even though the service being voluntarily rendered is under a contract, when it is not shown that such service differs from that performed by the railroad company as a common carrier for other shippers except as to delivery between stations.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 21-24, 901-905.]

2. SAME—POWER OF RAILROAD COMMISSIONERS.

Where a railroad company, as a common carrier, renders services to one corporation, so as to enable it to serve the public, and, without sufficient excuse, refuses to render similar services to another corporation lawfully authorized to likewise serve the public, it is an unjust discrimination, which the railroad commissioners have the power under the Constitution and laws of this state to make just and reasonable rules and regulations to prevent.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 14-20.]

3. CONSTITUTIONAL LAW—RULES OF RAILROAD COMMISSIONERS—PRESUMPTIONS.

Rules and regulations made by the railroad commissioners to prevent unjust discriminations or other abuses by railroad companies are by law deemed and held to be prima facie reasonable and just; and, in the absence of a showing of unreasonableness, the enforcement of such rules and regulations against a railroad company will not, of itself, be a taking of property without due process of law, or deprive such railroad company of the equal protection of the laws.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 700, 701, 832, 834.]

4. CARRIERS — CONTRACTS FOR TRANSPORTATION.

A contract for transportation made by a railroad company is subject to the provisions of the Constitution and laws existing when the contract is made.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 220.]

(Syllabus by the Court.)

In Banc. Application by the state on the relation of W. H. Ellis, Attorney General, for a writ of mandamus to the Atlantic Coast Line Railroad Company. Demurrer to return sustained, and writ awarded.

See 40 South. 875.

An alternative writ of mandamus upon the relation of the Attorney General issued from this court (41 South. 529) against the Atlantic Coast Line Railroad Company to enforce an order of the railroad commissioners of the state under the provisions of chapter 4700, p. 76, Acts 1899. The alternative writ states that upon complaint, notice of hearing, failure to appear, and after consideration, the railroad commissioners did find and determine that the Atlantic Coast Line Railroad Company was guilty of an unjust discrimination by transporting and distributing for the Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire along said railroad line in this state, and by refusing to perform like services for any and all other telegraph and telephone companies, in violation of chapter 4700 of the Laws of Florida; that the railroad commissioners did thereupon order and adjudge that such unjust discrimination be discontinued and that said Atlantic Coast Line Railroad Company be required to haul and distribute between its stations, on and along its line of railroad in the state of Florida, for any and all telegraph and telephone companies, their men, wire, poles, and other material, for the erection, maintenance, operation, repair, construction, and reconstruction of their lines of wire, and that the said Atlantic Coast Line Railroad Company for such services performed and rendered may charge certain rates fixed and promulgated by a specified general order of the railroad commissioners; that the Postal Telegraph Cable Company, a corporation, having condemned and acquired a right of way and easement to construct a line of poles and wires upon the right of way of the Atlantic Coast Line Railroad Company, applied to and demanded of the said Atlantic Coast Line Railroad Company to haul and distribute between its stations on and along its line of railroad, between the city of Jacksonville and the city of Lakeland, in certain counties of the state of Florida, for the Postal Telegraph Cable Company, its men, poles, wire, and other material for the erection, construction, maintenance, and operation of its telegraph line between said points, and offered to pay for such services the rate fixed and promulgated by the railroad commissioners, but the said Atlantic Coast Line Railroad Company refuses to receive and haul and distribute between its stations, on and along its line of railroad, from Jacksonville to Lakeland, the men, poles, wire, and other material of the Postal Telegraph Cable Company under the said order of the railroad

commissioners; that upon such refusal of the Atlantic Coast Line Railroad Company to comply with the order aforesaid an order was passed by the railroad commissioners requesting and directing the Attorney General to institute proceedings to enforce compliance by the Atlantic Coast Line Railroad Company with the order of the railroad commissioners aforesaid in behalf of the said Postal Telegraph Cable Company.

A demurrer to the alternative writ was overruled. State ex rel. v. Atlantic Coast Line Railroad Company (Fla.) 41 South. 529.

The return of the respondent to the alternative writ states that:

"(1) The respondent admits that it is transporting and distributing for the Western Union Telegraph Company its men, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line along respondent's line of railroad operated in the state of Florida, and refuses to perform a like service for all other telegraph and telephone companies, but avers that it is not guilty of discrimination thereby, nor subject to any order of the commission in regard thereto, by reason of the fact that the respondent has never held itself out, and does not hold itself out, as a common carrier, to distribute freight between stations, nor to carry passengers to points between stations, nor to furnish cars to effect the distribution of freight or passengers, or both, between stations, and that such service forms no part of the duty of a common carrier, and that the distribution of freight between stations and the carrying of passengers to points between stations, and the furnishing of cars for the distribution of freight and the discharge of passengers at points between stations, is solely a subject of contract; and that in pursuance of its constitutional and legal rights, the respondent, together with other roads in said contract mentioned, on the 14th of October, 1902, entered into a contract which is still subsisting and unexpired, with the Western Union Telegraph Company, a corporation under the laws of the state of New York, for transporting and distributing for the said Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire along respondent's road in the state of Florida, for certain mutual considerations and mutual benefits to flow to and be derived by each of the contracting parties. The contract is set out in full in the return. It provides for mutual services and compensations. Among its provisions is the following:

"Fifth. The railroad companies, respectively, agree to transport, free of charge, over their railroads, upon application of a superintendent or other general officer of the telegraph company, all persons in the employ of the Western Union and International Ocean Telegraph Companies, or either of them, when

traveling on the business of either or both of said companies; and also to transport free of charge, along the lines of their various railroads, and to distribute wherever reasonably required, all poles, wire, cross-arms, and other material and supplies of said Western Union and International Ocean Telegraph Companies, for the construction, maintenance, operation, repair, and reconstruction of the land lines and wires of either or both of said telegraph companies, along said railroads covered by this agreement, and of such additional wires and lines of poles and wires as may be erected under the provisions of this agreement. * * * And unless thereto required by lawful authority, from which no reasonable recourse may be had, the railroad companies will not transport men or material for the construction, maintenance or operation of a line of poles and wire or wires, or underground or other telegraph line in competition with the lines of the telegraph company, party hereto, except at and for the railroad companies' regular local rates, nor will they furnish for any competing telegraph line any facilities or assistance that they may lawfully withhold, nor stop their trains, nor distribute material therefor at other than regular stations.

"Provided, always, that in protecting and defending the exclusive grants conveyed by this agreement, the telegraph company may use and proceed in the name of the railroad companies, or either of them, or any of the companies controlled by them, or any of them, but shall indemnify and save harmless the railroad companies, and each of them, and said companies controlled by them or any of them, from any and all damages, costs, charges, and legal expenses incurred therein or thereby."

The respondent says that whereby and by virtue of the terms and stipulations of and by virtue of the terms and stipulations of said contract the relation of the respondent to the Western Union Telegraph Company is not the relation of carrier to shipper, but wholly contractual, and of such dependent and mutual character with considerations of such kind and character that it would be impossible for the Postal Telegraph Cable Company to give the same consideration or the same equivalent to respondent that is given by and received from the Western Union Telegraph Company for the mutual services performed as are more fully set forth in said contract, and that the enforcement of said order of the Florida railroad commission would result in violating the contractual rights of respondent and in depriving respondent of its property without due process of law, and of the equal protection of the laws, contrary to the guaranties of the Constitution of the United States and the amendments thereof.

"(2) The respondent admits that it is transporting and distributing for the West-

ern Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line along respondent's line of railroad operated in the state of Florida, and refuses to perform a like service for all other telegraph and telephone companies, but avers that it is not guilty of discrimination thereby, nor subject to any order of the commission in regard thereto by reason of the fact that the respondent has never held itself out, and does not hold itself out as a common carrier to distribute freight between stations, nor to carry passengers to points between stations, nor to furnish cars to effect the distribution of freight or passengers, or both, between stations, and that such service forms no part of the duty of a common carrier, and that the distribution of freight between stations and the carrying of passengers to points between stations and the furnishing of cars for the distribution of freight and the discharge of passengers at points between stations is solely a subject of contract; and that in pursuance of its constitutional and legal rights the respondent, together with other roads in said contract mentioned on the 14th of October, 1902, entered into a contract which is still subsisting and unexpired with the Western Union Telegraph Company, a corporation under the laws of the state of New York, for transporting and distributing for the said Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire along respondent's road in the state of Florida, for certain mutual considerations and mutual benefits to flow to and be derived by each of the contracting parties. (The contract is again set out in full in the return.)

"(3) The respondent admits that it is transporting and distributing for the Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line along this respondent's line of railroad operated in the state of Florida, and refuses to perform a like service for all other telegraph and telephone companies, but avers that it is not guilty of discrimination thereby, nor subject to any order of the commission in regard thereto, by reason of the fact that the respondent has never held itself out and does not hold itself out as a common carrier to distribute freight between stations nor to carry passengers to points between stations, nor to furnish cars for the distribution of freight or passengers, or both, between stations, and that such service forms no part of the duty of a common carrier and that the distribution of freight between stations, and the carrying

of passengers to points between stations, and the furnishing of cars for the distribution of freight and the discharge of passengers at points between stations is solely a subject of contract; and that in pursuance of its constitutional and legal rights, the respondent, together with other roads in said contract mentioned on the 14th of October, 1902, entered into a contract which is still subsisting and unexpired with the Western Union Telegraph Company, a corporation under the laws of the state of New York, for transporting and distributing for the said Western Union Telegraph Company its men, wire, poles, and other material for the erection, maintenance, operation, repair, construction, and reconstruction of its line of wire along respondent's road in the state of Florida for certain mutual considerations and mutual benefits to flow to and be derived by each of the contracting parties; and by virtue of the terms and stipulations of said contract the relation of the respondent to the Western Union Telegraph Company is not the relation of carrier to shipper, but wholly contractual, and of such a dependent and mutual character and with such considerations of such a character that it would be impossible for the Postal Telegraph Cable Company to give the same consideration or the same equivalent to this respondent that is given by and received from the Western Union Telegraph Company for the mutual services performed as are more fully set forth in the contract, and is performing the service for the Western Union Telegraph Company under and by virtue of said contract, and avers that it has always been willing and is now ready and offers hereby to transport and carry the same material for the Postal Telegraph Cable Company mentioned in the alternative writ as being carried for the Western Union Telegraph Company at and for this respondent's regular local rates for the article or commodity shipped from and to regular stations on respondent's line of railroad in the state of Florida that may be offered in the ordinary and usual way in which shipments are tendered, and is now willing and has always been willing so to do, and now offers to transport any and all of the employes of the Postal Telegraph Cable Company for this respondent's regular legal rates to and from any regular station on respondent's line of railroad in the state of Florida, on its trains running to and from the stations that the said employes or employes may desire to go or depart from, and refers to and hereby makes the contract as set forth between respondents and the Western Union Telegraph Company a part of this return; whereby and by virtue of the terms and stipulations of said contract the relations of this respondent to the Western Union Telegraph Company is not the relation of carrier to shipper, but wholly contractual,

and of such a dependent and mutual character with considerations of such kind and character that it would be impossible for the Postal Telegraph Cable Company to give the same consideration or the same equivalent to this respondent that is given by and received from the Western Union Telegraph Company for the mutual services performed as are more fully set forth in said contract.

"And respondent avers that it had a right to contract as it has done and that the said contract does not contravene or violate any laws of the state of Florida and that the setting aside and making void said contract is not within the power of the said railroad commission of the state of Florida, and not within the scope or contemplation of the act of the Legislature of the state of Florida creating and constituting said railroad commission and the powers of said commission as therein defined."

The relator demurred to this return on the grounds that:

"(1) It has already been determined in this proceeding that the order made by the railroad commissioners which, by this proceeding, is sought to be enforced was a valid exercise of the powers possessed by the railroad commissioners under the laws of this state, and that question being *res adjudicata* cannot again be raised by respondent.

"(2) The railroad commissioners have judicial powers under the Constitution and the law creating them, and having determined, after hearing, of which respondent was duly notified, that the respondent was guilty of unjust discrimination in the respects recited in the order sought to be enforced, such order is an adjudication of that question which cannot be reviewed by this court.

"(3) The making of the order sought to be enforced was an exercise of the powers possessed by the railroad commissioners under the law creating them, and, under such law, the said order is *prima facie* reasonable and just, and the return of the respondent does not deny or question its reasonableness or justness.

"(4) The transportation and distribution for the Western Union Telegraph Company of its men, wire, poles, and other material for the erection, maintenance, operation, repair, and construction, and reconstruction of its line along the respondent's line of railroad, which is admitted in the return, discloses a carriage by respondent as a common carrier and a service to which others, in like situation as the Western Union Telegraph Company, are entitled.

"(5) The contract set forth in the return and under which the respondent claims that its relation to the Western Union Telegraph Company is not that of carrier to shipper, but wholly contractual, is illegal and void, because

"(a) It contravenes the act of Congress of

July 24, 1886, c. 230, 14 Stat. 221, entitled 'An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes.'

"(b) It contravenes the act of Congress of July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.'

"(c) It is a contract in restraint of trade."

F. T. Meyers and Daniel W. Rountree, for relator. John E. Hartridge, for respondent.

WHITFIELD, J. (after stating the facts). The return of the respondent, briefly stated, is that it is transporting and delivering between stations on its line, men, wire, poles, etc., for the Western Union Telegraph Company, as alleged in the alternative writ, and is refusing to perform a like service for all other telegraph and telephone companies, but avers that it is not guilty of discrimination thereby, nor subject to any order of the commission in regard thereto, by reason of the fact that the respondent has never held itself out, and does not hold itself out, as a common carrier in respect to the particular service performed for the Western Union Telegraph Company and refused for others; that such service forms no part of the duty of a common carrier and is solely a subject of contract; that in pursuance of its legal rights the respondent on October 14, 1902, entered into an agreement still existing with the Western Union Telegraph Company to perform the mentioned service for certain mutual considerations and mutual benefits to the contracting parties set out in an attached contract, by virtue of which contract the relation of respondent to the Western Union Telegraph Company is not the relation of carrier to shipper, but wholly contractual, and of such nature that the Postal Telegraph Cable Company could not give the same consideration or the same equivalent to respondent that it is receiving from the Western Union Telegraph Company for the mutual services stated in and performed under the said contract; that the enforcement of the order of the railroad commissioners would result in violating the contractual rights of respondent and in depriving respondent of its property without due process of law, and of the equal protection of the laws, contrary to the guaranties of the Constitution of the United States and the amendments thereof; that respondent has always been willing and is now ready and offers to transport and carry like employes and material for the Postal Telegraph Cable Company at and for respondent's regular local rates for the employes, articles, or commodities shipped from and to any regular stations on respondent's line of railroad in the state of Florida that may be offered in the ordinary and usual way in

which passengers and shipments are tendered: that respondent has a right to contract as it has done, and that said contract does not contravene or violate any of the laws of the state of Florida, and that the setting aside and making void said contract is not within the power of the railroad commission of the state of Florida, and not within the scope or contemplation of the act of the legislature creating said commission.

The demurrer raises the question of the sufficiency of the return as a defense to the writ.

In the opinion on the demurrer to the alternative writ in this case (Fla.) 41 South. 529, we said: "The respondent having voluntarily performed this service for the Western Union Telegraph Company may not deny it to another company applying for similar service under like conditions. The order of the railroad commissioners is a general order, and we think fully authorized by the Constitution and chapter 4700, p. 76, Acts 1899. Nor is this duty affected by the fact that the service was performed for the Western Union Telegraph Company under an agreement or contract. The rates prescribed in this general order for the services to be rendered are general in their nature and apply to all telegraph and telephone companies which seek to have the services performed and are not challenged on the ground of unreasonableness."

We understand from the admissions in the return of the respondent that it has been for some years past and is now, with trains and cars operated by it, voluntarily transporting and delivering along its railroad line, between the stations thereon, the employes and the poles, wires, etc., of the Western Union Telegraph Company, and that it refuses to render similar service for others. Such service is that of a common carrier, and the fact that it is performed under a particular contract does not affect the character of the service even though the consideration of the contract cannot be furnished by another company demanding similar service, since the same service should be performed for all for a reasonable compensation, and there is no question as to the reasonableness of the compensation fixed under the law for this service.

The facts admitted in the return as to the service being rendered by the respondent for the Western Union Telegraph Company and refused to other companies under like circumstances, show that such service is rendered as a common carrier, and the averment in the return that the service is being rendered under a contract, and not as a common carrier, cannot avail the respondent as a defense to the writ. There is no showing that the service being rendered for the Western Union Telegraph Company is different from that rendered to other shippers of the same subjects of transportation except that delivery is made between stations on the respondent's line of road. The respondent of-

fers to transport the employes, poles, wire, etc., of the Postal Telegraph Cable Company, thereby admitting them to be proper subjects from and to regular stations, at its local rates, of transportation.

The respondent, a common carrier, admits that it is voluntarily transporting and delivering between stations on its line, employes and freight for one incorporated public telegraph company to maintain lines of wire along the railroad line, and that it refuses similar services to others, without giving sufficient excuse for such refusal, thereby admitting that it is guilty of unjust discrimination as found by the railroad commissioners. Under these circumstances the respondent may be compelled to perform like services, for a reasonable compensation, for another incorporated public telegraph company to enable it to lawfully establish and maintain its lines of wire along the railroad line. The respondent cannot refuse to render the service to the Postal Telegraph Cable Company on the ground that the service rendered to the Western Union Telegraph Company is under a contract and that the service is not rendered as a common carrier, when it is not shown that such service differs from that rendered other shippers except as to delivery between stations. See *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 South. 225; *Chicago & Northwestern Ry. Co. v. People*, 56 Ill. 385, 8 Am. Rep. 690; *Messenger v. Penn. Ry. Co.*, 37 N. J. Law, 531, 18 Am. Rep. 754; *Cumberland Telephone & Telegraph Co. v. Morgan's L. & T. R. Co.*, 51 La. Ann. 29, 24 South. 803, 72 Am. St. Rep. 442; *Mercantile Trust Co. v. Atlantic & P. R. Co.* (C. C.) 63 Fed. 910; 5 Am. & Eng. Ency. Law (2d Ed.) 177; 6 Cyc. 372.

Under section 30 of article 18 of the Constitution "the Legislature is invested with full power to pass laws * * * to prevent unjust discrimination * * * by persons and corporations engaged as common carriers in transporting persons and property or performing other services of a public nature." Chapter 4700, p. 76, Acts 1899, provides that the railroad commissioners shall make reasonable and just regulations for the observance of rates fixed by them "as to charges at any and all points for the necessary handling and delivery of all kinds of freight and transportation of passengers, and for the prevention of any unjust discrimination in connection therewith * * * and to direct and control all other matters pertaining to railroads that shall be for the good of the public. Said commissioners shall have full power and authority to require any railroad, railroad company or common carrier to properly operate its railroad or transportation line and to furnish all the necessary facilities for the convenient and prompt handling, transportation and delivery of all freights offered along its line for transportation and shall provide and prescribe all such rules and regu-

lations as may be necessary to secure such operation and the furnishing of such facilities and the prompt handling, transportation and delivery of all freights offered."

It is clear that where a railroad company in its capacity as a common carrier renders services to one corporation so as to enable it to serve the public, and, without sufficient excuse, refuses similar services to another corporation lawfully authorized to likewise serve the public, it is an unjust discrimination; and the railroad commissioners have the power under the constitution and laws of this state to make just and reasonable rules and regulations to prevent such unjust discrimination. See *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 South. 225; *State ex rel. Cumberland Telephone & Telegraph Co. v. Texas & P. Ry. Co.*, 52 La. Ann. 1850, 28 South. 284; *State ex rel. Attorney General v. Atlantic Coast Line R. Co.* (Fla.) 40 South. 875. See, also, *Augusta Brokerage Co. v. Central of Georgia R. Co.*, 121 Ga. 48, 48 S. E. 714; *Tift v. Southern Ry. Co.* (C. C.) 123 Fed. 789; *Agee & Co. v. Louisville & N. R. Co.* (Ala.) 37 South. 680.

The power of the railroad commissioners to make the order here sought to be enforced is fully established. The statute provides that "all the rules and regulations made and prescribed by said commissioners * * * to prevent unjust discriminations or other abuses * * * shall be deemed and held to be prima facie reasonable and just."

The respondent did not appear to be heard in response to the notice served on it of the hearing before the railroad commissioners when the order here sought to be enforced was made, and it does not claim that the order is an unreasonable and unjust regulation; nor is the rate of compensation claimed to be unjust and unreasonable; so it cannot be said that the enforcement of the order will be a taking of the property of the respondent without due process of law, or will deprive it of the equal protection of the laws. See *State v. Jacksonville Terminal Co.*, 41 Fla. 337, 27 South. 225.

The rights of the respondent under the contract which was made in 1902, are subject to the constitutional and statutory provisions above quoted, and the enforcement of the order of the railroad commissioners will not violate valid contractual rights of the respondent. *City of Tampa v. Tampa Water Works Company*, 45 Fla. 600, 34 South. 631, affirmed in 199 U. S. 241, 26 Sup. Ct. 23, 50 L. Ed. —.

The respondent rests its defense upon its claim that in rendering the stated service to the Western Union Telegraph Company it is not acting as a common carrier, and therefore it is not required by law to render a similar service to other telegraph companies; but, as we have seen, the facts as to the character of the service admitted in the return constitute the service that of a common

carrier, and this service being voluntarily performed for one gives others under like conditions a right to demand it for themselves.

The demurrer to the return is sustained, the return is held to be insufficient, and the peremptory writ is awarded.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, HOCKER, and PARKHILL, JJ., concur.

(117 La.)

No. 15,936.

MAYOR, ETC., OF TOWN OF HOMER v. BROWN.

(Supreme Court of Louisiana. June 18, 1906.)

1. CRIMINAL LAW—APPEAL—DECISIONS REVIEWABLE—NATURE OF SUBJECT-MATTER—VALIDITY OF ORDINANCE.

Where a party charged with having violated a municipal corporation ordinance, in which a fine is imposed for its violation, unsuccessfully contested the legality of that ordinance in the trial court, he is entitled to an appeal to the Supreme Court on that issue, regardless of the amount involved.

The issue and contestation, to be so appealable, is as to the legality of the legislation of the municipal corporation, not as to proceedings taken in the trial court in enforcement of the ordinances, nor as to the correctness or legality of the conclusions or action of the judge below, acting under and by virtue of the ordinance. *Municipality v. Blanc*, 1 La. Ann. 385; *State v. Zurich*, 21 South. 977, 49 La. Ann. 447; *State v. Fourcade*, 13 South. 187, 45 La. Ann. 721, 40 Am. St. Rep. 249.

2. SAME.

Under the Constitution of 1898 the class of cases wherein an issue in the trial court as to the legality or constitutionality of ordinances gives a direct right of appeal to the Supreme Court from the decision on that issue in the trial court has been enlarged and made to cover municipal ordinances wherein no fine has been authorized or directed to be imposed for their violation; but in that class of cases the judgment of the trial court to authorize an appeal must have been against the constitutionality of the ordinance.

3. INTOXICATING LIQUORS—MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY.

The ordinance which is resisted in this case did not fall within the grasp and scope of the powers conferred upon the town, and is illegal and ultra vires.

Breaux, C. J., dissenting.

(Syllabus by the Court.)

Appeal from Mayor's Court of Town of Homer; Hugh Taylor, Judge.

Suit by the mayor and board of selectmen of the town of Homer against Thomas H. Brown. From a judgment against the defendant, he appeals. Reversed, and suit dismissed.

Richardson & Richardson, for appellant. Enos Howard McClendon, for appellee.

NICHOLLS, J. Defendant, charged with "violating an ordinance No. 63 of the town, was tried and convicted and sentenced to pay a fine of \$50 and costs, and in default of payment to be confined in the lock-up for 30 days."

He pleaded that the town had no authority, either under the Constitution or by act of the Legislature, to pass said ordinance; that the ordinance was illegal, ultra vires, and unconstitutional. The pleas were overruled.

After sentence, defendant appealed.

In the Supreme Court the appellee has moved to dismiss the appeal on the ground that it was without appellate jurisdiction in the premises, and that the only issue raised by the pleadings was as to the constitutionality of the Ordinance No. 63, under which defendant was fined by the mayor; that the legality of the fine imposed was not attacked, and for that reason it was not in contestation.

In support of the motion to dismiss counsel cite *State ex rel. Johnson v. Thompson*, 111 La. 315, 35 South. 582, and *Town of Ruston v. Monroe Fountaine** (not yet officially reported) 42 South. —.

Defendant, in opposition to the motion, cites *State v. Tsnin Ho*, 37 La. Ann. 50, *State v. Clesi*, 44 La. Ann. 86, 10 South. 409, *State v. Hennessey*, 44 La. Ann. 805, 11 South. 39, *State v. Freitas*, 49 La. Ann. 345, 21 South. 551, *State v. Zurich*, 49 La. Ann. 447, 21 South. 977, *State v. Hohn*, 50 La. Ann. 432, 23 South. 966, *State v. Faber*, 50 La. Ann. 952, 24 South. 662, and *Town of Minden v. McCrary*, 108 La. 518, 32 South. 468.

On Motion to Dismiss.

Appellant is appealing from a sentence of the mayor's court imposing a fine upon him by virtue of land under the authority of an ordinance of the town of Homer. He unsuccessfully pleaded the illegality and unconstitutionality of the ordinance, leveling his attack against the right, power, and authority of the town to enact the ordinance in imposing the fine.

He occupies, therefore, the very situation which entitles him under the terms of article 85 of the Constitution of 1898, to have his case appealed to the Supreme Court. He does not seek to have it examine under this appeal the proceedings taken in the mayor's court under and in enforcement of the ordinance and the actions and conclusions of the mayor, but to examine the proceedings taken by the council and board of trustees of the town of Homer and their power and authority in passing the ordinance and imposing the fine therein ordered to be inflicted for its violation; in other words, he is attacking the legality and constitutionality of the ordinance itself. Counsel of appellee seems to take the position that the contestation made below should have been, not the legality and constitutionality of the ordinance imposed by the corporation, but the legality and constitutionality of the proceedings in the mayor's court and of the judgment rendered by the mayor imposing the fine.

*Rehearing granted June 26, 1906.

In that contention he is in error. That position was contended for and ruled against as far back as the case of *Third Municipality v. Blanc*, 1 La. Ann. 385, wherein unanswerable reasons were assigned for so concluding. The decision in that case has been repeatedly affirmed since, and has been made the basis of the jurisprudence on that subject since. This court has nothing whatever to do on an appeal from the decision of the mayor's court, with the proceedings in that court, and the conclusions of the mayor as to the guilt or innocence of the defendant under the evidence and the ordinance.

If these matters are assailable, they should be assailed by certiorari or prohibition.

We have nothing to do with the facts of this case further than was declared in *State v. Fourcade*, 45 La. Ann. 721, 13 South. 187, 40 Am. St. Rep. 249.

The portion of article 85 of the present Constitution, upon which rests the right of appellant to bring his case by appeal to this court, is identical with that of article 81 of the Constitution of 1879, and the jurisprudence under it remains unaltered. The present article has enlarged the class of cases in matters of contestation in regard to the legality and constitutionality of municipal ordinances in which an appeal to the Supreme Court is authorized, so as to cover cases of ordinances generally; that is, to ordinances which have not imposed a fine wherein the legality and constitutionality of the particular ordinance has been contested. In that class of ordinances the right of appeal is conditioned upon the judgment of the lower court having been adverse to the constitutionality of the ordinance.

In the *Blanc Case*, 1 La. Ann. 386, the court said:

"The purpose of the Constitution was to enable the citizen in all the cases provided to test their constitutionality and legality to the court of last resort, and thus enable this tribunal to interpose directly a check upon the abuses of municipal legislation. Questions arising in the application and execution of municipal ordinances are left with the ordinary tribunals, under the right of appeal for an examination of the facts as in other civil cases. The magistrates who administer the law are all, in relation to their judicial functions, state officers, and there is no reason for any direct supervision over their proceedings as to matters of fact in any particular class of cases within their jurisdiction. Any inconvenience in this respect is presumed to be fully provided for in the mode of their selection and the short duration of their appointment.

"It would be difficult to assign a reasonable cause, which should subject these two clauses of the Constitution to an entirely different operation, and require from the appellate court, in case of a tax, toll, or impost, nowhere extortionately or unjustly applied, to confine itself to the question of its constitutionality or legality, without giving the party aggrieved any other relief than the decision on these points would afford, and in case of a fine or penalty enable the same court to take cognizance of and decide upon the whole merits of the case.

"The reason is the same in both cases for the exercise of the appellate power on questions

of law and its nonexercise on matters of fact. By these means, which we recognize, the Constitution as affording supervision over municipal legislation is secured, and the cognizance of facts left with the tribunals of the first instance exclusively in cases under the amount fixed for the appellate jurisdiction of this court in civil cases.

"The concluding part of this article of the Constitution limits the jurisdiction of this court in criminal cases to questions of law, and the conclusion that, in the case of a petty fine, a greater privilege should be held to be secured to the citizen than in prosecution involving liberty or life, and rest on something more definite than a mere implication.

"Another conclusive reason against adopting the interpretation of the clause of the article contended for by the counsel for the defendant is that the determination of questions of fact in the numerous cases which occur of this kind would be impossible under the present organization of this court."

If the construction of article 85 of the Constitution of 1898 which counsel of the town of Homer contends for were correct, the result would be to open an appeal to the Supreme Court on all questions of fact and law involved therein, regardless of amount, and importance, all judgments of mayors, recorders, justices of the peace, and other inferior officials, rendered in the enforcement of municipal ordinances, while matters of the most serious import, decided by district judges upon matters resting upon an administration of the laws of the state, would be unappealable to the Supreme Court, unless it should be made to appear that the matters in dispute therein were such as to make them fall above the lower limit of that court's jurisdiction. A construction which would lead to such results could not possibly be a proper one. See, on this point, *State ex rel. Satcho v. Judge*, 49 La. Ann. 235, 21 South. 690.

The motion to dismiss is not well grounded, and it is hereby denied.

On the Merits.

In the brief filed on behalf of the town its counsel says:

"The amended charter of Homer (section 3) gives the mayor and selectmen the power to make regulations to secure the general health of the municipality, to prevent, to remove and abate nuisances, * * * to prohibit and suppress tipping shops, saloons, dramshops, club-rooms * * * and all kinds of indecent and other disorderly practices."

These provisions of the charter are those upon which the power and authority of the town to enact the ordinances are sought to be made to rest.

Ordinance No. 63, for the violation of which appellant was convicted and sentenced, provides that:

"It shall be unlawful for any person or persons to solicit, receive, accept or transmit orders for the sale of intoxicating liquors of any kind within the corporate limits of the town of Homer, La., and any person or persons convicted on trial before the mayor of violating this ordinance shall be fined not more than one hundred dollars, for each and every offense, or im-

prisonment not exceeding thirty days or both at the discretion of the mayor."

A comparison of the ordinance with the powers upon which it is supposed to rest fails, as it should, to bring its terms within the grasp of the powers conferred upon the town. The ordinance is so vague, indefinite, and general as really not to furnish the basis upon which to ground an offense. *State v. Forman*, 50 La. Ann. 1023, 24 South. 603. It has no foundation to rest upon outside of the will of the board of trustees and the mayor. We are of the opinion that the ordinance in question was adopted without and beyond any authority given to the town of Homer, and that it is illegal.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from is hereby annulled, avoided, and reversed, and the suit is dismissed, with costs.

BREAUX, C. J. I respectfully dissent.

(117 La.)

No. 15,662.

NOLAN v. LABATUT et al.

(Supreme Court of Louisiana. Jan. 2, 1906. On Rehearing, June 18, 1906.)

1. NOTARIES — MISCONDUCT — LIABILITIES ON BOND.

Where a notary represents that some one wants to borrow a certain sum of money, and that the act of mortgage to secure the loan will be passed before him, and that if the money is sent to him he will pass the act of mortgage and deliver the mortgage note to the lender, and the money is sent to him, and instead of a genuine mortgage note he delivers a note paraphed by him as notary for identification with an act of mortgage, but which is in fact nothing but a forgery, *held*, the notary, under these circumstances, owed the duty to the lender of the money to execute a genuine act of mortgage, and for his violation of that duty the surety on his bond is responsible.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Notaries, §§ 28, 31.]

2. SAME.

And the surety is in like manner responsible if the notary, instead of representing that the act of mortgage is to be passed by him, represented that it had already been passed by him, and supported the assertion by pointing to his official paraph on the note. In such a case he would have given currency to the note by means of his official paraph.

Breaux, C. J., dissenting.

On Rehearing.

3. SAME—CONSTRUCTION OF BOND.

The notary in the parish of Orleans is required to give a bond in the sum of \$10,000, "conditioned as the law directs for the faithful performance and discharge of his duties as notary public," and he and his surety are liable thereon, not only to those who employ him, but to any one who may sustain loss by reason of his failure, faithfully, to discharge his duties as notary, or by reason of his wrongful acts, committed by virtue, or by means, or under color, of his office.

4. SAME—DUTIES.

It is, however, no part of the duty of a notary to solicit or receive money for invest-

ment, and money intrusted to him for that purpose is not received in the discharge of the duties, or by virtue, or by means, or under color, of his office, and the surety on his official bond is not liable therefor.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Notaries, § 30.]

Land, J., dissenting. Provosty, J., dissenting in part.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; George Henry Théard, Judge.

Action by Jennie Nolan against Henry P. Labatut and others. Judgment for defendants, and plaintiff appeals. Amended and affirmed.

Saunders & Gurley, for appellant. Purnell Mitchell Milner, for appellee Fidelity & Deposit Co. of Maryland.

PROVOSTY, J. This suit is on the bond of a notary who absconded. The defense of the surety is that the acts, out of which the obligation sought to be enforced is alleged to have grown, were committed by the notary in his individual, not in his notarial, capacity, and that as a consequence the surety is not liable. The defense is founded on the decision of this court in the case of *Schmitt v. Drouet*, 42 La. Ann. 1065, 8 South. 396, 21 Am. St. Rep. 408, the doctrine of which is expressed by the court as follows:

"Before a notary and his surety can be held, it is necessary to determine whether the act done or not done, committed or omitted, was or not authorized by law, was or not incumbent upon him, was or not required of him, whether he was directed to do it, whether he has failed to discharge the duty, and whether injury has been sustained. It has hence been held that, where a notary does a thing which the law does not authorize him to do, although he does so, *eo nomine*, in his capacity of a notary public, the surety is not responsible."

That doctrine is inapplicable to the facts of this case, because the delinquencies charged against the notary in this case are with respect to acts done, or omitted to be done, in his official capacity.

Plaintiff seeks to recover the amounts of several notes which the absconded notary palmed off upon her as valid mortgage notes identified with acts of mortgage passed before him, but which, with the exception perhaps of one, turned out to be forgeries. The notary had simply manufactured them, and, if he ever took the trouble to go through the form of executing acts of mortgage purporting to secure them, he never recorded the acts, and on absconding left no trace of them in his office. The one exception is the J. V. Olivieri note for \$500. The evidence shows that there is a man by that name living in New Orleans, and that there is an act of mortgage purporting to secure this note duly recorded. As to this note, plaintiff will have to be nonsuited. The story of the others is as follows:

Plaintiff had some money which she was in the habit of investing in mortgage notes

of small denominations. Those involved in this suit range from \$250 to \$675. The notary, H. P. Labatut, would let her know, usually by letter, that he had an investment for her, naming the amount, and request her to send him her check. She would either send the check, or take it to him in person. She would call for the mortgage note a day or two later, and he would hand it to her, laying stress upon his paraph of it as conclusive proof of its regularity, and she, trusting blindly to the efficacy of this paraph as a reliable criterion of genuineness, would accept the note.

But, perhaps, it were best to state the matter in some detail.

W. Westerhouse note, \$550: The notary offered the investment to plaintiff, told her that he would pass the act of mortgage, and that it was not necessary for her to be present. Part of the money was already in the hands of the notary, and plaintiff left her check with him for the balance. When she called for the note he showed her his notarial paraph on it, as proof conclusive that the mortgage had been duly executed to secure it.

J. C. West note, \$400: The notary wrote to plaintiff to send her check. She called at his office, and he told her he would examine the titles and pass the act of mortgage. When the note was delivered to her a few days later, she asked if it was perfectly correct, and he pointed to his paraph on the note as conclusive evidence.

D. J. Owens note, \$650: The notary wrote to plaintiff he had an investment for her, and that he expected to close it the next day, and to send her check. Plaintiff, at the time appointed, carried her check and gave it in exchange for the note; the notary assuring her that he himself had passed the act of mortgage. The note was duly paraphed by him.

A. Harris note, \$650: The notary wrote to plaintiff he had an investment for \$650, which he expected to close during the week, and to send her check. When he delivered the note to her a few days later, he told her he had passed the act of mortgage, and called her attention to his notarial paraph on the note.

H. Howat note, \$675: Plaintiff was unable to recall the circumstances of the acquisition of this note, but her check for same bears date May 22d, and the note itself May 24th, and on May 27th the notary wrote her:

"I have your investment of \$675 duly executed, and have note for same."

Wm. Andrews note, \$250: The notary manufactured this note, authenticating it by his official paraph, and gave it to plaintiff in part settlement for some money he had collected for her.

G. W. Kaupp note, \$600: The notary wrote to plaintiff that he had a note for \$600, secured by mortgage as per act passed by

himself, and offered it to her as an investment.

As to all the notes, plaintiff testifies that what guided her in determining whether to purchase the notes or not was the notary's paraph on them, and his statement that he had passed the acts of mortgage.

Thus it appears that, with the exception of the Andrews and Kaupp notes, which were already in existence at the time Labatut offered them to plaintiff, the circumstances were that the notary informed the plaintiff that some one wanted to borrow money, and that, if she would lend it, he would execute a mortgage to secure the loan; and that plaintiff furnished the money on the faith of the mortgage that was thus to be executed, she not appearing to the act of mortgage because the notary had represented to her, and rightly, that her doing so was not necessary. In other words, he was to execute a genuine mortgage to secure her loan, and he executed, instead, a forgery. It seems to us that these facts speak for themselves. If under these circumstances a notary were not to be responsible on his bond it would not be easy to conceive under what circumstances he would be.

The Kaupp and Andrews notes were already in existence when the investment was offered to plaintiff, and therefore, as to them, the notary did not undertake to execute an act of mortgage to secure plaintiff, but simply represented that the mortgage was already in existence. The transaction was simply a purchase of the note. But it was in his official capacity that Labatut represented to plaintiff that he himself had passed the act, and it was to his official paraph he pointed, and to which she trusted, and it was by the use of his office that he created the paper in exchange for which plaintiff parted with her money. In the case of the other notes he said:

"Give your money, and I will pass an act of mortgage to secure it."

In the case of the Kaupp and Andrews notes he said:

"Give your money, I have passed an act of mortgage, and here is the note secured by it."

Defendant's learned counsel argues very plausibly that if Labatut had made no pretense of investing the money, but after receiving it from plaintiff for the purpose of turning it over to the borrower had put it in his pocket and refused to return it, or had flatly told plaintiff that he was going to deliver a forged note to her, the surety on his bond would clearly not have been responsible; because it is no part of the official functions of a notary to receive money for the purpose of investment. True, under those circumstances, the surety would not be responsible, and for the reason stated; but those are not the circumstances of this case. For all we know, until the sham ceremony of the delivery of the note had been gone

through with, the money was as safe in the hands of Labatut as it would have been in bank. He would have paid it over on demand as readily as the cashier of the bank would have done. The fact is that the real parting with the money was not the placing of it in the hands of Labatut, but it was the accepting of the forged note. Labatut at times had moneys for plaintiff, and plaintiff never considered that the money had gone away from her because it was in his hands. He invested some of this money in good notes for her. This court cannot decide this case on the hypothesis that Labatut refused to return the money, or that he flatly declared that he was delivering a forged note. What would have happened if he had done anything of that kind this court does not need to stop to inquire. The court is satisfied from the circumstances of this case that there was no probability of his doing anything of that kind. Hence the case must stand on the fact that by the use of his office he obtained such a hold on plaintiff's money as brought about her loss, and the surety must therefore answer for it. Plaintiff parted definitively with her money on the faith of his apparently official acts.

The Westerhaus note was on a printed form having in the upper left corner the words: "H. P. Labatut, Notary Public, New Orleans." It bore on its face the following paraph: "Ne Varietur. Secured by mortgage by act passed before me this day. New Orleans, Oct. 27th, 1900." On delivering it to plaintiff, Labatut called her attention to the paraph as a proof of regularity and genuineness. But plaintiff, and probably he himself, did not notice that the paraph was not signed. In that respect it was incomplete. Defendant's learned counsel relies upon the absence of the signature as a fact differentiating this note from the others. We fail to see the difference. The note purported to be a complete note and was delivered by the notary as such.

The learned counsel for defendant insists that plaintiff confided her money to the notary as her agent for him to invest it for her, and that his act in investing it in forged notes was the act of a mere agent, not of a notary. But it is perfectly plain, under the facts, that Labatut dealt with plaintiff in the two capacities of agent and notary, and that, whatever he may have done for her as agent, it was clearly and distinctly as notary that he represented that he had executed the acts of mortgage and paraphed the notes. Nothing shows that as agent he was unfaithful to his trust. On the contrary, he seems to have rendered her as agent a full, complete, and satisfactory account. It was as notary, and by means of the paraphernalia of his office—his printed letter heads, his printed forms of notes, his paraph, and his acts of mortgage in buckram—that he swindled her; and, we repeat, the surety on his official bond must

answer. Repeatedly Labatut told plaintiff when delivering the notes to her that his bond would stand responsible for their genuineness and regularity, and she acted on that representation.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed in so far as it condemns Henry P. Labatut, and be set aside in so far as it is in favor of the surety company, and that there now be judgment in favor of the plaintiff, Miss Jennie Nolan, and against the defendant the Fidelity & Deposit Company of Maryland, for the sum of \$3,775, with 5 per cent. per annum interest from the 20th day of January, 1903; same being for all the notes sued on except that of J. V. Oliveri, for \$500, as to which the suit of plaintiff is dismissed as in case of nonsuit. Defendants to pay the costs of the lower court, and the Fidelity & Deposit Company of Maryland to pay the costs of this appeal.

BREAUX, C. J., dissents.

On Rehearing.

MONROE, J. The cause of action in this case is set forth, substantially, as follows:

That the defendant Labatut is a notary public, and that the defendant the Fidelity & Deposit Company of Maryland is the surety on his official bond:

"That, at various and sundry times, * * * petitioner employed the said Labatut, as a notary, to procure the execution of acts of mortgage on real estate and notes secured thereby which petitioner desired to purchase *as a means of investing her money*; that said Labatut would inform petitioner when persons would come to him desiring to obtain loans on the security of mortgages of real estate in this city; and that (petitioner) would instruct the said Labatut to procure the execution of the act of mortgage offered and of the note secured thereby, and would give him the money to pay the exact amount of the said note to which the mortgagee, under the contract of mortgage, would be entitled, except in one or two cases, where the said Labatut had some money which he had collected for petitioner, and, in those cases, the petitioner added the money required to cover the difference between what the said Labatut had and the exact amount required to pay for the note, and the said Labatut would bring to petitioner the said notes duly paraphed by him and purporting to be secured by mortgage or vendor's privilege on real estate in this city, and petitioner accepted said notes on the faith of said paraph, believing the said notes were, in fact, secured by mortgage and vendor's privilege, as stated by said paraph, and as she had instructed that they should be secured. Now your petitioner shows that, in a number of instances, to be given hereafter, said notes were mere forgeries and were not secured by an act of mortgage or vendor's privilege, and that the paraph on the face of said notes, purporting to show that they were so secured, was false, and that petitioner was misled by said paraph and by the statements of said Labatut and lost the money which was paid for the said notes in consequence. Your petitioner shows that the said Labatut violated the duties which he owed as notary to your petitioner, to procure genuine and valid acts of mortgage and notes secured thereby, and that he deceived and defrauded your petitioner by affixing his offi-

cial paraph as a notary on the face of the notes declaring that the same were secured by mortgage or vendor's privilege, when, in fact, they were not so secured, and that, for the said acts, both the said notary and the said surety are liable, in solido, to your petitioner for the money so paid out by petitioner in the purchase of the said forged notes bearing the false paraph and certificate of the said Labatut, as above stated. Your petitioner further shows that, in purchasing mortgage notes, secured by the acts of mortgage before a notary in this city, it is customary for the lender to deliver the money or check purchasing the mortgage note to the notary to deliver to the mortgagor, and that, in that way, petitioner paid for all the notes hereinafter described, of the aggregate value of \$4,275, all of which petitioner took and paid for in reliance upon the paraph of the said notary on the face of the said notes. This paraph is customarily and invariably affixed upon the face of the notes secured by mortgage in this city by the notary before whom the act of mortgage is passed, and is universally relied upon as showing that the said note is secured by mortgage. Petitioner shows that the notes so purchased by her were as follows, to wit: [Here follows a descriptive list of the eight notes.] Petitioner shows that the said Labatut is insolvent and unable to pay anything on the said notes; that all of his acts and doings in the premises were fraudulent, and were violative of his duty as a notary and of the duties which he owed to petitioner, *who had employed him, as a notary, to procure the acts of mortgage and the notes secured thereby* as above mentioned; and that, for his said violation of his duties as notary, the said Labatut and the said surety on his official bond as notary are liable, in solido, to your petitioner for the amount of money that she has lost in the purchase of the said notes." (Italics by the court.)

The Fidelity & Deposit Company, for answer—

"Denies that plaintiff's transactions with said Henry P. Labatut were in his notarial capacity or in the performance of any of the duties required of him by law, but avers, on the contrary, that said Henry P. Labatut was, for a long time, the trusted agent of the plaintiff for the investment of funds for her, and, at times, had and retained money belonging to her for investment, and also had the key to her bank box. Respondent denies that the plaintiff was misled by the paraph on the notes referred to, and avers, on the contrary, that she deposited funds with the said Labatut or paid said Labatut money with which to buy said notes referred to, and relied on his individual honesty and integrity, and that if she sustained any loss it was through embezzlement of those funds," etc.

It appears from the evidence that Labatut would write to the plaintiff that he had in view an investment in mortgage paper, and that she would send him, or take him, her check, and, some days later, get from him what purported to be a mortgage note. Labatut, however, collected (or professed to collect), for her, the notes and interest on the notes, in which her money was thus invested, and, at times, would render her statements showing the reinvestment, in other paper, of moneys collected for her account, and, for these services, or for such services as he might be considered to have rendered, he, now and then, with the consent of the plaintiff, deducted small sums from the balances in his hands. In regard to the note of W. Westerhouse, for \$550, plaintiff testi-

fies that she received a communication, as above described, in response to which she gave Labatut her check, dated October 25, 1900, for \$328 (which check was paid to Labatut on the day of its date). The remaining amount necessary for the purposes of the promised investment was to have been taken from a balance, which Labatut already had in his hands, resulting from collections which he had made for plaintiff's account; but at what time those collections were made does not appear. Some time after the check had been delivered and cashed, plaintiff received from Labatut what purported to be the note of W. Westerhouse, for \$550, payable to his order and by him indorsed and bearing, also, an inscription in the following terms, to wit: "Paraph: Ne Varietur. Secured by mortgage—by act passed before me this day. New Orleans Oct. 27, 1900." This inscription, as may be observed, does not bear the signature of the notary.

We produce, in this connection, part of plaintiff's examination as a witness:

"Q. I ask you if you don't admit that you handed Mr. Labatut this check for \$328 prior to being shown any note or act of mortgage? A. Yes, sir; but he said it was pending; that he was examining the title. * * * Q. Haven't you been investing your money in that way for seven or eight years? A. Yes, sir. Q. Then, in this purchase of this Westerhouse note, if you say you relied on the paraph, why is it you accepted the note when no paraph was there? A. Well, I knew that was his writing, and I knew he was the notary that had executed that. * * * It is paraphed, but not signed. I knew he had done it, and gave it to him, but, in fact, it was an oversight. I didn't notice it until after he was gone. Q. Now, on this Westerhouse note, the only amount of money which you gave Mr. Labatut was \$328, isn't that a fact, because he had for your account the balance of the money? A. Yes, sir. Q. How long had he had the balance of the money? A. I couldn't say. I would have to refer to my notes and find out. I suppose I could hunt it up. * * * Q. And he never accounted to you for that \$269 other than by what you say—the delivery of this note? A. I gave him permission to do that, with my check and the amount he had for me to buy the mortgage note."

The story of the J. C. West note, for \$400, is told as follows:

"New Orleans, La., Oct. 28, 1901.

"Miss Jennie Nolan—Dear Miss: I have a safe investment for \$400 for which you can send me your check. I had another application for a much larger amount, but, as you have not the amount, give you privilege of this one. When you call, on Monday following, All Saints' Day—when I hope to have the Howat note settled—we can see what may be done with that amount. The investment I offer may not be closed for a couple of days, but wish to be in position to accommodate when he calls. Trusting that you are well, I beg to remain,

"Sincerely, [Signed] H. P. Labatut."

In reply to this communication, plaintiff gave Labatut her check, of even date therewith, for \$400, and on November 5th, following, or, possibly, later than that, he gave her what purported to be the note of J.

C. West, for that amount, secured by mortgage, being one of the notes sued on in this case.

Concerning the Owen note, for \$650, of date January 10, 1902, plaintiff gives this, with other, testimony:

"Q. Now, I find that, on January 9th, Mr. Labatut wrote you a note stating that he had collected the Janson note for you and had another investment for \$650, and I find that, on January 9th, you gave your check to him for \$611. Do you recollect whether you came to the office with your check or with his letter on that date or sent this? A. Whether I sent the check? Q. Yes. A. I don't know. I think I sent one check. I don't know now which one it is. Q. You have no positive recollection of this? A. I have no positive recollection as to whether that is the one I sent—that check; that is the check I sent him, I sent him that check. Q. Then, at that time that you sent it to him, you were not exhibited any notarial act in connection with this investment, were you? In other words, if you sent the check on January 9th, you never saw any notarial act exhibited to you by him? A. Well, I went down later and got my note. Q. What note is that? By Counsel: The Owens note. A. I didn't see anything for the Owens. I think he didn't read the act of mortgage to me. Q. So, then, in this particular case, you handed Mr. Labatut \$611, without, contemporaneously, receiving any note or being shown any act of mortgage? A. I didn't give him any money. Q. I mean handed him the check? A. I sent him the check, and he examined the title and passed the act of mortgage, and I got my mortgage note when I called, and he showed me the paraph on the note as security."

Concerning the Harris note, for \$650, dated April 4, 1902, plaintiff received a communication from Labatut reading as follows:

"Henry P. Labatut, Notary Public. Hennen Building. Mortgage Loans Negotiated.

"Miss Jennie Nolan—Dear Miss: Having an investment of \$650, which I submit you, I would be pleased if you would hand bearer check for same. I expect to close the matter during this week and suggest that you call on Saturday morning, about 10 a. m., so that the note can be placed in your box. If this is not convenient you can call at your convenience. I trust that you are well, and with best wishes, beg to remain

"Yours sincerely, [Signed] H. P. Labatut."

Plaintiff says that she sent the check as requested (and the check, which is in evidence, bears date April 2, 1902, whilst the note bears date April 4, 1902), and that she saw no note or mortgage until later when she obtained the note by going to the office for it. Plaintiff's check for \$675, given for the Howat note, bears date May 22, 1902. The note is dated May 24, 1902, and there is in the record a communication from Labatut, of date May 27th, in which he says:

"I have your investment for \$675 duly executed, and have note for same. I will wish you to call tomorrow by 9 or 10 a. m., so that I can place same in box and also withdraw note of Miss Ducros, for \$75, secured by gas stock which must be transferred to the new company assuming the same. I will explain same to you."

Speaking of the Andrews note for \$250, dated September 19, 1901, plaintiff says:

"Q. How did you pay for the note? A. With the money that he had for my account. Q. In

other words, then, Mr. Labatut bought this note for you of William Andrews out of money received by him for your account on payments of other notes held by you? A. Yes."

Concerning the Kaupp note for \$600, dated November 15, 1899, there appears in the record a communication from Labatut to the plaintiff of date March 19, 1900, in which he says:

"I have a note for \$600 dated November 15, 1899, payable two years after date, with 7 per cent. interest, drawn by G. W. Kaupp, secured by mortgage on good real estate. The note is now worth \$614 being int. accrued for 4 months. If agreeable to you, you can send me your check for the amount and I will retain the note for your account. The act of sale by which the note is secured was made by me. Trusting that you are well,

"Sincerely, [Signed] H. P. Labatut."

Plaintiff testifies that she bought the note in question, but was unable to say at what time she had given her check for the price.

It may be here remarked that the checks by which plaintiff parted with her money were made payable to the order of Henry P. Labatut; that the communications upon the faith of which the checks were given all bore that signature; and that the accounts which were furnished by Labatut, from time to time, were signed in the same way and without the addition of his official character. Thus, he, at one time, probably in September, 1901, rendered an account reading as follows:

H. P. Labatut in Account with Miss Jennie Nolan.

By note of J. Faivre & int.	\$510 85
By note of J. A. Weinans and int.	206 00
By interest, note of Mrs. Korndorfer	48 00

Total credit	\$764 85
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To purchase note of Mrs. Edw.

Durrie, \$500 less 6 per cent. \$470 00

To city taxes 1904.	33 00	503 00
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Balance	\$261 85
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E. & O. E. Note of Wm. Andrews (\$250)	235 00
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[Signed] H. P. Labatut.	\$ 26 85
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So that, it was merely by crediting this account, and not by parting with her money, at the time, that plaintiff acquired the Andrews note.

Opinion.

The question here presented for decision is one of considerable importance to the public at large, who are interested in knowing upon what basis their transactions with notaries public rest; to the notaries, since those of them who are content to confine themselves to the discharge of the functions which the law assigns to the notarial office are interested in not being charged a commission, in order to obtain the bonds which they are required to give, which will be out of proportion to the risk; and to the sureties on the bonds, who are interested in not being held liable beyond their contracts.

Act No. 42, p. 34, of 1890 (amended and reenacted by Acts No. 138, p. 217, of 1896, and Act No. 187, p. 367, of 1902), provides that a notary public in the parish of Orleans shall give bond in the sum of \$10,000, "conditioned as the law directs, for the faithful performance and discharge of his duties as notary public." If therefore there was, at any time, a question as to whether (considering Rev. St. § 2503, and Act No. 40, p. 53, of 1886) the obligation of his bond should not be confined to those by whom he may have been employed, that question no longer exists, and the bond, required not to be subscribed in favor of the Governor of the state (Act No. 187, p. 367, of 1902), inures to benefit of any one who may sustain loss by reason of the failure of the notary faithfully to perform and discharge his duties as notary public, or, by reason of his wrongful acts, committed by virtue, or under color, or by means, of his office. *Rochereau v. Jones*, 29 La. Ann. 82; *Schmitt et al. v. Wid. O. Drouet*, 42 La. Ann. 1064, 8 South. 396, 21 Am. St. Rep. 408; *Weintz et al. v. Kramer et al.*, 44 La. Ann. 35, 10 South. 416. It would be tedious and useless to undertake to enumerate the acts which a notary may legally do, or which he may do, by virtue, or color, or means of his office. This court has said:

"A notary is defined to be an officer whose duty it is to attest the genuineness of any deeds or writings in order to render them available as evidence of the facts therein contained. *Abbott's Digest*, vol. 2, p. 182, v. 'Notary.' Also, a notary is a public functionary, authorized to receive all acts and contracts to which parties wish to give the character of authenticity, attached to the act of public authority, to secure their date, their preservation and the delivery of copies. *Dict. Droit Civil*, vol. 5, p. 27, v. 'Notaire.'"

"Although section 2492, Rev. St., provides that notaries public shall "have certain powers, it does not undertake to enumerate them all. It does not mention, for instance, that of receiving the renunciation of married women of their rights over the property of their husbands; the duty imposed upon notaries to attend to the registry of acts of sale in the conveyance book of the proper office; to paraph notes secured by privileges or mortgage with acts before them, Rev. Civ. Code, art. 3384, and various other acts authorized by law." *Schmitt et al. v. Widow O. Drouet et al.*, *supra*.

As suggested in the foregoing excerpt, the duty is expressly imposed, by Rev. Civ. Code, art. 3384, upon "every notary before whom an act shall have been passed, by which notes to order have been given for the payment of a debt bearing a privilege or mortgage, of attesting each of the notes by putting his name on it," mentioning the date of the act from which the privilege or "mortgage is derived, under penalty of damages." But, although notaries are authorized to prepare, and to authenticate, and to record, acts of sale and of mortgage, and, although they

are required, under penalty, to paraph notes, to order, given in connection with such acts and secured by privilege or mortgage, they are neither authorized nor required to receive, or to act as the custodians of, any money which is to pass between the parties to those acts. In the case of a sale, the cash portion of the price goes from the vendee to the vendor, and, in the case of a mortgage, the money goes from the mortgagee to the mortgagor, unless, in either case, the parties, by agreement, constitute the notary their agent or depository, in which event he acts as an individual and not in the discharge of any duty of his office. More than 50 years ago, Mr. Roselius, in arguing the question before our predecessors, said:

"The functions and authority of a notary public are defined by law, and, surely, no one ever supposed that the public officer whose duty it is to draw up, in the form and with the solemnities pointed out by law, a deed or authentic evidence of a contract of sale, was authorized to receive the price, and that such payment discharged the purchaser. * * * Now, as the notary is not the mandatory of the vendor for whom he draws up and passes a deed of sale, it would seem to follow, as a necessary consequence, that the purchaser cannot make a valid payment of the price to him."

And Eustis, C. J., as the organ of the court, said:

"We concur with the counsel in the opinion that the delivery of the money to the notary's clerk did not constitute a payment."

The case was decided in favor of the plaintiff, on the ground that he had consented that the money should be deposited with the notary. *Breen v. Schmidt*, 6 La. Ann. 13. In the following year, a similar case was presented, against the same defendant, and *Rost, J.*, as the organ of the court, said:

"This case differs from that of *Breen* against the same defendant (6 La. Ann. 13), in this, that it is not shown that, as in that case, the defendant had authorized the plaintiff to deposit with the unfaithful notary the cash portion of the price, etc. The notary having absconded without accounting for the amount deposited, we are of opinion that the plaintiff must bear the loss." *Brown v. Schmidt*, 7 La. Ann. 349.

And the doctrine thus applied was affirmed in the *Succession of O'Keefe*, 12 La. Ann. 246. In a case where suit was brought against a notary and his sureties for the recovery of money which had been deposited with the notary to enable him to cancel certain mortgages, it was said:

"The securities of a notary public are only liable on its failure to discharge the duties of his office. The law has not made it the official duty of a notary to receive money to erase mortgages." *Lescouzeve & Abry v. Ducatel et al.*, 18 La. Ann. 470.

In another case, where the purchaser of a slave, which, as it turned out, the vendor was unable to deliver, deposited the price with the notary by whom the act of sale had been prepared, and sued the notary and his surety for its recovery, it was held:

"There is no authority given by law to a notary, when parties intend to pass acts of sale

before him, for him to receive moneys or checks from one party to deliver to the other. Such an act forms no part of his duty as a notary. The security which he gives for the faithful performance of his duties as a notary is only bound for such acts of his as the law authorizes or requires him to do in his official capacity." *Monrose v. Brocard et al.*, 20 La. Ann. 78.

There is no doubt that the paraphing (i. e., the writing thereon by the notary of his signature, with mention of the date of the act with which it is connected) of a mortgage note is a notarial function, for the nondischarge, or improper discharge, of which the notary and his sureties may be held liable to any one who may thereby be injured. Hence, if the plaintiff had purchased (whether from the notary, himself, or from any one else) the forged and paraphed notes here sued on, believing them to be what they purport to be, she would be entitled to recover. But, our reconsideration of the case has lead us to the conclusion that, save in the case of the Kaupp note, she had parted with her money, not only before the notes had been paraphed, but before they had come into existence (the Westerhouse note, it may be remarked, is not, and never has been, paraphed), and, in two instances, at least, the forged notes sued on were given and received in discharge, or partial discharge, of Labatut's indebtedness, as agent, for moneys which he had previously collected for plaintiff's account. The legal situation is therefore correctly stated in the following excerpt from the opinion in a case, closely resembling this, in which, as in this case, the defendant, who was a notary, had, for several years, been receiving money from the plaintiff for investment, and of accounting for the same by remitting to the plaintiff forged notes and pretended deeds of trust with false certificates of acknowledgment, to wit:

"It thus appears from the relator's own evidence that he never parted with any value on the faith of Boughton's official acts. Boughton, as the relator's agent, sent to him a number of forged notes and forged and fraudulently acknowledged deeds of trust, and, on the faith thereof, obtained certain credits on his account with relator. It is difficult to see on what theory any liability on Boughton's official bond is to be enforced under the circumstances. * * * As, under the admitted facts of the case, the damages are the result solely of the criminal conduct of plaintiff's own agent, in embezzling plaintiff's funds, the mere fact that said agent happened to be a notary cannot give the plaintiff a cause of action on the bond. The false certificates of acknowledgment are, in fact, wholly extraneous matter." *Mathews v. Boughton*, 53 Mo. App. 155.

In the case at bar, the defendant Labatut appears to have solicited the plaintiff to deposit her money in his hands for investment, and she seems to have yielded to his solicitations upon his assurances (over his individual signature as it happens, though it would have been the same if he had signed as notary) that he would, at some time in the near future, furnish the securities in which

the money was to be invested. But, if he had borrowed the money for his individual account upon such assurances, and had afterwards made the assurances good by forgeries, committed as a notary, it would hardly be contended that the plaintiff sustained no loss until the forgeries were committed, and we think that there is no difference, in that respect, between the case of a notary who obtains money as a loan to himself and the case of one who obtains it for the purpose of investing it for the owner, and that, in either case, if the money is not accounted for, the owner must be considered to have lost it when he parted with it rather than when, at a later date, a forgery is committed by way of accounting. In the matter of the Kaupp note, the evidence, we think, justifies the conclusion that the note was actually in existence, in due form and having all the appearance of a genuine instrument, when the attention of the plaintiff was first called to it, and that she parted with her money on the faith of what Labatut, as a notary, had actually done, and not upon the faith of that which, as an individual, he promised to do as a notary, and, in that respect, the matter differs from that of the Andrews note, which Labatut delivered to the plaintiff by way of accounting for moneys which he had previously received from her and had embezzled. Plaintiff's counsel insist that the view which we now take of the case is at variance with that expressed in the case of *Stork v. Am. Surety Co.*, 109 La. Ann. 713, 33 South. 742. The difference, however, lies in the facts and not in our views upon the questions of law. It was said in the case mentioned, referring to the notary's bond there sued on:

"The bond was given for the faithful performance of the duties of his office. The liability, none the less, has been restricted as security, to the faithful performance of such acts as the law authorizes or requires him to do, in his official capacity"—citing *Monrose v. Brocard*, 20 La. Ann. 78.

And the court then proceeds to hold that it was within the official duties of the notary to receive mortgage notes for the cancellation of the mortgages by which they were secured, and that his sureties were liable for their diversion. The facts being different, we do not find it necessary, for the purposes of the case at bar, to review the reasoning which lead to that conclusion.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be avoided and amended, in so far as it rejects entirely the demand of the plaintiff against the defendant the Fidelity & Deposit Company of Maryland, and that plaintiff now have judgment against said company, in solido, with the defendant Henry P. Labatut, in the sum of \$600, with legal interest thereon from judicial demand, and costs, and in all other respects that said judgment be affirmed.

It is further adjudged and decreed that, as between plaintiff and defendants, the defendants be condemned, in solido, for the costs of the appeal, and that, as between the two defendants, the costs be borne by defendant Henry P. Labatut.

LAND, J., dissents. PROVOSTY, J., dissents in part, adhering to the original opinion.

(117 La.)

No. 15, 880.

DOSS et al. v. BOARD OF COM'RS OF MERMENEAU LEVEE DIST.

(Supreme Court of Louisiana. June 23, 1906.)

LEVEES—JUDICIAL NOTICE—REPEAL OF STATUTE—EFFECT—ABATEMENT OF SUIT—CONSTITUTIONAL LAW.

The General Assembly, by Act No. 79, p. 192, of the year 1904, sought to create a new levee district, viz., the Mermantau levee district.

The court takes judicial notice of the public laws of the state.

By the repeal the statute attacked on the ground of unconstitutionality has passed out of existence.

Nothing of it remains. It *was* a statute.

The suit abates, and no judgment can be rendered therein.

The court will not pass upon the constitutionality vel non of a statute that has been repealed.

Each of the parties pays his own costs. In re Lambert, 39 South. 447, 115 La. 469; Interdiction of Jones (La.) 41 South 431.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 37; vol. 44, Cent. Dig. Statutes, §§ 371-373.]

(Syllabus by the Court.)

Appeal from Eighteenth Judicial District Court, Parish of Acadia; James E. Barry, Judge ad hoc.

Action by W. L. Doss and others against the board of commissioners of Mermantau levee district. Judgment for defendants, and plaintiff appeals. Dismissed.

Thomas Thompson, Taylor, Medlenka & Taylor, and Bernard Titcher, for appellants. Hampden Story and Miller, Dufour & Dufour, for appellees.

BREAU, C. J. Plaintiffs are owners and taxpayers within the limits of the levee district sought to be organized by Act 79, p. 192, of 1904, which has passed out of existence.

They sue to restrain the defendants from organizing into a board of commissioners, and to restrain them personally from enforcing any part of the statute cited supra, upon the ground that it is unconstitutional.

They attack the statute for unconstitutionality on a number of grounds.

They alleged, and introduced testimony proving, that they are taxpayers, and that the enforcement of the law will be detrimental to their property within the district. We readily conclude that they unquestionably had a standing in court to attack the act on the ground of unconstitutionality. They also have a locus standi to enjoin the board of

commissioners and the "members of the board individually" from acting under the law creating the levee district.

Defendants sought to meet plaintiff's demand by pleading that the petition disclosed no cause of action, and, in the alternative, if the exception of no cause of action is overruled, then they pleaded prematurity.

These pleas were overruled by Judge Debaillon. His term of office having expired, when the case was afterward called for trial, his successor, as district judge, recused himself.

A judge ad hoc was appointed to try the case.

The answer of general denial was filed by the defendants. Evidence was heard on the merits. The presiding judge (ad hoc) discussed questions relating to the merits in his opinion, but limited the decree to the question of prematurity, and on the ground of prematurity alone he dissolved the injunction and dismissed the action.

Plaintiffs appeal.

Before this court appellees called attention to a bill, which has passed through the two houses, repealing the act before cited. Subsequently the repealing statute received executive sanction and is now a law.

This court takes judicial notice of public laws of this state.

The levee board had never been organized. The commissioners had taken the oath. They had never met to organize the board.

By the effect of the repealing law, there is no commissioner to enjoin, and even personally the persons named cannot well be enjoined from executing a law which has no existence. The defense no longer has any legal vitality. It has completely gone out of existence. There remains nothing of it, not even a shadow. It is as if it had never existed at all, for during its short-lived days it accomplished nothing, and left nothing behind whereby it may be known that a corporation existed. Of it there can scarcely aught be said but that if this litigation were to continue, it would be against a mere myth, and nothing whatever would be the result. It is very evident that plaintiffs cannot be disturbed by any attempt of defendant to enforce a statute repealed.

We determine actual controversy. There would be no useful purpose in deciding that a statute which has been repealed was unconstitutional.

The matter of cost presents the only remaining question.

There is no decision to be found upon the subject in our reports. There are decisions of the Supreme Court of the United States in which a similar question has been decided. The decree in one of the cited decisions enjoined appellant from enforcing a statute against the appellee. The statute was repealed while the case was pending on ap-

peal. The court, on the authority of *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, in which a similar question was decided, dismissed the appeal. Subsequently, on proper motion, the decree was amended in order to reserve to the parties interested the right to pursue whatever right they might have for the fee which they claimed under the law which had been repealed. Nonetheless it was held that the proceedings had abated by the repeal, and the question of cost was settled as in those cases where the proceedings have abated entirely. *New Orleans Flour Inspector v. Glover*, 160 U. S. 170, 16 Sup. Ct. 321, 40 L. Ed. 382; *New Orleans Flour Inspector v. Glover*, 161 U. S. 103, 16 Sup. Ct. 492, 40 L. Ed. 632. See, also, *State v. Board of Commissioners* (Ind. Sup.) 54 N. E. 812.

A similar rule was laid down in *Thayer v. Seavey*, 11 Me. 289; *Inhabitants of Saco v. Gurney*, 34 Me. 14.

The repeal of an act is a complete bar to further proceedings. The case comes to an end *vi majori*, and none of the parties to the suit can recover judgment. They come to a standstill, to an impassable wall, and it only remains for the court to dismiss the action.

Neither of the parties is in a position to claim or receive costs. No proceedings can be pursued under a repealed statute, though begun before the repeal, unless by special clause in the repealing act.

To return to the proceedings in the district court.

We have noted that the district judge dissolved the injunction and dismissed the action on the ground of prematurity. On the authority of the decisions cited, the action abated from the first.

The abating effect relates back to the origin of the suit.

This was, substantially, the view expressed in the decision first above cited which was followed in *New Orleans Flour Inspectors v. Glover*, 160 U. S. 170, 16 Sup. Ct. 321, 40 L. Ed. 382, and *New Orleans Flour Inspectors v. Glover*, 161 U. S. 103, 16 Sup. Ct. 492, 40 L. Ed. 632.

It is well settled that appellate courts will dismiss where, pending appeal, relief becomes impossible because of the repeal of the law.

For reasons assigned, it is ordered, adjudged, and decreed that the appeal is dismissed. Each of the parties pays his own costs.

(117 La.)

No. 16,119.

AMET v. TEXAS & P. RY. CO.

In re AMET.

(Supreme Court of Louisiana. June 18, 1906)

1. EXPROPRIATION — STATUTES — CONSTRUCTION.

The terms "taking or expropriation" as used in Act No. 96, p. 142, of 1896, amending

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the general expropriation statutes of the state, must be construed as equivalent.

2. SAME—CONSTITUTIONAL PROVISIONS.

The term "taken" is used in the state Constitutions of 1879 and 1898 in the sense of "expropriation" and that is its proper significance in legislation relative to the exercise of the power of eminent domain.

3. CONSTITUTIONAL LAW — STATUTES — CONSTRUCTION IN FAVOR OF VALIDITY.

To hold that the Legislature intended the word "taking" as used in the act of 1896, to mean an unlawful appropriation of lands, and that this term was interpolated in the text to enable corporations to acquire title by the short prescription of two years, would be tantamount to declaring the act unconstitutional, as no such object is expressed in the title.

4. EMINENT DOMAIN—REMEDIES OF OWNERS—PRESCRIPTION.

The short prescription of two years applies only when there has been a judgment of expropriation, and the corporation has entered into possession before the payment of the compensation awarded. *Mitchell v. Railway Co.*, 6 South. 522, 41 La. Ann. 363, reaffirmed.

As the present Constitution of the state prohibits such a taking, unless just and adequate compensation be first paid, the power of the Legislature to make such a trespass the basis of a special short prescription is more than doubtful.

(Syllabus by the Court.)

Action by Mrs. Volcy Amet against the Texas & Pacific Railway Company. Judgment for defendant, and plaintiff applies for certiorari or writ of review. Reversed and remanded.

Adolph Jalmens Lafargue, for applicant.
William Harris Peterman, for respondent.

LAND. J. Relator's counsel in his brief presents the question of law to be solved as follows:

"The main issue in this case is whether or not the prescription of two years, provided in the statutes governing expropriation of property by corporations, applies to cases when the property has neither been expropriated under the law nor obtained by conventional deed.

"The record shows that the defendant is using the land of the plaintiff for a right of way, and that it holds it without deed or decree of expropriation.

"The suit is for the value of the land used and expropriated for said right of way, which is in the very center of plaintiff's plantation, and comprises 3.75 acres.

"Also for damages caused by the impairment of drainage, etc., for all of which plaintiff asks judgment in the sum of \$1,962.50.

"The district court sustained the plea of prescription of two years and dismissed plaintiff's action.

"The Third Circuit Court of Appeal affirmed the judgment, and the case is before you on a writ of review."

It appears that in the year 1895 the St. Louis, Avoyelles & Southwestern Railway Company constructed its road over the plantation of the plaintiff, and used the right of way in question until July, 1896, when the company went into the hands of receivers, who operated the road until July, 1898, when, by a judicial sale ordered by the United States Circuit Court, the property passed into the hands of Emile Carlsbach, who in April, 1899,

sold the same to the Avoyelles Railway Company, the author of the defendant company.

The evidence shows that the previous consent of the relator was not obtained, but that she made no objections to the construction and operation of the railroad through her premises, and urged no claim for compensation until the present suit was instituted on October 20, 1903.

Defendant pleaded the prescription of two years provided by section 1, Act No. 96, p. 142, of 1896, amending and re-enacting section 1479 of the Revised Statutes of 1870, so as to read in part as follows:

"All claims for lands or damages to the owner caused by its taking or expropriation for such public works shall be barred by two years prescription which shall commence to run from the date at which the land was actually occupied and used for the construction of the works."

Section 1479 and section 698 of the same statutes as well as article 2630 of the Revised Civil Code are identical in terms, and their last sentence reads as follows:

"All claims for lands or damages to the owner caused by its expropriation for the construction of any public works, shall be barred by two years prescription which shall commence to run from the date at which the land was actually occupied and used for the construction of the works."

The only change made by the act of 1896 was the interpolation of the words "taking or" before the word "expropriation." The original law was enacted in 1855 by Act No. 83, p. 32, and was intended to meet the contingency of the expropriating company of taking possession after the award of the jury but before payment of compensation. See *Mitchell v. Ry. Co.*, 41 La. Ann. 363, 6 South. 522.

Such a taking of possession is now forbidden by the organic law which prohibits it unless the compensation be first paid. Const. 1898, art. 167. Defendant's contention is that the word "taking" thus interpolated into the text means appropriation, without due process of law or legal right, and that the lawmaker intended to make a trespass of this kind the basis of the short prescription of two years barring all claims of the owner for the land or damages. All the presumptions of law are against such a construction. Section 1479 of the Revised Statutes of 1870, which was amended by Act. No. 96, p. 142, of 1896 is under the title, "to provide for the expropriation of lands for railroads and other works of public utility." This section was amended in 1886 so as to include the state or any political corporation created for the purpose of exercising any portion of the governmental powers of the state.

The title of Act No. 96, p. 142, of 1896, is to amend and re-enact the section as thus amended, and to provide for the expropriation of property for purposes of charitable hospitals and public schools.

Hence, the lawmaker was legislating on the subject-matter of the judicial expropriation of private property for public purposes.

Conceding, then, that the word "taking" may mean appropriation without due process of law, the question remains whether the lawmaker used it in this sense. The conjunction "or" may be used as a disjunctive or as an equivalent.

We quote from Webster's International Dictionary as follows:

"Or may be used to join as alternatives terms expressing unlike things or ideas or different terms expressing the same thing or idea."

The Constitution of the United States provides that no person shall be deprived of his property without due process of law.

Article 2 of the Constitution of 1898 provides that no person shall be deprived of property "except by due process of law."

Article 167 of the same instrument declares that "private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid."

This article was copied from the Constitution of 1879.

The word "taken" as thus used necessarily means an "expropriation" by due process of law, as this is the only constitutional mode by which a person may be deprived of his property.

Hence the same term as used in the expropriation statute of 1896 must be held to mean a legal taking or expropriation, and not unlawful appropriation.

We are not advised that the term "taking" has ever been used in any statute relative to the exercise of the power of eminent domain in the sense of a trespass on real estate.

It cannot be presumed that the lawmaker intended to use the term "taking" as the equivalent of unlawful appropriation.

The title and context of the statutes and the organic law of the state forbid such a conclusion.

We cannot on the face of the act presume the deliberate legislative intention of interpolating in an expropriation statute a new law of prescription to enable corporations to acquire title to lands by mere occupancy, without legal right or title, for the short period of two years from the date of the trespass.

Such a construction would render the act unconstitutional, because the object is not expressed in the title, and is not germane to the expressed object of amending a statute relative to the expropriation of lands by judicial proceedings. Article 31 of the Constitution of 1898 reads:

"Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in its title."

What can be more foreign to a statute providing for the expropriation of land for public purposes by judicial proceedings, and specially declaring that the plaintiff corporation shall not take possession without pre-

vious payment of the amount awarded by judgment of the court, than a special law of prescription, enabling a corporation to deprive the owner of his land and all claims for damages by a continued trespass for two years?

We conclude that the Legislature had no intent to violate the organic law by the interpolation of another and distinct object in the amendatory statute or by giving legal effect to the unlawful taking of property without compensation first paid by the enactment of a special law of prescription in favor of quasi public corporations.

This case was tried on its merits, but went off on the plea of prescription.

We do not think it our province in a proceeding of this kind to pass on questions of fact not considered in the courts below.

It is therefore ordered, adjudged, and decreed that the judgment of the district court and of the Court of Appeal rendered herein be reversed, and it is now ordered and decreed that the plea of prescription filed by defendant be overruled, and this cause be remanded to the district court for further proceedings according to law; defendant to pay costs in both appellate courts.

BREAUX, C. J. I concur in the decree.

(117 La.)

No. 16,060.

SCOVELL et al. v. ST. LOUIS SOUTHWESTERN RY. CO.

In re ST. LOUIS SOUTHWESTERN RY. CO.

(Supreme Court of Louisiana. June 22, 1906.)

1. EXPROPRIATION—PRESCRIPTION—APPLICABILITY.

Mrs. Volcy Amet v. Texas & Pacific Railroad Company, 41 South. 721, reaffirmed, to the effect that the prescription of two years under Act No. 96, p. 142, of 1896, applies only where the property has been taken in pursuance of a judgment of expropriation.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 783-785.]

2. PRESCRIPTION—MINORS.

Prescription of 10 years does not run against minors.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 390-398.]

3. RAILROADS—RIGHT OF WAY—PAYMENT BY RAILROAD COMPANY.

A plantation was seized and sold after a railroad had appropriated and had been for some time using a right of way through it, and afterwards was repurchased, no mention being made in either sale of the right of way. *Held*, that the right of way did not pass with the plantation at the sheriff's sale, and that the obligation to pay for it, which the railroad owed to the owners at the time of the appropriation, continued to be a debt due to these owners after they had repurchased the property.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 405-416.]

4. SAME—DEDICATION.

From this debt the railroad was not liberated by the act of the owners in laying off the

land into streets and squares, according to a map placed of record, and selling lots as per the map. A railroad cannot acquire property by dedication, and no one pretends that the right of way in question belongs to the public. (Syllabus by the Court.)

Certiorari to Court of Appeal, Parish of Caddo.

Action by Mrs. Mary Lee Scovell and others against the St. Louis Southwestern Railway Company. Judgment for plaintiffs, and the defendant applies for certiorari or writ of review to the Court of Appeal. Affirmed.

See 38 South. 582.

Alexander & Wilkinson, for applicant. Charles Latham Gaines and Thomas Fletcher Bell, Jr., for respondents.

PROVOSTY, J. The two plaintiffs are owners of the Plain Dealing and Shady Grove plantations, and sue the defendant railway company for the value of the right of way which it occupies across the places. The company took possession without title, but with the consent of the father and tutor of plaintiffs, who, by the way, was also the vice president of the company. This was in 1888, and the road has been in actual operation ever since. The plaintiffs were emancipated and dispensed from attaining the age of majority on August 2, 1896, and October 20, 1897, respectively. This suit was instituted in October, 1903. For part of the distance on Plain Dealing plantation, the road traverses the town of Plain Dealing, which was laid out into squares and streets by the father and tutor of plaintiffs, according to a map placed of record by him; and since their emancipation the plaintiffs have made sales as per this map. The plaintiffs lost the ownership of Shady Grove plantation, by a sheriff's sale made in 1895; but they repurchased the property in 1899. In these sales no mention was made of the railroad, or of the right to sue for the value, or use, of the land taken by it.

The first defense is the prescription of two years, under Act No. 227, p. 457, of 1902, amending Act No. 96, p. 142, of 1896, amending Act No. 117, p. 215, of 1886, amending Rev. St. § 1479, which is Act No. 38, p. 32, of 1855, incorporated in Civ. Code, art. 2630.

After thorough and mature consideration, this court held, in the case of *Mrs. Volcy Amet v. Texas & Pacific R. R. Co.* (not yet officially reported) 41 South. 721, that this prescription applies only where the property has been taken in pursuance of a judgment of expropriation. Hence the prescription is inapplicable in this case.

The next defense is the prescription of 10 years, by which continuous and apparent servitudes are acquired, and personal actions are barred.

Article 3522, Civ. Code, provides that prescription does not run against minors "except in the cases provided by law." The

cases thus provided by law are specified in article 3541, Civ. Code; and the prescription of 10 years is not one of them. The plaintiffs were minors up to the time of their emancipation in 1896 and 1897; hence this plea of prescription is not good.

The learned counsel for defendant say that the prescription of 10 years here invoked is not properly a prescription, but in the nature of a perpetual bar, and, as such, applies to minors. We fall entirely to see the force of this argument. The lapse of time by which a servitude is acquired, and by which a liberation from debts is effected, is certainly a prescription. It comes exactly within the codal definition of prescription.

The next defense has reference to Shady Grove alone. It is that, when plaintiffs reacquired the property, they got it in the condition in which it was; that is to say, with the railroad upon it, and that they cannot now object to the railroad's being upon it.

In answer to this, the plaintiffs say that they were owners of the plantation when the railroad came upon it and took possession of the right of way. That the effect of this taking was to segregate this right of way from the rest of the plantation, so that at the sheriff's sale, it did not pass as part of the plantation, but remained in the hands of the railroad; and that it so remained subject to the obligation to pay for it. That this obligation was a debt due to them, and has continued to be a debt due to them, not paid, and not prescribed.

This appears to us to be a complete answer.

The next defense is that, by laying off the property into squares and streets according to a map, and recording the map, and making sales as per the map, the plaintiffs have dedicated the right of way to the public.

This defense, we assume, has been put in only for what it might be worth. It is without merit. No one pretends that the public owns this right of way, and it is well settled that a railroad cannot acquire property by dedication. 9 A. & E. E. of Law, p. 23.

The judgment of the Court of Appeal is affirmed.

BREAUX, C. J. I concur in the decree.

PARKER v. STATE.

(Supreme Court of Alabama. July 6, 1906.)
APPEAL—RECORD—BILL OF EXCEPTIONS—SIGNING.

A bill of exceptions cannot be considered on appeal, unless it affirmatively appears that it was signed within the time required by law. [Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2320.]

Appeal from Coffee County Court; H. H. Blackmon, Judge.

"Not officially reported."

John Parker was convicted of a criminal offense, and he appeals. Affirmed.

Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. It appears from the record that this case was tried and the defendant convicted on the 5th day of July, 1905, and the bill of exceptions was signed on the 3d day of August, 1905. There is nothing to show when the court adjourned, nor that any time was allowed for the signing of the bill of exceptions. Hence it does not affirmatively appear that the bill of exceptions was signed within the time prescribed by law, and it cannot be considered.

There being no error apparent on the record, the judgment of the court is affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

MALONE et al. v. LA CROIX.

(Supreme Court of Alabama. May 30, 1905.)

1. EVIDENCE—JUDICIAL NOTICE—METHODIST EPISCOPAL CHURCH—DIVISION.

Courts will take judicial notice of the division of the Methodist Episcopal Church, of the territory over which jurisdiction was to be and has been exercised by the subdivisions thereof, respectively, and of the articles of separation, with reference to a territorial division of the common property.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 26.]

2. RELIGIOUS SOCIETIES—PROPERTY—TRUSTEES—DEEDS—CONSTRUCTION.

Where a deed to property was executed to certain parties as trustees of the Methodist Church situated in a certain town, for the use and purpose that such trustees should erect a building thereon for the use of the "Methodist Episcopal Church in the United States of America," the property to be held by the grantees and their successors appointed under the statute of Alabama, and thereafter trustees were appointed in accordance with Code 1896, § 4193, the trustees so appointed, though named as trustees of the Methodist Episcopal Church South, became the legal successors of the original trustees and were vested with the title of their predecessors; the court taking judicial notice of the division of such church.

3. APPEAL—EXCLUSION OF EVIDENCE—PREJUDICIAL ERROR.

Where, in ejectment by trustees for a lot held by them for the benefit of a church, plaintiffs stated that they expected to identify the lot as a part of the land described in the government patent, a failure so to do before the erroneous exclusion of evidence of plaintiffs' appointment as such trustees and the taking of a nonsuit did not relieve the court of error in excluding evidence of plaintiffs' title.

4. EJECTMENT—EVIDENCE.

Plaintiff, in ejectment, must rely on the strength of his own title, and not on the weakness of defendant's title.

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

"To be officially reported."

Action by George Malone and others, trustees, against Ida La Croix. From a judgment, plaintiffs appeal. Reversed.

This was a statutory action of ejectment, brought by George Malone, Ernest Hine, R. H. Richardson, T. J. Turrentine, J. J. Turrentine, H. M. Lewis, T. M. Hobbs, W. T. McDonald,

and Theo Westmoreland, as trustees of the Athens Station of the Methodist Episcopal Church South, against Ida R. La Croix. As part of their testimony, plaintiffs offered in evidence the proceedings before the register in chancery of Limestone county, appointing them trustees of the Methodist Episcopal Church South under the deed set out in the opinion, which proceedings were not allowed in evidence by the court. The opinion sufficiently sets out the evidence and rulings of the court on which it is based. The plaintiffs took a nonsuit, with bill of exceptions, on the ruling of the lower court excluding evidence of their appointment as trustees.

W. R. Walker and T. C. McClellan, for appellants. W. T. Sanders and R. W. Walker, for appellee.

ANDERSON, J. In the year 1883 John M. Lane and Fletcher Lane and their wives, of the county of Limestone, executed a deed to the lot in question to Samuel De Woody and others, as trustees of the "Methodist Church situated in Athens, * * * unto the said parties of the second part, trustees as aforesaid, and to their successors in office, in trust for the use and purposes hereinafter mentioned and declared; * * * that they shall erect a building thereon, or cause to be erected a house of worship, for the use of the Methodist Episcopal Church in the United States of America, according to the rules and discipline which from time to time may be agreed upon; * * * and in further trust and confidence that they shall at all times forever hereafter permit such members and preachers of the said Methodist Episcopal Church to preach and expound God's Holy Word therein." The deed further provided that the property should be held by the parties of the second part, "and to their successors in office chosen and appointed according to the statute of the state of Alabama." The register in chancery, under section 4193, Code 1896, is clothed with the authority to appoint trustees in case of a vacancy, and the deed required the successors to be appointed under the statute. The plaintiff introduced proceedings had before the register, showing the appointment of plaintiffs, and reciting that they had been named by the proper authority as trustees of the Methodist Episcopal Church South previous to said appointment. We think that, under the terms of the deed and the statute, the trustees appointed by the register succeeded to the legal title; but, inasmuch as they are designated as trustees for the Methodist Episcopal Church South, it might be contended that they cannot be the lawful successors to persons who were designated in the deed as trustees of the Methodist Episcopal Church of America. This apparent variance relates only to the *cestuis que trust*, and which we think but one and the same.

We think the courts of the land can and

will take judicial notice of the division of perhaps the largest and most powerful Protestant Church in the United States, of the territory over which jurisdiction was to be and has been exercised by the subdivisions, respectively, and of the articles of separation, with reference to a territorial division of the common property. Not only is this a fact of historical notoriety, but the title to property one held before the separation has often been passed upon by the high courts of the country, and in reference to the rights and ownership of the respective wings of the church thereto. "The separation of the Methodist Episcopal Churches, the one north and the other south of a common boundary line, has been the subject of much discussion, in which the whole community more or less felt an interest, and was an event that connected itself with, and formed a part of the history of the country, of which no well-informed man could be ignorant, and from its notoriety, courts would take judicial notice of it without proof." *Humphrey v. Burnside*, 4 Bush (Ky.) 215; *Hart v. Bodley*, Hardin (Ky.) 98; *Creighton v. Bilbo*, 1 T. B. Mon. (Ky.) 138. In passing upon the title to church property and in upholding the right of the trustees of the Methodist Episcopal Church South to sue for the church property conveyed to the church before the division under a deed similar to the one before us, the court, in *Humphrey's Case*, supra, said: "The difference in name makes no difference in character or authority." This same court in the case of *Humphrey v. Burnside*, 4 Bush, 226, said: "The original Methodist Episcopal Church has been authoritatively divided into two Methodist Episcopal Churches, the one north and the other south of a common boundary line, which, according to the plan of separation, limits the extent and jurisdiction of each; that each, within its own limits, is the lawful successor and representative of the original church, possessing all its jurisdiction and entitled to its name; that neither has any more right to exceed those limits than the other; that the Southern Church, retaining the same faith, doctrine, and discipline, and assuming the same organization and name as the original church, is not only a Methodist Episcopal Church, but is in fact, to the South, the Methodist Episcopal Church as truly as the other church is so to the North, and is not the less so by the addition of the word 'South' to designate its locality." See, also, *Gibson v. Armstrong*, 7 B. Mon. (Ky.) 481. The Supreme Court of Missouri in the case of *Goode v. McPherson*, 51 Mo. 126, took judicial notice of the division and of the common boundary line, holding that it was "an event that connected itself with the history of the country, and, from its notoriety, courts will take judicial notice of it without proof."

The Supreme Court of the United States, in the case of *Smith v. Swormstedt*, 16 How. 304-308, 14 L. Ed. 942, involving the property of a "Book Concern" owned and con-

trolled by the church before the separation, said: "In the year 1844 the traveling preachers in General Conference assembled, for causes which it is not important particularly to refer to, agreed upon a plan for a division of the Methodist Episcopal Church, in case the annual conferences * * * should deem it necessary. * * * [It is claimed that] the beneficiaries must be * * * in connection with the Methodist Episcopal Church, as organized and established in the United States at the time of the foundation of the fund; and that, as the complainants, and those they represent, are not shown to be traveling preachers in that connection, but traveling preachers in connection with a different ecclesiastical organization, they have forfeited their right, and are no longer within the description of its beneficiaries. This argument, we apprehend, if it proves anything, proves too much; for, if sound, the necessary consequence is that the beneficiaries connected with the church, North as well as South, have forfeited their right to the fund. It can no more be affirmed, either in point of fact or of law, that they are traveling preachers in connection with the Methodist Church as originally constituted, since the division, than of those in connection with the church South. Their organization covers but about half of the territory embraced within that of the former church, and includes within it but little over two-thirds of the traveling preachers. Their General Conference is not the General Conference of the old church, nor does it represent the interest, or possess territorially the authority, of the same; nor are they the body under whose care the fund was placed by its founders. It may be admitted that, within the restricted limits, the organization and authority are the same as the former church. But the same is equally true in respect to the organization of the church South. * * * It is insisted, however, that the General Conference of 1844 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division, and hence that the organization of the church South was without authority, and the traveling preachers within it separated from an ecclesiastical connection which is essential to enable them to participate as beneficiaries. * * * But we do not agree that this division was made without the proper authority. On the contrary, we entertain no doubt but that the General Conference of 1844 was competent to make it, and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations, occupying the place of the old one. In 1784, when this church was first established, and down till 1808,

the General Conference was composed of all the traveling preachers in that connection. This body of preachers founded it by organizing its government, ecclesiastical and temporal, established its doctrines and discipline, appointed its superintendents or bishops, its ministers and preachers, and other subordinate authorities, to administer its policy and promulgate its doctrines and teachings throughout the land. It cannot therefore be denied—indeed, it has scarcely been denied—that this body, while composed of all the traveling preachers, possessed the power to divide it and authorize the organization and establishment of the two separate, independent churches. The power must necessarily be regarded as inherent in the General Conference. As they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one, so they might, at any subsequent period; the power remaining unchanged. * * * The division of the Methodist Episcopal Church having thus taken place in pursuance of the proper authority, it carried with it, as a matter of law, a division of the common property belonging to the ecclesiastical organization, and especially of the property in this Book Concern, which belonged to the traveling preachers. It would be strange if it could be otherwise, as it respects the Book Concern, inasmuch as the division of the association was effected under the authority of a body of preachers who were themselves the proprietors and founders of the fund."

It therefore stands to reason, and we must conclude as a matter of law, that the plaintiffs, when appointed trustees of the Methodist Episcopal Church South by the register in chancery, became the legal successors of the original trustees, and were vested with the title of their predecessors, and that the trial court erred in excluding the evidence of their appointment. It is true that the plaintiffs, in introducing evidence of title failed to identify the lot in question as a part of the quarter section described in the patent from the government; but counsel stated at the start that they expected to prove this fact, and we do not think a failure to do so before the exclusion of the evidence and the taking of the nonsuit relieves the trial court of error in excluding evidence of plaintiff's title. With the evidence already introduced excluded, the evidence of identity could avail nothing to the plaintiff. *Hubbard v. Baker*, 48 Ala. 491; *Erwin Meyer & Co. v. Crowell*, 17 Ala. 227; *McDonald v. Wood*, 118 Ala. 589, 24 South. 86.

The trial court committed no error in excluding deeds from Van Hoose to La Croix, or from La Croix to Van Hoose. The plaintiff in ejectment must rely upon the strength of his own title, not the weakness of defendant's title, and these deeds were certainly not admissible to help make a *prima facie* case for the plaintiffs.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MCCLELLAN, C. J., and TYSON, DOWDELL, SIMPSON, and DENSON, JJ., concur.

COLLOCK v. STATE.

(Supreme Court of Alabama. June 14, 1906.)

1. HOMICIDE — SELF-DEFENSE — WITHDRAWAL AFTER AGGRESSION.

If the aggressor withdraws from the conflict in good faith after having provoked it, and announces a desire for peace, but is pursued by his adversary, his right to take life in self-defense revives.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 151, 152.]

2. ASSAULT AND BATTERY — CRIMINAL RESPONSIBILITY — INSTRUCTIONS.

On a prosecution for assault and battery, defendant testified that he attempted to avoid the difficulty by leaving the house where prosecutor was, but that prosecutor followed and attacked defendant, who cut him. The court refused to instruct that, though defendant brought on the difficulty, yet if he abandoned the contest his right of self-defense revived. *Held*, that the ruling was proper, as defendant's manifestation of unwillingness was before the fight, and the charge did not hypothesize defendant's good faith in withdrawal.

3. SAME.

A requested instruction that, although the defendant may have been the original aggressor, he might set up self-defense, provided he attempted in good faith to retire from the conflict and announced his desire for peace, was properly refused as predicated defendant's right to set up self-defense upon a mere attempt by him in good faith to retreat from the conflict, instead of upon an actual withdrawal.

Appeal from City Court of Mobile; O. J. Semmes, Judge.

"Not officially reported."

James Collock was convicted of an assault and battery, and he appeals. Affirmed.

The defendant was indicted, tried, and convicted for an assault and battery with a knife upon one Simms, and sentenced to a term of four months' hard labor. The evidence tended to show that the crime was committed. The evidence of the defendant tended to show that he attempted to avoid the difficulty, left the house where prosecutor was, and went to a house nearby, where he was followed by prosecutor. The "damn lie" was passed, and the prosecutor raised his pistol and pulled the trigger three times, when defendant cut him with a knife; the pistol having failed to fire.

The defendant requested the following written charges, which the court refused. "(1) I charge you, gentlemen of the jury, that, although the defendant may have been the original aggressor, he may set up self-defense, provided he attempted in good faith to retire from the conflict and announced his desire for peace. (2) I charge you, gentlemen of the jury, that, although you may believe from the evidence beyond all reasonable doubt that the defendant brought on the difficulty, yet, if he

abandoned the contest, his right of self-defense revived.

Boyles & Kohn, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. The matters presented for review by the record involve only the correctness of the rulings of the trial court in refusing to defendant two written charges requested by him. Each of them attempted to invoke the well-recognized principle, which obtains in homicide cases, that if the aggressor withdraws from the conflict in good faith after having provoked it, and clearly announces his desire for peace, but is pursued by his adversary, his right to take life in self-defense revives. *Parker v. State*, 88 Ala. 4, 7 South. 98; *Crawford v. State*, 112 Ala. 1, 21 South. 214; *Bostic v. State*, 94 Ala. 47, 10 South. 602. Pretermittin all consideration of the soundness of the application of this doctrine in cases of assault and battery, the charges were properly refused. The testimony of defendant is the only testimony tending in any degree to show his unwillingness to go into the fight; and his manifestation in this regard was indicated, if at all, before the fight commenced.

The language of the second charge, instead of postulating the facts shown by this testimony, employs broad terms well calculated to impress the jury that his withdrawal, if at all, was after the fight commenced. Furthermore, it does not hypothesize his good faith in doing so (*Parker v. State*, supra), and may also be objectionable (which we do not decide) on account of leaving it to the jury to say what constituted self-defense. *Harbour v. State*, 140 Ala. 103, 108, 37 South. 330. The first, in addition to some of the vices pointed out as possessed by charge 2, possesses the further fault of predicated defendant's right to set up self-defense upon a mere attempt by him in good faith to retreat from the conflict, instead of upon an actual withdrawal.

Affirmed.

SIMPSON, ANDERSON, and DENSON, JJ., concur.

GLASS v. STATE.

(Supreme Court of Alabama. May 31, 1906.)

1. HOMICIDE—EVIDENCE.

In a prosecution for murder, all the occurrences and conversations of the evening from the time defendant appeared at the scene of the killing until the killing occurred, and in which defendant participated, which were shown to be parts of a continuous transaction occurring within a brief space of time, were admissible in evidence.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 341, 351.]

2. CRIMINAL LAW—CONDUCT OF ACCUSED AT TIME OF ARREST.

In a prosecution for murder, the fact that at the time of his arrest defendant threw his

hands behind him and drew a pistol was admissible in evidence, under the rule that the conduct and demeanor of a defendant at the time of his arrest are competent evidence against him.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 780.]

3. HOMICIDE—MALEVOLENT SPIRIT—COMMON PURPOSE.

In a prosecution for murder, evidence that about an hour or an hour and a half before the killing, while in company with another, defendant stated that he was going over to a certain house near which the killing occurred and at which a dance was being held and would dance "or break it up," in connection with other evidence, was competent as tending to show a malevolent spirit on the part of defendant and a common purpose on the part of him and a co-defendant to go to the dance for an unlawful purpose.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 295.]

4. SAME—PREPARATION FOR ACT.

In a prosecution for murder, evidence that about half an hour before the shooting defendant borrowed a pistol was competent as tending to show preparation.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 301.]

5. SAME.

In a prosecution for murder, a witness was properly permitted to testify that he heard shots; that soon thereafter two boys came running by his house from the direction of the scene of the murder; that he heard the one behind say, "Wait, F. J.; I've killed one damn scoundrel, and I will kill another if he runs up on me;" that the one who called had a pistol in his hand—witness further testifying that accused's co-defendant was commonly called "F. J."

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 303-309.]

6. WITNESSES — IMPEACHING TESTIMONY — SHOWING ENMITY ON PART OF WITNESS.

Where, in a prosecution for murder, one of defendant's witnesses testified that he was a special friend of deceased, the state was properly permitted, against defendant's objections, to ask the witness if he had not been indicted for selling whisky, and requested deceased to be a witness, and that on the latter's replying he would tell the truth to the witness' disadvantage, witness was incensed and remained so.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1192, 1193, 1277.]

7. SAME — GENERAL CHARACTER FOR TRUTH AND VERACITY.

A witness in a criminal case cannot be interrogated with respect to his own general character for truth and veracity.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1135-1143.]

8. SAME—SCOPE OF REDIRECT EXAMINATION.

Where, in a prosecution for murder, a state's witness was asked on cross-examination whether he ever had any trouble with defendant, and answered, "Yes, in this way," the state had a right to show whether the trouble was a fight, a personal difficulty, or other kind of trouble, without going into the details.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 997, 1002.]

9. CRIMINAL LAW—EVIDENCE.

In a prosecution for murder, the state was improperly allowed to show that a certain witness had been summoned as a witness in behalf of defendant, where the only purpose of so doing was to prejudice the jury against defendant.

10. SAME—REMARKS OF COUNSEL.

Where, in a prosecution for murder, there was no evidence that the deceased's children were left to charity or his friends, the court should have excluded a statement of the state's solicitor in his argument to the jury that defendant had taken the life of deceased and left his three orphan children to charity or his friends.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1669, 1676.]

11. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

In a prosecution for murder, an instruction that if defendant was at fault in bringing on the difficulty, but withdrew from it in good faith and was departing, and deceased walked up to defendant and pushed or knocked him down, and it appeared to defendant that he was in great danger of bodily harm and could not have retreated, he had the right to shoot deceased, and a further instruction that if defendant had had no difficulty with deceased, and while saying or doing nothing to deceased was shoved or knocked down by the latter, and could not have retreated, and it appeared to defendant that he was in danger of receiving great bodily harm from deceased, defendant had the right to shoot, were properly refused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 614-632.]

12. CRIMINAL LAW — MOTIVE — REASONABLE DOUBT OF GUILT.

In a prosecution for murder, an instruction that if the state failed to show any motive on the part of defendant to commit the offense charged, and his guilt was not clearly proven, then such absence of motive, considered in connection with all the evidence in the case, might generate in the minds of the jury a reasonable doubt of defendant's guilt, was properly refused.

13. SAME—ARGUMENTATIVE INSTRUCTIONS.

In a prosecution for murder, an instruction that there was no evidence in the case that defendant did or said anything in a certain house near which the killing occurred that would have justified deceased in striking him was argumentative and properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1960.]

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

"To be officially reported."

J. D. Glass was convicted of murder, and appeals. Reversed.

Nearly all the facts necessary to a proper understanding of the case appear in the opinion. The witness Knight was permitted to testify over the objection of the defendant that he saw the defendant and Bedsole about an hour and a half before the difficulty over at the new mill, and that Glass said in Bedsole's presence that they were going over to Milner's house and dance, or break it up. The witness Penler was allowed to testify that he heard the shots, and soon thereafter two boys came running by his house from the direction of Milner's, he living about three doors below Milner, when he heard the one behind say, "Wait, F. J.; I've killed one damn scoundrel, and I'll kill another if he runs up on me;" that the one behind and the one who called to "F. J." had a pistol in his hand. The witness was further permitted to testify that Bedsole was commonly called "F. J." The solicitor asked the wit-

ness Carden, "Is it not a fact that you were indicted in Elmore county for selling whisky, and asked Mr. Rutherford to be a witness for you, and he said that he would tell the truth, and it would hurt, and you got mad with him about it and have been mad with him ever since?" Mr. Rutherford was the man alleged to have been killed. Objection to this question was overruled. The defendant inquired of witness Law on cross-examination, "Do you think you know your general character in the community in which you live?" "Is your character good or bad in the community in which you live?" The court sustained the solicitor's objection to these questions.

The defendant requested the court to give the following charges, which were refused: "(4) If the defendant J. D. Glass was at fault in bringing on the difficulty, but withdrew from it in good faith and was departing, and the deceased came out of the witness Milner's house, walked up to the defendant Glass, and pushed or knocked him down, and got down on him, and it appeared to the defendant Glass that he was in danger of great bodily harm, and the defendant Glass could not have retreated, he had the right to shoot the deceased. (5) There is no evidence in this case that the defendant Glass did or said anything in Milner's house that would have justified the deceased, Rutherford, in striking him. * * * (11) If the jury believe from the evidence that the state has failed to show any motive on part of defendant Glass to commit the offense charged, and his guilt is not clearly proven, then this absence of motive may, when considered in connection with all the evidence in the case, generate in the minds of the jury a reasonable doubt of the guilt of the defendant Glass. * * * (28) If the jury believe from the evidence that the defendant Glass had had no difficulty with the deceased, and the defendant Glass was standing in the field opposite Milner's house, and went towards the defendant, and nothing was said or done by defendant Glass to the deceased, and the deceased shoved or knocked Glass down, and Glass could not have retreated, and it appeared to him that he was in danger of receiving great bodily harm from deceased, then he had the right to shoot."

Hill, Hill & Whiting, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The appellant, J. D. Glass, was jointly indicted and tried with one Frank Bedsole for the murder of Marshall Rutherford. The trial resulted in the acquittal of Bedsole and the conviction of Glass of murder in the second degree. From the judgment of conviction, Glass has appealed.

The killing was done by Glass with a pistol on the first night in May, 1905, in the city of Montgomery, on what is known as "Fac-

tory Row" and across the road from the house of James Milner. There was a dance in progress at Milner's house, and several persons were gathered there. Among them were the deceased and his three little girls. Besides there were a number of ladies in the house. All the occurrences and conversations of the evening from the time defendant Glass appeared at James Milner's house, until the killing of the deceased, and in which defendant Glass participated, were shown to be but parts of a continuous transaction, occurring within a brief space of time, and there was no error in permitting the state's witness James Milner to testify to them. *Armor's Case*, 63 Ala. 173; *Stitt's Case*, 91 Ala. 10, 8 South. 669, 24 Am. St. Rep. 853; *Jordan's Case*, 81 Ala. 20, 1 South. 577; s. c. 79 Ala. 9; *Churchwell's Case*, 117 Ala. 126, 23 South. 72.

The defendant Glass was arrested several hours after the shooting by Policeman Avant, assisted by Policeman McDade. The fact that defendant threw his hands behind him and drew his pistol at the time of the arrest was properly allowed to be proved. The conduct and demeanor of defendant at the time of his arrest are competent evidence against him. *Henry's Case*, 107 Ala. 22, 19 South. 23; *Bowie's Case*, 58 Ala. 335.

The declaration made by defendant Glass about an hour or an hour and a half before the killing, while he and defendant Bedsole were together, when taken in connection with the other evidence, was properly admitted as tending to show a malevolent spirit on the part of Glass, and a common purpose on the part of him and Bedsole to go to the dance for an unlawful purpose. Witness McHugh was permitted to testify that at McNeill's store, about a half hour before the shooting, he saw defendant Glass whisper to one Redmond, and that immediately Redmond pulled his pistol out and gave it to Glass. This evidence was properly admitted. It tended to show preparation on the part of Glass. *Ford's Case*, 71 Ala. 385; *Finch's Case*, 81 Ala. 41, 1 South. 585.

The motion to exclude the evidence of the witness Penler is so patently without merit as to require no discussion. *Henry's Case*, 107 Ala. 22, 19 South. 23.

Defendant's witness Carden having testified that he was a special friend of the deceased, the state was properly allowed, against the objections made, to ask the question that was objected to. This question was asked for the purpose of showing enmity on the part of the witness, and thus to contradict his claim of special friendship. This is always allowable. *McHugh's Case*, 31 Ala. 317; *Haralson's Case*, 82 Ala. 47, 2 South. 765; *Yarbrough's Case*, 71 Ala. 376; *Burke's Case*, 71 Ala. 377.

A witness cannot be interrogated with respect to his own general character for truth and veracity; and the court committed no

error in its rulings on questions propounded on cross-examination by defendant to the witness Law.

State's witness McSwain was asked on cross-examination this question: "Did you ever have any trouble with him [defendant]?" The witness answered, "Yes, in this way." The bill of exceptions recites that counsel for defendant refused to let the witness state what the trouble was. The solicitor then asked the witness this question: "Explain what the trouble was." It may be that illegal evidence would have been responsive to the question, and the court cannot be put in error for sustaining an objection to such a question. *Ross' Case*, 139 Ala. 144, 36 South. 718. But when the question also calls for evidence which would be competent, and the court overrules an objection to it, the court will not be put in error for the ruling, and if illegal evidence is embraced in the answer the remedy is by motion to exclude. It is apparent that the state had the right to show whether the trouble was a fight, a personal difficulty, or other kind of trouble, without going into the details. *Jones' Case*, 76 Ala. 8. There was no motion to exclude, and we need not consider the answer to the question.

That Mrs. Kirby had been summoned as a witness in behalf of the defendant was immaterial, and the solicitor was improperly allowed to show that fact by her. As has been recently said by us, the only possible purpose of such a question and its answer was to prejudice the jury against the defendant. *Neilson's Case* (Ala.) 40 South. (No. 4) p. 221.

The record contains no evidence that the deceased's three children were left to charity or his friends, and yet the solicitor stated in his argument to the jury: "The defendant has taken the life of Mr. Rutherford, and left his three orphan children to charity and to his friends." This cannot be considered as a mere inference, but is the statement of a fact, and the court should have excluded that part of the statement embraced in defendant's motion. *Neilson's Case*, supra; *Wolfe v. Minnis*, 74 Ala. 386; *Davis v. Common Council of Alexander City*, 137 Ala. 206, 33 South. 863.

Charges 28 and 4, requested by the defendant, were properly refused. *McClellan's Case*, 140 Ala. 99, 37 South. 239; *Wilson's Case*, 140 Ala. 43, 37 South. 93.

Charge 11 was properly refused. *Jackson's Case*, 136 Ala. 22, 34 South. 188; *Hornsby's Case*, 94 Ala. 55, 10 South. 522; *Griffith's Case*, 90 Ala. 583, 8 South. 812.

Charge 5 was argumentative, and was properly refused.

The affirmative charge requested by defendant is absolutely without merit.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

OWEN v. McDERMOTT et al.

(Supreme Court of Alabama. June 30, 1906.)

1. EVIDENCE—CONCLUSION OF WITNESS.

In an action to recover for transportation furnished by plaintiff to defendants, testimony of defendants as to whether or not they owed plaintiff for the transportation was not a conclusion, but a collective fact, and competent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2183, 2220–2233.]

2. NEW TRIAL—GROUNDS.

Where, in an action to recover for transportation furnished by plaintiff to defendants, testimony of defendants as to whether or not they owed plaintiff for the transportation was erroneously excluded, the court had power to grant a new trial on account thereof.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 53.]

3. APPEAL—NEW TRIAL—VERDICT AGAINST WEIGHT OF EVIDENCE.

Where the evidence is sharply in conflict, the appellate court will not set aside an order granting a new trial on the ground that the verdict was contrary to the weight of the evidence, unless the evidence is plainly and palpably in favor of the verdict.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"Not officially reported."

Action by Frank L. Owen against Mike McDermott and others. From an order and judgment granting a new trial, plaintiff appeals. Affirmed.

McAlpine & Robinson, for appellant. Mitchell & Tonsmeire, for appellees.

DENSON, J. This suit was brought by the plaintiff, Frank L. Owen, against three defendants. The cause was discontinued as to the defendant Thorne; she not having been served with process. There was a verdict and judgment in favor of the plaintiff against the other two defendants. On motion made by the defendants, the verdict was set aside, and the defendants were granted a new trial. From the order and judgment granting the new trial the plaintiff appealed.

On the trial one of the defendants was asked this question: "Do you owe Mr. Owen any sum for transportation, or not?" The plaintiff objected to the question on the grounds that it called for a conclusion of the witness and that it was incompetent. The court sustained the objection, and the defendants reserved an exception to the ruling of the court. This ruling of the court was assigned in the motion as one of the grounds for a new trial. The foundation of the plaintiff's cause of action was a claim of \$238 for transportation from New York to Mobile, alleged to have been furnished at the request of the defendants by the plaintiff to four members of the "Thorne Opera Troupe." The plaintiff had given evidence tending to show that he had furnished the transportation as alleged and that it was worth the amount claimed. Whether or not the defendants owed plaintiff for the transportation was a matter within the knowledge

of the defendants, and testimony that they did not owe plaintiff would not have been a conclusion, but a collective fact, and it would also have been competent evidence. The witness would have been subject to cross-examination as to the answer he would have given. The court erred in sustaining the objection. *Shrimpton v. Brice*, 109 Ala. 640, 20 South. 10; *Hood v. Disston*, 90 Ala. 377, 7 South. 732; *Turnley v. Hanna*, 82 Ala. 139, 2 South. 483; *Elliott v. Stocks*, 67 Ala. 290; *Massey v. Walker*, 10 Ala. 290. And it was within the power of the court to grant a new trial on account of this error, committed against the defendants.

But, without discussion of the evidence, it is sufficient to say that it was sharply in conflict, and we cannot say that it is plainly and palpably in favor of the verdict. Therefore we are unable to say that the court erred in granting the new trial on the ground that the verdict was contrary to the weight of the evidence. *Smith v. Tombigbee & N. Ry. Co.*, 141 Ala. 332, 37 South. 389; *Dillard v. Savage*, 98 Ala. 598, 13 South. 514; *Karter v. Peck*, 121 Ala. 636, 25 South. 1012. The judgment granting the new trial is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

HAAS v. COOK et al.

(Supreme Court of Alabama. June 30, 1906.)

1. PARTNERSHIP — ATTACHMENT — PROPERTY SUBJECT.

An affidavit for attachment, charging that "W. & W., a firm composed of C. W. and J. W., were justly indebted, etc., constituted a proceeding against the firm, and not against the individuals, and the attachment could not be levied on individual property of the partners.

2. ATTACHMENT—FORTHCOMING BOND—SUFFICIENCY.

Plaintiff's attachment against a firm was levied on the individual property of A., one of the partners, and an attachment in favor of L. against the firm and the individuals composing it was levied on the individual property of B., the other partner. B. replevied his property, and the replevy bond was made payable to L. and to plaintiff, recited plaintiff's attachment, and was executed by B. alone. Held, that the bond was for the replevy only of the property of B., and, notwithstanding superfluous and irrelevant matter, was sufficient for that purpose.

3. SAME—AMENDMENTS.

Attachment proceedings may not be amended so as to create a lien affecting the rights of another attaching creditor, previously legally fixed upon the same property.

4. SAME—IRREGULARITIES—PERSON ENTITLED TO COMPLAIN.

Where defendant in attachment replevied the property and sold it, another attaching creditor, who never acquired any lien or right to the property levied on and replevied, could not question irregularities in the other attachment.

Appeal from Circuit Court, Choctaw County; J. T. Lackland, Judge.

"Not officially reported."

Action by Sigmund Haas against A. B. Cook and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

R. P. Roach, for appellant. W. F. Glover, for appellees.

HARALSON, J. An attachment against a partnership by its firm name, without mention of the individual partners, can only be levied on partnership property; it cannot be levied on the individual property of the partners. *Watts v. Rice*, 75 Ala. 289.

The affidavit for the attachment, recites that "Adolph Brown, a member of the firm of Brown Bros., makes oath and says, that Woolf & Wallace, a firm composed of C. E. Woolf and J. H. Wallace, are justly indebted to Brown Bros. in the sum," etc.

The attachment bond was by Brown Bros. to "Woolf & Wallace, a firm composed of C. E. Woolf and J. H. Wallace."

The attachment writ followed, in the description of the defendants, the affidavit and bond.

The levy of the attachment, as returned by the sheriff was, "Executed the within writ by attaching the following property, jointly, with an attachment in favor of J. E. Lindsey, as the property of C. E. Woolf, to wit: One stock of merchandise, etc., and on certain real estate described in the levy as belonging to said Woolf. And as to the property of J. H. Wallace, the following, to wit: One stock of merchandise, 6 head of mules, etc., and on certain described real estate, belonging to said Wallace."

In the case of *Baldrige v. Eason*, 99 Ala. 516, 13 South. 74, in the caption of the complaint the parties were stated as:

"John Thomas Eason, Plaintiff, v. Baldrige, Murray & Halsey, a Firm Composed of W. F. Baldrige, Charles H. Halsey and A. F. Murray, Defendants. (The judgment was by default against said firm.)

"We are of the opinion that the pleading and the judgment entry show that the judgment was rendered against the partnership as such only. * * * Under our statutes, a suit against William F. Baldrige, A. F. Murray, and Charles H. Halsey, constituting the firm of, and doing business as partners under the name of Baldrige, Murray & Halsey, is very different from a suit against Baldrige, Murray & Halsey, a partnership composed of," etc.

If Brown's affidavit for attachment had charged that C. E. Woolf and J. H. Wallace, doing business under the name of Woolf & Wallace, it would have been a charge against the firm and the individuals composing it; but it charged that Woolf & Wallace, a firm composed of C. E. Woolf and J. H. Wallace, are justly indebted, etc., which constituted a proceeding against the firm and not against the individuals. As above stated, the bond and writ appear to follow the affidavit. The two attachments, one of Brown Bros., and the

other of J. E. Lindsey, in the hands of the sheriff, were levied at the same time,—Lindsey's, as above shown, on individual property of C. E. Woolf,—personal and real, and the one of Brown Bros., on the individual property of J. H. Wallace, personal and real. There was no firm property levied on under either attachment. Brown's attachment, about which the controversy in this case arises, was not leviable, as appears, on the individual property of either Wallace or Woolf; but, however, that may be, it has no relevancy to the levy of Lindsey's writ on Woolf's property, on which the Lindsey writ was levied, but on which the one of Browns' was not levied.

Woolf, it appears, replevied the personal property of his, on which the writ was levied. The replevy bond, which is made payable to J. E. Lindsey and Brown Bros., and recites also, the attachment of Brown Bros., was executed by and is the bond of Woolf alone, and not of Brown Bros. It does not refer to but one stock of goods levied on, of the value of \$644.75, which was the admitted value of the Woolf stock levied on, and has no reference to the property of Wallace on which Brown Bros.' writ was levied. This replevy bond was inartfully drawn, it is true, and contains superfluous, redundant matter. For instance, it is payable to J. E. Lindsey and Brown Bros., and recites the attachment of the latter firm, but it is plainly the obligation of Woolf and his sureties and of none others, and is for the replevy of property on which Brown Bros.' attachment has never levied. It is admitted in the agreed statement of facts, that the personal property of Wallace, on which Browns' levy was made, never went into the sheriff's hands, and nothing has been realized therefrom by sale or otherwise. If it were not for the superfluous, irrelevant matter recited in the replevy bond of Woolf, the bond would have been regular; but as it is, it was good for the purposes for which it was given, and was not vitiated by the said superfluous recitals therein.

The property replevied was delivered by the sheriff to said Woolf under said bond and no part of it was delivered to Brown Bros. It was afterwards sold by Woolf for \$644.75, which it is admitted was its full values. It is further admitted, that said Woolf kept the proceeds of the sale,—\$644.75,—in his possession. Afterwards, a judgment was rendered in the circuit court in favor of said Lindsey in his attachment suit, against Woolf for \$953.00. Thirty days, thereafter, the sheriff returned said replevy bond to the clerk of the court marked forfeited, and the clerk, thereupon, issued execution in favor of Lindsey against said Woolf and his bondsmen, and the said Woolf then paid over, on the said forfeiture bond, \$644.75, which had been paid to him on the sale of said goods, which, as admitted and stated above, was the fair and adequate value of the attached

goods, and this was before the fall term, 1902, of the said circuit court.

At the fall term, 1902, of that court, Brown Bros. amended the papers in their said attachment suit, so that the suit should be "against Woolf & Wallace, a firm composed of C. E. Woolf and J. H. Wallace, and against the members of the firm individually." At the spring term of that court, Brown Bros., plaintiffs in said attachment suit, recovered judgment therein against the said C. E. Woolf individually, for the sum of \$1,500, with waiver of exemptions as to personal property. It was then admitted, as above stated, "The stock of merchandise levied on under said attachment of Brown Bros., has never been delivered to the said sheriff, nor has any thing ever been realized out of same on the said judgment of Brown Bros. against said C. E. Woolf, but that the same remains unpaid."

The defendant pleaded a sixth plea, after Brown Bros. amended their complaint, which sets up, "that at the time of the levy of the attachment of Brown Bros. against the firm of Woolf & Wallace on the property belonging to C. E. Woolf and described in said replevy bond, an attachment issued in favor of John E. Lindsey against C. E. Woolf individually, was also levied on said property, as the individual property of C. E. Woolf for \$1,300. both of which attachments were levied on said property on the 8th day of February, 1902, and at the spring term, 1902, of the circuit court of Choctaw county, Alabama, judgment was rendered in favor of said Lindsey against said C. E. Woolf, in the sum of \$953, and the value of said goods was \$644.75, on which judgment, the said bond was declared forfeited, and the property, or its value, was attached under said bond and applied to the part payment of said Lindsey judgment, which was due prior to the amendment of said Brown Bros.' attachment, which was not amended until the fall term of said circuit court, 1902."

This plea was demurred to on grounds: "(1) That it sets up one wrong of the defendants as an excuse for the wrong complained of in the complaint. (2) The plea shows that Brown Bros.' attachment was levied on the property of the defendant in attachment, and that it was the duty of the sheriff, if the property was released on replevy bond, to take such a bond as the statute requires, and the fact, if it be a fact, that the property was delivered to J. E. Lindsey, is in no way a defense to plaintiff's cause of action for failure of sheriff to take a proper replevy bond. (3) The plea does not deny, but confesses and attempts to avoid the cause of action set up in the complaint, but alleges irrelevant matters and transactions between outside parties as a defense to the breach of duty of defendant, Cook, which breach is the foundation of this suit."

This demurrer was properly overruled. The gravamen of the plea is, that the attachment

of Brown Bros., when sued out, was against the firm of Woolf & Wallace, and not against them as individuals, and that the amendment of the complaint, so as to make the attachment to be against the firm of Woolf & Wallace and against the members of said firm individually, was made after the replevy bond of Lindsey was declared forfeited, and the property or its value was collected under said bond and applied to the part payment of said Lindsey judgment, before the said amendment, and when it was too late for the amendment to affect the payment by the sheriff to Lindsey of the proceeds of the property levied on under his attachment. Conceding that the amendment of the attachment proceedings was properly made, it could not certainly affect rights which had been properly and legally fixed before it was made.

It appears, that Lindsey acquired a lien on the property levied on, to which it does not appear, that said Brown Bros. ever acquired any lien or right. It is said, there were vitiating irregularities in the Lindsey proceedings, but, if this be true, Brown Bros., or their assignee, Sigmund Haas, the appellant, having no lien or right to the property levied on and replevied by Woolf, or arising from the sale thereof, cannot properly question the same.

There was no error in giving the general affirmative charge in favor of defendants.

Affirmed.

WEAKLEY, C. J. and DOWDELL and DENSON, JJ., concur.

PEARSON v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—FAILURE TO SET OUT ALL THE EVIDENCE—PRESUMPTIONS.

Where, on appeal from a conviction of an assault with intent to murder, under an indictment charging an assault on a certain party, the evidence in the bill of exceptions showed an assault on another party, and there was no evidence of an assault committed on the party named in the indictment, nor any showing when the assault was committed, nor the venue, but the bill of exceptions did not purport to set out all of the evidence, it will be presumed that there was other evidence than that shown by the bill of exceptions, which warranted a refusal of the affirmative charge for defendant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3031.]

2. HOMICIDE—ASSAULT WITH INTENT TO MURDER—SELF-DEFENSE—INSTRUCTIONS.

In a prosecution for assault with intent to murder, a requested charge on self-defense, that "the very circumstances of one being within the precincts of his dwelling or of his business house serves as a warning to deter an assailant from intruding therein," was a mere argument, and properly refused.

3. CRIMINAL LAW—INSTRUCTIONS—ASSUMING FACTS.

In a prosecution for assault with intent to murder, a requested charge that defendant was attacked at his own house, and that the law does not require that he retreat in order to plead self-defense, and the principle extends to

his dwelling house with so much additional space as is used for the purpose of a dwelling, assumed that defendant was attacked and was properly refused.

4. SAME—JUDGMENT—ENTRY.

Judgment entries on conviction should show an adjudication by the court on the verdict of the jury.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2536-2542.]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

"Not officially reported."

Garfield Pearson was convicted of assault with intent to murder, and appeals. Affirmed.

The defendant was indicted, tried, and convicted of an assault with intent to murder. The facts are sufficiently stated in the opinion. The charges requested by the defendant, and refused by the court, are as follows: (1) The general affirmative charge. (2) "The very circumstances of one being within the precincts of his dwelling or of his business house serves as a warning to deter an assailant from intruding therein." (3) "Garfield Pearson was attacked at his own house. The law does not require that he retreat in order to claim the benefits of his plea of self-defense; and the principle extends to his dwelling house, with so much additional space as is used and occupied for the purpose of the dwelling and customary buildings."

The judgment rendered in this case was as follows: "Comes Oscar L. Gray, Esq., solicitor for the First judicial circuit of Alabama, who prosecutes for the state in this cause, and also came the defendant in his own proper person and by attorney, and, being arraigned and charged upon the bill of indictment, pleaded thereto not guilty. Thereupon came a jury of good and lawful men, to wit, M. W. Bell and 11 others, who were sworn according to law, who upon their oaths, do say: 'We, the jury, find the defendant guilty as charged.' Defendant, being present in open court and asked by the clerk what he had to say as to why the sentence of the law should not be passed upon him, says nothing material. It is therefore considered and adjudged by the court, and it is a sentence of the court, that the defendant be, and he hereby is, sentenced to the penitentiary of the state of Alabama for five years," etc.

Canterbury & Gilder, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The defendant was indicted for an assault with the intent to murder John Wiley. The evidence set out in the bill of exceptions shows the assault was committed on John Wyatt. There is no evidence that tends to show an assault committed on John Wiley, nor is there any that shows when the assault was committed, nor is there any which shows the venue. But

the bill of exceptions does not purport to set out all of the evidence. Therefore we will, to support the ruling of the court refusing the affirmative charge requested by the defendant, presume there was other evidence than that shown by the bill of exceptions which warranted the refusal. It follows that error cannot be predicated of the court's refusal of the affirmative charge. *Keep v. Kelly & Levin*, 29 Ala. 322; *Gaines v. Harvin*, 19 Ala. 491; *Hudson v. Bauer Grocery Company*, 105 Ala. 200, 16 South. 693; 2 Mayfield's Digest, p. 495, § 17.

Charge 2, refused to the defendant, is a mere argument, and was properly refused.

Charge 3 assumes that the defendant was attacked, and pretermits any inquiry as to freedom from fault. It was properly refused. *Metlock's Case*, 114 Ala. 6, 22 South. 112.

We call attention to the imperfectness of the judgment entry in this case. It is barely sufficient to support the conviction. Those who write judgment entries should be careful to let the entry show an adjudication by the court on the verdict of the jury. *Driggers' Case*, 123 Ala. 46, 28 South. 512; *Wilkinson's Case*, 106 Ala. 23, 17 South. 458; *Wright's Case*, 103 Ala. 95, 15 South. 506.

There is no error shown, and the judgment of the circuit court is affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

DIXON v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. INCEST—INDICTMENT.

Under Code 1896, § 4889, declaring that, if "any man and woman" (within the prohibited degrees) have sexual intercourse together, etc., they must, on conviction, be punished, an indictment charging that defendant, a man, being father of C. D., "a girl," and within the prohibited degree of consanguinity, etc., did have sexual intercourse with the said C. D., etc., was not fatally defective for failure to charge that C. D. was a "woman," viz., a female having passed the age of puberty.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Incest, §§ 8, 9.]

2. SAME—ELEMENTS OF OFFENSE.

The crime of incest may be committed with a female who has not arrived at puberty.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Incest, §§ 1-5.]

Appeal from Circuit Court, Conecuh County; J. C. Richardson, Judge.

"To be officially reported."

John Dixon was convicted of incest, and he appeals. Affirmed.

E. E. Newton, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. The statute against incest is: "If any man and woman" (within the prohibited degrees), have sexual inter-

course together, etc., they must on conviction be punished as therein prescribed. Code 1896, § 4889. The indictment charges that "John Dixon, a man, being the father of Callie Dixon, a girl, and within the (prohibited) degree of consanguinity, etc., did have sexual intercourse with the said Callie Dixon," etc. There was a demurrer to the indictment in substance that it does not charge that the defendant had sexual intercourse with a woman; did not aver that Callie Dixon was a woman, nor did it state her age, whether under or over ten years, etc.

The contention of the defendant is, that the indictment is defective in the use of the word "girl," instead of the word "woman"; that the term "woman," is a female who has passed the age of puberty, while a girl may not have passed that age.

This distinction is without force, unless the crime of incest cannot be committed with a female who has not passed the age of puberty. We apprehend that the offense may be committed, at least by the man, on a female within the prohibited degree, without respect to her age.

An indictment alleged: "Walter Butler did assault Delia McCall, a woman, with the intent forcibly to ravish her." The proof showed, that Delia McCall was a girl, eleven years of age. The defendant was convicted, and this court held, that there was no variance for that, between the allegations and proof. The defendant asked the charge: "Unless the jury believe from the evidence that Delia McCall had reached the age of puberty there can be no conviction in this case," which charge was refused, and as held by us, properly so. *Butler v. State*, 120 Ala. 668, 25 South. 1024.

In *King v. State*, 120 Ala. 332, 25 South. 178, the indictment was in Code form, except in the substitution of the words "a girl under the age of ten years" for the word "woman," used in form 12 charging an assault on a woman with intent forcibly to ravish her, and it was held, that it sufficiently charged an offense under section 4346 of the Code of 1896, making it an offense to commit "an assault on another," with intent to ravish. The distinction attempted to be drawn is too technical to be meritorious.

No other error is raised and insisted on in the record. The demurrer was properly overruled.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

KNIGHT v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. CRIMINAL LAW—INSTRUCTIONS—CONSPIRACY.

Where, on a prosecution for murder, it appeared that defendant was present when decedent was killed by another, and there was evi-

dence from which a conspiracy between defendant and the other might be inferred to do an unlawful act, in the doing of which the killing ensued, it was proper to refuse an instruction that there was no evidence of a conspiracy to take the life of decedent or to do any other unlawful act.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

2. SAME—ACCESSORIES.

It was proper to refuse to instruct that there was no evidence that defendant aided or assisted in the killing.

3. SAME—ABSTRACT INSTRUCTIONS.

An instruction that conspiracy is a common purpose to do an unlawful act, and that it need not be shown by positive proof, and that it is not necessary that there should be a prearrangement to do the specific wrong complained of, was not objectionable, as abstract, where there was evidence from which the jury might have inferred a conspiracy.

Appeal from Circuit Court, Conecuh County; J. C. Richardson, Judge.

"Not officially reported."

Mack Knight was convicted of murder in the first degree, and he appeals. Affirmed.

The defendant was indicted with Wade Oliver for murder in the first degree. The tendencies of the evidence are sufficiently set out in the opinion. At the request of the state the court gave the following written charge: "The court charges the jury that conspiracy is a common purpose to do an unlawful act, and it need not be shown by positive proof; nor is it necessary that there should be prearrangement to do the specific wrong complained of." The court refused to give the following charges, requested by the defendant: (3) Affirmative charge. "(5) The court charges the jury that there was no evidence in this case of a conspiracy between the defendant and Wade Oliver to take the life of Leander Feagin, or to do any other unlawful act." "(F) The court charges the jury that there is no evidence in this case that shows that the defendant aided or assisted Wade Oliver in killing Leander Feagin."

James F. Jones, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The defendant was jointly indicted with one Wade Oliver for the murder of Leander Feagin. The defendant was separately tried and found guilty, and was sentenced to imprisonment in the penitentiary for life. The evidence showed that the killing was done by Wade Oliver and the defendant was at the time present. There was other sufficient evidence from which the jury might have inferred the existence of a conspiracy on the part of the defendant and Wade Oliver to do an unlawful act, in the doing of which the killing ensued. Moreover, independent of any conspiracy, there was evidence tending to show that the defendant was present, aiding, abetting, or encouraging Wade Oliver in the killing.

The trial court committed no error in the refusal of written charges 3, 5, and F, re-

quested by the defendant, nor in the giving of the written charge requested by the state. The evidence in this case differentiates it from the cases of *Dennis v. State*, 112 Ala. 64, 20 South. 925, and *Crane v. State*, 111 Ala. 45, 20 South. 590. The charge given for the state was not abstract. As we have said, there was evidence from which the jury might have inferred a conspiracy.

We find no error in the record, and the judgment will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

MIDDLEBROOKS v. STEPHENS.

(Supreme Court of Alabama. June 30, 1906.)

1. ACKNOWLEDGMENT—SUFFICIENCY.

In an action to recover possession of land, defendant, after showing loss of the original paper, offered in evidence a certified transcript of a deed from M. S. and C. S., which was objected to on the ground that the certificate of acknowledgment was void. The certificate was: "I, M. S. and C. S., in and for said county, hereby certify that M. S. and C. S., whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me this day that, being informed of the contents of this conveyance, they executed the same voluntarily on the day the same bears date. Given under my hand this 5th day of Jan., A. D. 1887. [Signed] S. J. C., N. P. ex off. J. P." It was shown that S. J. C. was a notary public at the time the deed was acknowledged, that the signature was his handwriting, and that he was dead. *Held*, that the acknowledgment was sufficient, and it was error not to admit the transcript in evidence.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, §§ 151, 181, 182.]

2. TRIAL—OBJECTIONS TO EVIDENCE—WAIVER.

Where, in an action to recover possession of lands, defendant offered to introduce a certified transcript of a deed, and exception was taken to the sustaining of an objection to the evidence on the ground that the certificate of acknowledgment was void, defendant did not lose the benefit of the exception by offering one of the grantors as a witness, who testified that she did not appear before the officer certifying the acknowledgment.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 259.]

Appeal from Circuit Court, Barbour County; A. A. Evans, Judge.

"To be officially reported."

Action by W. T. Middlebrooks against M. C. Stephens. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

This was an action to recover possession of a certain tract of land named in the complaint. The defendant, after showing the absence of the original paper, offered to introduce in evidence a properly certified transcript of a deed from M. K. Stephens and wife to B. F. Stephens, conveying the land described in the complaint. The plaintiff

objected to the introduction of this paper because it was not self-proving; the certificate thereto being void. The court sustained the objection, and the defendant excepted. The certificate referred to was in the following language: "State of Alabama, Barbour County. I, M. K. Stephens and M. C. Stephens, in and for said county, hereby certify that M. K. Stephens and M. C. Stephens, whose names are signed to the foregoing conveyance and who are known to me, acknowledged before me this day that, being informed of the contents of this conveyance, they executed the same voluntarily on the day the same bears date. Given under my hand this the 5th day of Jan., A. D. 1887. [Signed] S. J. Cumming, N. P. ex-off. J. P." It was shown in the testimony that S. J. Cummings was a notary public at that time, that the signature was his handwriting, and that he was dead.

Peach, Thomas & Peach and Steiner, Crum & Well, for appellant. Foster, Samford & Carroll and A. A. McDonald, for appellee.

HARALSON, J. No case has arisen in this court which presents the exact question that arises upon the certificate of acknowledgment to the deed of M. K. and M. C. Stephens to B. F. Stephens. Bearing in mind that a literal compliance with the statutory form is not necessary, and that acknowledgments should be liberally construed to the end that they may prevail rather than perish, if the court can fairly find a substantial compliance with the prescribed form, we are of opinion the acknowledgment is sufficient, and that the circuit court erred in excluding the deed.

Taking into consideration the whole certificate, including the signature of the officer, and the letters and abbreviations fairly importing his official character, we are satisfied that the names of the grantors first appearing in the certificate, were inserted by inadvertence or mistake, and that they may be excluded. When these names are thus removed, as they should be, there remains a good and sufficient acknowledgment, containing every essential of the statutory form. This is not the making of a new certificate, but is the mere correction of a clerical error, apparent on the face of the paper. It is not necessary to review the cases, although they have been examined, since we discover nothing in the previous decisions of this court which militates against the conclusion we reach.

After the erroneous ruling had been made and the exception duly reserved, the appellant did not lose the benefit of the exception by offering one of the grantors as a witness, who testified that she did not appear before the officer certifying the acknowledgment.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL, and DENSON, JJ., concur.

MONTGOMERY ST. RY. CO. v. LEWIS.

(Supreme Court of Alabama. June 30, 1906.)

1. STREET RAILROADS—OPERATION—REGULATION—STATUTES.

Code 1896, § 3441, imposing on engineers and conductors of trains the duty of causing their trains, when approaching a railroad crossing, to come to a full stop within 100 feet of the crossing and not to proceed until they have acquired knowledge that the way is clear, applies to street railroads.

2. CARRIERS—STREET RAILROADS—INJURIES TO PASSENGERS—NEGLIGENCE—PLEADING.

Under Code 1896, § 3441, requiring operators of trains to stop 100 feet before crossing another railroad and not to proceed until they know that the way is clear, a complaint in an action by a street car passenger for injuries in a collision at a railroad crossing, alleging that the operatives of the car negligently ran the same on the railroad crossing without first knowing that the track was clear, and that by reason of such negligence plaintiff was injured, etc., was not objectionable as an insufficient attempt to particularize defendant's negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1275½.]

3. PLEADING—DEMURRER—PLEADING GOOD IN PART—NEGLIGENCE—WILLFUL INJURY.

Where counts of a complaint for injuries were sufficient as charging simple negligence, it was not error to overrule a demurrer thereto because they attempted to state a cause of action for willful or wanton injury and were insufficient for that purpose.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 486, 487, 439, 506; vol. 37, Cent. Dig. Negligence, §§ 185, 204, 209.]

4. APPEAL—ASSIGNMENTS OF ERROR—WAIVER.

An assignment of error, not insisted on in appellant's argument and brief, will be deemed waived.

5. CARRIERS—INJURIES TO PASSENGERS—WILLFUL INJURY—EVIDENCE.

In an action for injuries to a street car passenger in a collision between the car and the railroad train at a crossing, evidence held sufficient to warrant a finding that the operatives of the street car were guilty of a violation of Code 1896, § 3441, requiring the operatives of a car to come to a full stop at a railroad crossing.

6. SAME—INSTRUCTIONS.

In an action for injuries to a street car passenger by collision with a railroad train at a crossing, an instruction that there was no duty on the part of the operatives of the car to come to a full stop before crossing the railroad, unless they knew or had reasonable cause to know that a train was approaching, was properly refused, as contravening Code 1896, § 3441, expressly imposing such duty.

7. SAME.

An instruction that it was the duty of the operator in charge of the train to have brought the same to a full stop before attempting to cross the street car tracks, and that the operatives of the street car were entitled to assume that the train would be so stopped unless the facts and circumstances were such as to indicate that the train would not be stopped, was properly refused as misleading, and as ignoring the duty imposed on the operators of the street car to stop by Code 1896, § 3441.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"To be officially reported."

Action by T. L. Lewis against the Montgomery Street Railway Company. From a

judgment for plaintiff, defendant appeals. Affirmed.

This was an action by Lewis, a passenger, for damages for injury received in a collision between one of defendant's street cars and some Louisville & Nashville freight cars at a crossing on grade. The seventh count of the complaint is set out in the opinion. The fifth count is in words and figures as follows: "Plaintiff claims of the defendant, the Montgomery Street Railway Company, a corporation, \$3,000 as damages, for this: that on, to wit, the 1st day of July, 1904, the defendant was engaged in operating by electricity a street railway in the city of Montgomery as a common carrier of passengers, and one of the tracks owned, used, or operated by the defendant crossed a railroad track in what is known as 'Vesuvius,' in said city, and the servant, agent, employé, motorman, or conductor in charge of one of defendant's cars, and upon which plaintiff was a passenger, knew that a railroad car was being operated upon said railroad track, and that to run said street car upon the said railroad crossing would naturally and probably result in a collision between the said car upon which plaintiff was a passenger and a railroad car, locomotive, or train, and notwithstanding such knowledge, and the probable and natural result of going upon the railroad track, the said servant, agent, employé, motorman, or conductor of the defendant, with a present consciousness that injury to plaintiff would probably result, wantonly or willfully ran said car upon which plaintiff was a passenger upon the said railroad track and it collided with the railroad car or train, and by reason of the willful or wanton conduct on the part of the servant, agent, employé, motorman, or conductor of defendant the plaintiff was greatly injured, his hip was injured, his head was injured, his back was injured, his arm was injured, his body was bruised, he was otherwise injured, he was internally injured, his hearing was impaired, he was permanently injured, he suffers and continues to suffer much mental anguish and physical pain, and was put to great expense in employing a doctor and buying medicines, and was prevented from tending to his business, all to his great damage." The eighth count is the same as the fifth count down to the words "willfully or wantonly," where they occur therein. The averment which follows is: "Willfully or wantonly stop said car upon the said track of the railroad, knowing at the time thereof that his action in so stopping said car upon said railroad track would probably result in disaster, and plaintiff further avers that a train of cars on said railroad track collided with the same car upon which plaintiff was a passenger, and thereby the said car upon which plaintiff was a passenger was violently thrown from said track and plaintiff was greatly injured." The injuries alleged are the same as in the

fifth count. The facts are sufficiently stated in the opinion, as are the demurrers.

There were a number of charges requested, but it is only necessary here to set out the following: Charge 12: "The court charges the jury that it was the duty of the operator in charge of the train of cars on the Seaboard Air Line Railway to have brought their train to a full stop before attempting to cross defendant's track, and the operatives of defendant's street car had the right to assume that the said train of cars would be so stopped, and to act on that assumption, unless the facts and circumstances were such as to reasonably indicate that said train would not be stopped." Charge 13: "The court charges the jury that there was no duty upon the operatives in charge of the street car which collided with the train of cars on the occasion testified about to bring said car to a full stop before crossing the railroad there, unless they knew or had reasonable cause to know that a train was approaching." The twelfth assignment of error is in the following language. "The court erred in sustaining plaintiff's objection to the question asked the witness Watts by defendant's counsel: 'What the plaintiff said in reference to the railroad company at the time of the accident?' Defendant's counsel stated that the evidence asked for by the question was part of the *res gestæ*, and that he expected to show that the plaintiff then and there remarked that the railroad company, referring to the steam road, ought to pay some damages." There was verdict and judgment for \$150.

Steiner, Crum & Well, for appellant. Hill, Hill & Whiting, for appellee.

DENSON, J. Action by T. L. Lewis, plaintiff, against the Montgomery Street Railway Company, defendant, to recover damages on account of personal injuries alleged to have been received by the plaintiff while a passenger on one of the defendant's street cars, in a collision which occurred between said car and a freight train of the Louisville & Nashville Railroad Company at a point on Chandler street in the city of Montgomery where the street railway of the defendant and the railroad of the Seaboard Air Line Railway cross each other at grade. The plaintiff obtained a judgment in the city court, and the defendant appealed.

The complaint is composed of ten counts. Demurrers were filed to each count, all of which were overruled by the court. The action of the court in overruling the demurrers to the complaint is assigned as error, but the only assignments in this respect which have been insisted upon in the argument of appellant's counsel are those which relate to the fifth, seventh, and eighth counts. The seventh count is in this language: "Plaintiff claims of the defendant, the Montgomery Street Railway Company, a corporation, \$3,000 damages, for this: that on, to wit, the 1st day

of July, 1904, the defendant was engaged in operating by electric force a street railway as a common carrier of passengers in the city of Montgomery, and one of the lines owned, used, or operated by the defendant ran into what is known as 'Vesuvius,' and crossed a railroad track in said Vesuvius, and plaintiff avers that the motorman, agent, servant, or employé in charge of one of the defendant's cars upon which plaintiff was a passenger then and there negligently ran said car upon the said railroad crossing without first knowing that said track was clear; that by reason of such negligence, the plaintiff was injured," etc. The foregoing is sufficient of said count to present intelligibly the question raised by the demurrer. The point of the demurrer is that the averment of negligence is insufficient on account of its generality. That the averment that the motorman negligently ran said car upon the said railroad crossing without first knowing that said track was clear is the averment merely of a conclusion. The argument with respect to this last point is that the averment was an attempt to particularize the negligence, and where this method is resorted to sufficient facts should be stated from which the court would be able to determine that the defendant was guilty of negligence. Without the use of the words, "without first knowing that said track was clear," in said count, under an unbroken line of decisions made by this court, the count would be sufficient. *Leach v. Bush*, 57 Ala. 145; *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 233, 26 South. 849, and authorities cited in the last case. The statute, section 3441 of the Code of 1896, imposes upon engineers and conductors of trains the duty of causing their trains when approaching a railroad crossing to come to a full stop within 100 feet of such crossing and of not proceeding until they know the way to be clear. This section has been held by us to apply to street railroads. *L. & N. R. R. Co. v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116; *Birmingham Sou. Ry. Co. v. Powell*, 136 Ala. 241, 33 South. 875. Certainly the count, if sufficient without the averment referred to, was not detracted from by the averment. Moreover, the averment that the motorman negligently ran the car upon the said railroad crossing without first knowing that the track was clear, is not the averment of a conclusion, but it is the averment of a specific fact. It was not necessary to state facts in detail from which said knowledge could have been determined by the court. Running the car on the crossing without first knowing the track was clear would constitute culpable negligence. *Sou. Ry. Co. v. Bryan*, 125 Ala. 297, 28 South. 445; *B'ham Sou. Ry. Co. v. Powell*, supra. The averment was amply sufficient to put the defendant on notice of what it was to defend against. The demurrer was properly overruled.

Demurrers to the fifth and eighth counts

raise the question of sufficiency of those counts as counts charging willful or wanton injury. If it should be conceded that the counts are insufficient as counts for willful or wanton misconduct, yet they are good as counts for simple negligence. This being true, the trial court will not be reversed for overruling the demurrer to them based on the theory of their insufficiency as counts for wantonness or willfulness.

The third count of the complaint was eliminated by a charge given by the court at the request of the defendant. The defendant pleaded the general issue to all the counts and contributory negligence to the first, second, and seventh. The tenth assignment of error is predicated upon an exception reserved to a part of the oral charge of the court to the jury, but it has not been insisted upon in the argument and brief of appellant's counsel. We therefore pass it without consideration.

At the conclusion of the evidence many charges in writing were requested by the defendant, 22 in all. Of the charges requested 7 were given and 15 were refused. Ten of the charges requested were in form the general affirmative charge with respect to each count in the complaint. The charge asked with respect to the third count was given. We have been unable to discover any evidence of contributory negligence in the record, and, though pleaded, it seems not to have been an issue on the trial, so far as the evidence is concerned. Counsel for appellant in their brief admit that the servants of the defendant may have been guilty of simple negligence in attempting to make the crossing. In keeping with this admission there is no insistence in their brief upon any error assigned with respect to charges applicable to the counts which aver simple negligence. But the insistence is that there is an absence of evidence to support the counts which aver wantonness and willful conduct. The evidence without conflict showed that the defendant was a passenger on one of defendant's cars; that the car was being operated by the defendant through its servants, a motorman and a conductor, at the time of the injury; that the car was en route to Riverside, in the city of Montgomery; the defendant's track and that of the Seaboard Air Line Railway cross each other on Chandler street in one of the suburbs in the city of Montgomery known as "Vesuvius"; that when defendant's car on which plaintiff was a passenger reached the said crossing, about 1 o'clock in the daytime, a collision occurred between it and a freight train which was being operated over the Seaboard road by the Louisville & Nashville Railroad. The freight train was being pushed by an engine along the track in a northerly direction. The evidence further showed without conflict that the car of the defendant had run onto the crossing, and the motorman had reversed the power in an effort to get off, and the car stopped on the crossing; that there was

a curve in the Seaboard road in the direction from which the freight train was approaching; that the crossing and the curve extended to the crossing, but the street car line was straight at the crossing. The motorman testified that he knew the line and that crossing, knew the Seaboard had a switch at that crossing, and knew that the Seaboard and the Louisville & Nashville road switched cars across there constantly. Evidence adduced by the plaintiff tended to show that there was no stop made by defendant's car before it ran onto the crossing, but that it was running at a rapid rate of speed—as expressed by the first witness for the plaintiff, "the car was coming full tilt." The evidence for the plaintiff further tended to show the freight train was approaching from around the curve, and that, on account of some staves that were piled at the crossing, view of the railroad was obstructed both ways until the crossing was reached. There was a man stationed on the end car of the freight train as it approached the crossing, and the evidence tended to show that the whistle of the engine of the freight train was blown and that the train came to a full stop within 100 feet of the crossing. The evidence as to whether the freight train stopped was in conflict. Evidence adduced by the defendant tended to show that the car was stopped within 6 or 8 feet of the crossing; that the motorman and conductor were on the platform of the car next to the crossing. Both of them testified that they stopped and looked up and down the track, saw no train coming, and the conductor signaled the motorman to proceed. Neither of them dismounted, but trusted to their view from the front platform of the car. The motorman testified that he could see up the track from where the car was stopped 50 yards, but could not see around the curve. The conductor testified that the car was about 4 or 5 feet from the crossing when it stopped; that he went out on the front platform, looked up and down the track, and signaled the motorman to go ahead; that the motorman released the brakes and begun to move along, was barely moving, and at that time some freight cars came down the line; that the motorman was afraid he could not get across the track, and released the brakes, reversed the car, and tried to back off, and the freight car struck about 6 inches of the front car.

The weight to be accorded the evidence was a question peculiarly within the province of the jury. If the evidence adduced by the plaintiff was worthy of belief, from it the jury was authorized to infer that there was a willful violation of the statute (section 3441 of the Code of 1896) in the manner in which the evidence tended to show the approach to the crossing was made by the servants of the defendant in charge of the car. Further, from the testimony, coupled with the testimony of the motorman, showing his knowledge of the facts and conditions of the crossing, the

frequent use of it by the railroads, and the probability that a train would pass it, or was liable to use the crossing, at any time, we think the jury was authorized to infer that the motorman was guilty of a reckless indifference to probable consequences of harm and injury to others; that his acts were performed with a knowledge of facts and conditions that rendered the same greatly dangerous to the lives of others, and a probability that they would result injuriously. "This degree of recklessness, with a conscious knowledge of its probable harmful consequences, constitutes that wantonness which in law finds its equivalent in point of responsibility to willful or intentional wrong." *L. & N. R. Co. v. Webb*, 97 Ala. 308, 12 South. 874; *A. G. S. R. R. Co. v. Anderson*, 109 Ala. 299, 19 South. 516; *Southern Ry. Co. v. Bryan*, 125 Ala. 297, 28 South. 445; *Birmingham Sou. Ry. Co. v. Powell*, 136 Ala. 231, 33 South. 875; *Sou. Ry. Co. v. Bonner*, 141 Ala. 517, 37 South. 702; *Sou. Ry. Co. v. Jones (Ala.)* 39 South. 118. The charges were properly refused.

Charge 18, refused to the defendant, contravenes the requirement of the statute (section 3441 of the Code of 1896). Hence, no error in its refusal.

Charge 12 was misleading in its tendencies. Besides it ignores the duty imposed upon the defendant by the statute. *Richmond & Danville R. R. Co. v. Greenwood*, 99 Ala. 501, 14 South. 495; *B'ham Sou. Ry. v. Powell*, supra.

There is no merit in the twelfth ground of the assignment of errors, which presents for review the ruling of the court on the admissibility of evidence.

We have considered all the assignments of error that have been insisted upon, and, having found nothing upon which a reversal should be ordered, the judgment of the city court must be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON, TYSON, SIMPSON, and ANDERSON, JJ., concur.

BENJAMIN v. STATE.

(Supreme Court of Alabama. Feb. 17, 1906.
Rehearing Denied June 30, 1906.)

1. CRIMINAL LAW—EVIDENCE—RES GESTÆ—ACTS AND STATEMENTS OF THIRD PERSONS.

On a prosecution for murder, it was error to admit testimony that, after deceased had received the fatal wound, people near the scene of the crime who pursued defendant cried "Murder!"

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 815, 821.]

2. HOMICIDE — EVIDENCE — FLIGHT OF ACCUSED.

On a prosecution for murder, it was proper to admit evidence to show that a crowd and the police chased defendant after the killing.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 365.]

3. CRIMINAL LAW—EXCLUSION OF EVIDENCE—DISCRETION OF TRIAL COURT.

In a criminal case, it was within the discretion of the trial court as to whether the evidence of a witness should be excluded because he, while under the rule, had talked with another witness about the case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1559-1563.]

4. WITNESSES—INCONSISTENT STATEMENTS OF WITNESS—EFFECT.

The fact that a witness on a prosecution for murder testified on his examination in chief that he saw the cutting, and on cross-examination testified that he did not see the killing, was no ground for excluding his evidence, but only went to his credibility.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1079-1082, 1285.]

5. HOMICIDE—INSTRUCTIONS—MALICE.

On a prosecution for murder, the only description given of the knife with which defendant killed deceased was that it was a small pocketknife; but the evidence showed that he died almost immediately. *Held*, that a requested instruction that the jury should not, from the mere use of the knife, presume malice, and that the instrument was not a deadly weapon from the use of which malice might be presumed, was properly refused.

Appeal from City Court of Montgomery; W. H. Thomas, Judge.

"Not officially reported."

Tom Benjamin was convicted of murder in the first degree, and he appeals. Reversed.

Defendant was indicted, tried, and convicted for killing Will Winget by cutting him with a knife. The charges requested and refused are as follows: "(1) If the jury believe all the evidence in this case, they must not convict the defendant of murder in either the first or second degree or manslaughter in the first degree. (2) The defendant must be tried on the evidence, and the evidence alone; and unless the jury believe from the evidence, and the evidence alone, that the defendant is guilty of murder, they must find the defendant not guilty. (3) If the jury believe the evidence in this case, they must not convict the defendant of murder in either the first or second degree. (4) If the jury believe the evidence in this case, they must not convict the defendant of murder in the first degree. (5) If the jury believe the evidence in this case, they must acquit the defendant. (6) I charge you, gentlemen of the jury, that you must not, from the mere use of the knife in this case, presume malice on the part of the defendant in taking the life of the deceased. (7) I charge you, gentlemen of the jury, that the instrument used in this case is not a deadly weapon from the use of which you may presume malice.

L. A. Sanderson, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The defendant killed the deceased by cutting him with a knife. Witness Alice Evans, after testifying to the circumstances that led up to the difficulty—that defendant cut the deceased and de-

ceased sank to the ground—was allowed over defendant's objection to testify that after they found the deceased was cut, and while defendant was walking rapidly off, the people around there hallooed: "Police! police! murder! murder! police! police!" as they pursued the defendant, who was running towards Holmes' store. As was said in *Wesley's Case*, 52 Ala. 182: "Acts and declarations of persons not parties are often received in evidence as parts of the res gestæ. Such acts or declarations as are thus received must have been done or made at the time of the occurrence of the main fact, must have a tendency to elucidate it, and must harmonize with it as obviously to constitute one transaction. True, it is not essential that they should be precisely concurrent in point of time with the main fact, if they spring out of the transaction, if they elucidate it." The exclamation under consideration was made by the "people around there," after the difficulty was over, and could not have elucidated any part of the difficulty or transaction; and, at most, the exclamation, "murder! murder!" was but the expression of the opinion of the people who uttered it, and its tendency was to unduly prejudice the minds of the jury. The court committed reversible error in admitting the exclamation. *Gordon's Case*, 129 Ala. 113, 30 South. 30.

That "Buck" and the crowd, with the police, chased defendant after the killing, was competent as tending to show flight. It was a matter that rested in the discretion of the court as to whether the evidence of witness Jeff Walls should be excluded because he, while under the rule, had talked with another of the witnesses about the case. *Sanders' Case*, 105 Ala. 4, 16 South. 935; *Burk's Case*, 120 Ala. 386, 24 South. 931. The motion to exclude a part of Buck Williamson's testimony was properly overruled. Having testified on the examination in chief, among other things, that he saw the cutting, the fact that on cross-examination he testified that he did not see the killing was not ground for excluding his evidence, but only went to the credibility of the witness.

Charges 1, 2, 3, 4, and 5, requested by the defendant, when construed in connection with the evidence, were patently bad, and the court did not err in refusing them. The only description given of the knife with which the defendant killed the deceased was that it was a small pocketknife. But the evidence without conflict showed that the deceased died almost immediately from the wound that was inflicted on him by the defendant with the knife. Charges 6 and 7 announced incorrect propositions of law, when construed with the evidence, and their refusal was proper. *Ex parte Nettles*, 58 Ala. 268; *Webb's Case*, 100 Ala. 47, 14 South. 865; 3 Brick. Dig. pp. 216, 217; *Robert's Case*, 68 Ala. 156.

We think, on the showing made, that the defendant was entitled to have the court require the state to admit the showing made for the witness McIntyre.

For the error in admitting the exclamation referred to, the judgment is reversed, and the cause is remanded.

TYSON, DOWDELL, and ANDERSON, JJ., concur.

PILCHER v. HICKMAN.

(Supreme Court of Alabama. June 30, 1906.)
JUDGMENT—SATISFACTION—ENTRY OF RECORD.

After plaintiff had obtained a judgment for a certain sum and costs, he gave defendant a receipt, agreeing to satisfy the judgment, which was entered on the execution docket, but subsequently, the costs not having been paid, execution was issued. *Held*, that a motion by defendant to have the judgment satisfied should have been granted.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 1668, 1706.]

Appeal from Circuit Court, Henry County;
H. A. Pearce, Judge.

"To be officially reported."

Action by T. B. Hickman against J. M. Pilcher, in which plaintiff had judgment. Defendant appeals from an order denying a motion to have the judgment satisfied and to quash a supersedeas granted defendant. Reversed and remanded.

W. O. Long, for appellant. Espy & Farmer and P. A. McDaniel, for appellee.

DOWDELL, J. T. B. Hickman recovered a judgment in the circuit court of Henry county against J. M. Pilcher for \$43.50, besides the costs of the suit. The facts show without dispute that the plaintiff, Hickman, for a valuable consideration agreed to satisfy his said judgment against Pilcher, both as to damages and cost, and gave to the said Pilcher the following receipt, which was put upon the execution docket, viz.: "T. B. Hickman v. J. M. Pilcher. Circuit Court, Abbeville, Ala. For value received I hereby mark satisfied in full the judgment rendered against the defendant in above-stated case. This October 23, 1903. T. B. Hickman. Attest: W. O. Long." The costs of said suit not having been paid, execution was, subsequent to the settlement between Hickman, the plaintiff, and Pilcher, the defendant, in which Hickman agreed to satisfy his said judgment against Pilcher, and subsequent to the entry of the above receipt upon the execution docket, issued against defendant. On these facts the defendant, Pilcher, obtained a supersedeas of the execution and entered a motion to have the judgment satisfied. On the hearing the trial court refused the motion and quashed the supersedeas theretofore granted.

In this the court was in error. The judgment was rendered in favor of the plaintiff, both as to damages and costs, and he had the

right to settle and satisfy the same in its entirety. The plaintiff, having received full satisfaction of the judgment by agreement and settlement with the defendant, both as to the principal and costs included in the judgment, the defendant was entitled to have the same entered satisfied, and no execution could therefore be legally issued. *Rice v. Dillahunty*, 20 Ala. 399; *Sanders v. Branch Bank at Decatur*, 13 Ala. 353; *Brewer v. Branch Bank at Montgomery*, 24 Ala. 439; *Bruce v. Barnes*, 20 Ala. 219; *Thomas v. Glazener*, 90 Ala. 537, 8 South. 153, 24 Am. St. Rep. 830; *South & North Ala. R. R. Co. v. Bradley*, 84 Ala. 463, 4 South. 611, and authorities there cited. Judgment will be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

CARROLL et al. v. FULTON et al.

(Supreme Court of Alabama. April 20, 1906.
Rehearing Denied June 30, 1906.)

1. PARTITION—BURDEN OF PROOF.

Where, in a suit to have land sold for division, complainants claimed as grantees of a child of the deceased owner of the land, which constituted decedent's homestead, the child having conveyed after majority, the burden was on complainants to show the vesting of title in the widow and minor children by reason of the fact that the estate was insolvent, or the homestead was all the land that decedent owned at his death.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 183.]

2. SAME—EVIDENCE—SUFFICIENCY.

In a suit to have land sold for division, complainants claiming as the grantees of a child of the deceased owner of the land, which constituted decedent's homestead, the child having conveyed after majority, three of decedent's neighbors testified that they never knew of decedent owning any other land, but there was testimony to the effect that decedent did own other lands. *Held*, that the evidence was not sufficient to show that the homestead was the only land owned by decedent at the time of his death, so as to vest title in complainants' grantor.

Appeal from Chancery Court, Geneva County; W. L. Parks, Chancellor.

"Not officially reported."

Suit by D. T. Fulton and others against O. A. Carroll and others. From a decree in favor of complainants, defendants appeal. Reversed, and decree entered dismissing the bill.

R. H. Walker, for appellants. W. O. Mulkey and C. D. Carmichael, for appellees.

McCLELLAN, C. J. The burden was, of course, on complainants to prove the title and interest in the land they sought to have sold for division which they alleged in the bill. Claiming, as they did, only upon the theory that they were the grantees of a tenant in common of the homestead owned by Delaware Peacock at the time of his death,

It was incumbent on them to show that title thereto had vested absolutely in the widow and minor children of the decedent; one of the children having conveyed to them after attaining lawful age. To such investiture of title it was necessary either that the estate of Delaware Peacock was insolvent or that the homestead was all the land he owned; and the burden of proof of one or the other of these facts was upon the complainants. Insolvency was not proved, but, to the contrary, solvency was affirmatively established by the respondents. This left upon complainants the absolute onus of proving that the homestead constituted the whole of decedent's landed estate. The substance of the evidence on this point for the complainants was that of two or three of Peacock's neighbors to the effect that they never knew or heard of his owning any other land. There was some testimony on the point of the respondents having some tendency to show that he owned other land at the time of his death. On this state of the evidence, we are not reasonably satisfied that the homestead was the only land owned by Delaware Peacock at the time of his death.

It follows that the decree granting relief to the complainants must be reversed. A decree will be here entered denying relief and dismissing their bill, but without prejudice. Reversed and rendered.

The foregoing was prepared by the late Chief Justice CCLELLAN, and has been examined in connection with the record, and approved, and is now adopted as the opinion of the court.

WEAKLEY, C. J., and HARALSON, DOWDELL, and DENSON, JJ., concur.

GASTON et al. v. O'NEAL.

(Supreme Court of Alabama. Jan. 15, 1904.
Rehearing Denied June 30, 1906.)

INTOXICATING LIQUORS — LICENSES — STATUTORY PROVISIONS.

Const. 1901, § 10, defines a local law as one applicable to any political subdivision of the state, and a special law as one which applies to an individual association or corporation. Montgomery City Charter (Acts 1892-93, p. 377) § 20, exempts persons procuring a liquor license from the city from paying any tax or license to the county. Act March 4, 1903 (Gen. Acts 1903, p. 184), provides for a county liquor tax, and repeals all laws, general and "special," inconsistent with itself, and Act Sept. 30, 1903 (Gen. Acts 1903, p. 298) § 4, again confers power on counties to levy a liquor tax, and provides that the statute shall not affect the exemption provided by any city charter. *Held* that, notwithstanding the constitutional definitions, the exemption was repealed by Acts March 4, 1903 (Gen. Acts 1903, p. 184), and not revived by Act Sept. 30, 1903 (Gen. Acts 1903, p. 298) § 4.

Simpson, Anderson, and Tyson, JJ., dissenting.

Appeal from City Court of Montgomery;
A. D. Sayre, Judge.

"To be officially reported."

Application by Jesse O'Neal for mandamus to compel J. B. Gaston and others to issue a county license as a retail liquor dealer. From a judgment awarding the writ, respondents appeal. Reversed.

This is an application for mandamus, filed by appellee against appellant, asking that appellant as judge of probate be required to issue to appellee a county license as a retail dealer in spirituous, vinous, and malt liquors. The petition alleges a compliance with the statute in reference to the filing of the recommendation and the making of the oath and subscribing the same, and the tender of the amount of state license required. It further alleges that section 20 of an act of the Legislature approved February 21, 1893 (Acts 1892-93, p. 368), to establish a new charter for the city of Montgomery, provided that all persons to procuring a license from the city council or its authorized agent for doing business in the said city, shall be exempt from paying any tax or license to the county of Montgomery for carrying on said business in said city. The petition also alleges that the business proposed was to be done exclusively in the city of Montgomery, and that it was to be a retail business for selling spirituous, vinous, and malt liquors for which petitioner had procured a license from the city of Montgomery, and that by said above-mentioned act retailers of spirituous, vinous, or malt liquors were named as exempt from county license. The respondent answered the petition, setting up that section 20 of said act was violative of section 2, art. 4, section 1, art. 1, and section 7, art. 1, of the Constitution; that the act was void because of the fact that the Senate Journal failed to show that the act was signed by the President of the Senate in the presence of the same immediately after its title had been publicly read at length; and also that section 20 of said act was repealed by an act of the Legislature approved March 4, 1903 (Gen. Acts 1903, p. 184), and styled "to better provide for the revenue of the state." The city court awarded the mandamus as prayed, and respondent appeals.

John G. Finley and William Blakey, for appellants. J. M. Chilton, for appellee.

WEAKLEY, C. J. Assuming without deciding that the exemption from county license claimed by appellee under the charter of the city of Montgomery was valid and in force at the time of the enactment of the statute of March 4, 1903, entitled "An act to better provide for the revenue of the state" (Gen. Acts 1903, p. 184), the majority of the court are of opinion that such exemption existed under a "special law," within the meaning of the general revenue law above mentioned, and that such special law, being inconsistent with a provision of said revenue law, was by the latter expressly repealed by

virtue of its last clause (page 232), which declared that "all laws and parts of laws, both general and special, inconsistent with the provisions of this act, are hereby repealed." It is contended that, since the Constitution of 1901 defines both local laws and special laws, it must be supposed the Legislature had the difference between them in mind, and that by using the term "special laws" in the repealing clause of the revenue act of 1903 it meant to exclude from repeal any local law; the argument further being that the charter of Montgomery exempting liquor dealers within that city from county license tax is a local law merely. We cannot agree to this contention. The definition of a general law, a local law, and a special or private law found in section 110 of the Constitution of 1901 merely states the meaning of those terms as they are employed in the article of the Constitution in which the section is located, and we are not thereby precluded from holding that upon a proper construction of the revenue act the Legislature meant by "special laws" any laws that were not general and which were inconsistent with the uniform plan for county license taxation the general revenue law of 1903 was designed to adopt. Although the charter of Montgomery was local, in the sense that it applied to a municipality, the exemption therein secured to persons taking out a privilege license from the city was, in a broad and just sense, special and exceptional, and hence inconsistent with that provision of the revenue law of 1903, which declared: "The court of county commissioners of each county, except in cases otherwise provided, may at any regular or special term, add to the taxes specified in this section such amounts not exceeding fifty per cent. of such taxes for county purposes as in their judgment may be necessary."

The use in the repealing clause of the statute of the term "all laws, general and special, in conflict with or inconsistent with," etc., is not unusual in our legislation; and in decisions of this court the terms "local law" and "special law" have been used interchangeably. *Maxwell v. State*, 89 Ala. 150, 7 South. 824; *Holt v. Mayor and Aldermen of Birmingham*, 111 Ala. 369, 19 South. 735. Mr. Justice TYSON in his opinion has shown that the words "except in cases otherwise provided" in the paragraph above quoted do not operate to save the exemption claimed by appellee, and we concur in his views on that proposition. We are not of opinion that the proviso added to section 4123 of the Code by the act of September 30, 1903 (Gen. Acts 1903, p. 298, § 4), in any event operated to revitalize and restore the exemption in the Montgomery charter, which we have declared the revenue law of March 4, 1903 (Gen. Acts 1903, p. 184), expressly repealed, and hence we do not need to inquire whether the act of September 30, 1903, was or was not constitutionally enacted. The

judgment of the city court awarding the mandamus was erroneous.

At the November term, 1903, a judgment was rendered in this case reversing the judgment of the city court and remanding the cause, without any written opinion expressing the views of the majority. Since then the cause has been pending on application by appellee for a rehearing. This opinion expresses the views entertained by the majority of the court as at present constituted, after consideration of the rehearing application, and it results that same must be overruled.

Reversed and remanded. Application for rehearing overruled.

HARALSON, DOWDELL, and DENSON, JJ., concur.

TYSON, J. (dissenting). The question in this case is whether a retailer of liquor in the city of Montgomery must take out a county, as well as a city and state, license. The court below held that he was exempt from paying the county license, and issued a mandamus accordingly. The authority of the county to levy such a tax prior to the act of March 4, 1903 (Gen. Acts 1903, p. 231), was found in the act of March 5, 1901 (Acts 1900-01, p. 2635), which is in great part section 4122 of the Code of 1896 amended. This section of the Code did not give the power to the county to levy a tax on licenses, but section 4123 did. When the act of 1901 undertook to amend section 4122, it incorporated in its body section 4123, saying that the counties might "add to the taxes specified in this section such amounts not exceeding fifty per cent. of such taxes," etc. The act of March 4, 1903, amends various subdivisions of the act of March 5, 1901, but seems to leave untouched subdivision 83 of that act and the provisions following it on page 2635, authorizing the counties to levy a license in the cases specified in "this section," meaning section 4122 of the Code as therein amended. The proviso, on page 231 of this act of March 4, 1903, however, evidently intended to embody the power contained in Code 1896, § 4123, and in the act of March 5, 1901 (Acts 1900-01, p. 2635), but by detaching the proviso from the section of the revenue law it was intended to form a part of, and attaching it to a different section, its effect is lost, unless "this section" is construed to mean "this act." Such a construction is allowable, but is unnecessary in this case, since the same provision is in force by the act of March 4, 1901, if not by the act of March 5, 1903. The question, therefore, is, as we have stated, whether or not the appellee must pay for a county license.

It is insisted on the one hand that the last provision of Act 1903, "repealing all laws and parts of laws, both general and special, inconsistent with the provisions of that act,"

is restricted in its operation by the terms of the clause granting power to the counties, because it says the counties may levy the tax in question "except in cases otherwise provided," and that in this case, as the city charter of Montgomery exempted the retailer from the tax, the case was otherwise provided for, and consequently the repealing clause would not operate on the city charter, since there would be no inconsistency in the two acts. On the other hand it is asserted that this argument proves too much, for all laws, general or special, in existence when the act of 1903 was passed, regulating in a different matter county taxation, would have provided otherwise than that act, and would therefore restrict the grant to the existing status and leave nothing for the repealing clause to operate upon. We think this last contention sound. The words "except in cases otherwise provided," in the clause relating to county taxation upon licenses, was in Code 1886, § 630, and Code 1896, § 4123, and seems to be a restriction of the power to levy the tax therein authorized to cases not otherwise provided for by the general law; that is, by the Code. There are in section 4122 of the Code of 1896 and in the act of March 5, 1901, and the act of March 4, 1903, several instances in which it is provided either that no county license shall be exacted or that one less than 50 per cent. of the state license is prescribed. See subdivisions 35-37 of section 4122 of the Code of 1896, and subdivisions 50, 59, 72, of the act of March 4, 1901. It was therefore necessary for the general power of the counties to levy license taxes to be restricted so as not to operate in cases already or otherwise provided for in the general revenue law. And we think that is the field of its operation.

It remains to consider the repealing clause of 1903. The lower court held that the provision of the charter of the city of Montgomery exempting retailers paying the city tax from a county tax, if otherwise a valid law, was not repealed by the act of 1903, because it was a "local" and not a "special" law according to the definition of those terms in the Constitution. It is natural to suppose that the Legislature, enacting laws under the Constitution, would use terms therein defined in the sense of such definition. Without looking further, therefore, we are authorized to adopt the meaning of the words "local," "special," and "general," as applied to laws in that instrument, and thus hold that the charter of the city of Montgomery, authorizing a city tax and exempting persons paying it from the county tax, being a "local" law, is not repealed by the clause of the act of 1903 specifying general and special laws inconsistent with its terms as being repealed. The fact that the act in its terms of repeal, which occur frequently in its body as well as at its conclusion, carefully excludes local laws, with one other exception, while specifying general and special laws, shows that

there was no intention to affect local laws, except when mentioned. The revenue law of 1884 (Acts 1884-85, p. 70) excepted from its operation special and local laws relating to county taxation. The act of 1903, in its repealing clauses throughout the act, omits the word "local," while retaining the word "special," as applied to laws repealed, showing an evident intent to make a distinction between them. And this legislative intention is further manifested, and, indeed, made plain, by the act of September 30, 1903 (Gen. Acts 1903, p. 295), amendatory of the act of March 4, 1903, passed by the same legislative body, wherein power is again conferred on the counties to levy a tax of 50 per cent. etc., "provided, that the provisions of the act shall not affect the exemptions provided by any city charter." And there appears to be good reason why the retailer, paying a license tax to the city, might be exempt from the county tax; for the tax being for government protection in each case, and the city government taking the place in large part of the county within its limits, it is not unreasonable that the exemption from the county tax should be allowed in view of the city assessment.

Numerous objections, however, are urged to the exemption claimed under the charter of the city of Montgomery. The exemption, it appears, has been allowed in every charter of the city from 1837 to this date, and so, as said by the judge of the lower court, "unless the provision has been repealed, it is still the law." We have held that it is not repealed by the revenue act of 1903. It therefore only remains to consider whether it is still a provision of the city charter. The contention is that the law of 1837 was repealed by the general revision of the city charter by the act of 1870, because, that being a general revision and amendment of the charter, the revised act is to be regarded as repealed by the general law, as well as by express terms of the Constitution in reference to amendatory statutes. It could hardly be held that the amendatory statute repeals by implication a term of the old statute which is expressly incorporated in its body. And if the old (charter of 1837) contained two distinct subjects which could not be joined in a new law, the constitutional provision would not repeal what could not be re-enacted. In such cases the new law would be a repeal of all of the old laws which could have been re-enacted. If, then, it was unconstitutional to prescribe in the charter act of 1870 (Acts 1869-70, p. 368) the legislative effect of paying a city license, the passage of that act would not repeal the valid expression of such effect in a previous law. The conclusion, therefore, is that the exemption claimed is supported by law, so far as the objection we are considering is concerned, whether it was carried forward by the act of 1870 or by the charter act of 1893.

But we think that it is competent for the

Legislature, in granting or amending the charter of a city, to prescribe the entire legislative effect of what is authorized. If a city license is authorized for certain callings and occupations, it would be singular that the Legislature could not say, in the same act and as germane thereto, that the payment of such license fees should be in lieu of county license fees for the same district; and granting in such cases an exemption from the county license is nothing more than saying what shall be the legislative effect of the city license. The question would naturally arise, in any enactment of municipal laws granting authority to levy license taxes, whether the county extending over the same territory should also exact a license tax. The Legislature could not possibly pass such a law without contemplating that the effect would, unless provided against, be to make persons pay two license taxes besides that to the state. It is thus entirely germane to the subject of such an enactment to prescribe the effect of its passage, which is done by saying that the city license shall be in lieu of the county license. The case of *City Council v. Nat. Building & Loan Association*, 108 Ala. 336, 18 South. 816, is directly in point. See, also, *White v. Burgin*, 113 Ala. 170, 178, 21 South. 832; *Ballentyne v. Wickersham*, 75 Ala. 533. The case of *Woolf v. Taylor*, 98 Ala. 254, 13 South. 688, is not at all opposed to this view.

It is next insisted that the exemption is unconstitutional because it creates a favored class of those doing business in the city of Montgomery. It does by no means appear but that supposed favored class in this instance, residing in the city, do not have to pay more than those residing in the country. *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364-368, 22 Sup. Ct. 673, 46 L. Ed. 949. Absolute equality in taxation is impossible, particularly in license taxation. *Tappan v. Merchants' N. B.*, 19 Wall. 490, 22 L. Ed. 189; *State Ry. Tax Cases*, 92 U. S. 575, 612, 23 L. Ed. 663. Taxation for revenue, whether paid to the state, or cities or counties, is all to support state government, and it is entirely competent for the state to prescribe that the payment of a city license tax shall be in lieu of a county license tax for the same district. *Travelers' Ins. Co. v. Connecticut*, supra. There is no illegal discrimination when all persons in the same situation are taxed alike, which is done in this case; and there is no unjust discrimination in requiring licenses to be rated according to the location of the business stand, or other matters supposed to affect the profits of the business, or in providing that the payment of a city license shall be in lieu of a county license for the same location and district. License taxation is not a tax on property, and is not governed by the rules of uniformity and equality prescribed for taxation on values *Saks v. Mayor*, 120 Ala. 190, 24 South. 728; *Goldsmith v. Mayor*, 120 Ala. 182, 24

South. 509. It makes no difference, then, in this case, whether the charter act of the city of Montgomery, approved February 1, 1893, was or was not properly enacted, as the exemption in question is supported by that, if valid, and by the prior acts, if it is invalid.

SIMPSON and ANDERSON, JJ., concur with TYSON, J.

CAMPBELL v. NOBLE.

(Supreme Court of Alabama. April 28, 1906.
Rehearing Denied June 30, 1906.)

1. ACKNOWLEDGMENT — MARRIED WOMEN — CONVEYANCE OF HOMESTEAD.

Where a husband owned a life estate in land occupied by himself and wife as a homestead, and the wife owned a vested remainder in fee, the grantee in their conveyance had the whole title after the husband's death, notwithstanding that the wife was not examined separately and apart from her husband.

2. TRUSTS—RESULTING TRUST—DEED OF BARGAIN AND SALE.

The common-law rule that a consideration was necessary in a deed of bargain and sale in order to prevent a resulting trust is abolished by the statute, declaring in effect that a conveyance shall pass the fee unless a contrary intention is clearly expressed in the conveyance.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 98.]

3. ADVERSE POSSESSION — STATUTORY PROVISIONS—NOTICE OF CLAIM.

Adverse possession is not available, where no declaration of an intention to claim adversely has been filed in the office of the judge of probate as required by statute.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 128-130.]

Appeal from City Court of Montgomery County; A. D. Sayre, Judge.

"To be officially reported."

Suit by Ida P. Noble against Mattie Campbell. From a decree in favor of complainant, defendant appeals. Reversed and rendered.

Plaintiff filed a bill seeking to quiet title to a certain lot in the city of Montgomery, making the necessary allegations under the statute. Defendant answered, denying the facts alleged in the bill, and set up by way of cross-bill her claim to said real estate, and asked for affirmative relief against the complainant in the original bill. Plaintiff answered the cross-bill, alleging a want of consideration for the deed from Susan Boyseau to defendant, and alleging, also, that it was the homestead of said Susan Boyseau and her husband, and that the said deed was void, for that it was not separately acknowledged by said Susan Boyseau. Plaintiff also alleges that Susan Boyseau left a last will and testament, which had been duly probated, leaving said lot to her. She also alleges a deed from one Harris, the husband of said Susan at the time of her death. She pleads the statute of limitation of ten years, inexcusable laches and neglect in attempting to enforce claim, and other things. Defendant

excepts to the answer of Ida Noble, stating that the deed therein referred to was without consideration, on the ground that a consideration is not necessary to support the deed in this case. She excepts to that part of the answer setting up adverse possession of the premises by Susan Harris on the ground that no notice of said claim is alleged to have been filed in the office of the judge of probate of Montgomery county as required by law. She excepts to that part of said answer setting up that the premises were the homestead of said Susan and Howard Boyseau, because the answer shows that the interest held by said Howard Boyseau had expired at his death, and because no separate examination of the wife is necessary to a valid conveyance of a homestead owned by her. Upon a hearing of the cause, the chancellor granted complainant relief prayed for, and decreeing that the respondent had no title or interest in the land. From this decree, respondent appeals.

Marks & Sayre, for appellant. Ray Rush-ton, for appellee.

DOWDELL, J. The main question in this case is whether the deed from Howard and Susan Boyseau to Mattie R. Campbell of December 10, 1892, is void for failure of an examination of the wife separate and apart from the husband. It appears from the undisputed evidence that at the date of the execution of the deed Howard and Susan occupied the land in question as a homestead; that Howard, the husband, held and owned a life estate in the property, and Susan, the wife, held and owned a vested remainder in fee. At the time of the filing of the bill Howard was dead. An examination of the wife separate and apart from the husband is required only where a conveyance is made of the homestead of the husband. *Dawson v. Burrus*, 73 Ala. 111. A conveyance of the homestead without an examination of the wife separate and apart from the husband is not necessarily void in toto. In *Snedecor v. Freeman*, 71 Ala. 144, it was said: "If the ownership be fractional, or less than a fee, the exemption is fractional, and continues only so long as the title of the owner and occupant lasts." Again, in *McGuire v. Van Pelt*, 55 Ala. 353, in a case where the conveyance carved a larger area than allowed as a homestead exemption, it was said: "The husband's disability to convey extended only to this 80 acres to be carved out of the entire tract. * * * The power to alienate was limited only by the quality and quantity of the estate." See, also, *Garner v. Bond*, 61 Ala. 84; *De Graffenried v. Clark*, 75 Ala. 425.

In this case the husband's estate expired by limitation with his death, and the only question, therefore, is whether the deed passed the estate of the wife, Susan. If the deed

had been confined to the conveyance of Susan's remainder interest in the estate, it is quite clear that no examination of the wife separate and apart from the husband would have been required or necessary to the validity of the conveyance, since there would have been no conveyance of the husband's homestead. We are of the opinion, under the above authorities and reasoning, that the conveyance was a valid one of the wife's fee in the land. The old common-law rule that a consideration was necessary in a deed of bargain and sale in order to prevent a resulting trust no longer obtains. 2 Devlin on Deeds, §§ 817, 1189. In this state the question is put at rest by the statute, declaring in effect that all conveyances shall pass the fee unless a contrary intention is clearly expressed in the conveyance. *Patton v. Beecher*, 62 Ala. 589. No fraud is alleged in the execution of the deed in question, and a consideration is not necessary between these parties.

There is nothing in the suggestion of adverse possession as a defense against the deed, since no declaration of an intention to claim adversely was ever filed in the office of the judge of probate. *Scales v. Otts*, 127 Ala. 582, 29 South. 63. The decree appealed from will be reversed, and one will be here rendered denying relief to the complainant in the original bill and granting relief to the respondent as prayed for in her cross-bill.

Reversed and rendered.

HARALSON, ANDERSON, and DENSON, JJ., concur.

A. G. RHODES & SON CO. v. CHARLESTON.

(Supreme Court of Alabama. May 30, 1906.
Rehearing Denied June 30, 1906.)

1. **APPEAL—OBJECTION NOT MADE BELOW.**

One may not complain on appeal of the allowing of an amendment to a pleading; he not having objected to the court allowing it, and not having moved to strike it after it was made.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1490; vol. 39, Cent. Dig. Pleading, §§ 1409-1412.]

2. **SAME—MATTERS NOT INSISTED ON IN BRIEF.**

An assignment of error, not having been insisted on in the brief, further than to repeat it, will not be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4256-4262.]

3. **SAME—PRESUMPTION.**

Where a plea is open to demurrer on any ground, and the record does not show the demurrer, which was sustained thereto, it will be presumed the ruling was properly made.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3706-3709.]

4. **SAME—LIMITING EXCEPTION.**

An exception to a charge on a particular ground will not authorize review of it on any other ground for objection.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1631.]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"Not officially reported."

Action by Laura Charleston against the A. G. Rhodes & Son Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This was an action by appellee against appellant for trespass to realty by breaking and entering a dwelling house and removing therefrom certain furniture and household effects. Plaintiff offered to amend her complaint by adding two counts, which was allowed by the court. It is not shown by the record that any objection was made to this in the lower court or that motion was entered to strike the same. The defendant sought to justify under a lease contract made with plaintiff by which title was retained in the furniture until paid for, the fact that it had not been paid for, several defaults in payment, and authority in the contract to retake. Demurrers were interposed and sustained to these pleas. There was verdict and judgment for plaintiff for \$90, and defendant appeals.

L. A. Sanderson, for appellant. Mark D. Brainard, for appellee.

DENSON, J. No objection appears to have been made by the defendant to the court allowing the amendment to the complaint, nor was any motion made to strike the amendment after it was made. Hence the first ground in the assignment of errors is not well founded.

The second ground in the assignment of errors is not insisted on in brief of counsel for the appellant, and we will regard it as waived. 2 Mayfield's Dig. p. 133.

It is clear from the reading of pleas 2 and 3 that they are not well pleaded to the counts of the complaint that claim damages for breaking into plaintiff's dwelling. Whether or not the demurrer to the pleas, which was sustained by the court, was in writing, makes no difference. Where demurrer has been sustained, and the demurrer is not shown by the record, it will be presumed by this court, in support of the ruling of the trial court, that it was properly made, when the plea is open to demurrer on any ground.

Charges 1, 3, and 4 were properly refused. There being several counts in the complaint, these charges were in bad form, if good otherwise. Goldstein v. Leake, 138 Ala. 573, 38 South. 458.

The seventh ground in the assignment of errors has not been insisted on in the brief of appellant's counsel. What is said in the brief as to this ground is a mere repetition of the assignment. 2 Mayfield's' Dig. p. 133, § 85.

The refusal by the court to give the general affirmative charge has been assigned as error, but the assignment has not been insisted upon in brief of counsel. Following our rule,

the assignment will not be considered. Kenan v. Lindsay, 127 Ala. 270, 28 South. 570; Pearson v. Adams, 129 Ala. 169, 29 South. 977.

The defendant excepted to a part of the oral charge, the exception being in this language, namely: "To so much of the charge set out above the defendant excepted as being the general affirmative charge for the plaintiff." Upon an inspection of the oral charge, it is quite clear that it is not subject to the particular exception reserved, and, as the defendant saw proper to particularize the ground of his exception, we cannot go beyond the ground stated in the exception.

We have found no error in the record, and the judgment is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

SMITH v. HILTON.

(Supreme Court of Alabama. June 30, 1906.)

1. JUSTICES OF THE PEACE—QUALIFICATION—VOID ACTS.

Where, at the time a justice of the peace issued an attachment, his office had expired, and he had failed to give an official bond as required by Gen. Acts 1903, p. 238, providing that a failure to execute such bond vacates the office, the attachment was void.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 8.]

2. SHERIFFS AND CONSTABLES — WRONGFUL ATTACHMENT—VOID WRIT AS DEFENSE.

Defendant, a constable levied on certain cotton under a void writ, and delivered the same to plaintiff's landlord, who sold the cotton and applied the proceeds to an alleged indebtedness of plaintiff for rent. Held that, though plaintiff was indebted to his landlord to an amount exceeding the value of the cotton, such facts constitute no defense to an action against the constable for conversion.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 143.]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

"To be officially reported."

Action by A. H. Hilton, against W. H. Smith. From a judgment for plaintiff, defendant appeals. Affirmed.

Espy & Farmer, for appellant. R. P. Coleman, for appellee.

HARALSON, J. It seems to be admitted on both sides, that C. A. Hardwick, who issued the attachment in favor of K. Blackmon, against the plaintiff in this case, A. H. Hilton, was not in fact a justice of the peace, at the time he issued such attachment. He had been a justice, whose term of office had expired, and he failed to give an official bond by the 10th of September, 1904, as required by Act approved 17th September, 1903 (Gen. Acts 1903, p. 238), which act provides, that the failure to execute such bond by that date, vacated the office.

The attachment was issued, therefore, by a person not authorized, and it was of no more legal effect than if it had been issued by a private individual. The writ that was issued was void, and would not support a levy. On the motion of plaintiff, said Hardwick dismissed said attachment, as is stated in the bill of exceptions. This means nothing more nor less, than that said Hardwick repudiated said attachment, as having been inadvertently and improperly issued by him, and that he would have nothing more to do with the matter.

Before this action on the part of said Hardwick, the constable, W. H. Smith, into whose hands the writ of attachment went, turned the bale of cotton, on which he had levied the writ, in to the hands of K. Blackmon, who claimed an interest in the cotton levied on, upon Blackmon giving him an indemnifying bond. The contention between the plaintiff and Blackmon was, as appears by the bill of exceptions, that plaintiff had rented land from Blackmon for the year 1904, at a stated rent, and made a crop on it, for which, as he alleges, he paid Blackmon, \$60, which was all that he owed for rent of the land. Blackmon, on the other hand, claimed that plaintiff had not paid all his rent, but owed him more on that account, than the bale of cotton was worth. Therefore, Blackmon sold the bale of cotton and applied the proceeds, as he contends, towards the payment of the rent still owing by plaintiff to him.

Thereupon, plaintiff commenced this action in trover against W. H. Smith, the constable, for the conversion of said bale of cotton. The defendant filed the plea of not guilty, and another plea, which is not set out in the record proper, nor in the bill of exceptions, which plea was, on motion of plaintiff, stricken out. Whether properly or improperly stricken, we are unable, and are not called on to adjudge, since we are not informed of the nature and character of said plea. The case was tried on the plea of the general issue, and the court gave the general charge for the plaintiff. It also instructed the jury, that the measure of plaintiff's damages would be the value of the cotton at the time of the conversion of the same with interest from date of the conversion to the time of the trial. These charges are assigned as error, and only the first is insisted on in argument.

As we have stated, the contention of defendant is, that if plaintiff was indebted to Blackmon, his landlord, for a balance due on rents for 1904, and Blackmon, after defendant delivered the cotton to him, sold it, and applied the proceeds to that indebtedness, this plaintiff could not recover in the case, if the value of the cotton sold did not exceed plaintiff's alleged indebtedness to Blackmon. This is tantamount to saying, that if A. owes B. a debt the latter has the legal right to take possession of A.'s personal property, without his consent and dispose of it, and apply the

proceeds of his sale to his debt without liability therefor.

In *Belser v. Youngblood*, 103 Ala. 545, 15 South. 863, we held, that when a tenant who has executed a mortgage on the crops grown on leased premises, sells a portion of such crops without instruction or authority of his landlord, the purchaser is liable in trover to the mortgagee, though the proceeds of the sale were paid to the landlord in payment of rent due him. It was there said, that a different rule, would sanction a dangerous precedent, and contrary to the former rulings of the court. *Keith v. Ham*, 89 Ala. 590, 7 South. 234; *Bird v. Womack*, 69 Ala. 392; *Higgins v. Whitney*, 24 Wend. 380. In *Bird v. Womack*, supra, which was an action of trespass de bonis asportatis, it was held, that if the defendant, being a mere trespasser, has applied the property seized by him to the plaintiff's use, but without authority, and without plaintiff's consent, express or implied, this fact is not available to him in mitigation of damages, although the use to which the property was applied, was the satisfaction of a lien which a third party held thereon. In the course of the opinion it was said: "If defendants generally, were permitted to invoke such a defense, they would be encouraged in pragmatical interferences with the property of third persons, and, perhaps, to such an extent as frequently to endanger the public peace. It is carrying the rule sufficiently far to accord this right of recoupment to parties who holds liens on property, which is the subject of conversion or trespass, and we are not inclined to extend its operation further, despite the hardship of the principle in many cases."

We find no error in the record, and the judgment below is affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

ANDERSON et al. v. BUCKLEY et al.
(Supreme Court of Alabama. May 31, 1906.
Rehearing Denied June 30, 1906.)

1. INSURANCE — DISSOLUTION OF COMPANY — ASSETS.

Some of the shareholders, in pursuance of a resolution of the board of directors, executed notes to an insurance corporation, and the resolution provided that on a dissolution of the corporation such stockholders as should not make such contributions should not be entitled to participate in any fund to be derived therefrom: the contribution being intended for the benefit only of the creditors of the company. *Held*, that though there was a consideration, in that the notes were given to raise the capital stock of the company to a sum where it could continue business without forfeiting its charter, on a dissolution of the corporation and payment of its debts in full the collection of the notes and distribution of the proceeds among the stockholders was not authorized.

2. ESTOPPEL—REPRESENTATIONS.

The fact that a statement filed by the insurance corporation under Code 1896, § 1109,

requiring the filing with the State Auditor of a statement showing the corporate assets, etc., showed the notes as part of the assets of the corporation and that by the statement a continuation of the company's franchise was secured, did not estop the shareholders who had executed the notes from denying that they were unconditional obligations.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"To be officially reported."

Suit by P. J. Anderson and another against C. W. Buckley and others. From a decree in favor of defendants, complainants appeal. Affirmed.

This was a bill filed by appellant and others, minority stockholders, against the appellee and others, as board of directors, alleging the incorporation of the Capital City Fire Insurance Company, the expiration of its charter by limitation, its dissolution, and the winding up of its affairs by its board of control. It charges that valuable assets in the shape of notes of various parties, among them a number of trustees of the corporation, and other valuable assets, have passed into the hands of these trustees, and that the outstanding debts and liabilities of the corporation amount to not more than \$40,000. The bill also alleges that the trustees or board of control are making no effort to collect the notes, but are permitting the same to become barred by the statute of limitations. The prayer is for an accounting by the defendants named respectively herein, that they be removed from being trustees of the corporation, and that some proper person be appointed as a receiver to take charge of and collect the assets.

Gunter & Gunter, for appellants. Horace Stringfellow, for appellees.

HARALSON, J. There is but a single question presented on this appeal, viz.: Whether certain notes executed by the respondents to Commercial Fire Insurance Company, should be treated as general assets of the corporation after dissolution and collected for distribution among the stockholders. The facts necessary for a fair consideration of the question are these: The notes were executed solely in pursuance of a resolution of the directors of the company at a meeting when respondents and complainant Anderson, all of whom were directors, were present. This resolution directed the vice-president to call upon the several shareholders to contribute to the capital stock of the company in proportion to their several holdings, "and to accept for such contributions the demand note of the corporation or the winding up of its affairs such stockholders as shall not make such contributions shall not be entitled to participate in any fund to be derived therefrom. Such contribution being intended for the benefit only of the creditors of the company." Complainants were non-contributing stockholders.

Soon after the notes were given, the secretary and manager of the company, prepared the statement required by section 1109 of the Code of 1896 to be filed in the office of the State Auditor. This statement submitted to and approved by the directors, included these notes as part of the assets of the company and were filed with the Auditor. Unless the notes had been so used as assets of the company the condition of the company was such as it was regarded by the directors as subjecting the company to have its authority to continue business revoked by order of the Auditor under authority of section 1203 of the Code of 1886. The notes were wholly without consideration except as shown, were given for the accommodation of the company, to be used only as needed in payment of the company's debts, and none of the makers received any thing for the notes. The debts of the company have all been paid and there is no need for the collection of the notes for the purposes expressed in the resolution under which they were given. It is now contended that the notes should be collected as other assets and distributed among the stockholders generally.

When the case was here on a former appeal we held that "these notes are absolutely without consideration as to these complainants, who are not creditors, but merely shareholders of the corporation, and not contributing shareholders under said resolution." *Anderson v. Buckley*, 126 Ala. 623, 28 South. 729.

It is insisted that under the facts as now presented a consideration is shown, that the notes were given to raise the capital stock of the company to a sum where it could continue business without forfeiting its charter; that a statement was filed including these notes as assets, and on the faith of such statement it was permitted to continue business, and the stockholders suffered the risk of losses by a continuance in business. This risk is said to be a sufficient consideration for the notes. If we concede for argument that such would be true that there was such consideration moving from the stockholders of the corporation as would render the contract binding, it would become binding only according to its terms. The resolution under which the notes were given was a part of the contract. The provision that the fund should be for the benefit of creditors only, that non-contributing shareholders should not participate therein, was as much a part of the contract as if written in the face of the notes themselves. A consideration for a contract renders the contract binding if not otherwise illegal, but certainly a consideration cannot warrant the making of a different contract from that which the parties made themselves. We think the question of consideration vel non can work no advantage to complainants; it cannot change the terms of the contract; it cannot make the notes inure to the benefit of those expressly excluded from their benefits.

We pass to a consideration of the question

of estoppel. It is insisted that having reported these notes as part of the assets of the corporation in the statement required by law to be furnished the Auditor and thereby secured a continuation of its franchise, the respondents are estopped to deny that the notes were unconditional obligations, that to set up that the notes were not absolutely bona fide assets for all purposes would be to perpetrate a fraud on the law so to speak.

It is first to be noted that the filing of the statement under section 1109 of the Code of 1896, is required of corporations as such. It is the act of the corporate body. In making the statement the officers represented all the shareholders, including these complainants as well as those making the notes. If a fraud is perpetrated on the state by the make up of the statement, the shareholders, who reap the benefits of such alleged fraud, are not in a position to complain. It appears that the complainant, Anderson, had full knowledge of all the circumstances attending the giving of the notes as well as the purpose thereof, and also of the making out of the statement now complained of. While he says he did not favor the movement it does not appear that even a protest was made by him as to the propriety of the statement furnished the Auditor. If, as now contended, by the complainant, Anderson, the statement to the Auditor was fraudulent and he did not approve of it, and was unwilling to assume the risk of injury to him as a shareholder by a continuance of the business, then he could have sought redress in the corporation, and failing there, other remedies were open to prevent the consummation of the illegal plan.

Again, the requirements of the law that insurance companies shall have a designated paid-up capital, and shall make statements to the Auditor of the assets and condition of the business, are manifestly for the benefit of the public who may have dealings with such companies. We would not say such statement is for the benefit alone of policy holders, or creditors of the company. Persons led to deal in the stock or bonds of such company on the faith of such statement, might be authorized to insist that those in the corporation responsible for the statement should make it good. But certainly such statement is not made for the information of the directors and shareholders of the corporation who own and control its property and affairs at the time it is made. These have other and direct sources of information, and as before pointed out, are responsible to the public for the statement itself. It is an elementary principle of estoppel that the person who sets it up must have relied upon the truth of the statement; must have had the right to rely on it, and must have altered his position for the worse, if the party estopped should gainsay the truth of the statement. If, as claimed, the report to the Auditor was misleading and fraudulent, these complainants have in no way been misled by it; they have not been induced thereby

to alter their position for the worse. Estoppels are for protection, not for gain. It is not shown that complainants have suffered any injury by the matters complained of. It is not questioned that if the rights of creditors were involved the makers of the notes would be bound to respond. In fact, it appears that the whole movement was for the purpose of protecting, rather than injuring creditors, and incidently to prevent a premature and forced dissolution of the corporation resulting in probable injury to stockholders by a hasty liquidation of its affairs. The makers of the notes are not shown to have had any interest whatever personal to themselves. Whatever benefits they derived, or hoped to derive, so far as the record discloses was in common with all the shareholders, complainants included. We cannot conceive any equitable right in complainants to profit to the extent of their pro rata of the proceeds of these notes at the expense of their associates.

The decree of the chancellor is affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

FOLMAR et al. v. LEHMAN-DURR CO.
(Supreme Court of Alabama. April 28, 1906.
Rehearing Denied June 30, 1906.)

1. PLEDGES — ASSIGNMENT OF DEBT — EXHAUSTING COLLATERAL.

Under Code 1896, § 947, providing that a transfer of a debt passes to the transferee the right of the transferor in any collateral security thereto, where complainants assigned to defendants the note of B., but failed to transfer the collateral, they must exhaust the collateral before proceeding against defendant on his note given as payment.

2. FRAUDULENT CONVEYANCES — WANT OF CONSIDERATION.

A conveyance of lands to the grantor's children for a recited consideration of a dollar is on its face voluntary, and therefore void as to existing creditors of the grantor.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 289-292.]

3. REFORMATION OF INSTRUMENTS.

To warrant reformation of a deed it must appear, and that by clear evidence, that it is expressed differently from what the parties mutually intended or agreed and that this was the result of fraud or mistake.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, §§ 68, 157-160.]

Appeal from Chancery Court, Montgomery County; W. L. Parks, Chancellor.

"To be officially reported."

Suit by the Lehman-Durr Company against George A. Folmar and others. From an adverse decree, defendants appeal. Reversed, rendered in part, and remanded.

The bill alleges an indebtedness of George A. Folmar to the Lehman-Durr Company of \$4,104.71, with interest thereon from April 4, 1896, and that the debt accrued prior

to June 12, 1896. It alleges a sale and transfer of certain lands therein described to the other defendants for love and affection, and a recited consideration of \$1 and \$2. It also alleges that the grantees in the deed from George A. Folmar and wife are the children of the grantors, and that the conveyances are voluntary and made for the purpose of hindering, delaying, or defrauding complainants in the collection of their debts. The defendants answered, denying any indebtedness on the part of George Folmar, admitting the making of the deeds and that they were children, and denying that said conveyances were made to hinder, delay, or defraud creditors.

W. L. Martin and Gunter & Gunter, for appellants. J. M. Chilton, for appellee.

ANDERSON, J. The transfer of the debt passes to the transferee the right of the transferor in such security or property pledged. Code 1896, § 947; Randolph on Commercial Paper, §§ 731, 1675; Duval v. McLoskey, 1 Ala. 734; Hatch v. White, Fed. Cas. No. 6,209.

Not only did the law give the respondent Felix Folmar the \$7,500 note held as collateral upon the assignment to him of the notes held by the complainant against Beall & Coston, but the undisputed evidence is that it was expressly agreed that, when the notes which this bill seeks to enforce were executed, it was expressly understood that the complainants should not only assign to Felix Folmar the notes against Beall & Coston, but all collateral held by them to secure the indebtedness of said firm, for the benefit of George A. Folmar. That being true, a withholding of said collateral note of \$7,500 deprived the assignee of the benefit of a collateral to which he was entitled, and the complainant, having failed to transfer the said collateral note of \$7,500, is required to exhaust the same before seeking payment from Geo. A. Folmar of so much of the Beall & Coston debt as may be included in the indebtedness. If said collateral is sufficient to discharge the debt of Beall & Coston assumed by Geo. A. Folmar, then the complainant cannot come upon Folmar for same; but, if insufficient, then they would be entitled to a decree for what the collateral would lack of paying the debt, giving the complainant the benefit of the \$350 already realized by the assignee on the collaterals that were assigned.

It is needless to discuss whether or not the complainant, under a subsequent agreement with Beall, had the right to hold the firm's collateral for the individual debt of Beall, as the complainant's own evidence shows that, if such an agreement was made, it was secondary to the purpose for which the original note was hypothecated. Roman admits that the note was originally left with

them to secure the indebtedness of the firm, and that Beall subsequently agreed that it should be held to secure his own debt, after the firm debt was paid. The fact cannot be doubted that when George A. Folmar gave complainant his notes assuming the debt of Beall & Coston, and the firm notes were transferred to Felix Folmar, this \$7,500 was at that time held primarily as a collateral to secure the notes so assigned. Nor can there be but little doubt that the complainant at the time of the transaction claimed to hold it exclusively as a collateral to secure the individual debt of Beall. George A. Folmar testified that the transaction was with Wilkerson, the attorney of complainant, and introduced a writing executed at the time, reciting, "This note is held by us as security for an indebtedness due by J. W. Beall," referring to the note of \$7,500.

This case will therefore be reversed, in order that the chancery court may require the complainant to give the respondent Geo. A. Folmar the benefit of said collateral by requiring it to exhaust the \$7,500 note before collecting from him any part of the debt of Beall & Coston that is included in the amount claimed under the original bill. It appears that the notes also include the individual indebtedness of George A. Folmar, all of which has been paid except \$382.89, and we affirm the ruling of the chancellor upon the report of the register as to the credits claimed by George A. Folmar. The complainant being an existing creditor of George A. Folmar the grantor, the conveyances from him to his children were voluntary upon the face thereof and void as to them. Seals v. Robinson, 75 Ala. 363; Caldwell v. King, 76 Ala. 149.

The respondents Lucy Hawkins and Felix Folmar say that the recited considerations were inserted in the deeds by mistake, that the true consideration is not disclosed, and they invoke the aid of the chancery court by cross-bill to have the conveyances reformed so as to make them recite the true consideration. In order to reform a contract which fails to express some important element thereof, it must appear that the parties mutually intended that it should have been so expressed, or that it is expressed differently from what they had mutually agreed it should express, and this failure or difference of expression is the result of mistake of fraud. Clark v. Hart, 57 Ala. 390; 1 Story's Eq. Ju. 140, 152; 1 Brick. Dig. p. 68, §§ 606, 607, 608. "Another familiar principle is that courts of equity proceed with very great caution in reforming written instruments, and, if the mistake as alleged is not admitted, it must be proved by clear, exact, and satisfactory evidence, the presumption being that the contract as executed contains the conclusion of all previous negotiations on the subject and is the final agreement of all parties." Kilgore v. Redmill, 121 Ala. 485, 25 South. 766. The chancellor

was fully justified by the evidence in holding that the grantees under the conveyances from George A. Folmar were not entitled to a reformation of the deeds.

The chancellor erred in sustaining the demurrer to the cross-bill, and a decree is here rendered overruling said demurrer. The sale, having been made and confirmed, is hereby vacated, and the decree having included the Beall & Coston debt, without giving the respondents the benefit of the \$7,500 collateral note, is reversed in that particular, but is affirmed in so far as it affects the individual indebtedness of Geo. A. Folmar, and in holding the conveyance from him to the other respondents inoperative as against the claim of the complainants.

Affirmed in part, reversed and rendered in part, and remanded.

WEAKLEY, C. J., and HARALSON, SIMPSON, and DENSON, JJ., concur.

SOUTHERN EXPRESS CO. v. OWENS.

(Supreme Court of Alabama. June 30, 1906.
Rehearing Denied June 30, 1906.)

1. CARRIERS — CARRIAGE OF GOODS — LIMITATION OF LIABILITY — NEGLIGENCE.

A carrier cannot limit its liability for negligence by an agreed valuation of the goods, on consideration of reduced charges, when the agreed valuation is greatly less than the real value and the contents or its value are not disclosed.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 663-665.]

2. SAME — ACTION FOR LOSS OF SHIPMENT — EVIDENCE — ADMISSIBILITY.

In an action against a carrier for the loss of a manuscript, constituting a school text-book, dealing with a subject on which there was no text-book, it was proper to permit plaintiff to testify as to the time spent in the preparation of the manuscript and what he considered it worth.

3. EVIDENCE — JUDICIAL NOTICE — FOREIGN DECISIONS.

The doctrine that a contract is governed by the law of the place can be invoked only by pleading, followed by proof, of the laws of a foreign jurisdiction; and the Supreme Court, on appeal, cannot take judicial notice of the decisions of the courts of other states.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 51.]

Appeal from City Court of Anniston; Thomas W. Coleman, Judge.

"To be officially reported."

Action by C. J. Owens against the Southern Express Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. J. Willett, for appellant. Blackwell & Agee, for appellee.

DENSON, J. This litigation arose from the failure of the defendant to deliver to the plaintiff certain goods that were delivered to the defendant as a common carrier at Columbia, S. C., to be carried to Sumter, S. C., to be there delivered to the plaintiff, the consignee. The complaint is in Code form.

Code 1896, p. 946, form 15. The description of the goods in the complaint is sufficiently definite to put the defendant on notice as to the particular package on which defendant's alleged dereliction was predicated. Hence the demurrer to the complaint was properly overruled.

It appears from the record that there was no controversy about the facts that the goods were received by the defendant as alleged and that they were never delivered. In other words, the liability of the defendant was conceded, but it sought to limit its liability to \$50. Pleas 2 and 7 presented this defense. Manifestly the contract sued on is a South Carolina contract. For this reason it is insisted by the appellant that the contract with respect to the liability of the defendant should be construed as such contracts have been construed by the Supreme Court of that state; in other words, that in declaring the substantive law of the case we should be governed by the adjudications of that court. This insistence invokes the doctrine of *lex loci contractus*, a doctrine which is well established and adhered to in this state. "Parties are presumed to be conversant of the laws of the country in reference to which they contract, and to stipulate with regard to them; and it is a maxim, that '*locus contractus regit actum*,' unless the parties have manifested a contrary intention." *Harlick v. Andrews*, 9 Port. 25; *Peake v. Yeldell*, 17 Ala. 636; *Thomas v. De Graffenreid*, 17 Ala. 609; *Camp v. Randle*, 81 Ala. 240, 2 South. 287; *Sou. Ry. Co. v. Harrison*, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936.

But the doctrine and maxim can be invoked only by appropriate pleading, followed by proof, of the laws of the foreign jurisdiction. We cannot take judicial knowledge of the decisions of the courts of other states. *Cubbedge v. Napier*, 62 Ala. 518; *Varner v. Young*, 56 Ala. 260. The South Carolina decision relied on by the appellant was not offered in evidence in the court below, and we cannot regard it as evidence here. "It can be consulted by us, as we could consult the opinion of any other reputable Supreme Court of a sister state; but it does not bind us as an adjudication." *Varner v. Young*, supra. The contract, then, must be construed by the principles of the common law, and in the absence of pleading and proof to the contrary we will presume that the common law on the subject in South Carolina is the same that it is in Alabama. 2 *Wharton on Conflict of Laws* (3d Ed.) p. 1534; *Crandall v. Great Northern R. R. Co.*, 83 Minn. 190, 86 N. W. 10, '85 Am. St. Rep. 458; *Forepaugh v. Delaware R. R. Co.*, 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672.

The point presented by the pleadings to be determined is whether a carrier may limit the extent of his liability by an agreed valuation upon consideration of reduced charges

for carrying a package, when the agreed valuation is greatly less than the real value of the package, and the contents of the package or its value are not disclosed to the carrier. In the case of *A. G. S. R. Co. v. Little*, 71 Ala. 611, this court said: "The liability of a common carrier is sometimes said to be of a dual nature—the one, a liability for losses by his own negligence or omission of duty, or that of his servants or agents, which is the liability of an ordinary paid agent or his bailee; the other, a liability for the losses by mistake or accident without any fault on his part, for losses accruing by unavoidable accidents, not within the exception of 'the act of God, or of the public enemy, or the fault of the party complaining,' which is of the nature of the liability of an insurer, having its origin and foundation in the policy of the common law. *Davidson v. Graham*, 2 Ohio St. 131. Whatever doubts may at any time have been entertained, it is now well settled that by special contract the carrier may limit or qualify the liability resting on him as an insurer, or his common-law liability, as it is most often expressed. *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *M. & O. R. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *M. & O. R. R. Co. v. Jarboe*, 41 Ala. 644; *S. & N. A. R. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578. The limitation of liability may extend, not only to the risks or accidents for which the carrier will be answerable, but to the amount of damages for which he will be answerable in the case of loss or injury, when the purpose appears to secure a just and reasonable proportion between the amount for which he is liable and the freight which he is to receive. In the limitation of liability, the carrier cannot, in any event, stipulate for more than an exemption from the extraordinary liability the common law implies; the liability extending beyond that of ordinary paid agents, servants, or bailees, denominated the 'liability of an insurer.' Public policy and every consideration of right and justice forbid that he should be allowed to stipulate for exemption from liability for losses or injuries occurring through the want of his own skill or diligence, or that of the servants or agents he may employ, or through his own or their willful default or tort."

In the case of *Ga. Pac. Ry. Co. v. Hughart*, 90 Ala. 36, 8 South. 62, goods were received for shipment packed in a box in apparent good order. A portion of the goods in the box were lost—were not delivered by the common carrier. The bill of lading contained a clause limiting the value of the goods to \$5 per 100 pounds in case of total loss; and it was contended on the trial that, if the plaintiff was entitled to a verdict, his recovery should be limited to \$5 per 100 pounds of the freight that was lost. The court said: "There is nothing in this contention; for the tendency of the testimony

was, and is, that the goods were lost through the negligence or bad faith of the defendant's employees." Then follows the quotation from the *Little Case* that we have set out above, and the court said of it: "We fully concur in what was said in *Little's Case*, supra, and hold that the city court did not err in the matter of the measure of recovery." The court further said in the *Hughart Case*: "It is not our intention to overrule or qualify what was said in *S. & N. A. R. Co. v. Henlein*, 56 Ala. 368, or in the later case of *Central Ry. Co. v. Smitha*, 85 Ala. 47, 4 South. 708. In consideration of special rates or privileges granted, a shipper may agree on values in case of loss or injury, provided such agreed valuations are not unreasonable or arbitrary, and provided, further, that no agreement exempting the carrier from the consequences of his perfidy or gross negligence is binding on the shipper. The rate expressed in the bill of lading before us—\$5 per 100 pounds—without any reference to the actual value of the thing shipped, is both unreasonable and arbitrary, and is not binding on the shipper."

In *L. & N. R. R. Co. v. Sherrod*, 84 Ala. 178, 4 South. 29, the case most strongly relied on by appellant here, the bill of lading contained a stipulation limiting the value of the goods and the extent of the defendant's liability in case of total loss. The agreed statement of facts showed that without such agreement as to the value a much greater rate of freight was charged on such shipments than was charged, which rate was reasonable, and that the limitation as to value was in consideration of a reduced rate of freight and was inserted in the bill of lading as a part of the contract of shipment. In that case this court, speaking through Judge Clopton, said: "Limitations as to the value do not come under the operation of the rule that a carrier cannot, by special contract, exempt himself from liability for the consequences of his own negligence, and ordinarily are not calculated to induce negligence. To the amount of the agreed valuation the carrier is responsible for loss occasioned by his neglect, or by any of the risks or accidents for which he is answerable. No public good will be subserved by denying to the parties the right to make such contracts. The shipper and the carrier may lawfully contract as to the valuation of the articles to be transported. Such special contract is in the nature of an agreement to liquidate the damages, proportionately to the compensation received for the carriage and the responsibility of safely carrying and delivery. When the value has been fairly agreed on, the carrier cannot recover a greater rate, and the shipper should not be allowed to take benefit of the reduced rate, if there is no loss, and to repudiate the contract, if there is a loss."

It would seem that in *Sherrod's Case*, the distinction so clearly made in the *Little* and *Hughart Cases* with respect of the dual nature

of the liability of the common carrier was lost sight of; for it is clearly held in those cases that, while a common carrier may by contract limit or qualify the liability resting upon him as an insurer, he cannot in any event stipulate for more than exemption from the extraordinary liability the common law imposes. In short, he cannot stipulate for exemption from or limitation upon his liability for losses by his own negligence or omission of duty, or that of his servants or agents, which is the liability of an ordinary paid agent or bailee. The argument urged in the *Sherrod Case* makes the degree of care requisite in the handling of goods depend, not on the nature of the thing to be carried—which ought to be the test of degree of care to be used by all persons or corporations pursuing the business of common carriers, even where a lawful contract limiting liability exists—but on the amount of compensation to be paid. It is said in that case that contracts by common carriers limiting liability are not ordinarily calculated to induce negligence, but exact from the carrier the measure of care due to the value agreed on. But would it not be a very dangerous rule which permits care to be measured by value? It would lead to a holding that the carrier owes but a slight degree of care when the thing to be carried is of small value intrinsically or by an agreed valuation, and the rule would be as fluctuating as is the value of things carried.

We understand the rule to be universal that the carrier must, even when a valid contract limiting liability exists, exercise such care as prudent persons would ordinarily use for the safety of the thing shipped, looking to the nature of that. A different rule would make the measure of care to depend on the adequacy of the sum paid for transportation, this to be determined by the value of the thing to be carried, which cannot be a correct rule, unless it be true that the degree of care to be used by a common carrier is to be measured by the compensation to be paid. We do not understand that such a rule ever has been or ever ought to be established. Followed to its legitimate result, such a rule would require the holding that a carrier by agreeing to gratuitously transport freight might by contract relieve itself from liability entirely and from obligation to exercise even the slightest care. In the case of a gratuitous mandatary, not charged with any public duty, we understand such rule to have been denied. It seems to us that such contracts do induce a want of care, for the highest incentive to the exercise of due care rests in a consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause. The author of the *American & English Encyclopedia of Law* says: "By the clear weight of authority in England, Canada, the United States, and almost without exception in the states of the Union, the rule has been adopt-

ed that the common carrier can make no contract the effect of which will be to exempt him from liability for negligence." 2 *Am. & Eng. Ency. Law*, 822.

Is the limitation in the contract before us within the prohibition of this eminently just and generally accepted principle? Manifestly the stipulation does not contemplate total exemption from liability. It only provides for partial or limited exemption. Upon that distinction the nice and important question arises: Can a stipulation of the latter character stand before the law when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the property lost or destroyed, can the limitation of its liability to \$50 be upheld in the court, if it should appear that its loss resulted from the negligence of the company and that it was in fact worth 30 times that amount, as the court found it to be? We think not. To our mind it is clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground and must be tested by the same principles. If one can be enforced, the other can. If either be invalid, it would seem that both must be held to be so; the same consideration of public policy operating in each case. The last utterance by this court on this subject is in line with the foregoing views, and we think is sound. *Sou. Ry. Co. v. Jones*, 132 Ala. 487, 31 South. 501. See, also, *Railway Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Coward v. Railway Co.*, 16 Lea. 225, 57 Am. Rep. 227; *Moulton v. St. P., M. & M. Ry. Co.*, 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781; *Railway Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; *Railway Co. v. Abels*, 60 Miss. 1017; *U. S. Ex. Co. v. Blackmon*, 28 Ohio St. 144; *Black v. G. T. Co.*, 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; *Rosenfield v. Ry. Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *M. P. Ry. Co. v. Fagan* (Tex. Sup.) 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; *Boscowitz v. Adams Exp. Co.*, 93 Ill. 525, 34 Am. Rep. 197.

We have examined the authorities relied upon by the appellant, and some of them undoubtedly support its contention. But we think the true rule is, and should be, that a common carrier has the right to restrict his common-law liability by special contract; and this extends to all losses not arising from his own neglect or omission of duty. "He cannot, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are es-

essential to the public interest. He is held to that degree of diligence which very careful and prudent men take of their own affairs, and he is responsible for all losses arising from a neglect of that degree of diligence enjoined upon him by his public employment; and public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties. The degree of diligence required by law of a common carrier is a matter over which he has no control and in which the public is interested." *Sou. Ry. Co. v. Jones*, 132 Ala. 437, 31 South. 501; *Ga. Pac. Ry. Co. v. Hugbart*, 90 Ala. 36, 8 South. 62; *A. G. S. R. R. v. Little*, supra; *L. & N. R. Co. v. Oden*, 80 Ala. 38; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Davidson v. Graham*, 2 Ohio St. 131, and authorities, supra; *City of Norwich*, 4 Ben. 271, Fed. Cas. No. 2761; *Sager v. Portsmouth*, 31 Me. 228, 1 Am. Rep. 659; *Railroad Company v. Lockwood*, 17 Wall. (U. S.) 357, 21 L. Ed. 627. "It must be understood however, that where the shipper of goods practices a fraud on the carrier, either by his acts or omissions, as to the value of goods, fraudulently concealing their value from the carrier, such fraud operates to discharge the carrier from liability. But a mere failure on the part of the shipper to inform a carrier as to the value of goods shipped would not per se be such fraud as would discharge the carrier. It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased or his care and vigilance may be lessened; and if there is such fraud and unfair concealment, it will make the contract a nullity." *Texas Express Company v. G. M. Scott*, 2 Willson, Civ. Cas. Ct. App. § 72; *H. & T. C. Railroad Company, v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

The principle above stated with respect of fraud is not invoked by any of defendant's pleas. The demurrer to plea 5 was properly sustained. And there is no error in the rulings of the court with respect to the demurrers to replications to pleas 2 and 7. *Southern Express Company v. Jones*, supra. The demurrer to plea 6 was properly sustained on the authority of *Southern Express Company v. Tupelo*, 108 Ala. 517, 18 South. 664. Upon the evidence contained in the record, even if fraud on the part of the shipper had been set up by the pleas in accordance with the principle above stated, we could not say that the court in rendering judgment for the plaintiff erred.

With respect to the nature of the property and its value the plaintiff was the only witness examined, and he testified: "I know the manuscript for the loss of which this suit is brought. There were 400 pages of legal cap paper in it, hand-written (written with pen and ink). It was bound by a binder whom I had to bind it in a book form. It

opened at the end and had a cover on it. In June, 1897, I decided to spend as much time as was necessary in preparing data and in writing the history of the development of South Carolina literature. I went into the libraries all over the state. I studied with older literary men in the state. I had access to the libraries belonging to these men, and can give you the names if you like. In the manuscript I divided the development of literature into five periods—colonial, revolutionary, state's rights, secession, and last quarter of the nineteenth century. I wrote the history of each period, and gave the lines of the representative writers of each period, and I annotated the choicest productions of these representative writers. I gave three years to the preparation of that manuscript. I closed the work in 1900, when I sent it to the school of graduate studies of the Columbia University, my alma mater. I spent most of my afternoons, my time at night, and during most of the time I made repeated trips on Saturday when my college work was over for the week to libraries over the state, and spent as much time in these libraries as I could in order to get back to my work the following Monday morning." After testifying as above, plaintiff was asked by his counsel this question: "From the time and labor devoted by you to the preparation of this manuscript, and the contents of it, the matter contained in it, what would you say was the reasonable value of that manuscript?" Objection was made to the question on the ground that it called for testimony that was incompetent, illegal, and irrelevant. The objection was overruled, and the witness answered: "Five hundred dollars for three years, or fifteen hundred dollars." On cross-examination plaintiff testified: "It would be hard for me to say what the market value of the package was in open market, other than its value on the subject, as there was no such text-book written. When I speak of this \$1,500 valuation I mean it was of that value to me. It is impossible for me to say what the market value of the package was, or what I could have gotten for it in dollars and cents. I never put in on the market as a manuscript, but had arranged to publish it as a text-book. I believe it had a market value, but it was never offered. I could not state any distinct market value, but I believe it had a market value. I do not know what market value it had."

Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with

nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way, and from such elements as are attainable. Trustees of Howard College v. Turner, 71 Ala. 429, 46 Am. Rep. 326; Cooney v. Pullman Car Co., 121 Ala. 368, 25 South. 712, 53 L. R. A. 690; Jonas v. Noel, 98 Tenn. 440, 39 S. W. 724, 36 L. R. A. 862; Masterton v. Mayor and Council of Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; Sullivan v. Lear, 23 Fla. 463, 2 South. 846, 11 Am. St. Rep. 388; 3 Sutherland on Damages (3d Ed.) § 919. The case of Boucher v. Shewan, cited by appellant, involved the value of pamphlets that had been converted by the defendant. It was insisted that they were such as treated the Christian religion scoffingly, and, therefore, had no literary value. The court said: "Admitting it to be true that the pamphlets are of the character represented, it may be that they cannot and ought not to be valued as of the value of pamphlets." But there can be no reason why the materials or paper contained in what are called "pamphlets" may not be held by the plaintiff as property, independent of what is printed in them. 14 U. C. C. P. 419. This is no authority for holding that, if the pamphlets had been legitimate ones, their value to plaintiff as literary productions could not have been assessed. Indeed, the opinion of the court shows that such damages might have been assessed.

Where the article lost has no market value, the rule of damages seems then to be its value to the plaintiff; and in ascertaining this value inquiry may be made into the constituent elements of the cost to the plaintiff in producing it. Green v. Boston R. Co., 128 Mass. 221, 35 Am. Rep. 370; L. & N. R. Co. v. Stewart, 78 Miss. 600, 29 South. 394, and authorities, supra. The court seems to have followed the rule as above stated. The plaintiff in the case testified to the value, and his was the only evidence, and we have not been shown that the court erred in its finding as to the value. Cooney v. Pullman Car Co., supra.

There is no error in the record, and the judgment must be affirmed.
Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

BOYETT v. STANDARD CHEMICAL & OIL CO.

(Supreme Court of Alabama. April 10, 1905.
Rehearing Denied June 30, 1906.)

1. EXCEPTIONS, BILL OF—REDUCTION OF TESTIMONY—COURT RULES—COMPLIANCE.

Where testimony set out in extenso in a bill of exceptions, relating to a material point in the case, was given by several witnesses and could not well be condensed into a general state-

ment, the bill would not be stricken for failure to comply with circuit court rule 33, subd. 5 (Code 1896, p. 1201), requiring condensation of testimony.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 17.]

2. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where a complaint contained counts on notes and also the common counts for goods sold and delivered, and the court gave the general charge in favor of plaintiff on the counts on the notes, all rulings on the common counts or on objections to their being joined in the same complaint with counts on the notes were without prejudice to plaintiff.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4225-4228.]

3. PLEADING—INCONSISTENT DEFENSES.

Where defendant gave certain notes in payment for fertilizers sold under a void contract, defendant was not estopped to deny the validity of the notes by pleas interposed to the common counts, also joined in the complaint, by which defendant set up payment of the demands sued on by the execution of the notes.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Pleading, § 189.]

4. BILLS AND NOTES—CONTRACT FOR ATTORNEY'S FEES—PLEADING—JOINDER.

An agreement in certain notes to pay attorney's fees is additional to the obligation of the note, and hence there is no objection to embodying in one count a claim for all attorney's fees claimed in the suit.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1467.]

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

"To be officially reported."

Action by the Standard Chemical & Oil Company against I. E. Boyett. From a judgment for plaintiff, defendant appeals. Reversed.

This was an action begun by attachment at the instance of appellee on certain notes executed by appellant to appellee recovering the sales of fertilizer. The complaint contained several counts declaring on the notes and other counts on the common counts. The defendants answered by pleas as follows: (1) The general issue; (2) not indebted; (3) want of consideration; (4) failure to procure license from the commissioner of agriculture to do business as a fertilizer dealer; (5, 6, 7, 8) were no tags; (9, 10) that the fertilizers manufactured by plaintiff were not guaranteed and a written or printed statement setting forth the ingredients filed with the commissioner of agriculture. To the common counts, the defendant pleaded payment of the same by the execution of the note sued on in the other count. The other facts necessary to an understanding of the opinion appear therein.

Sollie & Kirkland, Steiner, Crum & Well, Stallings & Reid, and Whaley & Prestwood, for appellant. A. A. Wiley, Powell, Albritton & Albritton, and Henry Opp, for appellee.

SIMPSON, J. This was an action commenced by attachment on promissory notes,

given for commercial fertilizers. Common counts were afterwards added, and various questions and exceptions raised thereon, and finally the general charge was given in favor of plaintiff on the counts based on the notes, and judgment rendered for plaintiff (appellee).

A motion is made by appellee to strike the bill of exceptions for failure to comply with rule 33, subd. 5, circuit court (Code 1896, p. 1201). While there are some portions of the testimony which might have been shortened, yet the greater part of that to which attention has been called as having been unnecessarily set out in extenso relates to tagging of the fertilizer, which was a material point in the case, and from the fact that the witnesses testified separately to separate and several portions of the goods taken out of the cars at different times, from all of which items of testimony the jury would have to make up its verdict, it could not well have been condensed into a general statement, and, even as to the testimony in regard to the shipment of the goods, although the defendant admitted receiving the goods, yet this might have been important in identifying the goods in regard to which each witness testified by reference to the cars and brands of the fertilizers. We cannot say that this was such a flagrant violation of the rule as to justify the striking of the bill of exceptions. As the court gave the general charge in favor of the plaintiff as to the several counts based on the notes, and the verdict of the jury shows that they found for the plaintiff, on those counts alone, all rulings on the common counts or on objections to their being joined in the same complaint, with the counts on the notes, if error at all, was without injury to the appellant.

The plaintiff contends that the court was authorized to give the general charge in favor of the plaintiff, on the counts based on the notes, because the defendant was estopped by his pleading from denying the validity of the notes; the defendant having interposed pleas to the common counts, setting up payment of the demands sued on, by the execution of the notes, and, under the rulings of the court, having gone to trial on said issue. "It is true that a party who has with knowledge of the facts assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith, to the prejudice of the adverse party," or, as otherwise expressed, "a party who defeats a judgment, by pleading or presenting a thing or judgment in one aspect, is estopped from giving it another, in the same or another suit, founded on the same subject-matter." 16 Cyc. p. 796; Pres. Con. of S. v. Williams, 9 Wend. (N. Y.) 147; Ogden v. Rowley, 15 Ind. 56; State Nat. Bank v. N. W. P. Co., 35 Iowa, 226; Hooker v. Hub-

bard, 102 Mass. 239; Hill's Adm'r v. Huckabee's Adm'r, 70 Ala. 183, 188, 189; Caldwell v. Smith, 77 Ala. 157, 165; Lehman, Durr & Co. v. Clark, 85 Ala. 109, 113, 114, 4 South. 651; Dickson v. McLarny, 97 Ala. 383, 392, 12 South. 378; Hodges v. Winston, 95 Ala. 514, 11 South. 200, 36 Am. St. Rep. 241; Taylor v. Crook, 136 Ala. 356, 378, 34 South. 905, 96 Am. St. Rep. 26. Yet that principle does not apply where the instrument sought to be set up by estoppel is void on account of the violation of penal statutes. "The same rule of public policy which forbids the execution of the contract forbids the giving of a quasi validity thereto." 15 Am. & Eng. Ency. Law (2d Ed.) p. 1014. "Validity cannot be injected into an illegal contract or act by way of estoppel," nor can "the defense of illegality be held to have been waived." Western U. Tel. Co. v. Young, 138 Ala. 240, 246, 36 South. 374. A sale of fertilizer without compliance with the statute is void, and no recovery can be had for the price, nor on any note given for the consideration thereof. 3 Mayfield's Dig. p. 791.

There was no error in overruling the demurrer to the fifth count. The agreement to pay an attorney's fee is one additional to the regular obligation of the note, and there is no objection to embodying in one count a claim for all the attorney's fees claimed in the suit, as it is all one subject, and no confusion arises therefrom.

There was no error in the ruling of the court excluding the certified copy of register of fertilizers manufactured, as it was merely negative evidence, and did not show that plaintiff had not filed a proper paper.

For the error in giving the general charge for the plaintiff, the judgment of the court is reversed, and the cause remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

JONES v. COAN.

(Supreme Court of Alabama. June 30, 1906.)

1. FRAUD—ACTION—QUESTIONS FOR JURY.

Code 1896, § 2813, provides that in actions for relief on the ground of fraud, barred by the statute, the cause of action must not be construed as having accrued until the discovery of the fraud, after which action must be brought within one year. *Held*, that where, in an action for fraud, the evidence was uncontradicted that plaintiff had not discovered it until less than a year before action, evidence that plaintiff had an opportunity to know and ought to have known of the fraud previously, if sufficient to raise an inference adverse to plaintiff, did not authorize the affirmative charge for defendant.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 60.]

2. SAME—EVIDENCE—SUFFICIENCY.

In an action for fraud practiced by a vendee on the vendor, whereby land was conveyed for an inadequate consideration, the evidence held sufficient to sustain a finding that defendant's representations were false and fraudulent.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"Not officially reported."

Action by James P. Coan against Henry C. Jones. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Horace Stringfellow, for appellant. O. S. Lewis and Ray Rushton, for appellee.

HARALSON, J. On the 26th of April, 1897, as appears from the record, the plaintiff and his wife, sold and conveyed to the defendant, H. C. Jones (to employ the language of their conveyance): "That portion of the western part of our land that will be flooded by back water caused by the erection of a dam thirty-one (31) feet in height to be built across the Tallapoosa river on land bought by Henry C. Jones of William Cole on the west side of said river in Elmore county and of Mrs. Britt on the east side of said river in Tallapoosa county all in section 6 of township 18 north, range 22 east in the state of Alabama. The eastern boundary line of land that we hereby grant shall be determined by a level line as such dam shall cause water to assume at low water and such boundary shall meander according to level of water as such dam shall influence. It is understood and agreed that the foregoing applies to low water and any extra differences in fluctuation of said water or change of level by rains is considered as not damaging and we assume such extra water level as may be caused by any abnormal flow of water in combination with any influence from said dam."

On the 28th of February, 1899, for good and sufficient considerations, the plaintiff and wife executed another deed to said Henry C. Jones, conveying to him property described as follows: "That already deeded (by said deed of the 26th of April, 1897), and such other and further portion of the lands of the said James P. Coan, that will be covered or flooded by back water caused by diverting or raising the water of the Tallapoosa river and Sangahatchie, and their tributaries, from their present or natural channels by building a dam of sufficient height to furnish, at any stage of water, an actual or net working head of fifty (50) feet between the surface head water and the surface tail water. The said dam to be built across the Tallapoosa river, in the development of a water power at such location as engineers may determine, but such dam and development is to be at same on and between land bought by H. C. Jones of W. H. Cole, on the west side of said river in Elmore county," etc.

On that date, February 28, 1899, as appears, the defendant, Jones, executed an agreement with the plaintiff as follows: "This agreement is to evidence the fact that in consideration of the deeding to me this day certain water or flood rights, I am

to have engineers to survey and determine by actual measurement the number of acres of land that will be flooded as set forth in said deed, over and above that already deeded (April 26, 1897); and I agree to pay to said James P. Coan for such excess land at the rate of twenty dollars per acre on or before October 1st, 1899. Upon the payment for this land under these conditions this instrument becomes the property of the holders of such deed, but upon the failure to pay for such lands, as is provided herein, the said deed and this agreement become null and void and the land to which it applies remains the property of James P. Coan, excepting that already deeded applying to a thirty one foot dam."

The complaint is, that the defendant, Jones, having this deed from the plaintiff for certain water or flood rights, for a 31-foot dam entered into a contract with plaintiff, for all additional land that would be flooded by building a dam of sufficient height to furnish at any stage of water an actual working head of 50 feet between the surface head water, and the surface tail water, or the difference between a 31 and a 50 foot dam. The contract, as has been seen, provided that the defendant was to have engineers survey and determine by actual measurement the number of acres of land that would be flooded in addition to that already deeded (April 26, 1897), and he was to pay the plaintiff for such excess land at the rate of \$20.00 per acre, on or before October 1, 1899. It further appears from the complaint, that one "Brewer as agent of the defendant represented and reported to plaintiff that the land that could be overflowed, was two and a half (2½) acres additional to that already purchased; that plaintiff relying on the statement of the said agent of defendant, did execute to defendant a deed conveying to him the land already deeded, and all additional land that would be flooded by back water of the Tallapoosa river and Sangahatchie creek and their tributaries, from their actual channels by building a dam of sufficient height to furnish, at any stage of water, an actual working head of fifty feet between the surface head water and surface tail water, for which defendant paid plaintiff the sum of \$50.00 (2½ acres, at \$20.00 per acre). And plaintiff avers, that the said statement of the agent of said defendant as to the amount of the land that would be flooded, to-wit, 2½ acres, was false and fraudulent, for plaintiff avers, that the land really covered by such water, is about 40 acres; and plaintiff alleges, that by reason of said representations and his relying on same, he executed a deed conveying the flood right above set out, to defendant, to his damage (of) one thousand dollars, for which, with interest from the 28th day of February, 1899, he now sues."

There are two counts in the complaint,

each of which sets up the agreement, and contains the same averments, except that the first avers that the contract was with defendant, and the other that it was with his agent.

The defendant pleaded the general issue and that the fraud complained of occurred, if at all, more than one year before the commencement of this suit, and that the cause of action is barred by the statute of limitations of one year.

The plaintiff replied, that he did not discover the fraud until less than one year before the commencement of this action. Code 1896, § 2813. Issue was joined on the replication and the cause was tried thereon.

The defendant requested the court to charge, that if the jury believed the evidence they must find a verdict for defendant. He also made a motion for a new trial. The refusal of the court to give said charge, and to grant the motion for a new trial, are the only errors assigned which are insisted on by counsel for appellant.

The plaintiff testified, "I learned for the first time, that the dam built covered more than 2½ acres, in addition to the first deed, when the water backed up there, in October, 1902. I never knew how much land was covered until the dam was built and the water backed up. * * * The water was not turned on to my knowledge, prior to October, 1902. There was a freshet before that, which threw the water out there, and the dam burst and the river went back into its banks. That was the time of the first big freshet, when the dam was first completed. The water did not back up any more until October, 1902." He further testified, that Brewer, who was defendant's agent in the matter, told him, the day he received the deed, that there were only 2½ acres of land flooded. He says, "Brewer gave me the check (for the 2½ acres) the day I signed the deed, and at the time I executed the deed, he told me they had run the line, and that there were only 2½ acres of my land, covered by the deed." J. P. Coan testified that he heard Brewer say at the house of plaintiff, at the time the deed was executed, that the overflow would cover only two and a half acres.

It appears that a check was given by defendant to plaintiff for \$50, which would be the exact amount for two and a half acres at \$20. Plaintiff testified the check was given the day the agreement was signed, though not paid, for some time afterwards, as the evidence tends to show. Weldon, a witness for defendant testified, that this check was made some time in April, 1899. This evidence tends to show, that it was to pay for 2½ acres. That was all of his land that was represented to plaintiff that the flood waters would cover.

M. Mason, a civil engineer of long experience testified, that he had made a care-

ful survey of the difference in the amount of land of the plaintiff between what would be flooded by a 31 and a 50 foot dam, and that the amount was 14 acres. He says, "In making the survey, he followed the deed from plaintiff to defendant, of February, 1899, and surveyed the land of plaintiff conveyed by that deed. The amount of the lands of plaintiff which would be covered by a 50-foot dam, in addition to what would be covered by a 31-foot dam was 14 acres."

J. M. Garrett, a witness introduced by defendant, testified, that being a civil engineer of long experience, he made a careful survey of the difference in the amount of land of the plaintiff that would be flooded by a 31 and a 50 foot dam, following the deed from plaintiff to defendant of February, 1899, and calculated that it was 11½ acres.

There was no evidence in conflict with the testimony of plaintiff, that he did not ascertain the alleged fraud that was practiced on him, until less than a year before the commencement of this suit, on the 18th of July, 1903, except, if that were important, that plaintiff had the opportunity to know and ought to have known better, long before. If that was sufficient to place the evidence for the two in conflict, and to raise an inference adverse to plaintiff, yet it did not authorize the giving of the general affirmative charge for the defendant. Moreover, the evidence as to the quantity of the plaintiff's land which was subject to be flooded by the 50-foot wall, and to which he was entitled to pay under his agreement with defendant, was, according to the evidence, for an excess of 2½ acres, so far, as to raise the fair inference, that a representation of the defendant's agent, if made, that it was only that amount, was false and fraudulent.

On an examination of the evidence, and charges given, other than as to the statute of limitations, we have not seen, nor had pointed out to us, wherein the verdict was wrong and unjust. *Teague v. Bass*, 131 Ala. 422, 31 South. 4.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

PECK v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. BURGLARY—INDICTMENT—SUFFICIENCY.

An indictment charging that defendant, with intent to steal, broke into and entered a building, to wit, the depot of the Southern Railway Company, etc., the said depot being the property of the Southern Railway Company, a corporation, sufficiently averred corporate character.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 60.]

2. SAME—OWNERSHIP.

It is sufficient, in an indictment for burglary, to lay the ownership of the building brok-

en into and entered, in the person in the possession and occupancy thereof.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 55-62.]

3. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

Under Code 1896, § 4333, providing that a judgment of conviction must not be reversed for error, when the court is satisfied that no injury resulted therefrom to defendant, the error, if any, in a prosecution for burglary, in admitting parol evidence of the ownership of the building entered, was harmless; it being proven that the building broken into and entered was in the possession of the party named in the indictment.

4. SAME — EVIDENCE — CONFESSION — ADMISSIBILITY.

Where defendant, while a prisoner in the custody of the officer arresting him, was taken by such officer and by the justice of the peace issuing the warrant under which the arrest was made into a closed room, and while there and just before entering on his preliminary trial was asked by the justice a question assuming defendant's guilt, in which manner an alleged confession was evoked, and there was evidence tending to show that defendant was a weak-minded person, and that he commenced crying when the question assuming his guilt was asked him, such confession was inadmissible, although it appeared that no threats or promises were made to induce the same.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1157, 1173.]

Appeal from Circuit Court, Hale County; B. M. Miller, Judge.

"To be officially reported."

Henry Peck was indicted for burglary, and appeals. Reversed.

De Graffenreid & Evans, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The demurrer to the indictment upon the ground that the indictment failed to charge that the Southern Railway Company was a corporation was without merit. The indictment charges that the defendant, "with the intent to steal broke into and entered a building, to wit, the depot of the Southern Railway Company, etc., the said depot being the property of the Southern Railway Company, a corporation." The point made by the demurrer is that the omission of the words "a corporation" after Southern Railway Company, where first used in the indictment, was a failure to aver corporate character; but this omission was supplied in the clause that followed as set out above. The circuit court properly overruled the demurrer.

It is sufficient, in an indictment for burglary, to lay the ownership of the building broken into and entered in the person in the possession and occupancy of the building. *Matthews v. State*, 55 Ala. 65; *Thomas v. State*, 97 Ala. 3, 12 South. 409. We need not consider whether there was error in admitting parol evidence of the ownership of the building entered, for, if error, it was error without injury, since it was proven that the depot building broken into and entered was in the possession of the Southern Rail-

way Company. Code 1896, § 4333; *Fuller v. State*, 117 Ala. 36, 23 South. 688. Possession is a collective fact, to which a witness may testify. *Wright v. State*, 136 Ala. 139, 34 South. 233.

The state was permitted to prove the confession of defendant against his objection. The confession sought to be proved was, under the decision in the case of *Kelly v. State*, 72 Ala. 244, inadmissible. The facts in the cases of *Bush v. State*, 136 Ala. 85, 33 South. 978, and *White v. State*, 133 Ala. 122, 32 South. 139, cited by the Attorney General, are different from the case at bar, and clearly differentiate the former case from the latter. Here the facts show that the defendant, while a prisoner in the custody of the officer making the arrest, was taken by the justice of the peace who issued the warrant on which the arrest was made and the officer who made the arrest into a room, and the door closed, and, being thus alone with the prisoner, and just before entering upon his preliminary trial, the justice of the peace asked the defendant a question which assumed the defendant's guilt, and in this manner the confession admitted in evidence on the trial was evoked. There was evidence tending to show that the defendant was a weak-minded person, and when the question was asked him which assumed his guilt "the defendant commenced crying and stated" (and here follows the confession). It was stated by the witness that no threats were made, nor promises, to induce the confession. The time, place, and surroundings of the prisoner, the manner of evoking the confession, and by whom evoked, in the very nature of things, were calculated to unduly influence the prisoner and render a confession under such circumstances inadmissible in evidence against him. And the mere fact that no threats were used or promises made to the defendant, and nothing more said to him than to ask the question which called for the confession, is not enough, under the facts in this case, to affirmatively show that the confession was voluntarily made.

In *McQueen v. State*, 94 Ala. 50, 10 South. 433, the confession of the defendant was made while under arrest, and to the officer in whose custody the defendant was; but the record shows affirmatively that the confession was voluntary. The court said in that case: "It is affirmatively shown that the confessions were not made under the influence of threats, promises, or other improper inducements, but were voluntary. (The italics are ours.) So, too, in the case of *Redd v. State*, 68 Ala. 492, the confessions, though made by the defendant to the officer and while in custody of the officer, appearing to have been voluntary, evidence of the confession was held to have been admissible. The principle held in this case was that the mere fact that the confession was made while in custody and in answer to questions asked by the officer is not alone sufficient to ex-

clude the confession; the confession otherwise appearing to have been voluntary. In *Miller v. State*, 40 Ala. 54, it was said: "A confession is not inadmissible, as is contended because elicited in answer to a question which assumes a prisoner's guilt. The law seems to be well settled that this, of itself, would not be sufficient to authorize the exclusion of the confession"—citing *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282. But the judgment of the lower court was reversed for the error of admitting the confession on the facts in that case. The facts in the case of *Spicer v. State*, 69 Ala. 159, were different from the case at bar. There the confession was made to one who had been left by the officer temporarily in charge of the prisoner, and the confessions thus elicited by questions of such person. It was said by the court: "They [the confessions] are affirmatively shown not to have been elicited through the influence of either threats or promises, or other improper appliances [italics ours], and were therefore voluntary."

There can be no difference in principle between this case and the case of *Kelly v. State*, supra. There the prisoner was interrogated by the magistrate while the preliminary trial was in progress; here the prisoner was interrogated by the magistrate just before entering upon the preliminary trial. Every condition in the one case calculated to unduly influence the prisoner and render his confession involuntary exists in the other. The confession, we think, was evoked by the employment of improper appliances, and, on the authority of *Kelly v. State*, supra, should have been excluded.

Reversed and remanded.

WFAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

147 Ala 79
HAMMOND v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. JURY—SPECIAL JURY—DRAWING OF JURY. Code 1896, § 5004, provides that when any capital case stands for trial the court shall, one day before the day set for trial, publicly draw from the jury box a certain number of such names for the case. *Held*, that is is not necessary that the presiding judge announce the names of the jurors as drawn from the box.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 283.]

2. SAME—SELECTION OF JURORS.

Code 1896, § 4333, provides that no judgment of conviction shall be reversed because of error when the court is satisfied that no injury resulted to defendant. Section 5004 provides that when any capital case stands for trial the court shall, at least one day before the day set for trial, draw a certain number of names from the box, a list of which shall be immediately made out by the clerk and an order issued to the sheriff to summon the persons so drawn. *Held*, that the fact that the clerk did not immediately make out a list, but that the names were placed in an envelope which was sealed and the list made out about four hours later,

was not prejudicial to accused, where it appeared affirmatively from the bill of exception that the list made by the clerk was composed of the names drawn by the judge and placed in the envelope, that the names served on defendant were copies of names on the list so made out, and that the copy of the names was served on defendant one entire day before trial.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 283, 289.]

3. SAME—MISTAKE IN NAME OF JUROR—EFFECT.

By the express provisions of Code 1896, § 5007, a mistake in the name of any person summoned as a juror to the trial of a capital case, either in the venire or in the list of jurors delivered to defendant, is not sufficient cause to quash the venire, or to delay or continue the trial, unless the court in its discretion is of opinion that the ends of justice so require, but the court must in such case direct the names of such persons to be discarded and others to be forthwith summoned.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 309, 543.]

4. CRIMINAL LAW—EVIDENCE RES GESTÆ.

On a prosecution for murder, evidence that, immediately after shooting deceased, defendant shot the brother of deceased was admissible as part of the *res gestæ*.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 807-810, 822, 823.]

5. SAME.

On a prosecution for murder, testimony that some of the shot from defendant's gun passed through the clothing of witness was admissible as part of the *res gestæ*.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 804.]

6. HOMICIDE — EVIDENCE — ADMISSIBILITY — CIRCUMSTANCES PRECEDING ACT.

Where, on a prosecution for murder, it appeared that defendant was marshal of a town, and there was evidence tending to show that he was attempting or intending to arrest decedent at the time of the killing, it was proper to limit defendant to proof of charges against decedent for violation of ordinances; details of the acts and conduct on the part of the deceased upon which the charges were based being incompetent and inadmissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 388.]

7. ARREST—POLICE—RIGHT TO ARREST WITHOUT WARRANT.

A policeman of a town has a right to arrest persons for violations of the ordinances without warrant, if the offense was committed in his presence.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arrest, §§ 151-156.]

8. HOMICIDE — JUSTIFIABLE HOMICIDE — ARREST.

Where a peace officer was in good faith attempting to arrest, and the offender was armed with a pistol and committed an overt act manifesting an intent to immediately use the pistol, under such circumstances as were sufficient to create in the mind of a reasonable man, and did in the mind of the officer, a belief that the offender was about to draw the weapon and immediately fire, the officer was justified in firing first.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 135, 143.]

9. SAME — EVIDENCE — ADMISSIBILITY — THREATS.

On a prosecution for murder, where the defense was that defendant, a peace officer, was in good faith endeavoring to arrest decedent for a violation of a city ordinance, it was error

to exclude evidence of threats made by decedent against the defendant, and evidence tending to show that decedent was a turbulent, dangerous, and bloodthirsty character.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 393-397, 399-413.]

10. WITNESSES—RECALLING WITNESS FOR IMPEACHMENT.

In a criminal case, it was within the discretion of the trial court to allow the solicitor for the state to recall witnesses for the defendant for the purpose of laying a predicate for their impeachment by proof of contradictory statements.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 792, 899, 1109.]

11. SAME.

The fact that the solicitor for the state in a criminal case recalled witnesses for defendant in order to lay a predicate for impeachment did not make them the state's witnesses.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1095-1100.]

12. CRIMINAL LAW—EVIDENCE—EXCLUSION OF EVIDENCE.

Where a witness gives a responsive answer, the party calling forth the answer has no right to have it excluded.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1644.]

13. SAME—OPINION EVIDENCE—CONCLUSION OF WITNESS.

In a criminal case, testimony of a witness that, if certain persons had exchanged pistols, witness would have seen it, was inadmissible as a conclusion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1039.]

14. SAME—INSTRUCTIONS—IMPEACHING OF WITNESS.

Where a witness testified that another witness whom it was sought to impeach had made to the former statements contradictory to his testimony, it was error to refuse to instruct that if the jury did not believe on all the evidence that the witness sought to be impeached made the statements which the other witness testified he did make, then the witness was not impeached.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1892.]

15. SAME—CREDIBILITY OF WITNESSES.

The court refused to instruct that if any of the state's witnesses had exhibited bias against the defendant or anger, and satisfied the jury that they had not testified truly and were not worthy of belief, and the jury thought their testimony should be discarded, they might discard it altogether. *Held*, error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1889-1893.]

16. SAME.

It was error to refuse to instruct that, if upon all the evidence the jury believed that the testimony as to the good character of certain witnesses was sufficient to overcome the impeaching testimony against them, the jury should weigh their testimony in the light of the proof of good character along with the other evidence in the case.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1889-1893.]

17. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

Where, on a prosecution for murder, there was evidence tending to show that defendant, a peace officer, approached decedent under the guise of making an arrest, but killed for the purpose of taking vengeance on decedent, requested instructions, seeking to invoke the doctrine of freedom from fault, which failed to

hypothesize good faith on the part of defendant in carrying the gun, were properly refused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 612.]

18. CRIMINAL LAW—INSTRUCTIONS—INTEREST OF DEFENDANT AS WITNESS.

On a prosecution for murder, it was proper to instruct that they must consider the testimony of defendant in the light of the interest he had in the prosecution.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1895-1901.]

19. SAME—APPEAL—PRESUMPTIONS—CONSISTENCY OF INSTRUCTIONS.

Where, on appeal, the oral charge of the court was not set out, it would be presumed that charges given for the defendant were not in conflict with the oral charge.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3032.]

20. SAME—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that it makes no difference in what language the definition of a reasonable doubt is clothed, but that when it is boiled down and brought to its last analysis it means no more or less than a doubt growing up out of all the evidence for which the jury can give a reason, as contradistinguished from a mere possibility, was not reversible error, although calculated to mislead and confuse the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1904-1922.]

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

"To be officially reported."

Abb Hammond was convicted of murder in the first degree, and he appeals. Reversed and remanded.

The defendant, Abb Hammond, was indicted, tried, and convicted of killing Bud Tucker by shooting him with a gun. Before entering upon a trial of the cause the defendant moved the court to quash the venire, assigning the following reasons: "Because the special venire of 50 names was not drawn as provided by law, in that the presiding judge did not cause the clerk of the court to make out a list of the special venire immediately as provided by section 5404 of the Code, and because the clerk did not immediately make out said list, and because the presiding judge of the court did not publicly draw from the jury box the names of 50 persons served on the defendant as a special venire from which he is to select a jury in this case, and cause the clerk of said court to immediately make out a list of the 50 names and issue an order to the sheriff and serve the same on the defendant, and because the presiding judge did draw from the box 50 persons as a special venire to try defendant's case, and caused the clerk of said court to place the 50 names so drawn in an envelope and seal the same and put it in his pocket, and did not immediately make out a list of said names, but took the said names away and four hours afterwards made out the list; because the said judge did not call out the names so drawn to serve as a special venire in open court, and did not cause the clerk in the presence of the court and in open

court to make out a list, but let him seal the same up and take it away in his pocket; because the regular list of the regular venire drawn and summoned to serve during the second week of said term of said court was not served on this defendant, in that C. C. Caxton was drawn and summoned as a regular juror, and no such man was drawn and summoned to appear and serve as a juror for said second week, but that C. C. Caxton was summoned to serve as a juror, when there is no such man in Covington county, but C. C. Croxton answered to the name of Caxton, and said Croxton was placed on the regular panel of the jurors, but was not served on the defendant, and because V. M. Hayes was drawn as a juror on the regular panel, and there was no such man on the regular panel or served on the defendant, but W. V. Hayes was put on the regular panel and not served on defendant." The court overruled this motion. The motion was afterwards amended, but was practically the same motion exemplified. The court, being satisfied from the evidence that there was a mistake in the names of the two jurors, Hayes and Caxton, and that there were no such persons living in Covington county, directed that those two names be discarded, and ordered the sheriff to summon two qualified citizens of the county to serve in their stead. The sheriff complied by summoning C. C. Croxton and M. V. Hayes, who were placed on the regular panel and qualified as jurors.

It appears from the evidence that Hammond was marshal of the town of Florala, and shot and killed Bud Tucker on the streets of said city with a gun, and fired at Jim Tucker, a brother of Bud. The other facts sufficiently appear in the opinion.

There were numerous charges requested by the defendant, some of which were given and 64 of which were refused. Those refused and criticised are as follows: (55) "If in this case the jury do not, upon a consideration of all the evidence, believe that the witness Jim Johnson made the statements which the witness Lawrence testified Johnson did make to him, then Johnson is not impeached." (58) "If any of the state's witnesses have exhibited malice against the defendant or anger, or have testified to contradictory statements and thereby satisfied the jury that they have not testified truly, and are not worthy of belief, and the jury think their testimony on these accounts should be discarded, they may discard it altogether." (64) "If upon all the evidence the jury believe that the testimony as to the good character of the witnesses Jim Johnson and Bryant is sufficient to overcome the impeaching testimony against these, if there is impeaching testimony, they should weigh their testimony in the light of this proof of good character along with all the other evidence in the case."

The court gave at the request of the solic-

itor the following charges: "(A) The court further charges the jury that they must consider the testimony of Abb Hammond, the defendant, in the light of the interest he has in the prosecution. (B) The court further charges the jury that all the charges read by defendant's counsel do not in any way conflict with, but are in harmony with, the charge given by the court, and they should not consider them to the exclusion of the charge of the court, because the written charges are only a different way of expressing the law. (C) The court further charges the jury that it makes no difference in what language the definition of a reasonable doubt is clothed. When it is boiled down and brought to its last analysis, it means no more or less than a doubt growing up out of all the evidence in the case for which you can give a reason, as contradistinguished from a mere possibility."

C. E. Reid, J. F. Stallings, and M. Sollie, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. Abb Hammond was convicted in Covington circuit court of murder in the first degree and sentenced to imprisonment in the penitentiary for life. From the judgment of conviction the defendant has appealed.

The motion to quash the venire was properly overruled. Section 5004 of the Code of 1896 does not require that the presiding judge shall announce the names of the jurors as they are drawn from the box; and, while we think it is the better practice for the clerk to make a list of the names immediately as they are drawn from the box by the presiding judge, it is unnecessary in this instance for us to decide that the statute is mandatory in this respect, as the bill of exceptions affirmatively shows that the list that was made by the clerk was composed of the identical names that were drawn by the presiding judge and placed in the envelope by the clerk, and, further, that the names served on the defendant were copies of the names on the list so made out, so that we are satisfied no injury could possibly have resulted from the manner in which the names of the jurors were drawn and disposed of, nor from the delay of the clerk in making the list. Code 1896, § 4333. It is shown that a copy of the names of the jurors was served on the defendant one entire day before the day fixed for the trial. This was a compliance with the law.

Evidently there was a mistake in the names of the jurors Croxton and Hayes; but it is statutory, and has been many times decided by this court that this furnishes no ground for quashing the venire. Code 1896, § 5007; Kimbrel's Case, 130 Ala. 40, 30 South. 454; Longmire's Case, 130 Ala. 66, 30 South. 413. The court conformed to the statute in discarding the names of the two jurors and

ordering two others to be summoned. Code 1896, § 5007.

The exceptions to the ruling of the court on the admissibility of evidence are numerous. The sixth, seventh, eighth, and ninth relate to the ruling permitting the state to prove that immediately after shooting the deceased the defendant shot the brother of the deceased. In this there is no error. Shooting the brother was a part of the *res gestæ*. *Seams' Case*, 84 Ala. 410, 4 South. 521; *Smith's Case*, 88 Ala. 73, 7 South. 52; *Plant's Case*, 140 Ala. 52, 37 South. 159. Evidence that some of the shot from the gun passed through the witness' clothing was also of the *res gestæ* and admissible.

The court properly limited the defendant to proof of the charges against the deceased for violation of the ordinances of the town. Details of the acts and conduct on the part of the deceased upon which the charges were based were incompetent and inadmissible. *Carden's Case*, 84 Ala. 417, 4 South. 823; *Gordon's Case*, 140 Ala. 29, 36 South. 1009; *Harkness' Case*, 129 Ala. 71, 30 South. 73. Moreover, the proof was without conflict that the deceased was carrying a concealed weapon and that the defendant saw the deceased when he concealed it—that the offense of carrying a concealed weapon was committed in defendant's presence; and the defendant testified that he went up to arrest deceased for carrying the pistol concealed at that time, and for "other things" before. So defendant had the benefit of the evidence that he was an officer and attempting to arrest the deceased for an offense that was committed in his presence. The defendant was a policeman at the time the killing occurred, and as such he had the authority, and it was his duty, to arrest persons for violations of the ordinances of the town; and this he could do without warrant if the offense was committed in his presence. To submit to an arrest under such circumstances was the correlative duty of the deceased. In *Russell on Crimes* it is stated: "In all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, the homicide is justifiable." 1 *Russell on Crimes*, 695; *Clements' Case*, 50 Ala. 117. "Social order and political government are dependent upon observance of law by the citizen. The mandates of the law are executed by officers provided for such purposes, and such officers are clothed by the law with the authority necessary to execute its mandates, and it affords them all the protection possible in the rightful performance of the duties imposed."

There are two theories of the prosecution in this case. The first is that the defendant of his own malice, and not in the discharge of his duty, killed the deceased to avenge a

personal grievance. The second is that, if he was in good faith attempting or intending to arrest the deceased, the circumstances did not authorize the use of the force employed. We think the evidence afforded an inference of the correctness of these theories. At the same time, the defendant's insistence on the trial was, and is here, that in good faith he was, with knowledge on the part of the deceased that he was a policeman, attempting to arrest the defendant and have him make bond for an offense or offenses in violation of the ordinances of the town committed in his presence. If the defendant was in good faith attempting to arrest the deceased, and if deceased was armed with a pistol and at the time of the attempted arrest he manifested an intention to resist the arrest, and committed an overt act which manifested an intent to immediately use the pistol, under such circumstances as were sufficient to create in the mind of a reasonable man, and if they did create in the mind of the defendant an honest belief that the deceased was going to draw the weapon and immediately fire on him in resistance of arrest, then the defendant was justified in firing first. *U. S. v. Rice*, 27 Fed. Cas. 796, No. 16,153; *Adams' Case*, 72 Ga. 85; *Boykin's Case*, 22 Colo. 496, 45 Pac. 419; *Morton v. Bradley*, 30 Ala. 683.

Upon consideration of the evidence we think, and hold, that there was some evidence which tends to support the defendant's theory, its weight, of course, was a question for the determination of the jury. Upon these considerations we hold that the court erred in declining to allow evidence of threats made by the deceased against the defendant and in declining to allow evidence tending to show that the deceased was a turbulent, dangerous and bloodthirsty character. *Green's Case*, 69 Ala. 6; *Robert's Case*, 68 Ala. 156; *Meyers' Case*, 62 Ala. 590; *Burns' Case*, 49 Ala. 370; *Jones' Case*, 116 Ala. 468, 23 South. 135; *Gafford's Case*, 122 Ala. 64, 25 South. 10; *Storey's Case*, 71 Ala. 329.

It was within the irrevisable discretion of the court to allow the solicitor to recall witnesses for the defendant for the purpose of laying a predicate for their impeachment by proof of contradictory statements; and by calling them the state did not, as is insisted by the appellant, make them its witnesses. *Jones' Case*, 115 Ala. 67, 22 South. 566; *Dudley's Case*, 121 Ala. 4, 25 South. 742; *Thomas' Case*, 100 Ala. 53, 14 South. 621; *Thompson's Case*, 100 Ala. 70, 14 South. 878; *Braham's Case*, (Ala.) 38 South. 919.

If a witness answers a question, and the answer is responsive, the party answering the question has no right to have the answer excluded. To acknowledge such right would be allowing the party to experiment. *Toliver's Case*, 94 Ala. 111, 10 South. 428. In allowing Bart Tucker to testify that Holley testified that, "if said Tucker had exchanged pistols at his restaurant, he (Holley) would

have seen it," the court erred. Such evidence was a mere conclusion of the witness Holley. *Reeves' Case*, 96 Ala. 33, 11 South. 296; *E. T., V. & G. R. R. Co. v. Watson*, 90 Ala. 41, 7 South. 813; *Ferguson's Case*, 134 Ala. 63, 32 South. 760.

In this case 100 written charges were requested by the defendant. Careful consideration of the case will reveal to any reasonable man an entire lack of necessity for this number of charges being flooded on the presiding judge and on this court for review. Every proposition in the case, we do not hesitate to say, could have been presented and covered by a dozen written charges. Then why so many written requests? Thirty-six of the 100 charges requested were given and 64 were refused. We shall not criticize the refused charges in detail. To do so would be both unprofitable and a useless consumption of time. Of the refused charges, those numbered 55, 58, and 64 assert correct propositions and should have been given. They fall within the exception to the rule against giving undue prominence to particular parts of the evidence, and the rule that charges should not be argumentative. *Hale's Case*, 122 Ala. 85, 28 South. 236; *Robert's Case*, 122 Ala. 47, 25 South. 238; *Perry's Case*, 78 Ala. 22; *Smith's Case*, 88 Ala. 73, 7 South. 52.

As has been intimated in a previous paragraph in this opinion, there is a tendency of the evidence to the effect that the defendant approached the deceased under the guise of making an arrest and killed him for the purpose of wreaking vengeance on him; in other words that the insistence that the defendant approached the deceased for the purpose of making a legal arrest is an afterthought—a mere pretense. In the light of this tendency of the evidence, those charges refused to the defendant which sought to invoke the doctrine of freedom from fault, of which No. 39 is an example, are bad. If for no other reason, they fail to hypothesize good faith on the part of the defendant in carrying the gun. Certainly, if the defendant was approaching the deceased, not having a purpose in good faith to arrest the deceased, but for the purpose of engaging in a difficulty with him, he was not without fault. *Reese's Case*, 135 Ala. 13, 33 South. 672; *Neeley's Case*, 20 Iowa, 108; *Benham's Case*, 23 Iowa, 154, 92 Am. Dec. 416. All the other refused charges were properly refused. Some of them if not inherently bad, were substantially duplicates of charges which the record shows were given for the defendant, while the others were vicious in one or more particulars.

In giving charge A for the state the court committed no error. *Wilkin's Case*, 98 Ala. 6, 13 South. 312; *Norris's Case*, 87 Ala. 85, 6 South. 371; *Smith's Case*, 118 Ala. 117, 24 South. 55.

The oral charge of the court is not set out. Therefore we are not in position to determine the correctness or not of charge B, given at the request of the state; but, in the present

state of the record we will presume, in favor of the court, that the charges given for the defendant were not in conflict with the oral charge.

Charge C, given for the state, was calculated to mislead and confuse the jury, and, while it is the better practice to refuse such charges, yet the giving of the charge does not constitute reversible error. *Caddell's Case*, 136 Ala. 9, 34 South. 191, and cases there cited.

It has been strenuously urged by counsel for the appellant that the record proper fails to show the presence of the defendant when the verdict of the jury was received. While, on account of reversible errors found in the record, it is not necessary for us to determine this question, we suggest that it is just as easy for the clerk to make the record show by direct recitals the presence of the defendant during the entire trial as it is to leave such important features to rest in inference, and more care should be taken in this respect by those who write and supervise minute entries.

For the errors pointed out, the judgment appealed from is reversed, and the cause remanded.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

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HOLMAN v. CLARK.

(Supreme Court of Alabama. June 30, 1906.)

1. EVIDENCE—OPINION OF WITNESS.

In detinue for a mule claimed by plaintiff under a mortgage, plaintiff testified that he sold the mule to the mortgagor, who had had possession prior to the sale and execution of the mortgage, and that the mule was his up to the time that the mortgage was executed, and that it was "so understood." *Held*, that it was not error to refuse to exclude the expression "it was so understood," since, as used, it should be taken as synonymous with "agreement" and the statement of a fact, and not a condition.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2149-2151, 2173, 2174.]

2. SAME—RELEVANCY—MATTER EXPLANATORY OF FACTS IN EVIDENCE.

In detinue for a mule, claimed by plaintiff under a purchase-money mortgage on the mule claimed to have been executed to him, it appearing that the mortgagor had been in possession of the mule prior to the time of the mortgage, it was proper to permit plaintiff to testify that the relation of landlord and tenant had existed between himself and the mortgagor for several years, and that he had furnished the mortgagor with several mules, including the one in controversy.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 134, 2173.]

3. DETINUE—ISSUES AND PROOF.

In detinue for a mule claimed by plaintiff under a mortgage describing the mule as black, the mortgage was admissible in evidence, though the complaint described the mule as being dark bay.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Detinue, § 33; vol. 9, Cent. Dig. Chattel Mortgages, § 90.]

4. SAME.

Where, in detinue for a mule claimed by plaintiff under a mortgage, the complaint alleged that the mule was sold to a certain person about 2 or 3 years before the commencement of the action, evidence that it was sold 1 year, 9 months, and 17 days before was a substantial correspondence with the complaint.

5. SAME.

Where, in detinue for a mule, there is a substantial correspondence between the description of the mule in the complaint and the proof, the age of the mule given in the complaint is immaterial.

6. EVIDENCE—MATERIALITY—STATEMENTS AND CONDUCT.

In detinue for a mule claimed by plaintiff under a mortgage executed to him on a sale of the mule to the mortgagor, the execution of a mortgage to a certain bank by plaintiff on all his property after he received the mortgage on the mule, in which mortgage to the bank the mule in question was not included, was immaterial and properly excluded.

7. SAME—DECLARATION—POSSESSION OF PROPERTY—EXPLANATION OF POSSESSION.

In detinue for a mule, plaintiff claimed under a mortgage on the mule executed to him on a sale of the mule by him to the mortgagor, and defendant claimed under a mortgage executed by the mortgagor prior in point of time to plaintiff's mortgage, and it appeared that the mortgagor had been in possession of the mule when defendant's mortgage was executed. *Held*, that a witness should have been permitted to testify that the mortgagor, at the time he executed defendant's mortgage, claimed the mule as his own.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1109-1120.]

8. TRIAL—OFFER OF PROOF—EVIDENCE INADMISSIBLE IN PART.

Error cannot be predicated on the court's refusal to admit proposed evidence, part of which is incompetent.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 120.]

Appeal from Circuit Court, Dale County;
A. A. Evans, Judge.

"To be officially reported."

Action by A. S. Clark against J. D. Holman. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Action of detinue by appellee against appellant for the recovery of a mule. The facts are sufficiently stated in the opinion. The plaintiff and defendant each requested the affirmative charge. The court gave this charge for the plaintiff, and refused it for the defendant.

Sollie & Kirkland, for appellant. J. E. Z. Riley, for appellee.

DENSON, J. This is an action of detinue, commenced on the 30th day of November, 1904, by A. S. Clark against J. D. Holman to recover a mule. The plaintiff obtained judgment in the circuit court, from which the defendant prosecuted this appeal.

In the complaint the mule is described with particularity, the description being as follows: "One dark bay mare mule about 7 years old, named 'Bert,' known as the Mc-

Knight mule,' sold to J. J. McKnight about two or three years ago by A. S. Clark." The plaintiff's right to recover is based on a mortgage executed by J. J. McKnight to him on the 13th day of February, 1903. On the trial, which occurred at the spring term, 1905, the plaintiff testified as follows: "I know the mule for which this suit is brought. She is a black mare mule about 11 years old. She is the same mule claimed in the complaint heretofore read to the jury. She is my mule. I traded for her from one Wilkinson. I traded him an iron gray horse mule for her. McKnight, from whom the defendant got the said mule, had the iron gray mule before the trade was made with Wilkinson. The iron gray mule was mine. I made the trade with Wilkinson for the mule in controversy, and McKnight did not make it. McKnight and myself had talked about our making a trade for the iron gray mule before it was traded to Wilkinson. We had talked about a price for the mule, and probably had agreed on a price; but the mule was to be my mule until it had been paid for. It was not McKnight's mule at all. It was my mule. When I traded with Wilkinson for the mule in controversy, it was left with McKnight; but it was my mule. We talked about McKnight buying the mule, and, if he ever paid for it, it was to be his mule; but he never paid for it. We talked about my selling the mule to McKnight, but it is not my recollection that I ever charged the price of the mule on my books. We may have agreed on a price that McKnight was to give for the said mule, but she was to be my mule till McKnight paid for her. On the ——— day of ———, 1903, I sold the mule straight to McKnight and took a mortgage on her. The mortgage now shown me is the mortgage I took on McKnight at the time I sold him the mule." The plaintiff then introduced the mortgage in evidence. The mortgage bears date of execution February 13, 1903, and was recorded in Barbour county on the 24th day of March, 1903. Only one mule is described in the mortgage, and the description there given is as follows: "One black-colored mare mule 8 years old."

Objection was made to the introduction of the mortgage on the ground that there was a variance between the description given in the complaint and that contained in the mortgage. Besides the general objection of variance, the specific grounds assigned relate to the color and age of the mule. The objection was overruled. Before considering the ruling of the court on the objection, we will dispose of two exceptions that were taken to rulings on the admissibility of evidence. After the mortgage was read to the jury, the plaintiff, further testifying, said: "The mule was mine up to the time that said mortgage was executed, and it was so understood." In view of all the evidence preceding it, the court did not err in refusing to-

exclude the expression of the witness, "it was so understood." As used, it must be taken as synonymous with agreement, and is the statement of a fact, not the expression of an opinion or a conclusion. *Griffin v. Isbell*, 17 Ala. 184; *Saltmarsh v. Brewer & Co.*, 34 Ala. 613; *Shafer v. Hausmon*, 139 Ala. 237, 35 South. 691.

The plaintiff further testified that at the time he took the mortgage from McKnight to himself the relation of landlord and tenant existed between him and McKnight, McKnight being on plaintiff's farm in Barbour county, Ala.; that the relation of landlord and tenant had existed between him and McKnight for several years; and that he had furnished McKnight several mules besides the one in controversy. "The defendant objected to the plaintiff so testifying as to the several years' tenancy of the said McKnight, upon the grounds that it is immaterial, illegal, and incompetent evidence." The part of the evidence referred to in the objection, "the several years' tenancy," we think was properly allowed. It was explanatory of McKnight's possession of the mule prior to the time the mortgage was executed. The plaintiff then testified that no price was agreed on between him and McKnight for the mule and no price for her was ever charged on his books.

Recurring to the admissibility of the mortgage as evidence: "It is a general rule that the substance of the issue must be proved, and any departure in the evidence from the substance constitutes a variance, and is fatal." Another rule stated by Mr. Greenleaf is that "whatever cannot be stricken out without getting rid of a fact essential to the cause of action must be retained, and, of course, must be proved, even though it be described with unnecessary particularity." 1 Greenleaf on Ev. §§ 195, 200; *Johnson v. Whitfield*, 124 Ala. 508, 27 South. 406; *Gulf City Shingle Co. v. Bayles*, 129 Ala. 192, 29 South. 800. With respect to the color of the mule given in the complaint and that given in the mortgage, we do not think the variance was sufficient to exclude the mortgage from the jury. There was substantial correspondence, at least to the extent to make the identity of the mule in this respect a jury question. *Connally v. Spragins*, 66 Ala. 258; *Tompkins v. Henderson*, 83 Ala. 391, 3 South. 774; *Cragin v. Dickey*, 113 Ala. 313, 21 South. 55. It must be conceded that the evidence showed without conflict that the mule was sold by A. S. Clark to McKnight 1 year, 9 months, and 17 days before the date of the filing of the suit. This was substantial correspondence with the averment in the complaint that the mule was sold to J. J. McKnight about 2 or 3 years ago by A. S. Clark. 1 Greenleaf on Ev. § 63. Age is not a matter of such essential description of the mule that it could not be

stricken from the complaint without affecting plaintiff's cause of action. Especially is this true when in other particulars there is substantial correspondence between the description alleged and the proof. Age then becomes immaterial. *Jones on Chattel Mortgages*, § 61; *Tolbert v. Horton*, 33 Minn. 104, 22 N. W. 126. Furthermore, the manner in which the age of the mule is averred in the complaint was a notification to the defendant that the proof in this respect would not correspond strictly with the age averred. We have noticed only the specific grounds of the objection made to the mortgage. Our conclusion is that the mortgage was properly admitted against the objections made to it. Authorities *supra*.

The execution of a mortgage to the bank of Abbeville by the plaintiff, after he received the mortgage from McKnight, on all of plaintiff's property, and in which he did not include the mule in controversy, was immaterial to any issue in the case, and was properly disallowed.

The defendant claimed title to the mule under a mortgage executed by McKnight to him prior in point of time to the plaintiff's mortgage. The proof showed that McKnight was in possession of the mule when defendant's mortgage was executed. In this condition of the proof witness Wells should have been allowed to testify that McKnight, at the time he executed the mortgage, claimed the mule as his own. Declarations of one in possession of property, explanatory of his possession, are competent. This point has been many times decided by this court. 3 Mayfield's Dig. p. 456, § 405; *McBride v. Thompson*, 8 Ala. 650; *Gary v. Terrill*, 9 Ala. 206; *Thompson v. Mawhinney*, 17 Ala. 362, 52 Am. Dec. 176; *Clealand v. Huey*, 18 Ala. 345; *Jones v. Chenault*, 124 Ala. 610, 27 South. 515, 82 Am. St. Rep. 211; *Daffron v. Crump*, 69 Ala. 77. The evidence in this connection proposed to be shown by the witness Beasley contained matter that was purely hearsay and of the kind that could not bind the plaintiff. No duty rested on the court to separate the good from the bad; hence error cannot be predicated of the court's ruling with respect to it. *McBride v. Thompson*, *supra*.

As the case must be reversed on the admissibility of evidence, and the evidence may not be the same on another trial, it is unnecessary to consider the correctness or not of the giving of the affirmative charge for plaintiff. There was no error in refusing the charge requested by the defendant.

For the error pointed out, the judgment must be reversed, and the cause remanded. Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

RILEY v. DILLON & PENNELL.

(Supreme Court of Alabama. June 30, 1906.)

1. SALES—CONDITIONAL SALES—NOTES—CONSTRUCTION.

Where a note given for a part of the purchase price of a mare provided that the title should remain in the sellers until the note was fully paid, it constituted a contract of conditional sale.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1321-1325.]

2. SAME—BREACH OF CONDITION—RIGHTS OF SELLER.

Where a mare was sold under a contract of conditional sale reserving title in the seller until the price was paid, the title never passed to the buyer prior thereto, and hence the seller was entitled on the buyer's default to follow the property and recover the same from a purchaser from the buyer, without offering to place either in statu quo.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1439-1442.]

3. INFANTS — CONTRACTS — DEFENSE OF INFANCY—AVAILABILITY.

The defense of infancy is a privilege personal to the infant, and cannot be availed of either by the infant's assignees or his privies in estate.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 53, 150.]

Appeal from Geneva County Court; P. N. Hickman, Judge.

"To be officially reported."

Action by Dillon & Pennell against H. C. Riley. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. O. Mulkey, for appellant. C. D. Carmichael, for appellees.

HARALSON, J. The action is in detinue, commenced on November 3, 1903, for the recovery of a mare.

In addition to the general issue, the defendant filed eight special pleas, the second, sixth and seventh of which set up in substance, that the defendant held title to the animal from one K. Y. Smith; that Smith, who was a minor, got the animal from plaintiffs, and executed to them his conditional sale-note for the sum of \$80, and in and by said note the title to the said property was retained in the plaintiffs.

The eighth sets up the fact of Smith's minority, and that he gave the \$80 note which represented the difference between the mare obtained from plaintiffs and a mule which said Smith let the plaintiffs have in part payment of the purchase price of the animal in question; which mule nor the proceeds thereof the plaintiffs have ever returned or offered to return to said Smith, but retain. The fifth sets up the same facts in substance as the eighth, and avers that the note was a conditional or "retained title" note,—the eighth setting up, that it was a mortgage. Both pleas set up that Smith was a minor at the time he executed the instrument.

Demurrers were interposed to these pleas and sustained.

The plaintiff introduced in evidence the instrument executed by said Smith, which is set out in the transcript. It is in form a promissory note, payable to the plaintiffs on the 20th of October next (1903). The obligation is referred to in the instrument itself as a note, and not as a mortgage. It contains the clause: "The title to remain in said Pennell & Dillon (the plaintiffs) until this note is fully paid." That this instrument purports on its face to be a conditional sale-note, not varied by any fact introduced in evidence, cannot be well disputed.

A sale and delivery of personal property with an express stipulation that the title is to remain in the vendor until payment thereof, is a conditional sale. *Sumner v. Woods*, 67 Ala. 142, 42 Am. Rep. 104; *Fields v. Williams*, 91 Ala. 504, 8 South. 808. "If the condition of payment is not fully complied with, or is not waived, the original vendor's rights become perfect and absolute, and he may follow the property into whosoever's hands it is (except as provided by section 1017 of the Code of 1896), or recover its full value, and without any deduction for any partial payment made by the original vendee; at law they are all forfeited." *Benjamin on Sales* (American Notes, 7th Ed.) p. 301; *Davis v. Millings*, 141 Ala. 380, 37 South. 737.

The title to the animal never did pass into Smith, and hence, never could have passed into the defendant, and plaintiffs could have recovered either from Smith, if he had the property, or from Riley, if Smith transferred the property to him. Disaffirmance, or putting any one in statu quo, is without any application here. The transaction is as though Smith had purchased the mare outright from plaintiffs, the title being retained by them until the \$80 had been paid. Giving the mule by Smith to the plaintiffs in exchange of animals was nothing more nor less than a part payment of the purchase price, just as if the value of the mule had been paid in money, which the plaintiffs were under no obligation to refund in order to maintain this suit.

Infancy is a personal privilege, to be taken advantage of by the infant alone, and not by a stranger. Interference by a stranger, wrongdoer, or person having no interest in the subject-matter, will not be tolerated or permitted, and the privilege not being transferrable cannot be exercised by assignees, or privies in estate. *Sharp v. Robertson's Ex'rs*, 76 Ala. 343; *Hooper v. Payne*, 94 Ala. 225, 10 South. 431.

There was no error in sustaining demurrers to the several pleas, nor in refusing the charges requested by defendant.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

BROADWOOD v. SOUTHERN EXPRESS CO.

(Supreme Court of Alabama. July 6, 1906.)

1. CARRIERS—LIMITATION OF LIABILITY—REQUIREMENT OF NOTICE OF LOSS—REASONABLENESS.

A stipulation, in a contract with a carrier for the transportation and delivery of goods, that it and every other carrier to whom the same may be delivered for transportation shall not be liable for any loss unless the claim therefor shall be presented in writing within 90 days after the date of the receipt, with receipt attached, is reasonable.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 669.]

2. SAME—WAIVER—PLEADING—SUFFICIENCY.

In an action against a terminal carrier for loss of goods, the carrier pleaded the failure of the consignee to give notice of damage within 90 days, as stipulated in the contract of carriage. A replication alleged that within 90 days after the date of the shipment the consignee called at the office of defendant and made inquiry for the goods, and was advised that the goods had not arrived; that he thereupon telegraphed to the shipper requesting that the initial carrier trace them; that the shipper, with the sanction of the agent of the initial carrier and within 90 days after the date of the shipment, wrote to the initial carrier's office of the nondelivery of the goods and inclosed a copy of the receipt; and that within 90 days after the shipment the initial carrier was advised of the nondelivery of the goods, whereupon it began an investigation for the recovery thereof and waived the provision in the contract requiring a claim for the goods to be made in writing. *Held*, that the replication did not show a waiver of the stipulation by the terminal carrier.

3. SAME—LOSS OF GOODS—AMOUNT OF RECOVERY.

A carrier, when sued for nondelivery of goods intrusted to it for transportation, claimed that at the time of the shipment the value as given by the shipper was stated at a specified sum. No fraud or deceit was practiced on the carrier by the shipper. The failure of the carrier to deliver the goods resulted from its own negligence. *Held*, that the consignee was entitled to recover the value of the goods, though exceeding the valuation fixed by the shipper.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 663-667, 708.]

4. SAME—LOSS OF GOODS—PROXIMATE CAUSE.

Where the proximate cause of loss of goods was the negligence of the shipper in marking or packing, the carrier is not responsible.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 532, 533.]

5. SAME—NONDELIVERY OF GOODS—EXCUSE—PLEADING—SUFFICIENCY.

A plea by a carrier, sued for the nondelivery of goods, which alleges that before it ascertained that the same was intended for plaintiff the plaintiff had left the United States, preventing the carrier from delivering the goods to him, and the carrier did not receive instructions from him to deliver the goods to any other person, was demurrable because it contained no matter of avoidance of the fulfillment of the carrier's contract, and failed to show an attempt by notice through the mails or otherwise to effect a delivery.

6. PLEADING—DEFECTIVE PLEA—REPLICATION—SUFFICIENCY.

Where a plea is bad, the sufficiency of a replication to it will not be considered.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Pleading, §§ 540-548.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

"To be officially reported."

Action by L. J. Broadwood against the Southern Express Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

There were a number of pleas and demurrers in the cause, but the opinion sufficiently discusses all of them except the replication to the fourth plea, which was as follows: "For further answer to this plea, the plaintiff says that the provisions of the contract under which defendant received the goods, to the effect that the Great Northern Express Company, and every other company to whom said goods may be delivered or intrusted for transportation, should not be liable for any loss or damage unless the claim therefor should be presented in writing at the shipping office within ninety days after the date of the receipt, with receipt attached to such statement, was without consideration, and was therefore void. And for further answer to this plea plaintiff says that within ninety days after the date of the shipment of the goods in question, and after ample time had elapsed for the arrival of said goods at Mobile, he called several times at the defendant's office at Mobile, and made inquiry for goods and was advised by the defendant's agent that said goods had not arrived, whereupon he telegraphed to M. M. Fry, at Bonners Ferry, Idaho, the shipper of the goods, that the said goods had not arrived at Mobile, and to have the Great Northern Express Company trace them; that said M. M. Fry, with the knowledge and sanction of the agent of the Great Northern Express Company at Bonners Ferry, Idaho, and within ninety days after the date of the shipment of said goods, wrote to the Great Northern Express Company at St. Paul, Minn., which was the office of the president of the Great Northern Express Company, of the nondelivery of the goods, and inclosed in said letter a copy of the receipt which was given at the time of the shipment of said goods; and that within ninety days after the shipment of said goods and after ample time had elapsed for the arrival of said goods at Mobile, the Great Northern Express Company was advised of the nondelivery of said goods at Mobile, whereupon the Great Northern Express Company began an investigation for the recovery of said goods and waived the provision in the contract under which it received said goods, requiring claim for said goods to be made in writing at shipping office accompanied by receipt."

The following demurrers were filed to these replications: "(1) Said replication shows that the common carrier agreed to transport said goods, which was a sufficient consideration. (2) Because the plaintiff is claiming under said contract, and cannot at the same time allege that it is void. (3) Because said repli-

cations do not traverse, confess and avoid, nor set up an estoppel as to the facts alleged in said plea. (4) It does not show that the Great Northern Express Company had authority to waive any provision of the contract so far as this defendant is concerned."

Plea 2-D, filed by the defendant, was as follows: "The defendant admits the receipt of said package, and says that before it ascertained that the same was intended for plaintiff, the said J. L. Broadwood, he had left the United States, thereby preventing defendant from delivering said package to him, and the defendant did not receive instructions from him to deliver it to any other person."

The following demurrers were interposed to this plea: "Said plea does not offer an excuse for not effecting a delivery of the package constituting the subject-matter of the suit. Said plea contains no matter in avoidance of the fulfillment of its contract as a common carrier of goods. Said plea shows no attempt, by notice through the mails or otherwise, to effect a delivery of the package."

Inge & Ambrecht, for appellant. J. H. Webb and Joel W. Goldsby, for appellee.

HARALSON, J. By amendment the second count of the complaint was withdrawn, leaving only the first count which is one claiming of the defendant damages for failure to deliver goods received by it as a common carrier, to be delivered to the plaintiff at Mobile, Ala.

The fourth plea sets up, "that under the provisions of the contract made under which the goods were received, it was provided that the Great Northern Express Company and every other company to whom said property might be delivered or intrusted for transportation, should not be liable for any loss or damage unless the claim therefor should be presented in writing at the shipping office within ninety days after the date of the receipt, with receipt attached to such statement; and defendant alleges, that this was not done, and, therefore, the plaintiff ought not to recover in this action."

This plea was demurred to on the ground, that the stipulation in the contract of shipment releasing defendant from liability to plaintiff, unless claim be presented at the shipping office in 90 days after the date of receipt with receipt attached to such statement, is an unreasonable regulation and not binding on the plaintiff.

It may be that the plea is subject to demurrer on other grounds than the one assigned, but we can only consider the plea with respect of the specific ground of demurrer assigned.

The reasonableness vel non of a stipulation of the kind under consideration is one of law for the determination of the court. Whatever may be the decisions of the courts of

other states and of the Supreme Court of the United States, this court is committed to the proposition that a contract fixing 30 days as the time within which such claims must be presented is not reasonable. *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Southern Express Co. v. Bank of Tupelo*, 108 Ala. 517, 18 South. 664; *Southern Express Co. v. Owens* (June 30, 1906) 41 South. 752.

But these cases are not conclusive of the question as to whether 90 days should be considered reasonable. On the contrary we have held, that a rule of a telegraph company, that it will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within 60 days after the message is filed with the company for transmission, is a reasonable one. *Harris v. Western Union Telegraph Co.*, 121 Ala. 519, 25 South. 910, 77 Am. St. Rep. 70. It was there held, that the rule did not purport to, nor did it in effect limit the defendant's liability for negligence, but only required reasonable notice to the defendant of claims for damages. See, also, *Wolf v. Western Union Tel. Co.*, 62 Pa. 83, 1 Am. Rep. 387; *Young v. Western Union Tel. Co.*, 34 N. Y. Super. Ct. 390; *Express Co. v. Caldwell*, 21 Wall. (U. S.) 264, 22 L. Ed. 556.

In the case last cited it was said, "Whether their rules (telegraph company rules) are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier."

So on the authority of the case of *Harris v. Western Union Tel. Co.*, supra, we hold that the provision in the contract of shipment requiring the claim for damages to be presented within ninety days is reasonable and the demurrer as assigned was properly overruled.

The demurrers to the replications to plea 4 were properly sustained. It is true that stipulations such as the one set up in the plea may be waived, or the carrier may estop itself from invoking it, as a shield from liability, but neither of the replications is sufficient to show a waiver by the defendant company.

This brings us to consideration of plea 5 and the demurrer thereto. That plea is as follows: "And for further answer to the complaint the defendant says that at the time of the shipment of said package the value thereof as given by the shipper, was stated at \$225.00, and that the plaintiff ought not to have and recover of the defendant an amount exceeding such valuation."

It will be observed that no fraud or deceit is alleged as having been practiced on the carrier by the shipper, and under the plea, notwithstanding the failure of the carrier to deliver the goods, may have been the result of its own negligence, and the real value of the goods may have been greatly in excess of the valuation fixed, still the recovery of the plaintiff would be limited to the amount set out in the plea. Under our more recent decisions

the demurrer to the plea was well made and should have been sustained. *Southern Ry. v. Jones*, 132 Ala. 437, 31 South. 501; *Southern Express Co. v. Owens* (June 30, 1906) 41 South. 752.

Plea 2-A set up as a defense to the action, that the name of the consignee of the goods was defectively given in the bill of lading issued for them, and on the package containing them when shipped. The rule on this subject is, that when it appears that the proximate loss or injury to the goods was the negligence of the shipper in marking or packing them, or in some other respect, the carrier cannot be held responsible. 6 Am. & Eng. Ency. Law, 266, and authorities cited; 5 Ib. 370.

It may be that this plea, if tested by proper objections to it, was defective,—a question we do not decide; but it does not appear that it was subject to the demurrer interposed to it, and the same was properly overruled.

Plea 2-D was faulty, and was subject to the demurrer, that it contains no matter in avoidance of the fulfillment of its contract as a common carrier of goods, and shows no attempt by notice through the mails or otherwise to effect a delivery of the package. The demurrer to it should have been sustained. It may be added that it is not demurred to on the ground, that it assumes that defendant was ignorant of the consignee of the goods, before he left the United States.

As this plea is bad, there appears to be no necessity for considering the replications to it. For the error in overruling the demurrer to plea 2-D and plea 5, the judgment must be reversed.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

ALLEN et al. v. BROMBERG et al.

(Supreme Court of Alabama. April 28, 1906. Rehearing Denied. July 6, 1906.)

1. WILLS—CONTRACT TO MAKE WILL—ENFORCEMENT.

A person may make a valid agreement to dispose of his property by will in a particular way, and a court of equity will require its performance.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 162-168.]

2. SAME—REMEDIES ON BREACH.

A contract for the execution of a will with particular provisions can be specifically enforced only by fastening a trust on the property of the testator in favor of the promisee and enforcing the trust against the persons claiming under the will violating the terms of the contract, and hence it is necessary, in order to enforce such a contract, that the will executed in violation of its terms be first probated.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 175-177.]

3. SAME.

A contract to execute a will containing certain provisions and appointing certain persons executors was performed. Thereafter, however, this will was revoked by the execution of

another will, appointing the same executors, but containing different provisions. *Held*, that under Code 1896, § 4264, declaring that the execution of a will revokes all former wills, the contract could not be enforced by setting aside the latter will and probating the former.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 175-177.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

"To be officially reported."

Bill by Frederick G. Bromberg and others against Edward P. Allen, as Roman Catholic bishop of Mobile, and others. From a decree for plaintiffs, defendants appeal. Reversed, and bill dismissed.

This was a bill filed by Bromberg and others, as executors of the last will and testament of Frederick Johnston, deceased, against Edward P. Allen, the Roman Catholic bishop of Mobile, the Catholic charities, and others, and sought to enjoin the probate of a will purporting to have been the last will and testament of Mary Johnston, wife of Frederick Johnston. The case made by the bill is that Johnston and his wife, both being over 60 years of age, and having no children, no mother and father living, and no near kin, agreed to execute similar wills, leaving their property, which consisted of certain real property and personal property, owed in severalty by each, each having such property in his or her own right, to the other during life of the survivor, and to certain charities, widows and orphans, in the city of Mobile. It alleges the execution of similar wills by each before same witnesses and of same date, the death of Frederick Johnston, and the probate of the original will left by him; the discovery subsequently of another and later will left by him and a similar will made by his wife; that the probate order admitting the first will to probate was annulled, and an order made admitting the latter will of Johnston to probate, naming the present appellees as executors; that the widow filed a dissent from the will under the statute, and received the proceeds of the will while filing dissent; that executors and the beneficiaries under Johnston's will compromised with her by giving her absolute property in certain bonds, together with the rents, incomes, and profits arising from the property left by Johnston and she re-executed the will similar to the husband's last admitted to probate; that later she executed another will, leaving her property to other objects than mentioned in the husband's will; that she was very old when it was executed, and that its execution was in fraud of orators; that the executors named in the will of the wife were applying to the probate court to probate said last will of Mary Johnston, and unless restrained would do so. There was motion to dismiss bill for want of equity, and to dissolve injunction, which were overruled, and from such decrees this appeal is prosecuted.

Sullivan & Stalworth and Gregory L. & H. T. Smith, for appellants. Fred G. Bromberg, for appellees.

DENSON, P. The bill in this case was filed to enjoin the probate of a will in the probate court of Mobile county, upon the allegation that its execution was in violation of a contract, made between the testatrix, and her husband, to execute similar wills, with the same executors, each in favor of the other for life, with remainder to certain public charities. The bill avers that the contract was performed upon the part of the husband who died first, and that the testatrix, his wife, accepted the benefits therefrom. It further avers that the testatrix in 1902 made a will in conformity with her contract with her husband, but in 1905 had executed the will containing different dispositions, the probate of which is opposed. The persons named as executors in the will of 1905, and the beneficiaries therein, are made parties defendant. The injunction prayed for in the bill was granted. This appeal is from the refusal to dissolve the injunction and to dismiss the bill for want of equity.

It cannot be doubted that a person may make a valid agreement to dispose of his property by will in a particular way, and that a court of equity will require its performance. *Bolman v. Overall*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107. In the case cited it is said: "It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy; for this can be done only in the lifetime of the testator, and no breach of the agreement can be assumed as long as he lives, and after his death he is no longer capable of doing the thing agreed by him. But the theory on which the courts proceed is to construe such agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a trust on it in favor of the promisees, and to enforce such trust against the heirs and personal representatives of the deceased or others holding under them charged with notice of the trust. The courts do not set aside the will in such cases, but the executor, heir, or devisee is made a trustee to perform the contract."

As a contract for the execution of a will with particular provisions can be specifically enforced only by fastening a trust on the property of the testator in favor of the promisee and enforcing such trust against the personal representatives and others claiming under the will violating the terms of the contract, it is necessary that the will be first probated, "for it cannot be recognized in any forum until admitted to probate." *Describes v. Wilmer*, 69 Ala. 25, 44 Am. Rep.

501. Nor does the fact that the agreement embraced the appointment of the same executors in both wills give equity to the bill. As stated, no breach of the agreement in any of its parts can be assumed as long as the testator lives, and after his death he is no longer capable of doing the thing agreed upon. Such agreement could be specifically enforced only by setting aside the latter will and probating the former. This could not be done. A will is in its very nature ambulatory, subject to revocation during the life of him who signed it, and is revoked by the execution of another will. Code 1896, § 4264. After such revocation it can be revived only by the expressed intention of the testator himself. Code 1896, § 4266.

For the reasons above given, a decree will be here rendered dissolving the injunction and dismissing the bill for want of equity.

HARALSON, DOWDELL, and ANDERSON, JJ., concur.

COLLIER v. PARISH.

(Supreme Court of Alabama. May 19, 1906. Rehearing Denied July 6, 1906.)

1. JUDGMENT—EQUITABLE RELIEF—MERITORIOUS DEFENSE.

In order to set aside a judgment on the ground of fraud, complainant must prove that he has a meritorious defense, which can be established by evidence on another trial, and that there was no negligence on his part.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 717, 718, 767, 838.]

2. SAME—EVIDENCE—SUFFICIENCY.

In a suit to set aside a judgment on the ground that it was taken against complainant through the fraud of defendant, evidence considered, and *held* insufficient to show the fraud, or to show that complainant was free from negligence.

Appeal from Chancery Court, Pike County; W. L. Parks, Chancellor.

"To be officially reported."

Suit by W. I. Parish against A. A. Collier. From a decree in favor of complainant, defendant appeals. Reversed.

This was a bill, filed by appellee against appellant, seeking to annul a decree therefor made and entered by the chancellor in a suit by A. A. Collier against appellant to enforce a vendor's lien, alleging a final decree on bill and decree pro confesso against this complainant for the sum of \$451.31, besides the cost, and a decree ordering the land to be sold and the fact that said land was advertised to be sold, alleging an agreement between complainant and J. B. Collier, to whom it is alleged the vendor's note was given, by which a satisfactory adjustment of the payments was made and an agreement on Collier's part to dismiss the bill seeking to enforce the vendor's lien, and a reliance upon the promise of Collier that the case would be dismissed, and his further representation that it had been dismissed, alleging also a sub-

missal to arbitration as to the payments complainant had made on the land, the proper selection of said arbitrators, and their return finding that complainant had paid Collier \$27 more than was due on said note, and also alleging that said decree was obtained by fraud and misrepresentation, and that A. A. Collier claimed afterwards to be the transferee of said note. The chancellor granted relief prayed for in the bill, and from this decree this appeal is prosecuted.

Brannen & Gardner and J. M. Chilton, for appellant. Foster, Samford & Carroll, for appellee.

SIMPSON, J. The first and second assignments of error relate to the action of the court in its decree of January 1, 1902, overruling the motion to dissolve the injunction and to dismiss the bill for the want of equity. Those were motions with regard to the original bill, which was afterwards amended by the filing of the amended bill on which issue was taken and the cause submitted. It is too late now to assign such action of the court as error. Practically the same questions come up in disposing of other assignments of error going to the merits of the case and the action of the court in rendering the decrees.

The prayers of the bill are, first, for a temporary injunction, with the usual prayer that it be made perpetual; second, that the decree be declared null and void on account of fraud, that orator be permitted to come in and defend against the claim of said respondent, and that a reference be ordered to the register to ascertain the amount of the unpaid purchase money and what amount if any remains due. The decree is that complainant is entitled to relief and to have the temporary injunction made perpetual, which is decreed, and it is further decreed that Parish is not indebted to A. A. Collier in any amount for the purchase of the land, nor upon the note or notes given to the complainant for the land, nor on the notes described in the pleading. Under our decisions, the dignity of a judgment is such that, in order to set it aside even on the ground of fraud, the complainant must prove that he had a meritorious defense which could be established by evidence on another trial, and that the judgment was taken by the fraud of the opposite party unmixed with negligence on his own part. Thus, although the judge had announced that no civil cases would be taken up, and that all parties interested could go home, and the opposing counsel afterwards obtained the judgment by stating to the court that it had been agreed on, this court held that the party was not entitled to relief because he failed to put in a plea. *National Fertilizer Co. v. Hinson*, 103 Ala. 532, 15 South. 844. And in a case where the party trusted to the verbal assurance of the

attorney of the opposing party that no judgment would be taken, in place of insisting on having the agreement in writing, the court said: "The circumstances which are relied on to excuse failure to defend at law must have been such that no exercise of diligence on his part could have guarded against," etc. *Norman v. Burns*, 67 Ala. 248, 252. See, also, *Ex parte Wallace*, 60 Ala. 267; *Collier v. Falk*, 66 Ala. 223.

All of the authorities hold that the proof of the essential matters shall be clear and convincing. The complainant in this case rests his case entirely upon the verbal assurance which he claims that J. B. Collier gave him. Pretermittting for the time being the question as to the legal sufficiency of the facts, even admitting them to be just as testified to by the complainant, the burden certainly rested on him to prove, by that clear and conclusive testimony which the law requires in such cases, first, that J. B. Collier was the agent of A. A. Collier in the management of this case, with authority to dismiss it, and, second, that he did make the statement as claimed in this bill. There is not a particle of proof about the agency, except some vague statements about looking after some lands for his wife and having looked after some cases in the justice of the peace court, none of which tended to show that he was clothed with the authority claimed in regard to this particular case. It is shown, too, by the testimony of the complainant himself, that he knew that Mr. Hubbard, the attorney, had possession of the notes and had brought the suit; also that, when he went to Mr. Hubbard once to get the notes for a short time, Mr. Hubbard refused to let him have them unless he would bring a written order from Mrs. A. A. Collier. He also states that J. B. Collier never told him that he was authorized to dismiss the suit, but only that what he did would be all right. He also admits that, while he does not recollect it, Mr. Hubbard may have told him (as Mr. Hubbard swears he did) that he (Hubbard) had charge of the matter, and that complainant had better get a lawyer and put in his answer, or a judgment would be taken against him. He also admits that it may be true, as testified to by Mr. Hubbard, that J. B. Collier told him, in Hubbard's presence, that he had nothing to do with the case, and that it was in Hubbard's hands. Taking his own testimony, in connection with that of Mr. Hubbard, the proof utterly falls on the question of agency and as to what was really said. The complainant relies entirely on his own testimony which is contradicted by J. B. Collier. The complainant filed no answer, did not even inquire of the register as to whether the suit was dismissed, nor of the attorney who had possession of the note and was in charge of the case. We hold that this contention is not supported by that convincing evidence which the law de-

mands, and he has not acquitted himself of all fault or negligence as the law requires in order to set aside the decree of the court.

These rules of law may sometimes work hardship; but, looking to the general good, the law deems the integrity of the judgments of our courts too important to allow them to be disturbed by a less measure of proof. The decree of the court is reversed, and a decree will be here entered dismissing the bill. Reversed and rendered.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

LEVYSTEIN v. GERSON, SELIGMAN & CO.
(Supreme Court of Alabama. July 6, 1906.)

PARTNERSHIP—SUIT AGAINST FIRM—AMENDMENT OF BILL—PARTIES DEFENDANT.

Conceding that Code 1896, § 40, allowing suits against partnerships by their partnership name without mentioning the names of the persons composing the firm, has no application to suits in equity, where a bill was against a partnership composed of several and service had on one, complainant was entitled to amend by converting the suit into one against the partners individually and striking out the names of those not served.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 374.]

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"To be officially reported."

Suit by H. Levystein, as trustee, against Emil C. Seligman and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Martin & Martin, for appellant. Steiner, Crum & Well, for appellees.

TYSON, J. The bill in this cause is exhibited against a partnership composed of three designated persons, nonresidents of Alabama; service of summons being made upon Emil C. Seligman, one of the named partners. After a decree overruling a motion to quash the summons made by the party served, the complainant proposed to file an amendment converting the suit into one against the partners individually and to further strike out the names of the partners not served, so as to make it a suit against Emil C. Seligman alone. The court refused to allow the amendment, and the question is error vel non in this ruling.

We think, on principle and authority, the amendment should have been allowed. Conceding that section 40 of the Code of 1896, allowing suits against partnerships by their partnership name without mentioning the names of the persons composing the firm, has no application to suits in equity (*City of Opelika v. Daniel*, 59 Ala. 211), this cause would be in a better situation for amendment than were the cases of *McCaskey v. Pollock*, 82 Ala. 174, 2 South. 674, and *Sims v. Jacob-*

son, 51 Ala. 186. In the latter case the action was brought in a firm name without any mention of individuals, and the plaintiff proposed to amend so as to evoke the action by individuals against individuals by inserting the names of the members of the plaintiff and defendant firms. The trial court refused to allow the amendment, and on appeal this court held the amendment allowable, saying: "The amendment proposed no change of parties and no change of the cause of action originally averred. A debt due the partnership of *Sims, Harrison & Co.* from the partnership of *Jacobson & Co.* must have been proved under the original, and must be proved under the amended, complaint. The partnership and their members were substantially before the court on the complaint as originally framed. A new party has not been introduced, which is unauthorized by our statute of amendments: but the designation of the respective parties, plaintiff and defendant, is only made more specific and certain. The amendment was proper, was the right of the plaintiff, and the court erred in refusing it." In the case of *McCaskey v. Pollock*, supra, a suit against the individuals of a firm was allowed by amendment to be converted into a suit against the partnership as such. The authority and reasoning of these two cases make it clear that the court erred in not allowing the proposed amendment in this case.

It is of no moment that the summons and the return of the sheriff thereon are not shown in the record, as it otherwise sufficiently appears that service was made on Emil C. Seligman, the member of the firm proposed by the amendment to be retained as the sole defendant. As the court dismissed the bill preliminarily for the want of parties defendant, we deem it unnecessary and improper to rule on other questions, which could arise only subsequently to the establishment of the suit in court.

Reversed and remanded.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

FULLER v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. HOMICIDE—EVIDENCE.

Where, in a prosecution for murder by shooting deceased with a gun, it was shown that, on the arrest of defendant and one jointly indicted with him, a number of shells were found on him, some of which shells had a certain mark, that two shots were fired at the time of the killing, and that two empty shells bearing such mark were found near the place of the killing, such shells were admissible in evidence as tending to show, in connection with other evidence, that defendant fired them on the occasion of the murder.

2. WITNESSES—COMPETENCY—CONVICTION FOR FELONY—CREDIBILITY.

Under Code 1896, § 1795, providing that no objection must be allowed to the competency

of a witness because of his conviction for any crime except perjury or subornation of perjury, but, if he has been convicted of other infamous crime, the objection goes to his credibility, a conviction for a felony made so by statute, which was not a crime at common law, may be shown for the purpose of affecting the credibility of the witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1126-1128.]

3. SAME—STATUTORY PROVISIONS.

Code 1896, § 4711, makes it a felony for any person to aid or attempt to aid any person to escape from jail confined therein under a charge or conviction of felony. Section 1795 provides that no objection must be allowed to the competency of a witness because of his conviction for any crime except perjury or subornation of perjury, but, if he had been convicted of other infamous crime, the objection goes to his credibility. Section 1796 provides that proof of a conviction may be made by the oath of the witness, without production of the record. *Held*, that a witness in a prosecution for murder was properly asked, on cross-examination by the state, if he was not convicted of aiding a prisoner charged with murder to escape from jail.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1106, 1141, 1142.]

4. SAME—EVIDENCE.

Where, in a criminal case, a witness admits that he was guilty of a felony for which he was convicted, testimony tending to show that he was not guilty thereof, was inadmissible.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1167, 1168.]

5. CRIMINAL LAW — TRIAL — ARGUMENT OF COUNSEL.

Where, in a prosecution for murder by shooting deceased with a gun, two empty shells found near the place of the killing and bearing the same marks as some found on defendant at the time of his arrest were admitted in evidence, it was not error to refuse to exclude from the jury remarks of the state's solicitor as follows: "You could take that gun which is in evidence, and try the gun on two of the shells in evidence, and put one shell in each barrel of the gun and snap it, and see if it did not make the same impression on the caps of the two shells, and in the same place on the caps as is made on the caps of the two empty shells in evidence; and I invite you, gentlemen of the jury, to make the experiment when you retire to the room to make up your verdict."

Appeal from Circuit Court, Bibb County;
B. M. Miller, Judge.

"To be officially reported."

Will Fuller was convicted of murder, and appeals. Affirmed.

The defendant was indicted with Henry Duncan for the murder of Allen Fuller by shooting him with a gun. A severance was demanded by this defendant, and he was put upon his trial, convicted, and sentenced to the penitentiary for life. It was shown on the examination of witnesses by the state that when the defendants were arrested some 25 or 30 shells were found on him; that some were gin shells and some were rifle shells, some were buckshot shells and some were not; but the buckshot shells were marked "New Club Shells." It was also shown that two shots were fired at the time of the killing, and two empty shells were found near the place of the killing, marked and branded

as above set out. These shells were offered in evidence over the objection of the defendant. Henry Duncan was introduced by the defendant, and on cross-examination the state was permitted, over the objection of the defendant, to ask him the following question: "Were you not convicted of aiding prisoner to escape from jail, the said prisoner being charged with murder?" The witness answered: "Yes; I was convicted and sentenced to Pratt Mines for aiding a prisoner to escape from jail, and the prisoner was charged with murder." The solicitor in his argument to the jury said: "You could take that gun which is in evidence, and try the gun on two of the shells in evidence, and put one shell in each barrel of the gun and snap it, and see if it did not make the same impression on the caps of the two shells, and in the same place on the caps, as is made on the caps of the two empty shells in evidence; and I invite you, gentlemen of the jury, to make the experiment when you retire to the room to make up your verdict." The defendant moved the court to exclude these remarks of the solicitor from the jury, but the court declined to do so. The defendant requested the following written charge, which was refused: "I charge you that if you believe, from all the evidence in this case, that Henry Duncan was not guilty of the charge of aiding a prisoner to escape from jail, then you should not consider the fact, as admitted by him, that he was convicted of the charge, in saying whether or not he testified willfully false in this case."

Logan & Fuller, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. Under the testimony the shells were sufficiently identified as being those found near the place of the killing. They were, therefore, properly allowed in evidence as tending to show, in connection with other testimony adduced, that defendant fired there on the occasion of the homicide.

Section 4711 of the Code of 1896 makes it a felony for any person to aid or attempt to aid any prisoner to escape from jail, confined therein under a charge or conviction of felony. Section 1795 provides that "no objection must be allowed to the competency of a witness because of his conviction for any crime except perjury, or subornation of perjury, but if he has been convicted of other infamous crime, the objection goes to his credibility." Under section 1796, proof of the conviction may be made by the oath of the witness without production of the record. At common law the conviction of a felony disqualified the witness, because the nature of the crime and the punishment rendered the witness infamous. 16 Am. & Eng. Ency. Law (2d Ed.) p. 245 et seq.; *Sylvester's Case*, 71 Ala. 17. It was a felony at common law for any one to aid the escape of a prisoner char-

ged with a felony, if he had knowledge of the crime upon which the prisoner was confined. Such assistance made the person rendering it an accessory after the fact.

The statute (section 4711 of the Code) is violated without reference to the knowledge of the person who aids the prisoner to escape of the nature of the charge under which the prisoner is confined, or without respect to whether the escape is effectual or not. *Wilson v. State*, 61 Ala. 15, 154. So, then, the conviction of the common-law offense of aiding a prisoner to escape charged with a felony, with knowledge of the crime, being itself a felony, would under the rules of the common law disqualify the convicted person as a witness. And an objection to the competency of such a witness, if sustained by the trial court, would be sustained on appeal, unless the record repels the presumption that the conviction of the witness was for the common law offense. *P. & M. Ins. Co. v. Tunstall*, 72 Ala. 142. But, aside from these considerations, we entertain the opinion that a conviction for a felony made so by statute, which was not a crime at common law, may be shown for the purpose of effecting his credibility as a witness under section 1795 of the Code. *Murphy v. State*, 108 Ala. 10, 18 South. 557; *Taylor v. State*, 62 Ala. 164, 165. This conclusion is not opposed to any of our cases. There are doubtless expressions in some of them which are calculated to mislead upon a mere cursory reading, but a careful examination of them will disclose that they support, rather than militate against, our conclusions. Their misleading tendencies grow out of a discussion of the nature of the act for which the conviction is had, with respect to whether that act was at common law of the nature of the crimen falsi. Where the conviction is for a felony, the question as to whether the act or offense is of the nature of the crimen falsi is wholly impertinent and unimportant. That question can only arise where the conviction is for a misdemeanor, and only becomes important in that class of cases.

Applying these principles to the exception reserved to the question propounded to defendant's witness, Henry Duncan, on cross-examination, it is apparent that there is no merit in it. There was no testimony introduced tending to show that this witness was not guilty of the charge on which he admitted he was convicted, and, indeed, such testimony could not have been legally admitted if offered. For this reason, if for no other, the written charge requested by defendant was properly refused.

There is no merit in the remaining exception to the ruling of the court with respect to the argument of the solicitor.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

TAYLOR v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. HIGHWAYS—WORK ON ROAD BY TAXPAYER—TEMPORARY ABSENCE.

One paying his street taxes in an incorporated town wherein he resides, and only temporarily absent for the purpose of working out a fine or indebtedness, with the intention of then returning and continuing his residence in the town, is not liable to road duty at the place of his temporary sojourn.

2. SAME—FAILURE TO WORK—CRIMINAL PROSECUTION—EVIDENCE.

In a prosecution for failure to work on roads, evidence that defendant lived in another town and had there paid his street taxes, that he was out of town temporarily working for one who had secured a fine and costs for him, and that on payment thereof defendant intended to return to his home, was proper to be considered on the question of whether or not defendant was simply a sojourner.

3. SAME—ROAD DUTY—LIABILITY.

The payment of street taxes in an incorporated town or city is a substitute for the performance of road duty, and one is not liable to both for the same period.

Appeal from Hale County Court; W. C. Christian, Judge.

"To be officially reported."

Lewis Taylor was convicted of an offense, and appeals. Reversed.

Defendant was tried and convicted for failure to work the roads. One defense endeavored to be interposed by the defendant was that he lived in the town of Greensboro, and had paid street tax to said town for the year ending March 1, 1906; that he was out of town temporarily, working for one Otts, who had secured a fine and costs for him; and that as soon as said fine and costs were fully paid it was his intention to return to his home in Greensboro. These facts were offered to be shown by the witness Otts; but, on motion of the solicitor, the court refused to permit the introduction of the testimony.

De Graffenreid & Evans, for appellant. Massey Willson, Atty. Gen., for the State.

SIMPSON, J. The defendant in this case was tried by the court without a jury, and found guilty of the offense of willfully failing or refusing to work the public road after legal notice, as charged in the indictment.

The court erred in sustaining the objection to the question by the defendant to the witness Otts, and in refusing to allow proof by said witness of the facts proposed. If the defendant was a resident of an incorporated town, where he was paying his street tax, and only temporarily in the country for the purpose of working out his fine or indebtedness, with the intention of then returning and continuing his residence in said town, he was not liable to road duty at the place of his temporary sojourn. *Spann v. State*, 14 Ala. 588. The facts sought to be proved were proper to be considered in order to determine whether or not he was simply a sojourner.

The motion to discharge the defendant

should have been granted. The payment of street tax in an incorporated town or city is a substitute for the performance of road duty, and it is not the intention of the law that a man shall be liable to both for the same period. The evidence is uncontroverted that the defendant had paid his street tax in and for the year, which did not end until March 1, 1906, and he was warned on February 1, 1906, to work the road on February 5, 1906. He could not be made liable for road duty until March 1, 1906.

As the defendant is entitled to be discharged, it is not necessary to pass on the demurrer to the indictment.

The judgment of the court is reversed, and a judgment will be here rendered discharging the defendant.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

STATE v. SIKES.

(Supreme Court of Alabama. July 6, 1906.)

1. CRIMINAL LAW—BAIL—ALLOWANCE—APPEAL BY STATE—EXCEPTIONS.

In order to support an appeal by the state from an order granting bail to a person charged with a capital offense, as authorized by Code 1896, § 4314, it is not necessary for the state to show that an exception to the judgment admitting the petitioner to bail was taken at the time the judgment was rendered.

2. SAME—TIME—NOTICE.

Where a judgment admitting a person charged with a capital offense to bail recited that the state gave notice of appeal when the judgment was rendered, the appeal was taken within the 30 days required by Cr. Code 1896, § 4316.

3. SAME—BILL OF EXCEPTIONS—SIGNING—TIME.

Where a bill of exceptions in a criminal case was signed within the 30 days fixed by the judge for signing the same, it was signed within the time allowed by Cr. Code 1896, § 4316, for taking the appeal.

4. SAME—EVIDENCE—REVIEW.

Where, on appeal from a judgment in a criminal case, the bill of exceptions fails to set out all the evidence, the judgment will not be reversed on the facts.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2938.]

Appeal from Probate Court, Crenshaw County; F. M. T. Tankersley, Judge.

"To be officially reported."

Habeas corpus on petition of Walton Sikes. From an order granting bail, the state appeals. Affirmed.

C. R. Bricken, for the State. D. M. Powell and F. B. Bricken, for appellee.

DOWDELL, J. The appeal in this case is prosecuted by the state from an order of the probate judge admitting the appellee on his petition for writ of habeas corpus to bail, while being held in custody under an indictment charging him with a capital offense. In such a case as the one before us,

Code 1896, § 4314, authorizes an appeal by the state. In order to support the appeal under this section, it is not necessary to show that the state, at the time of the judgment was rendered admitting the petitioner to bail, reserved an exception to the rendition of the judgment. Notice of the appeal was given by the state at the time of the judgment rendered admitting petitioner to bail, and the judgment so recites. The appeal, therefore, was taken within 30 days, as provided in section 4316 of the Criminal Code of 1896.

There is no merit in the question raised on the signing of the bill of exceptions. The bill of exceptions was signed within the 30 days fixed by the judge for the signing of the same, and this was within the time allowed by the statute (section 4316) for taking the appeal. The bill of exceptions does not purport to set out all of the evidence introduced on the hearing. In this state of the record, we are unable to say that the judge of probate before whom the hearing was had erred in admitting the petitioner to bail. The rule is well settled that in appeals from judgments of trial courts, where the bill of exceptions fail to set out all of the evidence, the judgment on the facts will not be disturbed. We fail to see why this rule is not applicable to a case like the one before us. It results that the order of the probate judge admitting the petitioner to bail must be affirmed.

Affirmed.

WEAKLEY, C. J., and ANDERSON and DENSON, JJ., concur.

FULLER et al. v. VARNUM.

(Supreme Court of Alabama. July 6, 1906.)

1. MORTGAGES—FORECLOSURE—REDEMPTION—BILL—DISMISSAL.

Where a bill to redeem from a foreclosure sale of land averred that the property was sold at the sale for \$200, and the note and mortgage, which was for \$174.25, showing a credit, were made an exhibit to the bill, which further alleged that \$249 was tendered to redeem, the bill was not subject to dismissal for failure to allege that such amount included the purchase price, with 10 per cent. thereon, etc.

2. SAME—POSSESSION.

Where a bill to redeem from a mortgage foreclosure sale alleged that complainant was one of the minor children of the mortgagor, who was residing on the land at the time of his death, which occurred during the year the foreclosure sale was had, and that the property was his homestead, and comprised all the lands owned by him, the bill was not subject to dismissal for failure to allege who was in possession of the land at the date of foreclosure or the filing of the bill, but was amendable in that regard.

3. SAME—SURRENDER OF POSSESSION.

Where complainant in a bill to redeem land from a mortgage foreclosure sale was in possession at the date of the foreclosure, he was under no duty to surrender possession as a condition precedent to his right to redeem, unless a demand had been made on him to do so

by the purchaser or his vendee, as provided by Code 1896, § 3506.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1816.]

Appeal from Chancery Court, Houston County; W. L. Parks, Chancellor.

"To be officially reported."

Bill by M. T. Varnum against Charles E. Fuller and others. From a decree sustaining defendants' demurrer to the bill, but overruling their motion to dismiss for want of equity, they appeal. Affirmed.

This was a bill seeking to redeem certain lands described therein from foreclosure sale under the power contained in a mortgage executed by W. J. Varnum to J. S. Koonce. The allegations of the bill are, briefly, that W. J. Varnum executed a mortgage to Koonce on certain lands to secure an indebtedness of \$174.25; the transfer of the mortgage by Koonce's heirs to Newton, and a transfer from Newton to Joe Baker; that some time in the year 1903 Varnum died, leaving surviving him a widow and seven children, including complainant, all of whom at that time were under the age of 21 years; that at the time of his death Varnum was in possession of this land, occupying it as a homestead, and that it did not exceed in area 160 acres, nor in value \$2,000; that on November 28, 1903, Joe Baker sold the lands under the terms and powers of the mortgage at and for the sum of \$200 to one J. F. Cochran, executing to said Cochran a deed to said land in the name of the mortgagors under the power in the mortgage; that in December, 1903, Cochran conveyed the lands to complainant's mother, and that before the filing of this bill complainant's mother executed and delivered a conveyance to respondents herein; that by reason of orator being one of the minor children of said Varnum at the time of his death, and the fact that said Varnum resided upon said land as his homestead, and that said land did not exceed 160 acres in area and \$2,000 in value, and that said Varnum owned less than \$1,000 worth of personal property at the time of his death, orator became and is the owner or tenant in common of the equity of redemption in said land. The bill alleges that no demand was ever made for possession, and that complainant has tendered to the proper parties the sum of \$249 for the purpose of redeeming said land, which tender has been declined. The respondents moved to dismiss the bill, and demurred to it: Because it does not appear that surrender was made of the land on demand and within 10 days thereafter; it does not aver that the complainant had paid into court the entire purchase price, with 10 per cent. interest per annum, and all other lawful charges, nor does it aver that the complainant is ready and will-

ing to abide the decree of the court; complainant does not offer to do it; it appears from the allegations of the bill that the complainant is not entitled to redeem from respondents the entire interest in or title to the lands.

R. D. Crawford, for appellants. Espy & Farmer, for appellee.

TYSON, J. This appeal is by the respondents from a decree sustaining their demurrer to the bill of complaint, but overruling their motion to dismiss it for want of equity.

It is first insisted that the motion should have been granted because the bill fails to aver that complainant tendered the purchase price paid at foreclosure sale, with 10 per cent. thereon; that it only avers a tender of \$249, the price paid at said sale. In a previous paragraph, however, it is averred that only \$200 was the purchase price paid at the foreclosure sale. The note and mortgage showing the amount of the mortgage debt is made an exhibit to the bill, and shows a credit thereon. It is apparent from this showing that the averments of the bill may be amended so as to show that the amount tendered, to wit, \$249, included all lawful charges known to complainant at the date of the tender. If any taxes were paid by the purchasers, they could be also shown by an amendment to be included in the \$249.

The other insistence, predicated upon the failure of the bill to show who was in possession of the land at the date of foreclosure or the filing of the bill, is also without merit. It is shown that complainant was one of the minor children at the date of the death of his father, the mortgagor, and that his father was residing upon the land at the date of his death, which occurred during the year the foreclosure sale was had; that it was his homestead and comprised all the lands owned by him. It is true it is not averred upon what day during the year 1903 the father died. His death may have occurred after the foreclosure, and if it did this would show complainant was in possession with his mother and the other children of the land; and, as against the motion, we would be, perhaps, authorized to so hold. But, be this as it may. If this be a defect, it is such an one as may be cured by amendment; and clearly, if complainant was in possession of the land at the date of the foreclosure, there was no duty upon him to surrender that possession as a condition precedent to redemption unless a demand was made upon him to do so by the purchaser or his vendee. Section 3506 of the Code of 1896. The motion was properly overruled.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

PRESTWOOD v. McGOWIN et al.

(Supreme Court of Alabama. July 6, 1906.)

1. APPEAL—FAILURE TO PRESENT QUESTION ON TRIAL—EXCEPTIONS TO RULINGS AFTER JUDGMENT.

The failure of the trial court to tax costs against plaintiff on account of certain defendants in favor of whom pleas of coverture were sustained will not be reviewed on appeal, where there is no assignment of error on the point, and it does not appear that any exception was taken to the trial court's action.

2. APPEAL—PARTIES AGGRIEVED—COSTS—ABATEMENT OF ACTION.

Code 1896, § 1331, provides that, when a plaintiff fails to recover against all the defendants, those against whom he fails to recover are entitled to have their proportion of the costs taxed against plaintiff; and section 1332 provides that, where plaintiff suffers his suit to abate by the death of the defendant, judgment for costs shall be rendered against him. *Held*, that the statutes are for the benefit of the parties who are discharged, or their estates, and in an action against several for breach of warranty of title one of them could not complain of the court's failure to tax costs against plaintiff on account of a defendant who died pending the case, on account of which the suit abated as to his estate.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 947-951.]

3. COVENANTS—BREACH OF WARRANTY.

Code 1896, § 1541, provides that any person who, without color of title or bona fide claim of inheritance or purchase, enters upon real estate and asserts adverse possession, must give notice thereof by a claim in writing filed in the office of the judge of probate; and section 1545 provides that until the filing of such declaration no possession of real estate shall be deemed adverse to any one. *Held*, that the statutes are intended to govern in suits for the recovery of real estate, and in an action for breach of warranty of title in a conveyance of land it is not necessary for plaintiff to show that the third person in possession of the land at the time of the conveyance had filed a claim under the statutes.

4. SAME—ISSUES AND PROOF.

Where, in an action for damages for breach of a warranty of title in a conveyance of land, the complaint alleged that at the time of the conveyance a third person had title to and was in possession of the land, proof of adverse possession was sufficient to justify recovery without proof of title.

Appeal from Circuit Court, Covington County; John P. Hubbard, Judge.

"To be officially reported."

Action by S. W. McGowin and others against J. A. Prestwood and others. From a judgment in favor of plaintiffs, defendant Prestwood appeals. Affirmed.

Powell & Albritton, for appellant. B. H. Lewis, for appellees.

SIMPSON, J. This was an action claiming damages for the breach of a warranty of title in a conveyance of land. There are numerous assignments of error, but the only matters insisted on in the brief of counsel for appellant are as follows:

1. The failure of the court to tax costs against the plaintiff on account of two defendants in favor of whom pleas of coverture

were sustained, and another who died during the progress of the case, on account of which the suit was allowed to abate as to his estate. It may be replied to this that there is no assignment of error on this point, nor any evidence that any exception was taken as to the action of the court in that particular, and, besides this, the judgment of the court shows that the two parties in favor of whom pleas of coverture were sustained were adjudged to "go hence and recover of the plaintiff their costs." As to the abatement, sections 1331 and 1332 of the Code of 1896 are enactments for the benefit of the parties who are discharged, or their estates, and also for the security of the officers of courts, and not the remaining defendant, who is liable for the entire breach of the contract and its attendant costs. No judgment for costs was taken against the estate of Bates.

2. The remaining proposition by appellant is that, inasmuch as the complaint alleges that several parties "had the title to and were in adverse possession of certain parts of said land, it is incumbent on plaintiff to prove both that the parties were in adverse possession and that they had the title to the parcels of land held by them," and he claims that in this case the possession of said parties could not be adverse, because it was not shown that any statement had been filed, in accordance with sections 1331 and 1332 of the Code of 1896. It is true that the allegata and probata must correspond, and it is also true that in some matters statements in the complaint which it was unnecessary to make must nevertheless be proved before the plaintiff can recover, as, for instance, where the statement is a part of the description of that which is material, so that the case proved is not substantially the same case as that which is alleged. *Gilmer v. Wallace*, 75 Ala. 220; *Forward v. Marsh*, 18 Ala. 645; *Wilkinson v. King*, 81 Ala. 156, 8 South. 189; *Stewart v. Tucker*, 106 Ala. 319, 17 South. 385; *Conrad v. Gray*, 109 Ala. 130, 19 South. 398; *Dill v. Rather*, 30 Ala. 60. Or where the cause of action proved is variant from that alleged, as in *Kennedy v. M. & G. R. R.*, 74 Ala. 430; *Ala. G. So. Ry. v. Grabfelder*, 83 Ala. 200, 3 South. 432; *Ala. G. So. Ry. v. Thomas*, 83 Ala. 343, 3 South. 802; *Harold v. Jones*, 97 Ala. 637, 11 South. 747. On the other hand, where the attachment bond sued on was set out in the declaration as conditioned that "R. C. and C. C. had prayed an attachment at the suit of said R. and C. C.," while the bond produced recited that "J. J. S." prayed the attachment at the suit of "R. and C. C.," the court says: "We do not think that this is a material variance, for these recitals do not form an essential portion of the condition of the bond." And in the same case, although the bond was alleged to have been given "for an ancillary attachment, and the bond proved was for an

original attachment, it was held not a material variance, as the bond in each case was the same in substance, and the liability the same." *Dickson v. Bachelder*, 21 Ala. 699, 704. Also, where the action was for neglecting to treat a hired slave with proper care, the court says: "The consideration and terms of the contract of hiring need not be alleged, and, if alleged, they need not be proved," as the right to recover did not depend upon the terms of the contract, but the gravamen being the manner of treatment of the slave while hired. *Moseley v. Wilkinson*, 24 Ala. 411. Also, where the bill alleged that "C. F. A." owed the debt, and the proof showed that "A. Bros.," a firm composed of "C. and F. A.," were the debtors, and also where the date of the deed was a year later than alleged, these were not such variances as to affect the right of recovery. *Peck v. Ashurst*, 108 Ala. 429, 438, 19 South. 781. And this court, also, while deciding that, where a single count contains several distinct, independent averments, each presenting a substantive cause of action, proof of either will authorize a recovery; but where a count contains several averments, "all of which combined together make up the averment of one cause of action, it is necessary to prove each of the averments," goes on to state that "mere redundancy will not vitiate a complaint. The redundant portion may be stricken out or rejected as surplusage." *Birmingham Ry. & Electric Co. v. Baylor*, 101 Ala. 488, 13 South. 793. Greenleaf states that "surplusage need not be proved," and that "the term 'surplusage' comprehends whatever may be stricken from the record without destroying the plaintiff's right of action; as if, for example, in suing the defendant for a breach of warranty upon the sale of goods, he should set forth, not only that the goods were not such as the defendant warranted them to be, but that the defendant well knew that they were not." 1 Greenleaf on Evidence (15th Ed.) § 51. And he defines a variance to be "a disagreement between the allegation and the proof, in some matter which, in point of law, is essential to the charge or claim, * * * or to have become so by being inseparably connected, by the mode of statement with that which is essential." *Id.* § 63.

In order to invalidate a conveyance of land it is not necessary that the party have title or even color of title. It is sufficient if he "asserts bona fide a claim to the property, in so veritable, notorious, and distinct a manner as to charge the vendor with notice." *Herbert v. Hanrick*, 16 Ala. 581, 596. In an action on a covenant of warranty, in which the complaint alleged that plaintiff was ousted by superior title, and that defendant did not place plaintiff in possession, and that he had not been able to obtain possession, the court says that "the covenant secures a legal entry, as well as the enjoy-

ment of the lands." Also: "Until the grantor proved he had title to the land conveyed, the possession of Reed was sufficient evidence of title in him, and the plaintiff could not be required to commit a trespass by ousting him. The possession of Reed was prima facie evidence of title in him, which could only be repelled by evidence on the part of the grantor of a title paramount to his." *Caldwell v. Kirkpatrick*, 6 Ala. 60, 62, 63, 41 Am. Dec. 36. We hold, then, that in this case proof of the adverse possession at the time of the conveyance was sufficient under the complaint to justify a recovery without proof of title in the party so holding. Sections 1541 and 1545 of the Code of 1866 are intended to govern in suits for the recovery of real estate, but they do not interfere with the principle above alluded to. In a case where a party has bought a tract of land, and finds another in possession of a part of it, he has no way of ascertaining whether he has "color of title, or bona fide claim of inheritance or of purchase." That can only come out in a suit for the land, and, as stated in *Caldwell v. Kirkpatrick*, supra, the purchaser makes out a prima facie case when he shows that he cannot obtain possession, because of the possession of another, who claims the land and refuses to deliver it up. It then devolves upon the party, who has given a covenant of title and seisin, to prove that the title which he has warranted is good.

The judgment of the court is affirmed.

MCCLELLAN, C. J., and TYSON and ANDERSON, JJ., concur.

CREEL v. KEITH.

(Supreme Court of Alabama. June 30, 1906.)

1. DEPOSITIONS—OBJECTIONS AT TRIAL.

Answers in a deposition, being responsive to the interrogatories, to which no objection was made, are not open to objection when offered at the trial.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 311.]

2. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE.

The joining of M., who of record had no title, in a deed, is sufficient to put the grantee, who had purchased of J., in whom was the record title, on inquiry as to M., and to furnish constructive notice of the recorded mortgage on the property given by M. to a third person, which was sufficient to lead upon inquiry to knowledge of the unrecorded deed from J. to M.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 477-481, 502, 503.]

3. SAME.

Where a grantee is put on inquiry, which will lead to knowledge, by one having no record title joining in the deed to him, a subsequent purchaser, in whose chain of title is such deed, is charged with the same notice.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 509, 513-518.]

Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge.

"To be officially reported."

Action by James S. Keith against Aaron H. Creel. Judgment for plaintiff. Defendant appeals. Affirmed.

This was a statutory real action in the nature of ejectment to recover a certain 40 acres of land named therein. The plaintiff under the statute propounded interrogatories to the defendant, which interrogatories were answered, and in which defendant set up its chain of title. Interrogatories were also propounded to one Ward, a justice of the peace, who was supposed to have written and acknowledged a deed from Margaret Jenkins to M. J. Jenkins, touching his knowledge of said deed and the contents thereof. No objection was interposed to the question in the interrogatory, but objections were interposed by the defendant to the answers to the interrogatory being read in evidence. It was shown by the testimony that Margaret Jenkins was the original owner of the land, and that she had Ward prepare a deed or paper conveying the land to M. J. Jenkins, which she signed and acknowledged, but did not deliver to M. J. Jenkins. It was further shown that the paper was lost, or rather that no one knew where it was. Plaintiff claimed through a mortgage made by M. J. Jenkins and wife on this land to J. R. Faircloth, a deed from Faircloth and wife to Kirkland, and a deed from Kirkland to plaintiff. Defendant claimed through deeds from Margaret Jenkins to Forester and from Forester to Pilcher, a deed from Margaret Jenkins and M. J. Jenkins to Pilcher, and a deed from Pilcher and wife to Forester and from Forester to defendant. The evidence further tended to show that Margaret Jenkins and Moses Jenkins owed Pilcher a sum of money, to secure \$100 of which they made Pilcher a mortgage, and in satisfaction of the mortgage executed to him a deed. The evidence further tended to show that M. J. Jenkins (agreed to be the same as Moses), procured the deed executed to him by Margaret Jenkins, carried it to Faircloth, and on the face of the deed secured a loan of money from Faircloth, securing it by mortgage on this land. Faircloth's mortgage was recorded. The deed from Margaret Jenkins to M. J. Jenkins was not recorded. There was a conflict in the evidence as to a delivery of the deed from Margaret Jenkins to M. J. Jenkins, but the evidence tended to show that M. J. Jenkins had such a deed, and showed it to Faircloth and others at the time he obtained money from Faircloth. There was demand made upon the defendant for the production of the deed, and also a demand upon M. J. Jenkins for a production of the deed. The deed was not produced, and every witness who was supposed to have any knowledge of it stated that they did not know where the deed was. In answer to his interrogatory, Ward set out the contents of the deed and

the acknowledgment. At the conclusion of the testimony the defendant requested the court to give him the general affirmative charge. This the court declined to do. There was verdict and judgment for plaintiff, and the defendant appeals.

Espy & Farmer, for appellant. W. O. Mulkey, for appellee.

DOWDELL, J. There was no error committed by the court in overruling the objections of the appellant, the defendant in the court below, to certain parts of the deposition of the witness Ward. This evidence was responsive to the interrogatories propounded to said witness and no objections were made to the questions. The objections to the answers and the motions to exclude, therefore, came too late. *Insurance Co. v. Tillis*, 110 Ala. 201, 17 South. 672; *R. R. Co. v. Bailey*, 112 Ala. 177, 20 South. 313; *Curtis v. Parker*, 136 Ala. 224, 33 South. 935.

Both parties derived title through Margaret Jenkins and M. J. Jenkins. The fact that M. J. Jenkins joined as a grantor with Margaret Jenkins in their deed to Pilcher, under the authority of *Gimon v. Davis*, 36 Ala. 589, was sufficient to put the grantee upon inquiry as to M. J. Jenkins, and to furnish constructive notice of the mortgage from said M. J. Jenkins to Faircloth, which said mortgage was duly recorded. Notice of the recorded mortgage to Faircloth was sufficient to lead up to knowledge of the unrecorded deed from Margaret Jenkins to M. J. Jenkins, if inquiry had been instituted. Notice that will lead to knowledge on inquiry is in law in such cases equivalent to knowledge. The deed from Margaret Jenkins and M. J. Jenkins to Pilcher was in defendant's chain of title. Consequently he had the same state of facts to put him upon notice and inquiry that Pilcher had by M. J. Jenkins joining as a grantor with Margaret Jenkins in the deed to him, Pilcher.

There was no error committed in refusing to give the general affirmative charge requested by the defendant. The judgment appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

JONES v. BAXTER.

(Supreme Court of Alabama. June 30, 1906.)

1. SHERIFFS—ATTACHMENT—LEVY—AUTHORITY OUTSIDE OF JURISDICTION.

An attachment levied by a sheriff on property situated entirely without the limits of his county is void.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 101.]

2. ATTACHMENT—LEVY—DEFECTS—WAIVER—FORTHCOMING BOND—EXECUTION.

The execution of a forthcoming bond by a defendant in attachment to gain possession of his

property taken under a void levy was ineffective to validate the levy, and did not deprive the defendant of his right to a vacation of the levy on motion.

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

"To be officially reported."

Action by R. M. Jones against Z. M. C. Baxter. From a judgment for defendant, plaintiff appeals. Affirmed.

Espy & Farmer, for appellant. Reid & Hill, for appellee.

HARALSON, J. This is an attachment suit commenced by R. M. Jones, the appellant, on the 3d day of September, 1904, against Z. M. C. Baxter, the appellee. The suit was issued out of the circuit court of Houston county, and was forwarded to the sheriff of Geneva county to be levied, and when the sheriff of Geneva received it, he went out of Geneva into Houston county and, on the 8th of that month, levied the writ on a growing crop situated in the latter county. On the 9th of the month, Baxter executed and delivered to the sheriff, a bond replevying the property attempted to be levied on, took it into his possession and never returned it to the sheriff. The defendant was a non-resident of the state, and when the Houston court convened, he appeared by his attorneys, specially for the motion, and moved the court to have the attachment dissolved and the levy dismissed. The plaintiff demurred to this motion, on the grounds: (1) That the sheriff of Geneva county had the authority to levy on property situated in Houston county, under and by virtue of said attachment, returnable to the circuit court of the latter county; (2) the levy was not void; and (3) because the said motion fails to set forth any facts which showed that the levy which is sought to be assailed is void.

The court sustained the demurrer to the second and third grounds of the motion, and overruled it as to the first ground.

The plaintiff filed a plea to said motion, fully set out on page 5 of the record. The defendant moved to strike said plea, which motion was granted.

On the trial of the motion to vacate and discharge the levy, the facts as stated above in the beginning of this opinion, were shown without conflict, and the court granted the motion, and entered judgment discharging and dismissing the levy made under the attachment.

It thus appears, that the single question is presented,—whether the court erred in discharging said levy, and that depends upon whether the sheriff of Geneva county had any right or authority to go out of his own county into Houston county and levy the attachment in his hands on property situated wholly in the latter county.

It is stated in *Freeman in Executions*, § 104, that "the execution may be regular, and in all respects valid when it was issued, and yet, not authorized, its service by the officer to whom it is delivered. By the rules of the common law, the writs of each court are only capable of enforcement within the territorial limits of its jurisdiction. * * * So, when intrusted with the execution of a writ of his own county, the officer must remember, that his authority under the writ is confined to the county. He has no legal power to levy on lands or property outside of the county. * * * The acts of an officer outside of his county are balliwick or unofficial and necessarily void unless expressly or impliedly authorized by some statute." In this state we have no statute applicable to sheriffs to take them out of this common-law rule. The foregoing principle, as stated by Mr. Freeman, is supported, as appears in his notes to the text by the decisions of the courts of many of the states.

Mr. Herman, in discussing what levies are void, says: "A levy made on property that is not subject to levy on execution is void," and gives instances of such, the last one of which is, "A levy upon property outside of the district or county of the officer holding the execution." *Herman on Execution*, § 168; *Street v. McClerkin*, 77 Ala. 580; *Stephenson v. Wright*, 111 Ala. 586, 20 South. 622. The court committed no error in discharging and dismissing said levy.

We are cited to the case of *Peebles v. Weir*, 60 Ala. 413, as opposed to the rulings of this court. That case holds, that the execution of a replevy bond by the defendant, in an attachment case, is sufficient to sustain a judgment against him by default. That decision is justified, on the grounds as therein stated, that by the execution of the bond, the defendant becomes a party to the suit, as do his sureties, so far that an execution may issue against them, if the plaintiff is unsuccessful in the suit, and fails to return the property to the custody of the proper officer. But, the execution of a forthcoming bond by a defendant to gain the possession of his property taken from him under a void levy, cannot have the effect of validating the levy, and would not deprive the defendant of making his motion to get rid of the void levy,—otherwise, he would be deprived of the possession and use of his property unlawfully taken from him under a levy which was void, and which had no more effect upon defendant's rightful possession of it than if it had not been made. The forthcoming bond was, itself void as a statutory bond, because it was without a valid levy to sustain it.

The ruling of the court below is approved. Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

GREER et al. v. HERREN.

(Supreme Court of Alabama. June 18, 1906.
Rehearing Denied July 6, 1906.)

COURTS—PROBATE COURT—JURISDICTION—PARTITION.

Where the only interest that the parties to a partition suit had in the land was by virtue of the will of the deceased owner, which interest was only the right to a distributive share of the proceeds of the sale of the property, subject to a deduction on account of advancements, the probate court was without jurisdiction to adjust such matters in a statutory proceeding to sell the lands for partition among joint owners.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Courts, §§ 86, 87.]

Appeal from Probate Court, Tallapoosa County; G. J. Sorrell, Judge.

"To be officially reported."

Petition by T. S. Herren against Julia Greer and others. From a decree sustaining demurrers to defendants' pleas, and ordering a sale of certain lands for partition, defendants appeal. Reversed. Petition dismissed.

Lackey & Bridges, for appellants. James W. Strother, for appellee.

SIMPSON, J. This was a petition filed in the probate court, by appellee against appellants, asking for a sale of the land described for partition among the heirs of James Vaughn, and their vendees. The answers or pleas, as called and treated in the record, set up the defense that the property in question belonged to the estate of said James Vaughn, and that according to his will, which is set out in full, said property was to be sold by his executor, and after the adjustment of advances the proceeds were to be distributed among the parties in interest, and that therefore the probate court was without jurisdiction to sell the land for partition in accordance with the prayer of the petition. The court sustained demurrers to the said pleas and ordered the sale of the land.

By the third item in the will the property in question was left to Sarah Vaughn, the widow of James Vaughn, for life, and in said item the option was given to the son, Frederick A. Vaughn, to take it at a valuation to be fixed by appraisers, and account for it as a part of his distributive share of his father's estate; and by the tenth item said Frederick A. Vaughn was made executor, and as such was directed to sell all of the lands which said James Vaughn died possessed of and undisposed of, and after the sale of the lands, the collection of other assets, and the payment of debts, three disinterested parties, to be selected by the children, were to distribute the money "in accordance with the provisions of this will." The other items of the will provide that each devisee is to be charged with the advances which had been made to him or her. It does not seem that said Frederick A. Vaughn has ever elected to take this property, though there is a conflict on the evi-

dence on that point. If he did, then, of course, there would be nothing to partition, and, if he did not, then it appears as follows: The petition in this case was filed August 12, 1905, and it appears that James Vaughn died in 1880, his widow died in 1886, and Fred. A. Vaughn was in possession of the premises, as executor, until his death in July, 1902, and that the respondent, Mrs. Greer, had filed a bill in the chancery court March 3, 1903, seeking to remove the estate of James Vaughn into the chancery court and have distribution there made.

Whatever interest any of the parties had in the property in question was under and by virtue of the will of said James Vaughn, and according to said will that interest was only the right to a distributive share of the proceeds of the sale of the property, subject to a deduction to be made on account of advancements. The probate court was without jurisdiction to adjust these matters in the statutory proceedings to sell lands for partition among joint owners. *Wimberly v. Wimberly*, 38 Ala. 40; *Wilkinson v. Stewart*, 74 Ala. 198, 204; *Marshall v. Marshall*, 86 Ala. 383, 389, 5 South. 475; *Allen v. Watts*, 98 Ala. 384, 11 South. 646.

The decree of the court is reversed, and a decree will be here rendered dismissing the petition.

Reversed and rendered.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

PENTON v. WILLIAMS et al.

(Supreme Court of Alabama. May 19, 1906.
Rehearing Denied June 30, 1906.)

EXCEPTIONS, BILL OF—SIGNING—TIME ALLOWED.

A bill of exceptions, signed after the time allowed, will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, §§ 54, 55.]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Action by J. A. Penton against A. J. Williams and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

This was an action of detinue for one horse and two yearlings, begun by appellant as plaintiff against appellee as defendant. From a judgment for the appellee, appellant appeals.

D. H. Riddle, for appellant. Lackey & Bridges, for appellees.

SIMPSON, J. On the 26th day of October, 1905, the order of the court allowed the plaintiff 30 days within which to file his bill of exceptions. The bill of exceptions was signed on the 27th day of November, 1905, which was after the expiration of the time allowed.

Consequently the bill of exceptions cannot be considered in this case.

There being no error assigned on the record, the judgment of the court is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

COLQUITT et al. v. GILL et al.

(Supreme Court of Alabama. July 6, 1906.)

1. COURTS — REMOVAL OF ADMINISTRATION FROM PROBATE TO CHANCERY COURT.

A bill may be filed in the chancery court by legatees or distributees for removal to such court of the administration of an estate, without alleging any cause for equitable interposition, where the fact that the probate court has assumed jurisdiction for final settlement is negative.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1293.]

2. SAME—ALLEGATIONS OF BILL.

A bill for removal of an administration from the probate to the chancery court need not allege that decedent died, or that the estate had assets in the county in which the administration is pending; those facts being referable to the issuance of letters of administration by the probate court, to which alone Code 1896, § 55, applies.

Appeal from Chancery Court, Crenshaw County; W. L. Parks, Chancellor.

"To be officially reported."

Suit by E. E. Gill and others against W. D. Colquitt and others, as administrators and individually. From an adverse decree, defendants appeal. **Affirmed.**

This was a bill filed by E. E. Gill and others against C. C., B. F., and W. D. Colquitt, individually and as administrators of the estate of C. C. Colquitt, deceased, seeking to remove the administration from the probate court of Crenshaw county to the chancery court thereof. The bill alleges that each of complainants are over 21 years old and that they, together with the respondents, are the sole and only distributees, next of kin, and heirs at law of C. C. Colquitt, deceased; that administration upon said estate is now pending and is undetermined, and is being conducted by said administrators under letters of administration issued to them by the probate court of Crenshaw county, Ala.; that there is no proceeding now pending, and no application has been filed by the administrators or any other person for a final settlement of said administration of said estate in said probate court. Respondents move the court to dismiss the bill for want of equity, and demur to it upon the following grounds: "There is no equity in the bill. The bill does not allege when or where C. C. Colquitt departed this life. The bill does not allege that decedent departed this life seised or possessed of any property real or personal. It does not allege that decedent died leaving any assets

in Crenshaw county, Ala. It does not allege that decedent left any assets at his death subject to administration. It does not allege when letters of administration were granted on the estate of decedent by the probate court. It does not allege when, where, or to whom letters of administration issued from the probate court. Its allegations are indefinite and uncertain as to whether letters of administration on the estate of decedent were sued out by J. F. Colquitt and W. D. Colquitt, or by other and different parties. The facts alleged are not sufficient to give the chancery court jurisdiction. Its allegations are too indefinite and uncertain to give this court jurisdiction of the administration of the estate of decedent. The chancellor overruled the demurrers and the motion to dismiss for want of equity, and from this decree the respondents prosecute this appeal.

C. H. Roquemore and Sollie & Kirkland, for appellants. M. W. Rushton and Bricken & Bricken, for appellees.

ANDERSON, J. A bill may be filed in the chancery court by legatees or distributees for the removal of the administration of an estate into said court and need not assign any special or general cause for equitable interposition. Harland v. Person, 93 Ala. 273, 9 South. 379; Cary v. Simmons, 87 Ala. 524, 6 South. 416; Ligon v. Ligon, 105 Ala. 460, 17 South. 89. But after the probate court has taken jurisdiction of the estate of a decedent for the special purpose of a final settlement of the pending administration there can be no removal of the administration into the chancery court, even at the instance of the legatees or distributees, unless some exclusive ground for equity cognizance is shown or unless some fact is averred because of which the powers of the probate court are inadequate and a resort to chancery is necessary. Ligon Case, supra. The bill in the case at bar negatives the fact that the probate court has assumed jurisdiction for a final settlement and contains equity. It is unnecessary for the bill to aver that decedent died, or that the estate has assets in the county in which the administration is pending, as those are facts referable to the issuance of letters of administration, and not to the removal of the administration from the probate to the chancery court, and section 55 of the Code 1896, applies only to the issuance of letters of administration by the probate court. The bill sufficiently shows that it is filed by the distributees of the estate of C. C. Colquitt, deceased, against W. D. and J. F. Colquitt, the administrators of said estate, and is not uncertain or ambiguous. The chancellor properly overruled the demurrer, and the motion to dismiss for want of equity and the decree is accordingly affirmed.

Affirmed.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

IRVIN v. STATE.

(Supreme Court of Florida, Division B. July 24, 1906.)

1. INDICTMENT AND INFORMATION—DUPLICITY.

When a statute makes either of two or more distinct acts, connected with the same general offense and subject to the same punishment, indictable as distinct crimes, they may, when committed by the same person at the same time, be coupled in one count and constitute but one offense; and such an indictment will not be subject to the charge of being duplicitous.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 337.]

2. SAME—OBJECTION, HOW MADE.

Where an information or indictment is complained of on the ground of duplicity, the defendant must make the assault thereon by demurrer or by motion to quash before verdict rendered. If he delays presenting such issue until after verdict, he will be held to have waived the same. He cannot raise such issue in a motion for new trial or by a motion in arrest of judgment.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 635, 473, 496.]

8. GAMING—INDICTMENT—SUFFICIENCY.

There is no merit in the contention that an indictment charging the defendant simply with keeping and maintaining a gambling table is defective because it fails to set forth the nature or kind of table that he is charged with keeping. The statute aims its penalty at the use to which a table is put or for which it is kept, without reference to the kind or character of such table. Any manner or kind of table kept and maintained for gambling purposes falls within the inhibition of the statute.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 237.]

4. CRIMINAL LAW—SENTENCE.

Where the penalty prescribed by the statute for the commission of a crime is imprisonment in the state penitentiary or a money fine, a primary sentence of imprisonment in the county jail is unauthorized. In such a case a sentence to imprisonment in the county jail can properly be imposed only as an alternative penalty upon failure to pay a money fine imposed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3320.]

5. SAME—APPEAL—DECISION—DEFECT IN SENTENCE.

Where there is no error affecting the merits of the trial of a criminal cause that will necessitate the grant of a new trial or vacation of the verdict found, but there is simply an unauthorized sentence imposed, an appellate court should reverse the judgment and sentence imposed, leaving the verdict to stand as a basis for a new and proper sentence, and should remand the cause for proper sentence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3223.]

(Syllabus by the Court.)

Error to Criminal Court of Record, Hillsborough County; Horace C. Gordan, Judge.

E. G. Irvin was convicted of keeping a gaming table, and brings error. Reversed and remanded.

Jno. P. Wall, for plaintiff in error. W. H. Ellis, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, hereinafter designated as defendant, was informed

against, tried, convicted, and sentenced for the crime of keeping and maintaining a gaming table, in the criminal court of record for Hillsborough county, and seeks reversal here by writ of error. The third count of the information, upon which the conviction was had, omitting its formal commencement, is as follows: "That the said E. G. Irvin, alias Mose Irvin, whose Christian name to the Solicitor is unknown, late of the county of Hillsborough aforesaid, on the thirteenth day of February in the year of our Lord one thousand nine hundred and six, and at divers other times and days since such day and the filing of this information, with force and arms at and in the county of Hillsborough aforesaid, did then and there unlawfully and feloniously have, keep, exercise, and maintain a certain gambling table and cards and poker chips for the purpose of gaming and gambling, against the form of the statute," etc.

The errors assigned are:

(1) That the court erred in denying the defendant's motion for new trial.

(2) Because the court erred in denying the defendant's motion in arrest of judgment.

(3) Because the court erred in the sentence pronounced upon the defendant in the lower court, in that the statute under which he was convicted does not permit imprisonment in the county jail, except for the nonpayment of a fine.

(4) Because the court erred in passing the sentence upon the defendant, in that imprisonment in the county jail cannot be imposed as a primary punishment.

The first of these assignments will be disposed of later.

The defendant's motion in arrest of judgment, the denial of which is assigned as the second error, was upon the following grounds:

"(1) Because the third count in the information, upon which this defendant was convicted, is bad for duplicity.

"(2) Because the said third count in said information is bad for duplicity, in that it charges the defendant, not only with keeping and maintaining a gaming table, but also of having and keeping cards and chips, which, if anything, are devices.

"(3) Because the said third count in said information does not set forth the nature or kind of table, which the defendant is charged with maintaining, and he was by such failure not sufficiently apprised of the matters charged against him."

There was no error in the denial of this motion.

Section 2644 Rev. St. of 1892, upon which the information is predicated, provides as follows: "Whoever by himself, his servant, clerk or agent, or in any other manner has, keeps, exercises or maintains a gaming table or room, or gaming implements or apparatus, or house, booth, tent, shelter or other place for the purpose of gaming or gambling, or in any place of which he may directly or indirectly have charge, control or management,

either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whether heretofore prohibited or not, shall be punished by imprisonment in the state prison not exceeding three years, or by fine not exceeding five thousand dollars." It is contended that under this statute the keeping of a gaming table is a distinct offense, for which a party may be indicted and convicted, and that the keeping of gaming implements or apparatus is another distinct offense, for which separate indictment and conviction may be had, and that the information in this case is bad for duplicity, in that in its third count, on which the conviction was had, it charges the defendant with these two separate and distinct offenses, viz.: (1) Keeping a gaming table; and (2) keeping gambling implements or apparatus, viz., cards and poker chips. While it may be entirely true that the keeping of a gaming table is one offense, and the keeping of gaming implements, such as cards and poker chips, is another distinct offense, for which a party may be separately and respectively indicted under the quoted statute, yet because the two acts are joined together in one charge in the manner done in this information does not necessarily make it subject to the charge of being duplicitous or of charging two separate and distinct offenses.

In the case of *Bradley v. State*, 20 Fla. 738, it was held by this court that, "when a statute makes either of two or more distinct acts, connected with the same general offense, and subject to the same punishment, indictable as distinct crimes, they may, when committed by the same person at the same time, be coupled in one count and constitute but one offense." *People v. Shotwell*, 27 Cal. 394. Such is the case here. The same person is charged at the same time and place with unlawfully keeping both a gaming table and gaming implements and apparatus, both of which call down the same penalty, and as charged in the third count of this information constitute but one offense, for which but one penalty can be imposed. But, besides this, it is settled by the great weight of authority that, where an information or indictment is complained of on the ground of duplicity, the defendant must make the assault thereon by demurrer or by motion to quash before verdict rendered, and that he cannot assail it for duplicity by a motion in arrest of judgment. If he delays until after verdict rendered to raise the issue of duplicity in the indictment, he will be held to have waived such issue. 1 Bish. New Crim. Proc. §§ 442, 443; 2 Ency. Pl. & Pr. 802; *Commonwealth v. Tuck*, 20 Pick. (Mass.) 356; *Coney v. State*, 2 Tex. App. 62; *State v. Brown*, 8 Humph. (Tenn.) 89; *Pollinsky v. People*, 73 N. Y. 65; *Simons v. State*, 25 Ind. 331, holding that the issue could not be raised in a motion for new trial; *State v. Miller*, 24 Conn. 522; *State v. Holmes*, 28 Conn. 230; *People v.*

Burgess, 35 Cal. 115; *People v. Shotwell*, supra.

It is again contended under the third ground of the motion in arrest of judgment that the indictment is defective because it fails to set forth the nature or kind of table that the defendant is charged with maintaining. There is no merit in this contention. The statute aims its penalty at the use to which a table is put, or for which it is kept, without reference to the kind or character of such table. Whether it be constructed of pine, oak, black walnut, or mahogany, or whether it be round, square, or elliptical, or covered with green baize or blue, can make no difference in the commission of the offense. Any manner or kind of table kept and maintained for gambling purposes falls within the inhibition of the statute. *Wren v. State*, 70 Ala. 1.

The defendant's motion for new trial is in substance that the verdict is not supported by the evidence. We think the evidence amply and accurately sustains the verdict found.

The third and fourth assignments of error are that the sentence imposed is not authorized by law. The sentence imposed upon the defendant was imprisonment in the county jail for a period of 12 months. This was unauthorized. The primary penalties imposed by the statute under which the conviction was had are imprisonment in the penitentiary or a money fine. Imprisonment in the county jail would only be authorized under this statute, as an alternative penalty in case of default in the payment of a money fine imposed. This error in the sentence imposed does not, however, in the absence of any other error affecting the trial, necessitate the grant of a new trial, or vacation of the verdict found, but simply reverses the erroneous judgment or sentence, leaving the verdict to stand as a basis for a new and proper sentence. *Webster v. State*, 47 Fla. 108, 36 South. 584.

The judgment and sentence of the court below is hereby reversed, and the cause remanded, with directions to impose a proper sentence upon the verdict found. The costs to be taxed against the county of Hillsborough.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

Ex parte KNIGHT et al.

(Supreme Court of Florida. July 25, 1906.)

1. HABEAS CORPUS—QUESTIONS DETERMINED.

The writ of habeas corpus cannot be used to review a judgment of conviction, under which a prisoner is held; if the judgment is merely erroneous; but, if the judgment is assailed on the ground that it is void, because it is based on a charge made under an invalid provision of a statute, and the charge constitutes no offense under the laws of the state, the validity

of the provision of the statute defining the offense may be determined on habeas corpus.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, §§ 24, 25.]

2. STATUTES—TITLE OF ACT—CONSTITUTIONAL LAW.

The purpose and effect of the constitutional requirement that "each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title," is to render inoperative any provision contained in the body of an act that is not fairly included in the subject expressed in the title, or that is not matter germane to or properly connected with that subject.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 136.]

3. SAME.

Under the constitutional provision as to the subject and title of a legislative act, only such provisions can be validly incorporated in the body of an act as are fairly included in one subject and matter properly connected therewith, which subject is the one expressed in the title of the act, and it may be as restrictive as the Legislature desires to make it.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 136.]

4. SAME.

Under the constitutional provision requiring the subject of a legislative act to be briefly expressed in the title, when the subject expressed in the title is restricted, only those provisions that are fairly included in such restricted subject and matter properly connected therewith can legally be incorporated in the body of the act, even though other provisions besides those contained in the act could have been included in one act having a single broader subject expressed in its title.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 136.]

5. SAME—CONSTRUCTION.

In determining whether provisions contained in a legislative act are embraced in one subject and matter properly connected therewith, the subject to be considered is the one expressed in the title of the act, and every fair intendment and reasonable doubt should be yielded in favor of the validity of the provision; but when an act contains provisions which, after yielding all fair intendments and reasonable doubts, are clearly not embraced in the subject of the act as expressed in the title, or in matter properly connected with that subject, such provisions are inoperative and without effect.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 56, 196.]

6. SAME—RESTRICTIONS IN TITLE.

Where the subject of a legislative act as expressed in the title is restricted and confined to enactments "to prevent the cutting or removing of any timber" from certain lands, a provision of the act designed to prevent "the gathering or removing any turpentine extracted from the pine timber so cut or boxed" on the lands is not fairly included within the restricted subject as expressed in the title and matter properly connected therewith, and such provision is inoperative and void.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 140-191.]

7. HABEAS CORPUS—VOID ACT.

Where a provision of an act on which a charge is made is inoperative and void, a judgment of conviction on the charge is void, and

persons held under such judgment will be discharged on habeas corpus.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 24.]

(Syllabus by the Court.)

In Banc. Petition by Robert J. Knight and W. C. Knight for a writ of habeas corpus. Petitioners discharged from custody.

R. McConathy and H. M. Hampton, for petitioners. W. H. Ellis, Atty. Gen., and E. W. Davis, for the State.

WHITFIELD, J. A petition for a writ of habeas corpus was presented to one of the justices of this court in which it is alleged, in substance, that the petitioners were convicted in the court of the county judge of Citrus county, Fla., upon a charge that Robert J. Knight and W. C. Knight, not being the owners of certain described lands in Citrus county that had been sold for taxes and had not been redeemed, did "cause and procure divers persons * * * to enter said lands and gather and remove turpentine extracted from the pine timber standing and growing thereon"; that upon appeal in a trial de novo the petitioners were likewise convicted in the circuit court for Citrus county, and a judgment of conviction was entered against them imposing a fine of \$250 each, or imprisonment for six months; that said last trial and judgment are final, and the petitioners are being restrained of their liberty thereunder without due process of law, in that the court was wholly without jurisdiction, since the charge under which they were convicted is not a crime under any valid law of this state. The writ of habeas corpus was issued by the justice as prayed for, and made returnable before the Supreme Court.

It is claimed that the charge under which the convictions were held is not an offense under the laws of this state, because that portion of the act on which the charge is founded is invalid, in that it is not embraced in the subject expressed in the title of the act and is not matter properly connected therewith.

While the writ of habeas corpus cannot be used to review a judgment of conviction under which a prisoner is held, if the judgment is merely erroneous, yet, if the judgment is assailed on the ground that it is void because it is based on a charge made under an invalid provision of a statute, and the charge constitutes no offense under the laws of the state, the validity of the provision of the statute defining the offense may be determined on habeas corpus. See *Ex parte Bowen*, 25 Fla. 214, 6 South. 65; *Ex parte Hays*, 25 Fla. 279, 6 South. 64; *Bronk v. State*, 43 Fla. 461, 31 South. 248, 99 Am. St. Rep. 119.

Section 16 of article 3 of the Constitution ordains that "each law enacted in the Legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."

The purpose and effect of this constitutional requirement is to render inoperative any provision contained in the body of an act that is not fairly included in the subject expressed in the title or that is not matter germane to or properly connected with that subject. Only such provisions can validly be incorporated in the body of an act as are fairly included in one subject and matter properly connected therewith. The subject is the one that is expressed in the title of the act, and such subject may be as restrictive as the Legislature desires to make it. When the subject expressed in the title is restricted, only those provisions that are fairly included in such restricted subject and matter properly connected therewith can legally be incorporated in the body of the act, even though other provisions besides those contained in the act could have been included in one act having a single broader subject expressed in its title. See *State ex rel. Gonzalez v. Palmes*, 23 Fla. 620, 8 South. 171; *Holton v. State*, 28 Fla. 303, 9 South. 716; *Webster v. Powell*, 36 Fla. 703, 18 South. 441; *Wade v. Atlantic Lumber Company*, 51 Fla. —, 41 South. 72; *Groover v. Trustees*, 45 N. J. Law, 399; section 120, *Lewis' Sutherland, Statutory Construction*.

In determining whether provisions contained in an act are embraced in one subject and matter properly connected therewith, the subject to be considered is the one expressed in the title of the act, and every fair intentment and reasonable doubt should be yielded in favor of the validity of the legislative enactments. *State ex rel. v. Bryan*, 50 Fla.—, 39 South. 929. But when an act contains provisions which, after yielding all fair intentments and reasonable doubts, are clearly not embraced in the subject of the act, as expressed in the title or in matter properly connected with that subject, such provisions are inoperative and without effect. See *Carr v. Thomas*, 18 Fla. 736; *Wade v. Atlantic Lumber Co.*, supra; *State ex rel. Gonzalez v. Palmes*, supra.

The charge upon which the petitioners were convicted was made under chapter 4416, p. 177, Acts of 1895, which is as follows:

"An act to prevent the cutting or removing of any timber from lands heretofore or that may hereafter be sold for taxes.

"Be it enacted by the Legislature of the state of Florida:

"Section 1. If any person shall cut or cause or procure to be cut or aid, assist or be employed in cutting any cedar, juniper, cypress, oak, pine, palmetto or other timber standing, growing or being on any lands that have heretofore been sold or may hereafter be sold for taxes, before the lands are redeemed or a tax deed issued for the same; or if any person shall remove or cause or procure to be removed, or aid or assist, or be employed in removing from any of such lands any cedar, juniper, cypress, oak, pine, palmetto or other

timber; or if any person shall cut or box or cause or procure to be cut or boxed, or aid, assist or be employed in cutting or boxing any pine timber on said lands for the purpose of extracting and gathering the turpentine therefrom, or shall gather or remove or cause to be gathered or removed, or aid, assist or be employed in gathering or removing any turpentine extracted from the pine timber so cut or boxed; or if any person shall in any way by cutting, felling, girdling or otherwise destroy or injure any timber standing, growing or being upon said lands, he shall for every such offense be deemed and held to be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars; provided, however, this act shall not apply to the owner or owners of said lands at the time the lands were sold for taxes."

This is a penal statute and should be strictly construed. *Ex parte Bailey*, 39 Fla. 734, 23 South. 552; section 521, *Lewis' Sutherland, Statutory Construction*. The title is a part of the act, and should be construed as such in determining the subject designed to be regulated by the act. See *State ex rel. Attorney General v. Green*, 36 Fla. 154, 18 South. 334.

This act in its body defines several distinct offenses and seeks by a prescribed penalty to prevent (1) the cutting of timber standing, growing, or being on any lands sold for taxes before the lands are redeemed or a tax deed is issued for the same; (2) the removing from such lands of any timber; (3) the cutting or boxing of any pine timber on such lands for the purpose of extracting and gathering the turpentine therefrom; (4) the removing of any turpentine extracted from the pine timber so cut or boxed; (5) the destroying and injuring of any such timber.

The convictions in this case were had upon a charge that the petitioners did "cause and procure divers persons * * * to enter" certain lands "and gather and remove turpentine extracted from the pine timber standing and growing thereon." This charge is based upon the provision of the act set out above that, "if any person * * * shall * * * cause to be gathered or removed * * * any turpentine extracted from the pine timber so cut or boxed" on certain lands, "he * * * shall be deemed and held to be guilty of a misdemeanor," etc. The question to be determined is whether or not the provision of chapter 4416, on which the charge was based, is included in the subject expressed in the title of the act or matter properly connected therewith, so as to validly define the offense.

The subject of the act here considered, as expressed in the title, is restricted to enactments "to prevent the cutting or removing of any timber" from certain lands, and any provisions contained in the body of the act that are fairly included in this restricted

subject or matter properly connected therewith are valid and operative. But, if any provision contained in the body of the act is not fairly included in this restricted subject, to wit, "to prevent the cutting or removing of any timber," and is not matter properly connected therewith, such provision is invalid and inoperative. Penal provisions designed "to prevent the cutting or removing of any timber" on certain lands are included within the restricted subject of this act; but a penal provision designed to prevent the "gathering or removing any turpentine extracted from the pine timber so cut or boxed" on the lands cannot be fairly included within such subject and matter properly connected therewith. See *State v. Fields*, 68 S. C. 148, 46 S. E. 771; *Harris v. State*, 110 Ga. 887, 36 S. E. 232; *State v. Great Western Coffee & Tea Co.*, 171 Mo. 634, 71 S. W. 1011, 94 Am. St. Rep. 802; *State v. Silver*, 9 Nev. 227.

As the provision prescribing a penalty for "gathering or removing any turpentine extracted from the pine timber" is not included in the restricted subject, to wit, "to prevent the cutting or removing of any timber" from certain lands, as expressed in the title, and is not matter properly connected with such subject, the provision is inoperative and of no effect.

The provision of the act on which the charge was founded being invalid, and the charge constituting no offense, the judgment of conviction based upon the charge is void, and the persons held in custody under such judgment are entitled to be discharged.

The petitioners will be discharged from custody.

SHACKLEFORD, O. J., and TAYLOR, COCKRELL, HOOKER, and PARKHILL, JJ., concur.

BLANTON v. STATE.

(Supreme Court of Florida, Division B. July 24, 1906.)

1. HOMICIDE—INSTRUCTIONS—CONVICTION OF LOWER DEGREE.

In a trial under an indictment charging murder in the first degree it is not error to refuse an instruction so framed as to tend to mislead the jury into the idea that, unless the evidence makes out a case of murder in the first degree, they must wholly acquit, and cannot convict of a lower degree of homicide.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 641.]

2. SAME—MURDER IN FIRST DEGREE—BURDEN OF PROOF.

A charge is properly refused that is so framed as to hold out the idea that it is incumbent on the state to prove expressly by affirmative evidence that the homicide was without justification. No such duty devolves upon the state. The burden is upon the state in every prosecution for crime to establish by proof, beyond a reasonable doubt, every material element of the crime charged, and in a prosecution for murder in the first degree it must prove, beyond a reasonable doubt, that the defendant

slew the deceased unlawfully and from a pre-meditated design to effect his death, and, if these material facts are established by proof, of necessity it will have been proved that such killing was not justifiable. The burden upon the state is to prove the affirmative proposition; the negative proposition, flowing out of it as a necessary corollary, it does not have to prove by express or affirmative proof.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 504.]

3. CRIMINAL LAW—INSTRUCTIONS.

A charge is properly refused that is so framed as to tend to mislead the jury into the belief that they are bound to lend the same credence to the testimony of the accused as a witness on his own behalf as to that of any disinterested witness.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1255, 1896.]

4. SAME—REPETITION OF INSTRUCTIONS.

There is no error in the refusal of the court to reiterate charges that have already been given in substance.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

5. SAME.

It is not error to refuse to give a charge that is so framed as to tend to mislead the jury into the belief that the judge was satisfied that any material fact in the case had been established by the proofs.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1731.]

6. SAME.

In a trial for homicide, when the court has already amply and accurately instructed the jury on the law of self-defense, it is not error to refuse other and further instructions that are merely elaborations of the same subject.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

(Syllabus by the Court.)

Error to Circuit Court, Madison County; Bascom H. Palmer, Judge.

Eloy Blanton was convicted of murder in the second degree, and brings error. Affirmed.

Charles E. Davis and C. B. Ashley, for plaintiff in error. W. H. Ellis, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error was indicted in the circuit court of Madison county for the crime of murder in the first degree, was tried and convicted of murder in the second degree, and from the life sentence imposed comes here by writ of error.

There are 15 assignments of error.

The first assignment is expressly abandoned.

The second assignment complains of the court's refusal to give the first charge requested by the defendant. Without repeating the charge here, it will be sufficient to say that, as held by the court below in his refusal to give it, it was faulty in being so framed as to tend to mislead the jury into the belief that unless they could convict the defendant of murder in the first degree, as specifically charged in the indictment, then they could not convict of any lesser degree of

homicide, but must acquit. A charge so framed is properly refused.

The third assignment of error complains of the court's refusal to give the fourth instruction requested by the defendant as follows: "The court further instructs you that a homicide may be justifiable. Therefore it is incumbent upon the state to prove that such homicide, if any be shown by the evidence in this case, was unlawful or without justification, to the exclusion of every reasonable doubt, else the accused cannot be convicted, and your verdict should be not guilty." This charge was properly refused, because it is so framed as to mislead the jury into the idea that it was incumbent upon the state to prove expressly by affirmative evidence that the homicide was without justification. No such duty devolves upon the state. The burden is upon the state in every prosecution for crime to establish by proof, beyond a reasonable doubt, every material element of the crime charged; and in a prosecution for murder in the first degree it must prove, beyond a reasonable doubt, that the defendant slew the deceased unlawfully and from a premeditated design to effect his death, and, if these material facts are established by the proof, of necessity it will have been proved that such killing was not justifiable. The burden upon the state is to prove the affirmative proposition; the negative proposition, flowing out of it as a necessary corollary, it does not have to prove by express or affirmative proof, as the charge in question erroneously requires it to do.

The fourth assignment of error complains of the court's refusal to give the fifth instruction requested by the defendant, as follows: "The court further instructs you that by the statute of 1895 laws of Florida the defendant is made a witness in his case, at his option, subject to being questioned and cross-questioned, and that his evidence is to be taken just the same as that of any other witness in this case, and believed by you as you would believe any other witness in the case, according as you may regard it credible; that the fact that the defendant is the accused in the case raises no presumption or implication against the credibility of his testimony." There was no error in the refusal to give this charge. The interest that a witness has in the result of a suit the law recognizes as an element proper to be considered in weighing his testimony as affecting its credibility. *Hampton v. State* (Fla.) 39 South. 421. The refused instruction is so framed as to mislead the jury into the idea that they must lend the same credence to the testimony of the accused as to that of any disinterested witness, notwithstanding his deep interest in the result of the trial. *Easterlin v. State*, 43 Fla. 565, 31 South. 350.

The fifth assignment complains of the court's refusal to give the sixth instruction

requested by the defendant. This instruction is in substance the same as the one last discussed, though couched in different terms, and what has been said in reference to the refused instruction just passed upon applies equally well to this assignment of error, and with the other, for the same reasons, this one must fall also.

The sixth assignment of error complains of the court's refusal to give the seventh instruction requested by the defendant. There was no error in its refusal because the court had already given substantially the same proposition of law in one of its charges to the jury, and there was therefore no error in refusing to reiterate.

The seventh assignment of error is expressly abandoned.

The eighth assignment of error complains of the court's refusal to give the ninth instruction requested by the defendant. There was no error in such refusal, for the reason that the court had already given substantially the same matter in charge to the jury, and, consequently, there was no error in the refusal to reiterate.

The ninth assignment of error is predicated upon the court's refusal to give the tenth instruction requested by the defendant. This refused instruction, as is stated in the defendant's briefs, is the same substantially as the tenth instruction refused in the case of *Ballard v. State*, and set out at length at page 289 of 31 Fla., page 371 of 12 South. Its refusal was assigned as error in that case, but the court did not there adjudge its refusal to be error. We think the charge was properly refused for the reason that as framed it had a tendency to mislead the jury into the idea that the judge thought that the proofs established the fact that the defendant had been assailed by the deceased.

The tenth assignment of error is based on the court's refusal to give the eleventh instruction requested by the defendant. The court had already instructed the jury most amply on the law of self-defense, and, as this refused instruction was upon that phase of the case, there was no error in its refusal. The same is the case with the eleventh, twelfth, thirteenth, and fourteenth assignments of error, based, respectively, upon the court's refusal to give the twelfth, thirteenth, fourteenth, and fifteenth charges requested by the defense. All of these charges were elaborations on the law of self-defense, and were all of them substantially and more accurately covered by the court's charges already given.

The fifteenth and last assignment of error calls in question the denial of the defendant's motion for new trial. The eighteenth to the twenty-seventh grounds of this motion, both inclusive, challenge the correctness of various charges given by the court to the jury. It will subserve no useful purpose to reproduce such charges here, as they are but repetitions

of charges that have heretofore been passed upon and approved by this court in other causes. We have critically examined them all, and find no reversible error in any of them.

The only other ground of the motion for new trial not already disposed of is that the verdict was not supported by the evidence. The evidence was very conflicting, but the jury by their verdict have cast the die of credence on the side of the evidence of the state. That evidence, when so believed, is ample to sustain the conviction had, and it is not for an appellate court, in such a case, to disturb the finding of the jury.

No error being found, the judgment of the court below is hereby affirmed, at the cost of Madison county; the defendant having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

MALOY v. STATE.

(Supreme Court of Florida, Division A. July 24, 1906.)

1. HOMICIDE—EVIDENCE—MOTIVE.

In a prosecution for homicide, testimony tending to show the personal feeling between the accused and the deceased and to disclose a motive for the crime is admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 288.]

2. CRIMINAL LAW—EVIDENCE — MOTION TO STRIKE.

As a general rule, motions to strike testimony that has been introduced in a prosecution for homicide must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the testimony itself, and testimony should not be stricken on the ground that it is not sufficient proof of what was intended to be proved by the party introducing it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1639.]

3. HOMICIDE—EVIDENCE—MOTIVE.

In a prosecution for homicide, testimony as to pending litigation between the deceased and the defendant at the time of the homicide is not rendered inadmissible because "it was not shown that there was any personal feeling or words between them."

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 323.]

4. CRIMINAL LAW—APPEAL—ASSIGNMENT OF ERROR.

In the absence of proper objections and exceptions, an assignment of error that the court erred in the manner of its cross-examination of the defendant, a witness for himself, cannot be considered by the appellate court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Homicide, §§ 2065, 2644.]

5. WITNESS—IMPEACHMENT.

In a criminal prosecution a defendant taking the stand as a witness may as a witness be impeached.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1113, 1129, 1130.]

6. CRIMINAL LAW—APPEAL—REVIEW.

In the absence of proper exceptions to the rulings of the court in admitting or in rejecting testimony, such rulings will not be considered when assigned as error in the appellate court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2662.]

7. WITNESS—ACCUSED AS WITNESS—IMPEACHMENT.

Where in a criminal prosecution the defendant has testified as a witness, the testimony of other witnesses as to the credibility of the defendant "as a witness in the case being tried" is inadmissible, and should be stricken on motion, since the credibility of the defendant as a witness in the case being tried is a question for the jury to determine. The inquiry should be confined to the general reputation of the defendant for truth and veracity, as affecting his testimony in any and all cases in which he may be a witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1131, 1125.]

8. HOMICIDE—EVIDENCE.

In a prosecution for homicide, where the testimony shows that the difficulty was precipitated by the threat of the deceased, in the presence of the defendant, to take possession of a hog on the premises of the defendant, the hog being claimed by each of them as his property, testimony as to the general reputation of the deceased for being unable to distinguish between his own hogs and those of other persons is not relevant to the issues being tried and is properly excluded on objection being made thereto.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Homicide, § 312.]

9. CRIMINAL LAW—APPEAL—ASSIGNMENT OF ERROR.

Where one assignment of error embraces, en masse the refusals of the court to give several separate and distinct instructions, such assignment of error will not be considered by the appellate court except so far as is necessary to ascertain if any one of the several instructions thus aggregated under one assignment of error was properly refused, and, if so found, the assignment fails.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2958.]

10. SAME—INSTRUCTIONS—PROVINCE OF JURY.

In a prosecution for homicide, a charge that "in this case the evidence shows that the defendant was and is justified under the law, in taking the life of the deceased, upon the ground of self-defense, and your verdict should be in favor of the defendant," should be refused as invading the province of the jury where there was evidence tending to show the guilt of the defendant, and the facts on which self-defense was claimed were disputed.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 621.]

11. SAME.

The refusals to give requested instructions are not erroneous where the charges given by the court fully and correctly covered the case, and especially where the requested instructions are not correct.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2011, 2017.]

(Syllabus by the Court.)

Error to Circuit Court, Santa Rosa County; Francis B. Carter, Judge.

J. L. Maloy was convicted of manslaughter and brings error. Affirmed.

T. F. West, for plaintiff in error. W. H. Ellis, Atty. Gen., for the State.

WHITFIELD, J. Upon an indictment for the murder of William Boyett, the plaintiff in error was convicted of manslaughter in the circuit court for Santa Rosa county, and brings writ of error.

At the trial the state attorney asked one of the witnesses for the state if he knew whether or not there had been any disturbance or litigation about land between the defendant and the deceased before the homicide. The witness answered that a lawsuit between them about some land was begun about a year before and had not been terminated. The defendant then objected to the question and moved to strike the answer on the ground "that it was not shown that there was any personal feeling or words between them. The fact that there was litigation is not sufficient." The court overruled the objection and motion to strike, and an exception was taken. The introduction of the testimony as to the existence of litigation between the deceased and the defendant at the time of the homicide was not improper for the purpose of showing the state of personal feeling between the parties and as disclosing a motive for the homicide. See *Johnson v. State*, 24 Fla. 162, 4 South. 535; *Smith v. State*, 48 Fla. 307, 37 South. 573; *Binns v. State*, 57 Ind. 46, 26 Am. Rep. 48; *Underhill on Crim. Ev.* § 323; *Abbott's Trial Brief, Criminal Causes* (2d Ed.) 543.

The motion to strike the testimony as to the litigation between the deceased and the defendant was not on the ground of irrelevancy, incompetency, legal inadmissibility, or impertinency, but on the ground that it was not sufficient.

A motion to strike out evidence that has been introduced in a cause must be predicated upon some feature of irrelevancy, incompetency, legal inadmissibility, or impertinency in the evidence itself, and not upon the ground that it is not sufficient. This is the rule in civil causes and is applicable generally to criminal cases. See *Walker v. Lee* (Fla.) 40 South. 881; *Wilson v. Johnson* (Fla.) 41 South. 395; *Wilcox v. Stephenson*, 30 Fla. 377, 11 South. 659. Evidence will not be stricken out on motion on the ground that it is not sufficient proof of what was intended to be proven by the party introducing it. See *State v. Cardoza*, 11 S. O. 195, text 240.

The testimony as to pending litigation between the deceased and the defendant at the time of the homicide was not rendered inadmissible because "it was not shown that there was any personal feeling or words between them," and, consequently, the motion to strike such testimony was properly overruled.

It is assigned as error that "the court erred in the manner of its cross-examination of the defendant, a witness for himself." No ob-

jections or exceptions appear to have been made or taken to the questions asked the witness by the court, and there is apparently no ground for exceptions. In the absence of proper objections and exceptions, this assignment of error cannot be considered here. See *Roten v. State*, 31 Fla. 514, 12 South. 910; *Lawrence v. State*, 45 Fla. 42, 34 South. 87.

An assignment of error that "the court erred in permitting the state to offer testimony showing that the general reputation of the defendant for truth and veracity" cannot be considered, since no exception was taken to the ruling of the court overruling an objection to such testimony. *Shepherd v. State*, 36 Fla. 374, 18 South. 773; *Sylvester v. State*, 46 Fla. 166, 35 South. 142; *Caldwell v. State* (Fla.) 39 South. 188. A defendant taking the stand as a witness may as a witness be impeached as any other witness. 2 *Wigmore on Evidence*, § 890; *Abbott's Trial Brief, Criminal Causes* (2d Ed.) 399. See, also, *Hart v. State*, 38 Fla. 39, 20 South. 805; *Green v. State*, 40 Fla. 191, text 199, 23 South. 851; *Milton v. State*, 40 Fla. 251, 24 South. 60; *Wallace v. State*, 41 Fla. 547, 26 South. 713; *Wilson v. State*, 47 Fla. 118, 36 South. 590.

There is an assignment of error that "the court erred in refusing to permit the witness Franklyn to testify that the defendant was worthy of belief in this case."

The defendant having testified in his own behalf, the state called a witness, Peter Franklyn, to testify as to the reputation of the defendant for truth and veracity. On cross-examination the witness was asked if the defendant was worthy of belief in this case. The answer was: "Yes, it seems he is from what he has told me, and what I know." This answer was stricken by the court and an exception taken. The action of the court was entirely proper, since the credibility of the defendant as a witness in this case was a question for the jury to determine without the aid of the opinion of another witness as to such credibility. The inquiry should have been confined to the general reputation of the defendant for truth and veracity as affecting his testimony in any and all cases in which he may be a witness. See *Nelson v. State*, 32 Fla. 244, 13 South. 361; *Mercer v. State*, 40 Fla. 216, 24 South. 154, 74 Am. St. Rep. 135.

The defendant asked a witness if he knew "what the deceased's general reputation for being able to distinguish between his own property and hogs and that of other people was?" Objections to the questions were sustained and exceptions were taken. The homicide grew out of a dispute as to the ownership of a hog, and it is suggested in the brief for the plaintiff in error that, if the deceased had a general reputation in the community of being unable to distinguish between his own hogs and the hogs of other people, evidence of it should have been permitted in order to throw light upon the acts and conduct of the parties engaged in the difficulty.

The testimony tends to show that the difficulty was precipitated by the threat of the deceased in the presence of the defendant to take possession of a hog in a pen on the premises of the defendant; the hog being claimed by each of them as his property. In this state of the case it cannot be said that testimony as to the general reputation of the deceased for being able to distinguish between his own hogs and those of other persons would be relevant to the issues being tried. Therefore the objections to the questions were properly sustained.

One of the assignments of error is that "the court erred in refusing to give special charges requested by the defendant, numbered one, two, five, six, seven, nine, ten, eleven, twelve, and thirteen." This one assignment of error embraces, en masse, the refusals of the court to give ten several requested instructions, and under the rule established in this court the assignment will not be considered except so far as is necessary to ascertain if any one of the several instructions thus aggregated under one assignment was properly refused. *Lewis v. State*, 42 Fla. 253, 28 South. 397; *Easterlin v. State*, 43 Fla. 563, 31 South. 350; *Eggart v. State*, 40 Fla. 527, 25 South. 144; *Jones v. State*, 44 Fla. 74, 32 South. 793; *McCoggle v. State*, 41 Fla. 525, 26 South. 734; *Kirby v. State*, 44 Fla. 81, 32 South. 836; *Pittman v. State*, 45 Fla. 91, 34 South. 88; *Shiver v. State*, 41 Fla. 630, 27 South. 36; *Griffin v. State*, 48 Fla. 42, 37 South. 209; *Parnell v. State*, 47 Fla. 90, 36 South. 165.

The requested instruction numbered one refused by the court was as follows: "In this case the evidence shows that the defendant was and is justified under the law, in taking the life of the deceased, upon the ground of self-defense, and your verdict should be in favor of the defendant."

This instruction was clearly improper as it invaded the province of the jury and was not justified by the facts of this case, since there was evidence of the guilt of the defendant, and the facts on which self-defense was claimed were disputed. See *McCray v. State*, 45 Fla. 80, 34 South. 5; *Boykin v. State*, 40 Fla. 484, 24 South. 141; *Wilson v. State*, 47 Fla. 118, 36 South. 580; *Leaptrot v. State* (Fla.) 40 South. 616.

Having found one of the refused instructions assigned en masse to have been erroneous and properly refused, the assignment of error will not be further considered. *McCoggle v. State*, 41 Fla. 525, 26 South. 734.

The denial of a motion for new trial is assigned as error, and among the grounds of the motion are the refusals of the court to give the several instructions, except the first, mentioned in the assignment of error last above referred to, so the plaintiff in error will have the benefit of review of the rulings on all the refused charges.

The instructions asked by the defendant

and refused by the court numbered 2, 5, 6, 7, 9, 10, 11, 12, and 13 have been carefully considered, and we are of the opinion that they were properly refused because the charges given by the court fully and correctly covered the case, and because the requested instructions were not correct in that they did not contain the propositions, respectively, that the defendant must have believed it was necessary to fire the fatal shot in order to avert a real or reasonable, apparent, imminent danger to the defendant, and that in order to be justified on the ground of self-defense the defendant must have used all reasonable means within his power and consistent with his own safety to avoid danger and to avert the necessity of taking the life of the deceased. See *Blanton v. State*, (filed this day) 41 South. 789.

This disposes of all the points argued for the plaintiff in error.

The judgment is affirmed.

SHACKLEFORD, C. J., and COCKRELL, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

(117 La.)

No. 16,058.

STATE v. BUSH et al.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 27, 1906.)

1. CRIMINAL LAW—APPEAL—OBJECTIONS TO CHARGE.

Objections to the charge, not made before verdict, will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2022.]

2. INDICTMENT—MOTION TO QUASH.

Motion to quash on the ground of the incompetency of one of the grand jurors comes too late after plea.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 473.]

3. GRAND JURY—DISQUALIFICATION OF JUROR.

Being charged with an offense not cognizable by the grand jury—for instance, the breach of a municipal ordinance—does not disqualify a grand juror.

4. JURY—COMPETENCY OF JUROR.

A juror who has declared that he thinks he is incompetent, because the deceased was his friend, but who, on being further questioned, says that, if sworn as a juror, he will try the case according to the law and the evidence, just as if he had not known the deceased, is competent. It is not for the juror to decide whether he is competent, but for the court.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 437, 594.]

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

A. P. and Madden Bush were indicted for murder. A. P. Bush was found guilty, and appeals. Affirmed.

Elstner & Land, Lewell Colbert Butler, and Andrew Jackson Murff, for appellant. Walter Guion, Atty. Gen., and James Martin Foster, Dist. Atty. (Lewis Guion and Wise, Randolph & Randall, of counsel), for the State.

PROVOSTY, J. The defendant A. P. Bush was found guilty of murder without capital punishment.

He applied for a new trial, on the ground of error in the charge of the judge. In overruling the motion the judge said:

"The testimony in this was closed about 8 o'clock p. m., Tuesday, March 6th, and just before the court was adjourned at 10 o'clock a. m., Wednesday, counsel for the defendant requested that the court reduce its charge to the jury to writing, whereupon the court expressed acquiescence to said request and then and there requested said counsel to hand in any special instruction he desired to have incorporated in the charge of the court to the jury. Whereupon said counsel answered he had none to offer, but preferred to wait until he heard the charge of the court. Further, when, on the afternoon of Wednesday, March 7th, the court had given the jury the written charge as found in the record in this case, the court addressed the attorney in this case for the state, as well of those of the defendant, if they had any special instruction which they desired to be given, and after time to confer the attorneys on both sides answered in the negative, and no objection to the charge as given by the court was made known, and no exception taken, whereupon the jury retired to consider its verdict, and after due consideration returned a verdict, before adjournment on the afternoon of Wednesday, March 7th, whereupon, after having the jury polled and its unanimity ascertained, the jury was discharged, and the court adjourned. And no objection to the charge of the jury being made known to the court until counsel for defendant presented a motion for new trial at motion hour on the morning of March 10th, the court overruled said motion as coming too late, and for the further reason that no injury to the accused was done, and, further, that the legal doctrine set forth in the charge objected to in the motion for new trial, though urged by the attorneys for the state in their argument before the jury, was not replied to or dissented from by counsel for defendant in argument."

Under the above circumstances, the question now presented is whether, not having made any objection to the charge of the judge when thus required to make known any he might have, the defendant was still in time to urge the objections on new trial, or can be permitted to urge them in this court. We think not.

The well-nigh universally accepted rule, both in civil and criminal cases, is that objections to the charge of the court will not be considered on appeal unless made before verdict. 2 Cyc. 700, 1046; Ency. P. & P. Vol. 8, p. 253; 12 Cyc. 666, 667; State v. McClanahan, 9 La. Ann. 210; State v. Chopin 10 La. Ann. 458.

In the case of State v. Ricks, 32 La. Ann. 1098, this court made a departure from that rule, and held that, where the charge had been written and was in the record, any er-

rors therein would be reviewed. Shortly afterwards, however, when the case was invoked as authority, in State v. Beaird, 34 La. Ann. 104, before the same judges, the court referred to it in the following terms:

"Although in writing, the judge's charge was not excepted to. We held in State v. Ricks, 32 La. Ann. 1098, that, where the charge was in writing and embodied in the record, we would notice errors, under proper assignment thereof, although not presented by bill of exceptions. While not now overruling this opinion, which, however, is contrary to prior authority (State v. Chopin, 10 La. Ann. 458), and therefore to be strictly construed, we deem it proper to say that it is in every way preferable that charges should be excepted to when given, in order that the judge may have an opportunity of explaining or correcting his charge at the time; otherwise, the defendant would be at liberty to take his chances of acquittal on the charge as delivered, and, if convicted, to urge his objection in subsequent proceedings.

"Only in case of gross and unambiguous error will we sustain objections to the charge not made and presented by bill of exceptions at time of delivery."

And about the same time in another case (State v. Curtis, 34 La. Ann. 1214) the same judges said:

"In a case of Ricks, 32 La. Ann. 1098, which he quotes, it appeared that the obnoxious charge had been given to the jury 'in writing and was embodied in the record,' which is not the case here. That decision had been subsequently reviewed by us, and has been considerably modified in the Case of Beaird et al., 34 La. Ann. 106, where we showed the danger of abuse in allowing the accused to complain on appeal of a charge, even in writing, to which he had not objected or excepted when it was given, by which course he 'would be at liberty to take his chances of acquittal on the charge as delivered, and, if convicted, to urge his objections in subsequent proceedings.' And without absolutely overruling the previous opinion we laid down the following rule: 'Only in cases of gross and unambiguous error will we sustain objections to the charge not made and presented by bill of exceptions at time of delivery.'"

It would seem to be plain that the authors of the Ricks decision refrained from absolutely overruling it simply because the necessity of doing so could be avoided by deciding the case on other grounds and because a court is always reluctant to overrule itself.

One year thereafter, in the case of State v. Sheard & Smith, 35 La. Ann. 543, the same judges said:

"This charge, when given, was not objected to in the court below, no bill of exceptions was taken to it, and from aught that appears in the record there is nothing to show that it was not fully acquiesced in by the accused when delivered, and the first complaint heard of it is in this court, in the counsel's argument."

The court referred to the Ricks Case, and underscored the qualifiers "gross and unambiguous" in the sentence:

"Only in cases of gross and unambiguous error will we sustain objections to the charge not made and presented by bill of exceptions at time of delivery."

Justice Levy, who had been the organ of the court in the Ricks decision, was succeeded on the bench by Justice Manning, a recognized authority in criminal law, and the latter, at the first opportunity, expressed himself, speaking for the court, in the case of *State v. Riculfi*, 35 La. Ann. 770, as follows:

"The errors assigned are alleged misdirections of the court in its charge to the jury, a mode of presenting such matters for review so unusual, and so contrary to established practice, that the prisoners' counsel have found it necessary to offer an explanation to excuse it, in the circumstance that the charge was delivered late at night. They asserted, however, that their right to submit these matters for review under that form rests upon repeated adjudications of this court." Eight cases are cited as sustaining this assertion, one of them being a civil cause, and, of course, wholly out of the domain of the subject, and not one of the others, with a single exception, sustaining or countenancing the practice. That exception in *State v. Ricks*, 32 La. Ann. 1008, which was qualified on the first opportunity the court had to intimate its correctness (*State v. Beaird*, 34 La. Ann. 104), and which is, as there admitted, contrary to authority, and again in *State v. Curtis* (not yet officially published) 41 South. 58, and may now be considered as overruled.

"The reason why this practice is not permitted is obvious. By it the judge had no opportunity to explain his charge—none to state that, as given, it was pertinent to the facts of the case, and that a fuller charge was not demanded by the circumstances attending the commission of the act for which the defendant is prosecuted. Bills of exceptions should have been taken to those parts of the judge's charge which were deemed to be wrong, which will always bring them up with the judge's reasons, and such facts as are necessary to show how the law was applied. They cannot be examined on an assignment of errors. Even a bill of exception, taken to the charge as a whole, is not allowed. *State v. Chopin*, 10 La. Ann. 458. An assignment of errors in criminal practice is for another purpose than correction of the charge of the court."

The case was one of murder, in which a verdict without capital punishment had been found, and the judgment was affirmed. The Ricks Case was expressly overruled.

So, likewise, the case of *State v. Bird*, 38 La. Ann. 497, was a case of murder without capital punishment. In it, after referring to the cases hereinabove mentioned, the court said:

"The correctness of the assumed misdirections of the judge in his charge to the jury cannot be heard and determined by way of motion for new trial."

In *State v. Ferguson*, 37 La. Ann. 51, a case of conviction for manslaughter on a charge of murder, the court said:

"Such a course illustrates, more forcibly than any reasoning which we could adopt, the wisdom of the now settled rule that an assignment of errors is not the legal mode of inviting review by an appellate court of alleged errors in the charge of the trial judge.

"The special charge which is urged to be erroneous must be objected to at the time that it is given, or the complaint cannot be heeded. The charge of the judge must not be confounded with a thesis on criminal law, to which hypercritical reversion is invited by counsel of the

party convicted. The law contemplates it as a synopsis of the principles which should control the trial, and jurisprudence has established the rule that by a timely objection the accused may secure the correction of any unguarded or erroneous utterance, or an explanation of any doubtful expression which may have occurred in the judge's instructions. And this court has more than once emphatically declared that it will not tolerate the vicious practice under which the accused would take his chances of an acquittal under a charge not objected to at the time, and, if convicted, to escape from the verdict by subsequently alleging errors in the identical charge which had gone without objection. *State v. Beaird*, 34 La. Ann. 106; *State v. Curtis*, 34 La. Ann. 1213; *State v. Riculfi*, 35 La. Ann. 774."

In *State v. Melton*, 37 La. Ann. 77, where the sentence of death had been imposed, and where a bill of exception had been taken "to the entire charge of the court," and an assignment of errors had been filed, and where the charge had been in writing, the court refused to consider the objection, citing the Cases of *Riculfi* and *Ferguson*.

Thus the doctrine of the Case of Ricks was thoroughly and emphatically repudiated.

In the case of *State v. Mack*, 45 La. Ann. 1155, 14 South. 141, the court said:

"The third ground, leveled at a sentence in the judge's charge, was set up for the first time after verdict. This court has repeatedly declared it to be the duty of the accused, at the time a charge is made, to make known any objections he might have, to the end that the judge's notice may be drawn to them and enable him to either strike out, modify, or enlarge the instructions."

The court went on, however, and added that it had examined the errors complained of and not found them "gross and unambiguous."

Thereby the court appeared to reinstate, in a measure, the doctrine of the Ricks Case, which had been repudiated in the Cases of *Riculfi*, *Bird*, *Ferguson*, and *Melton*.

In *State v. Jones*, 46 La. Ann. 1395, 16 South. 369, a case in which the death penalty had been imposed, the court set aside the verdict because of the refusal to give a special charge, although no bill of exception had been reserved. And in *State v. Thomas*, 50 La. Ann. 148, 23 South. 250, a case in which the death penalty had been imposed, the court set aside the verdict because of an erroneous charge, although no objection had been made below. In these cases, however, the rule by which the charge to the jury cannot be reviewed unless objected to before verdict does not seem to have attracted the attention of the court. It is not only not discussed, but not even alluded to, and the cases of *Bird*, *Riculfi*, *Ferguson*, *Melton*, and *Mack* are not referred to.

In the case of *State v. Wright*, 104 La. 44, 28 South. 909, the court refused to entertain an objection that had not been urged below, and cited the Cases of *Bird* and *Riculfi*, but added that a different rule prevailed in capital cases, and cited the Cases of *Jones*

and Thomas, *supra*, as well as other cases; but these other cases we have found not to be in point, and it is not apparent why they were cited. The court does not seem to have observed that the Case of Riculfi had been a capital case, and does not seem to have had its attention attracted to the Case of Melton, which had also been a capital case, nor to the Case of Ferguson.

In *State v. Procella*, 105 La. 518, 29 South. 987, a case of manslaughter, the court said:

"There is no bill of exception to the charge nor assignment of errors in the record. Under these circumstances no alleged error can be considered, unless the charge appears, upon its face, to be glaringly unjust and erroneous"—citing the Cases of Beaird, Curtis, Ferguson, Melton, and Mack.

In the case of *State v. West*, 105 La. 639, 30 South. 119, a case of horse stealing, the court formulated the rule as in the Cases of Beaird and Curtis; that is to say, that objections to the charge not made before verdict would not be noticed, except in cases of gross and unambiguous error. The court made no reference to the Cases of Beaird, Riculfi, Ferguson, Melton, and Wright.

Recapitulating the foregoing, we find that the generally accepted rule is that objections not made before verdict cannot be listened to on appeal; that this rule had been adopted in this state by the cases of *State v. McClanahan*, 9 La. Ann. 210, and *State v. Chopin*, 10 La. Ann. 458, and had stood for many years, when by the case of *State v. Ricks*, 32 La. Ann. 1098, it was overthrown; that the authors of that decision almost immediately recognized that they had made a mistake, and in the Cases of Beaird (34 La. Ann. 106) and Curtis (34 La. Ann. 1214) sought to hedge by declaring that such untimely objections would be noticed only where the error was "gross and unambiguous;" that soon thereafter, Justice Manning having succeeded Justice Levy on the bench, the court, in the case of *State v. Riculfi*, 35 La. Ann. 770, overruled the Ricks decision root and branch; that the re-established rule was rigidly applied in the cases of *Bird* (38 La. Ann. 497), *Ferguson* (37 La. Ann. 51), *Melton* (37 La. Ann. 77), and *Mack* (45 La. Ann. 1155, 14 South. 141), and seemed to be well and firmly settled; that in this last-mentioned case the court, after holding that the objections could not be considered, went on and added that the court had nevertheless examined the errors complained of, and found them not to have been gross and unambiguous; that this purely casual remark seems to have opened a door through which the doctrine of the Ricks Case, as sought to be muzzled in the Beaird and Curtis Cases, has crept back into our jurisprudence, without making any noise—that is to say, without discussion; that the Cases of Jones and Thomas, in which this was done, were shortly followed by the Case of *Wright*, in which the rule was again held to be in full force, but not to have sway in capital cases; that in

the Cases of *Procella* and *West* the court ignored the distinction thus sought to be established in the *Wright* Case, and, again without discussion, went back to the doctrine that gross and unambiguous errors would be examined, though not objected to before verdict.

It must be admitted that the state of our jurisprudence on this point is unsatisfactory. A rule of almost universal jurisprudence, and that had long prevailed in this state, was overthrown without discussion, and was, within a very short time, re-established after thorough discussion and giving of reasons, and adhered to in a series of cases involving life and liberty, and then, again without discussion, was put aside. The cause of this vacillation is not far to find. The rule in question is one of those which operate with great harshness in certain cases, and the temptation to bend it becomes overstrong. But when some case comes up wherein its wisdom is again made manifest, as in the case we are now dealing with, it is dug up and again brought into service.

The charge of the court in this case bears upon its face evidence of having been prepared with due care, and there can be no doubt that it was prepared with the sole view of stating the law correctly. The learned judge a quo, in a spirit of perfect fairness, requested counsel to submit to him any special charges they might wish him to give, and after delivering the charge asked counsel if they had any objection to it, and counsel answered they had none.

Under these circumstances, the alternatives presented are that the error complained of was not sufficiently marked to attract the attention of counsel, or else that counsel noticed it, but thought they would take advantage of it by letting the jury render a verdict which would be valid if in favor of their client, but invalid if in favor of the state. If the alleged error failed to attract the attention of counsel, the reason must be that it was not "gross and unambiguous," and, if so, it is not reviewable, even under the rule of the Beaird and Curtis Cases. On the other hand, if it attracted the attention of counsel, and they deliberately abstained from having it corrected, they must be considered either as having waived it, or as having designed to play fast and loose with the court, a thing they could not be permitted to do. Counsel say it was the duty of the court to charge the jury correctly, and that by interposing they would have prejudiced their case before the jury. True, the judge must charge the law correctly, but he is human, and therefore fallible; and it is recognition of this that the law requires that in every case the accused shall be represented by counsel, whose imperative duty it shall be to call the judge's attention to any error he may have made in his charge, to the end that the same may be corrected, and the jury rightly instructed. So far as prejudicing the case is concerned, the theory of the law is

that harm cannot be done to the case of the accused by having the court correct an error prejudicial to him in its charge.

The distinction sought to be established in the Wright Case between capital cases and cases not capital is one not sanctioned by our jurisprudence; nor, so far as our investigation has gone, by any decision elsewhere, excepting, possibly, in the one case of *People v. Leonardi*, 143 N. Y. 360, 38 N. E. 372, cited in 8 E. of P. & P. p. 257, note. It is a distinction that could not be justified on principle, but, at best, only by policy or expediency, and a doubtful expediency at that; for liberty is as precious as life in the eye of the law, and, if all share the celebrated sentiment of Patrick Henry, "Give me liberty or give me death," is likewise so in fact.

No better founded in principle, and to the same extent of doubtful expediency, is the distinction sought to be made between gross and unambiguous error and error not of that character. If the error, though gross and unambiguous, has been harmless, it is for that reason not reviewable. If, on the other hand, though not gross and unambiguous, yet it has brought about a conviction not sanctioned by the law of the land, it has done all the harm that the grossest and most unambiguous error might have done, and should nullify the verdict. If slight, and yet fatal, the accused may say of it what *Mercutio* said of his wound:

"Tis not so deep as a well, nor so wide as a church door; but 'tis enough, 'twill serve. Ask for me to-morrow, and you will find me a grave man."

The error in the instant case, if error there was, was not so gross or unambiguous as not to have eluded the notice of the judge *a quo*, a lawyer of large experience and recognized erudition and ability, and yet, if counsel for defendant are to be believed, has led to the unjust and illegal condemnation of defendant just as effectually as the grossest and most unambiguous error might have done.

Again, where is to be found the line of demarkation between gross and unambiguous error and error not of that character? Is the court to trace the line in each case for the particular case? Is that line to wave back and forth as the spirit of the moment may move this court? Is this court to be a law unto itself in determining whether a particular error is to fall on this or that side of this fanciful or arbitrary line? On which side of the line, for instance, would the matter impugned as error in the instant case be assignable? The learned counsel for defendant, backing themselves with authority, say on one side. The learned counsel for the state are clear to the contrary. In all reason, this court should be content with the difficult task of determining whether particular legal propositions are, or not, erroneous, without undertaking the incomparably more difficult, if not impossible, task of assigning degrees to particular errors. What stands out perfectly

plain, manifest, and certain to one mind may prove occult, vague, and doubtful to another mind. It is a matter of everyday experience that judges will hold opposite sides of a legal proposition, and both insist that their side is plainly right, and the other side plainly, if not absurdly, wrong.

Concluding that the error in question is not presented in such shape as to be reviewable, it becomes unnecessary to waste time with a statement of it.

The next contention of defendant is that counsel for the state in their closing argument made remarks which were improper, and were prejudicial to defendant. The following is the remark in question:

"Suppose a schoolgirl was returning to her home along some unfrequented street or highway, and was assaulted by a drunken brute; could he be heard, on his trial, to urge his drunkenness as an excuse or palliation of his crime?"

To understand defendant's objection to this remark, it is necessary to know that, shortly before, a drunken negro named Coleman had outraged and murdered a young girl on the outskirts of the city of Shreveport as she was returning home from school, and that this had aroused the indignation and resentment of the people of Shreveport to such a pitch that, to prevent a lynching, state troops from other parts of the state had had to be sent to Shreveport and kept there until the negro had been tried, convicted, and executed. The contention is that the hypothetical case thus stated by counsel for the prosecution was a transparent allusion to the Coleman Case, and was well calculated to prejudice the jury against the accused.

The learned judge says:

"In the argument of this case Mr. M. C. Elstner, of counsel for the accused, very strenuously urged the intoxication of the accused as an extenuation of the homicide; and when W. S. Wise, of counsel for the state, was making the closing argument, he, in combatting the argument of Mr. Elstner, stated a hypothetical case by way of illustration of the error of Mr. Elstner's contention, in these words, to wit: 'Suppose a schoolgirl was returning to her home along some unfrequented street or highway and was assaulted and murdered by a drunken brute; could he be heard, on his trial, to urge his drunkenness as an excuse or palliation of his crime?'"

"Whereupon Mr. A. J. Murff, of counsel for the accused, about the time Mr. Wise was concluding the statement of his hypothetical case, without rising from his seat, stated that he excepted to the remarks of Mr. Wise; but he did not call on the court to stop or reprimand him, nor request the court to charge the jury to disregard said objectionable remarks."

"Further, the court will say that while the hypothetical case stated by counsel for the state, in some of its outlines, recalled the Coleman Case, referred to in bill of exceptions, it was so wanting in those features of the Coleman Case, that had so recently stirred the people of Caddo Parish to summary vengeance, that the court failed to appreciate the impropriety of the illustration, or that any

injury could be done to defendant or any prejudice aroused against him."

To which the judge here says the counsel for the state add that in urging this plea of drunkenness counsel for defendant had called into requisition all the resources of eloquence, and evidently with telling effect, and that for undoing their work, and putting things in their true light, it became necessary for counsel for the state to show the jury how this specious doctrine of drunkenness being an excuse for crime would work in practice, and that the hypothetical case stated did no more than this.

Be this as it may, we do not find that counsel transcended the bounds of legitimate argument. The illustration, although perhaps a vivid, or even a lurid, one, was nothing more than an illustration, a loyal weapon of forensic warfare. Those elements of the Coleman Case which appealed to prejudice had no application to, and as a consequence could have no play or effect in, the case of defendant, who is a white man and was not charged with rape. The illustration was used, not to enforce the idea that drunkenness is an aggravation of the crime, but simply that it is not an extenuation of it.

Defendant's other contentions are submitted in the brief without argument. They have no merit, and shall be disposed of summarily.

The motion to quash was filed after plea, and was based upon the alleged incompetency of one of the grand jurors, resulting from his having been charged with the violation of one of the sanitary ordinances of the city of Shreveport punishable by fine not exceeding \$50. After plea, the motion came too late. *State v. McGee*, 38 La. Ann. 206; 12 Cyc. 357; E. of P. & P. vol. 2, p. 775; A. & E. E. (1st Ed.) vol. 4, p. 762. Moreover, the breach of a municipal ordinance is an offense not cognizable by the grand jury, and the crime and offense whereof the charge disqualifies a grand juror are those cognizable by the grand jury.

The challenge of the juror Hodges is based upon his having said that he did not think he should make a competent juror, as he had been a friend of the deceased. But the juror, when further questioned, said that, if sworn as a juror, he would try the case according to the law and the evidence, just as if he had never known the deceased. He was therefore qualified. *State v. Garig*, 43 La. Ann. 365, 8 South. 934; *State v. Williams*, 49 La. Ann. 1152, 22 South. 759; *State v. Mayfield*, 104 La. 173, 28 South. 997; *State v. Hebert*, 104 La. 227, 28 South. 898. It is not for the juror to decide whether he is a competent juror or not, but for the court.

Judgment affirmed.

BREAUX, C. J., and NICHOLLS, J., concur in the decree. LAND, J., takes no part, not having heard the argument.

(117 La.)

No. 16,159.

STATE v. STEWART et al.

(Supreme Court of Louisiana. June 21, 1906.
Rehearing Denied June 28, 1906.)

1. JURY—COMMISSIONERS—OATH OF OFFICE.

The oath administered to the jury commissioners was that required to be taken by all officers in the state, to which was added a special oath to discharge and impartially perform all the duties incumbent upon them as jury commissioners for the parish of St. Mary. That carried with it as a consequence an obligation to discharge and impartially perform the duties thrown upon them by the act of 1898. There was no necessity for mentioning that particular act.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 268.]

2. SAME—QUASHING VENIRE—GROUNDS.

The motion to quash the venire was properly overruled. The averments of the motion were not such as under the fifteenth section of Act No. 135, p. 223, of 1898, would have justified the court in sustaining the motion. No fraud was committed, and no injury shown.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 282, 359, 367.]

3. CRIMINAL LAW — TRIAL — COMPELLING CALLING OF WITNESSES.

Defendant in a criminal action is not entitled to demand as a matter of right that the district attorney should call all the eyewitnesses to the alleged crime charged against him to the stand as witnesses.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1570.]

4. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE.

A defendant charged, under section 791 of the Revised Statutes, with having cut another with a dangerous weapon with intent to murder, objected to a witness being allowed to testify that the weapon with which he was cut by the accused, was a razor, on the ground that it was not alleged in the indictment that that was the instrument used. The case was on trial before the jury. No motion to quash the indictment had been made nor bill of particulars asked for. There was no legal ground for preventing the witness from testifying. The statute did not call for the naming of the instrument.

It was for the jury to determine under the evidence adduced whether the instrument was a dangerous one or not as used.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 248, 249, 256.]

5. CRIMINAL LAW — ARREST OF JUDGMENT — GROUNDS—OBJECTIONS TO INDICTMENT.

Objections to an indictment which may be remedied by an amendment or cured by verdict should not be urged in a motion in arrest of judgment but in a motion to quash.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2445-2462.]

6. WITNESSES — ATTENDANCE — RIGHT OF ACCUSED TO COMPULSORY PROCESS.

The right to compulsory process referred to in the Constitution is the right of accused persons to demand the issuing of subpoenas for their witnesses and of having the same served. The right to have attachments issued to compel the attendance of witnesses exists only when circumstances and conditions are such as to call legally for that writ. *State v. Allemand*, 25 La. Ann. 526; *State v. Comstock*, 36 La. Ann. 310.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1, 28.]

7 CRIMINAL LAW—CONTINUANCE—GROUNDS—
—NCE OF WITNESSES.

Where an accused person has at his instance obtained subpoenas for his witnesses which have been served by domiciliary service, and it appears on the day fixed for the trial that one of the witnesses so served is absent, the court has the right to demand before granting a postponement or continuance of the case, that defendant should make a showing in aid thereof. If the district attorney should make the admissions demanded of him by Act No. 84, p. 117, of 1894, it is not reversible error for the court to rule the defendant to trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1342-1347.]

Provosty and Monroe, JJ., dissenting.

(Syllabus by the Court.)

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Albert Campbell Allen, Judge.

Louis Stewart was convicted of assault with intent to murder, and appeals. Affirmed.

Foster, Milling, Godchaux & Sanders, for appellant Louis Stewart. Walter Gulon, Atty. Gen., and William K. Wilson, Dist. Atty. (Lewis Gulon, of counsel), for the State.

Statement of Case.

NICHOLLS, J. The defendant, after unsuccessfully urging an application for a new trial and in arrest of judgment, appeals from the verdict of a jury which found him guilty of having violated section 791 of the Revised Statutes in having cut with a dangerous weapon, with intent to murder. The jury recommended him to the mercy of the court.

During the progress of the trial six bills of exception were taken exclusive of the bills taken to the overruling of the application for a new trial and the motion in arrest of judgment.

The points covered by these bills were presented in succinct form on the motion for a new trial, viz.:

(1) The refusal of the court to quash the venire.

(2) The refusal of the court to grant compulsory process to bring the witnesses of accused to court.

(3) The refusal to instruct the district attorney to place on the stand one Henry Baldwin who had been subpoenaed by the state.

(4) As set forth in arrest of judgment that the information does not describe the character of the weapon used.

Appellant filed in the Supreme Court the following assignment of errors:

(1) The court erred in refusing to quash the jury venire from which the jury that tried and convicted defendant was drawn, as will appear by bill of exceptions No. 1, it appearing that the said jury venire was drawn by persons who pretended to draw as jury commissioners, but who, in fact, were not jury commissioners; they never having qualified by taking the oath required by Act No. 135, p. 216, of 1898, as amended by Act No. 58, p. 136, of 1904; and therefore that

when he was forced to trial by a jury thus drawn and convicted by such a jury, he was deprived of his liberty without due process of law, and such a trial by such a jury is violative of the Constitution and laws of the state of Louisiana, and of the amendment to article 5 of the Constitution of the United States.

(2) The court erred in refusing the compulsory process of the court for obtaining the witnesses of your defendant herein, as will appear by bills of exceptions Nos. 2, 3, and 4; which refusal was in violation of the Constitution of the state of Louisiana and of the United States, and especially of Amend. art. 6, of said Constitution, which guaranties to every citizen the right to be confronted by the witnesses against him, and to have the compulsory process of the court to secure the attendance of witnesses in his favor.

(3) The court erred, as will appear by bill of exceptions No. 6, in refusing to require the district attorney to call the witnesses to the res gestæ, and to place them upon the stand for examination; that the statutes of the state of Louisiana adopt the common-law mode of procedure in criminal cases, and under the common law, it is the duty of the state to call all the witnesses to the res gestæ, and that the failure of the district attorney to call such witnesses, and the refusal of the trial judge to force him to call such witnesses, is to convict your defendant and deprive him of his liberty without due process of law, which is violative of both the Constitution of the state of Louisiana and Amend. art. 5, of the Constitution of the United States.

(4) The court erred, as will appear by bills of exceptions Nos. 5, 7, and 8; all of which errors are prejudicial to the rights of the accused herein, and should be passed upon and corrected by your honorable court, and that the sentence herein should be annulled and set aside, and a new trial granted your defendant herein.

And for which your defendant accordingly prays.

In the second bill of exception it is recited that when the case was called for trial the state announced its readiness for trial. The defense asked to have its witnesses called when it was found that one Short Anderson was absent. Upon an examination of the return of the sheriff, it was found that he had been served by leaving a copy of the subpoena at his domicile. The defendant asked for an attachment to secure the attendance of the witness, but the court refused to issue the attachment because it was a rule of the court that no attachment will issue unless there is personal service; whereupon the defendant objected and insisted that the attachment be issued and the court refused and to the ruling of the court to issue the same defendant excepted.

The per curiam to the bill states that when the case was called for trial the defendant asked that the witnesses be called when it was found that Short Anderson was absent. The sheriff's return on the subpoena showed that he had endeavored to summon the witness personally; he not being at home, a legal domicile service was made.

The defendant asked for a continuance on the ground that Short Anderson was absent, a witness thereon, the defense alleging due diligence. The state objecting to the continuance, the court ruled that the defendant must make the proper showing. To which ruling defendant's counsel excepted and reserved a bill. The counsel then asked the court to issue a subpoena for the absent witness, order its officers to make a personal service thereon, and that the cause be continued until such time as return could be made on said summons. The state objecting to the continuance, the court expressed its willingness to order the summons to issue as required, but refused to continue the case without a proper showing being made, to which ruling counsel also excepted and reserved a bill. The counsel for defendant then asked that an attachment issue for the absent witness and that there be a delay until service could be made upon the same. The state objecting thereto, the court refused to order the attachment to issue the return on the subpoena showing a domicile service. The state having insisted upon the case going to trial, the court ordered the defense to go to trial unless a formal application for a continuance be filed.

After excepting and reserving bills, the counsel for defense filed a written application for a continuance, to which the state objected. The application was argued and submitted and the court ruled that a continuance should be granted, unless admitted that the absent witness would testify to the facts as stated in the application for a continuance. The state made the admission, and the court ordered the trial to go on as would appear by the minutes of April 12th, which were taken down at defendant's request at the time these motions were made. The case was tried and the evidence of Short Anderson, as contained in the motion for continuance, was read to the jury. The defendant had the benefit of the process of the court. The witness was summoned by a domicile service; the only service that the sheriff could make under the circumstances, the witness being absent and as shown afterwards by the written motion for a continuance absent across Grand Lake. Under such circumstances the court had the right before postponing or continuing the case to be informed as to the materiality, relevancy, or necessity of the testimony sought to be elicited through this witness. *State v. Bradley*, 6 La. Ann. 554-556; *State v. Celestin*, 48 La. Ann. 272, 19 South. 119.

This case has been postponed twice before during the term of court—once because it was ascertained that the defendant was absent at work in the swamp "across Grand Lake" and the district attorney, rather than forfeit his bond, reassigned the case. Besides the court did not force him to go to trial without the benefit of his absent witness. The court sustained his written motion for a continuance unless the state admitted that the absent witness would swear as stated in the motion. The district attorney had a right under Act No. 84, p. 117, of 1894 to admit that the witness, if present, would swear to the facts stated in the motion, and insist that the trial go on.

The admissions were read to the jury. They were corroborated by the defendant on the stand, and, at least, in part by one other witness, defendant's brother.

If the trial courts must continue cases under circumstances as shown herein, there would be no end to the delays resulting therefrom.

In bill No. 3 it is recited that when it appeared on the call of the witnesses that his witness Short Anderson was absent, he asked the court to issue an attachment, and the court having refused to do so on the ground that the witness had not been personally served and no attachment, the defendant having reserved a bill to this ruling, asked the court to issue a subpoena for said witness, and asked that the case be postponed until such time as said witness could be summoned personally and be forced to attend court; the said witness being a resident of Foster Post office, and residing about five miles from Franklin where the court was holden, and asked that the case be postponed until this service could be made. Whereupon the court stated that it would order the subpoena to issue, but would not delay the case. To which ruling of the court, defendant excepted, and reserved a bill.

In his per curiam the judge states that his reasons for action complained of were fully given in bill No. 2, which he adopted and made a part of bill No. 3; that in this bill, counsel states that he asked for an attachment first, and then asked for a new subpoena, but this statement was not correct; that the new subpoena was asked for first, is shown in minutes of court, April 12th.

Bill No. 4 recites that when, on the call of the witnesses, his witness Short Anderson was shown to be absent, defendant asked for an attachment for the witness, and the court refusing to grant an attachment as would appear by bill No. 2, defendant asked for a subpoena and delay for same to be served, as would appear by bill No. 3. the court then notified the defendant that unless he made a legal showing by motion and affidavit for continuance that he would be forced to trial. Whereupon defendant objected to being forced to make a formal

application for a continuance, and to being forced to trial without his witnesses, the law authorizing him and guarantying him the presence of his witnesses upon the trial of his case; but, being thus required to make the motion and affidavit, he did so, reserving the full benefit of his exceptions, and reserving a bill to the ruling of the court in forcing him to make a formal motion for a continuance.

In his *per curiam* to this bill the judge states that the reasons assigned by him in bills Nos. 2 and 3 covered the objections set out in bill No. 4, and the objections in bill No. 4 should have been included in one bill. When the state objected the court ruled that the defendant should make a showing under the law. In his statement of facts in this bill, defendant is not altogether ingenuous and correct. For instance, he states that he objected to being forced to go to trial without the witnesses. Counsel knows that all his witnesses were present except one "Short Anderson," and that the district attorney admitted that if said witness were present he would swear to just what the motion for continuance stated he would swear to.

Defendant filed a motion for a new trial for the following reasons:

(1) That the indictment does not describe the character of weapon which it is averred was used by him in committing the offense charged.

(2) For the reason that he was forced to trial without the presence of his witness Short Anderson; the said witness being absent without any fault of your defendant, and that it was impossible to make his defense as complete with said witness absent as if he had been present.

That in the trial of the case he was not informed as to what the state's witnesses would swear, and therefore he was not prepared to set up fully in his application for a continuance what the said witness would testify with reference to the case.

(3) That the counsel for the state, or counsel representing the state when he closed the evidence for the state, failed to place upon the stand one Henry Baldwin, who was shown to be an eyewitness of the transaction and in fact the nearest person to the prosecutor at that time. Defendant then requested the court to require the state to call said witness Henry Baldwin; it having been shown that he was present during the entire difficulty. That the counsel for the state informed the court that he proposed to save said witness for rebuttal; but when your defendant had introduced his evidence, the said witness was not called for rebuttal, but the evidence of defendant was attempted to be rebutted by the prosecuting witness Louis Caffery, and another witness, both of whom had been sworn by the state in presenting its case in chief, and that it was then too late for him to avail himself of the evidence of the said Henry Baldwin.

That the verdict of the jury was contrary to the law and the evidence. He shows that if he is granted a new trial and all the evidence is heard he will be able to make good his defense.

The motion for a new trial was overruled.

Opinion.

The motion to quash the venire was properly overruled.

The contention that the oath of the jury commissioners should have recited that they would faithfully discharge "the duties imposed upon them by Act No. 185, p. 216, of 1898," has no merit. In the oath administered to them they swore that they would support the Constitution and laws of the United States and the Constitution and laws of this state, and that they would faithfully and impartially discharge and perform all the duties incumbent upon them as jury commissioners for the parish of St. Mary, La., according to the best of their ability and understanding, so help them God.

The oath so administered was that required to be taken by all officers, to which was added a special oath to discharge and impartially perform all the duties incumbent upon them as jury commissioners for the parish of St. Mary.

This oath carried with it as a necessary consequence the obligation to discharge and perform the duties incumbent upon them by the act of 1898. There was no necessity for mentioning that particular act.

That portion of the motion to quash the venire, which was based upon the claim that the meeting of the commissioners was too late, is met by the statement of the judge that—

"The meeting was within 30 days after they had qualified, and, besides, that it was not sufficient to allege fraud and injury; they should be shown to exist, and they had not been shown here either by proof or by inference."

The ruling of the court on the particular objection referred to, was correct. The averments of the motion were not such as under the fifteenth section of Act No. 135, p. 223, of 1898 would have justified the setting aside of the venire. The allegations of the motion were "that to force him to trial with a jury drawn by persons who did not take the oath prescribed by law, and were not legally qualified as jury commissioners, and who further violated the law by not summoning a jury in the manner and at the time provided by law, would be the inflicting of a great fraud and wrong upon him, and a great fraud had been committed in the selecting and summoning of the jury which will work an irreparable injury upon him if he is forced to be tried by said jury."

We have just held that the jury was properly qualified. What fraud or injury had been or would be committed in the premises is not easily perceived.

The contention that it is reversible error for a trial court when required so to do not to compel the state's attorney to call all the eyewitnesses to the transaction to the stand as witnesses when one is charged with "murder" or "cutting with intent to murder," is not tenable. The same point was raised and passed upon adversely in *State v. Williams*, 30 La. Ann. 842. That decision has been subsequently affirmed by this court. It is true that a state officer, having knowledge of the fact that certain parties (whom he believes to be credible and reliable) were eyewitnesses to a fight, whose testimony, if produced, would and should exonerate the accused, should not (for the purpose of obtaining an improper conviction) refuse and neglect to take into consideration and act upon such knowledge. This duty of the prosecuting officer is other and very different from a right in the accused to require that the district attorney should place all the witnesses to the transaction on the stand. That matter is one which district attorneys acting conscientiously in the discharge of their duty must determine for themselves. So many reasons might exist (in the different cases occurring) where great wrong and a failure of justice would result from not leaving to prosecuting officers freedom of action in respect to the course which the nature of the case would require to be followed for the vindication of the law, that to barely suggest the result of the recognition of the right so broadly claimed by appellant carries appreciation of the necessity of rejecting it. It may be (as declared in the *Williams Case*) that some special case might justify special relief, but the present one no more than that case, calls for exceptional action.

The complaint of appellant that the court should have permitted the witness Caffery to prove that the instrument with which he was cut was a razor, over his objection that such testimony was inadmissible under the recitals of the indictment which did not describe the character of the weapon used, is not well founded. Objection of no kind had been made to the indictment. When the case went to trial the evidence was admissible to show the cutting; whether the weapon used was a dangerous one was for the jury to determine. The indictment followed the language of the statute. The weapon used was not named, but the cutting was alleged to have been done "with a dangerous weapon." That matter was not one to be urged in a motion of arrest of judgment as was afterward done, but should have been urged in a motion to quash. Objections to indictments which may be remedied by amendment or cured by verdict should not be advanced in a motion in arrest. *Clark's Crim. Proc.* § 186; *State v. Summerlin* (not yet officially reported) 40 South 792.

Out of the order which it occurs in the transcript we think it proper to refer here to the comments of the judge in refusing the

application for a new trial. Referring to that motion he says:

"While the evidence was conflicting as to one phase of the case there was no conflict whatever as to the guilt of the prisoner. In other words, if the jury had believed defendant's witnesses only, their verdict could have been, under the law, no less than guilty of cutting with a dangerous weapon, with intent to kill. The witnesses for the state in their testimony showed a willful and malicious cutting with a razor with intent to murder. The jury believed them as shown by their verdict and the court who listened attentively to all the evidence is firmly convinced that the jury has reached a just and correct verdict."

We now direct our attention to what in last analysis is the real ground of defendant's claim that he has been "injured" entitling him to relief. It is that, by the rulings of the court, he was deprived of his right of having had placed before the jury from his own mouth the testimony of the witness Short Anderson, and been forced to submit on paper his testimony to the jury under an admission by the district attorney that if he were present in court he would testify, as it was stated he would in the application for a continuance.

He contends that the effect of this condition of things was to cause his conviction, insisting that had Anderson testified in person in court, he would have so influenced the jury on his behalf that the result of the trial would have been different from that actually reached. His conclusion on that subject is entirely different from that of the district judge. The various complaints which defendant makes of having been "refused the benefit of compulsory process," of having "been forced to make an application for a continuance" and "subsequently forced to go to trial" were simply successive steps leading up to and causing the ultimate injurious act complained of. The proximate act or cause of injury, if any, was the placing of Anderson's testimony before the jury through paper admissions, instead of having the witness himself testify in court. The other facts complained of were causes of the cause or steps leading up to and producing it. It is obvious when defendant complains of having been refused the benefit of "compulsory process" that he considers as "the compulsory process" which the Constitution refers to the proceedings taken against a witness to compel his presence in court when he had failed to appear after having had service of subpoena made upon him; but in this matter he is mistaken. While proceedings by attachment are compulsory in character they are not the process which is referred to in the Constitution as the "right to compulsory process." The process referred to is "the right to demand subpoenas for his witnesses and a right to have those subpoenas served. When he has been accorded those he has received the benefit of "the constitutional right to compulsory process."

The right of the court to vindicate its

authority and enforce obedience to the subpoena, through attachment, is something distinct from this. An accused person is entitled to have an attachment issue, but only when the circumstances and conditions are such as to call for the writ. They have not existed in this case. The constitutional right is referred to in *Wigmore on Evidence*, vol. 3, § 2181, and volume 4, § 2595; *Rice on Evidence*, vol. 3, § 188.

The defendant was granted a subpoena in the case before the court, and that subpoena was served, so that his position differs from that of *Boitreaux*, the defendant, in the case of *State v. Boitreaux*, 31 La. Ann. 188, and *Fairfax*, the defendant in the case of *State v. Fairfax*, 107 La. 624, 31 South. 1011.

In both of these cases the subpoenas had been issued, but neither had been served. Not only did the defendant in this case obtain a subpoena for *Anderson* from the court, but permission was given to issue an alias subpoena, of which privilege he declined to avail himself, unless coupled with a stay of proceedings until return had been made upon the same. The subpoena which had issued originally to *Anderson* not having been served personally, defendant was not under the rule of the court, entitled to have his attendance at court enforced through an attachment. The exception of defendant to the refusal of an attachment was not well taken. *State v. Allemand*, 25 La. Ann. 526; *State v. Comstock*, 36 La. Ann. 308. When defendant requested a postponement of his case after the "domiciliary service" of the subpoena upon *Anderson* had been shown, the court had the right, before granting that request, to force him to make a proper showing. The action of the court, requiring him to do so, did not furnish good ground for an exception.

On defendant's complying with the order to make a showing, the district attorney availed himself of the privilege accorded him by Act No. 84, p. 117, of 1894, of requiring an immediate trial by making the admissions demanded by that statute. The court thereupon ordered the defendant to go to trial. Defendant excepted, but the trial proceeded with the result of the defendant's conviction. Appellant urges that the court had no legal right to force him to trial. There is no doubt that the court's ruling was correct under the circumstances disclosed, unless the statute mentioned is unconstitutional. The unconstitutionality of the law is not pleaded, and in *State v. Lee*, 50 La. Ann. 9, 22 South. 954, and *State v. Nathaniel*, 52 La. Ann. 563, 26 South. 1008, its constitutionality was sustained. *Wigmore on Evidence*, vol. 4, § 2595, sustains that view. We think this case falls under that of *State v. Nathaniel*, 52 La. Ann. 563, 26 South. 1008.

Finding no legal ground for reversal, the judgment is affirmed.

PROVOSTY, J., dissents.

MONROE, J. It does not appear to me that the defendant has been accorded the compulsory process for the obtention of his witness to which he is entitled.

I therefore dissent.

DAWSON v. STATE.

(Supreme Court of Alabama. May 17, 1906.
Rehearing Denied June 30, 1906.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—DEFENSE OF HABITATION—INSTRUCTIONS.

Where, in a prosecution for assault with intent to murder, there was evidence that, when the shooting was done, defendant was outside the inclosure which constituted the home of W., an instruction that if defendant was assaulted by prosecutor in a manner calculated to lead a reasonable man to believe that defendant was in great danger of life or limb from the assault, and that defendant did so believe, and defendant was free from fault in bringing on the difficulty, then defendant was not bound to retreat before striking in self-defense, if defendant was at the home of W. by her invitation, was properly refused as extending the privileges of the home to include the highway outside her inclosure.

2. SAME—SELF-DEFENSE.

It is not sufficient that "circumstances are apparently dangerous to a reasonable man" to justify a person in shooting in self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 127, 158-162.]

3. SAME.

Where, in a prosecution for assault with intent to kill, there was no evidence of any striking in self-defense except the shooting by defendant, a request to charge that if W. invited defendant to her home, and defendant was assaulted while there by one not a member of that home, without fault on his part, defendant was not bound to retreat before striking in self-defense, was properly refused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 629, 630.]

4. CRIMINAL LAW—NEW TRIAL—DISCRETION OF COURT.

The motion for a new trial in a criminal case is addressed to the sound discretion of the court, and not revisable.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2134, 3067-3069.]

Appeal from Circuit Court, Coosa County; George A. Sorrell, Special Judge.

"Not officially reported."

Clint Dawson was convicted of assault with a pistol, and he appeals. Affirmed.

The defendant requested the following written charges, which were refused: "(1) I charge you that if you believe from the evidence that the defendant was assaulted by Robert Thomas in such a manner as was calculated to lead a reasonable man to believe that defendant was in great danger to life or limb from the assault, and the defendant did so believe, and you should further find from the evidence that the defendant was free from fault in bringing up the difficulty, then the law would not require the defendant to retreat before striking in self-defense, if you further believe from the evidence that the defendant was at the home of Helena Wilson by her invitation. (2) I charge

you that if the defendant was invited to the home of Helena Wilson, and that while there, so invited, he was attacked by one not in the family of said Helena Wilson, then the law does not cast on him the duty to retreat. (3) I charge you gentlemen of the jury, that the danger need not be real before one is justifiable in shooting in defense of his life; but the law says one is justifiable in striking a fatal blow if the circumstances are apparently really dangerous to a reasonable man. (4) I charge you that if you believe from the evidence that Helena Wilson invited the defendant to her home, and the defendant was assaulted while there by one not a member of that home, without fault on his part, then the law would not require the defendant to retreat before striking in self-defense."

D. H. Riddle, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The defendant in this case was tried under an indictment charging assault with intent to murder Irvin Hanna, and was convicted of an assault with a pistol. The testimony for the state was, in substance, that at about 8 or 9 o'clock at night the defendant was seen on the premises of a woman named Helena Wilson, standing between the gate and the house, near the gatepost, with a pistol in his hand pointed towards Robert Thomas, who was standing near the gate, in the edge of the road; that one Irvin Hanna, who was with several others passing down the road called to defendant not to shoot, but, while said Hanna and others were running down the road, defendant came out in the road and fired several shots at them, one of which took effect in the leg of said Hanna and one in the leg of Robert Thomas, both from the rear. The testimony for the defense was, in substance, that while defendant and another man were walking on the road towards the home of Helena Wilson, said Hanna and four or five others threw rocks at them, and threw rocks at them again after they had gotten on the premises of said Helena Wilson, between the gate and the house, several rocks striking the defendant, and while said rocks were being thrown the defendant fired several shots at Robert Thomas, and that at the time the firing was done the defendant was backed up against Helena Wilson's house, also that there was nothing to have prevented defendant from going away from the house, and no obstructions at the end of the house.

Charge 1, requested by defendant, was properly refused, as it was misleading. There was evidence on the part of the state that when the shooting was done the defendant was outside the inclosure which constituted the home of Helena Wilson, and the jury might infer from this charge that the privileges of the home extended to that phase of the testimony, construing "at her home"

to include the road outside her gate. Charge 2 is subject to the same criticism, besides being elliptical.

Charge 3 was properly refused. It is not sufficient that "circumstances are apparently dangerous to a reasonable man" to justify a person shooting in self-defense.

Charge 4 was properly refused. It was calculated to mislead the jury. There was no evidence in this case of any striking in self-defense, except the shooting by the defendant, so that, applying the charge to the facts in this case, the jury might infer the right to shoot in self-defense, without regard to the nature or violence of the assault or the degree of peril.

The motion for a new trial in a criminal case is addressed to the sound discretion of the court, and not revisable.

The judgment of the court is affirmed.

TYSON, ANDERSON, and DENSON, JJ., concur.

TERRY et al. v. WILLIAMS.

(Supreme Court of Alabama. June 30, 1906.)

1. EVIDENCE—RES GESTÆ.

Where, in trespass for the removal of plaintiff's furniture, defendant claimed that plaintiff had fully consented to such removal, evidence that she was sitting in one corner of the house crying at the time was admissible as *res gestæ* and as bearing on the question of consent.

[Ed. Note.—For cases in point, see vol. 20. Cent. Dig. Evidence, §§ 307, 314.]

2. TRESPASS—REMOVAL OF PERSONALTY—EVIDENCE.

Where, in trespass for the removal of plaintiff's furniture, defendant claimed ownership of the furniture under a conditional contract of sale, while plaintiff insisted that the paper executed by her to defendants was to secure a loan of money, evidence that defendants were pawnbrokers and dealers in secondhand furniture was admissible.

3. TRIAL—ORDER OF PROOF—DISCRETION.

It is within the discretion of the trial court to allow evidence in rebuttal which might have been offered in chief.

[Ed. Note.—For cases in point, see vol. 46. Cent. Dig. Trial, § 152.]

4. SAME—EVIDENCE—OBJECTIONS—TIME.

It is too late to object to the admissibility of evidence after the argument of counsel has begun.

[Ed. Note.—For cases in point, see vol. 46. Cent. Dig. Trial, §§ 183-185.]

5. SAME—READING EVIDENCE TO JURY.

Where certain receipts had been introduced in evidence, counsel for plaintiff had the right to refer to them and to read them to the jury for the first time when making his argument.

6. TRESPASS—TITLE—BURDEN OF PROOF.

The gist of an action of trespass to personal property being the disturbance of possession, plaintiff is not bound to show that the legal title was in her, or that it was not in any other person.

7. SAME—PUNITIVE DAMAGES.

Where, in trespass for the removal of personal property, there was evidence that the unlawful taking was perpetrated in a

rude, wanton, or reckless manner, and was accompanied by circumstances of aggravation and oppression, exemplary damages were allowable.

Appeal from City Court of Bessemer; B. C. Jones, Judge.

"To be officially reported."

Action by Sallie Williams against Will Terry and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This was an action for trespass for taking goods. No question was raised on the pleading. The tendencies of the evidence and the assignments of error are sufficiently set out in the opinion of the court. The defendant requested the following written charges, which were refused: "(1) I charge you, gentlemen of the jury, that the burden is on the plaintiff in this case to show that the title to the property is vested in her, and in no other person. (2) I charge you, gentlemen of the jury, that there can be no punitive damages recovered in this case." There was motion for new trial, based upon the refusal of the court to give these charges, and because the verdict was contrary to the evidence and excessive, which motion was overruled. The verdict and judgment was for \$75.

Pinkney Scott, for appellants. W. F. Welch, for appellee.

WEAKLEY, O. J. The action is trespass for the wrongful taking of personal property. Before considering the assignments of error that are insisted on, it will be helpful to state the tendencies of the evidence. The plaintiff claimed and testified that one of the defendants (the two being partners) came to her house and without just cause or legal excuse and against her objection forcibly seized and carried away furniture which she had purchased from other parties and for which she had fully paid, while the defendants claimed they had sold her the furniture on credit, reserving title and right to retake possession, without legal process, upon default in payment, and, furthermore, that for an admitted default she consented to the taking at the time they reclaimed the furniture. In support of their theory, the defendants offered in evidence a writing purporting to be a lease contract from them to the plaintiff requiring her to make small monthly payments, and authorizing a taking of the furniture upon default. The plaintiff admitted the execution by her of the writing, but testified that it was made to secure a loan upon the furniture from the defendants, who were pawnbrokers as well as dealers in secondhand furniture, which loan she testified had been fully paid; and in support of her claim that she had purchased the furniture from Jeff Clay & Sons, and had paid therefor, she produced divers receipts from that firm for small payments on furniture account, which were admitted in evidence without objection. The conflicting

tendencies of the evidence obviously presented a controversy for the decision of the jury, and it was to the jury submitted, whose finding was favorable to the plaintiff. We have only to decide whether any errors intervened, which require the judgment upon the verdict to be reversed. We proceed to a consideration of those assignments of error that counsel for appellants has discussed in his brief:

1. The defendants claiming that plaintiff had fully consented to the removal of the furniture, it was competent to prove in her behalf that at that time she was "sitting in one corner of the house crying." This incident, so natural and probable on the part of a woman if she objected to the taking of her household goods, was a part of the *res gestæ*, and had an important bearing upon the question of consent *vel non*, to which issue the court limited the evidence.

2. As supporting plaintiff's contention that the writing introduced by defendants was executed by her to secure a loan of money, it was proper to allow her to prove they were pawnbrokers; that is, persons who loan money. The answers to the question, which stated that they were both pawnbrokers and dealers in secondhand furniture, had a material bearing upon controverted questions of fact, and presented to the jury information as to the business of the defendants that was proper for their consideration, in view of the conflicting evidence as to their dealings with plaintiff. A part of the answer was beneficial to them.

3. It was within the discretion of the trial court to allow evidence in rebuttal that might have been offered in chief.

4. The receipts from Jeff Clay & Sons were offered and admitted in evidence without objection or exception. It was of no consequence that they were not then read to the jury. It was, of course, too late to object to their admissibility after the argument of counsel had begun. Since the receipts were in evidence, counsel for plaintiff had the right to refer to them and to read them to the jury when making his argument. The statement of defendants' counsel when objecting to the reading of the receipts, that they had not been offered in evidence, that, if so, he did not hear the offer, and that had he heard the offer, he would have then objected can avail nothing in the face of the positive assertion in the bill of exceptions that the receipts were admitted in evidence; no objection to their admission at the time they were offered being shown.

5. The gist of the action of trespass is the disturbance of the possession, and the action is maintainable by one who may have a rightful possession alone or possession with a qualified title. *Grisham v. Bodman*, 111 Ala. 194, 20 South. 514. The existence *vel non* of legal title in the plaintiff is, therefore, not always an important inquiry. If the defendants' evidence be accepted as true, they had

the right to reclaim their property peaceably, and were not trespassers. 28 Am. & Eng. Ency. Law (2d Ed.) 563; *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271, 278. On the other hand, if they had no right to or claim upon the furniture, and plaintiff did not consent to its removal, as her evidence tended to show, then plaintiff could recover upon proof of her possession alone, whether the legal title resided in her or in some third person. Under these circumstances the court could not properly charge the jury that the burden of proof was upon plaintiff to show the legal title was in her; and much less could the court require her to show affirmatively that the legal title was "in no other person." Charge 1 was properly refused.

6. It cannot be asserted as a matter of law that a case was not made for punitive damages. In view of the tendencies of the evidence, favorable to the plaintiff, that inquiry was for the jury. The unlawful taking of personal property, perpetrated in a rude, wanton, or reckless manner, or accompanied by circumstances of aggravation or oppression, will authorize the imposition of exemplary damages against the wrongdoer. *Burns v. Campbell*, 71 Ala. 271, 292, and numerous cases there cited.

7. What has already been said disposes of all the grounds assigned in the motion for a new trial and leads to the conclusion that no error was committed in overruling the motion. Finding no error, the judgment is affirmed.

Affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

ROCK ISLAND SASH & DOOR WORKS v. MOORE & HANDLEY HARD- WARE CO..

(Supreme Court of Alabama. May 29, 1906.
Rehearing Denied June 30, 1906.)

1. APPEAL—REVIEW—HARMLESS ERROR—RULINGS ON DEMURRERS.

Where certain pleas to which demurrers were overruled were thereafter withdrawn, the rulings on the demurrers will not be reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4104.]

2. EVIDENCE—WRITTEN CONTRACTS—VARIANCE BY PAROL.

Where there are two written contracts in question, it is competent to show by parol that they relate to one and the same transaction and constitute in effect but one contract, without offending the rule against varying a written contract by parol.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1903.]

3. SALES—SEVERABLE CONTRACT.

Where defendant ordered one car of sash, with the privilege of three, at 78 per cent. off list, specifications for first car to be furnished within 20 days, and, if others are taken, all to be furnished by April 1st, etc., the order was

severable, so that defendant could not escape liability for breach of the contract, growing out of the failure to furnish specifications on the first car within the time limited.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 174.]

4. SAME.

Where a seller has agreed to deliver the goods in installments, and the buyer has agreed to pay the price in installments, which were proportioned payable on delivery of each installment, default by either party with reference to any one installment will not ordinarily entitle the other to abrogate the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 174.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"To be officially reported."

Action by the Rock Island Sash & Door Works against the Moore & Handley Hardware Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This was an action on the common counts. The defendant filed the general issue and pleas 3, 4, and 5. Pleas 2, 6, 7, and 8 were withdrawn. Plea 3: "And for further plea in this behalf, and by way of set-off, the defendant says that the plaintiff is indebted to the defendant in a large sum, to wit, \$300, which sum defendant claims of the plaintiff as damages for the breach of a certain contract made between plaintiff and defendant on the 29th day of November, 1900, whereby the plaintiff undertook and agreed to sell and deliver to defendant for an agreed price one car of sash, with privilege to defendant to take three cars of sash at the same price per car. And defendant says that plaintiff broke its said contract, and failed and refused, without just cause or legal excuse, to furnish and deliver said one car of sash, and that by the plaintiff's said breach of said contract the defendant was greatly damaged, and lost the profits it could and would have made upon said car of sash, and defendant was compelled to buy other sash at a greater price than plaintiff had bound itself by said contract to deliver said cars of sash for, and all to the damage of defendant in the sum of \$300; and defendant offers to set off its said demand and claim against that of the plaintiff mentioned in the complaint and the several counts thereof." This plea was amended by striking therefrom the words, "and lost the profits it could and would have made upon said car of sash," where they appear in said plea, and by adding next after the words "a greater price" the words "to wit, \$300." Plea 4: "And for further plea in said behalf, and by way of set-off against plaintiff's demand, the defendant says that the plaintiff is indebted to the defendant in a large sum, to wit, \$700, which sum defendant claims of the plaintiff as damages for the breach of a contract made on November 29, 1900, between plaintiff and defendant, whereby the plaintiff agreed for a valuable consideration to sell and deliver to defendant, free on board cars at Rock Island, Ill., and

less freight to Birmingham, one car of knock-down sash, with the privilege of three cars of sash, and, if defendant should elect or take the two last-named cars of sash, they were to be furnished by April 1, 1901, by plaintiff at the same price per car which was agreed on for the said first car; and the defendant says that the plaintiff broke its said contract in this: That, although defendant furnished the plaintiff specifications for said two cars of sash prior to April 1, 1901, the plaintiff failed and refused on demand to furnish and deliver to defendant two cars of sash on or prior to April 1, 1901, as plaintiff had agreed to do; and defendant says that it has been greatly damaged by plaintiff's said breach of contract, and had to purchase other sash at a higher price, to wit, \$700, than plaintiff had agreed as aforesaid to furnish said sash for, and otherwise was greatly damaged by plaintiff's said breach of contract and all to the damage of defendant in the sum of \$700, which defendant offers to set off against plaintiff's claim in said cause, and defendant claims judgment for the excess." Plea 5: "And for a further plea in this behalf defendant says that heretofore, to wit, on the 29th of November, 1900, the defendant purchased from the plaintiff, through its agent, certain doors and blinds and sash, known as 'K. D., or knock-down, sash'; that the doors and blinds were entered upon one order, and the K. D. sash was entered upon another order, and the two orders formed one and the same transaction with the said agent of plaintiff; that in and by the said order for K. D. sash the defendant gave an order for one car of K. D. sash, with privilege of three, and specifications for the last two of said cars of K. D. sash referred to in said order were, if taken, to be furnished by April 1, 1901, and the defendant says that the plaintiff shipped to the defendant the said cars of doors and blinds, but wrongfully refused and failed to ship either of the two last-named cars referred to in the order as 'K. D. sash'; and that by said failure and refusal of the plaintiff to ship said two cars of K. D. sash referred to in said order defendant was greatly damaged, and defendant lost the difference in price between what plaintiff had agreed to sell said sash for and what they were worth at the time and place of delivery, to wit, \$1,000, was put to expense in and about purchasing other cars of K. D. sash from other vendors thereof, and had to pay a greatly increased price for the cars of K. D. sash which it brought to take the place of those which it had contracted to buy from plaintiff as aforesaid, to wit, \$1,000, and was otherwise put to great expense and damage in and about and by reason of plaintiff's said breach of its said contract, all to the damage of defendant in the sum of \$1,000. And defendant hereby offers to recoup its said damages against plaintiff's said claim and claims judgment for the excess."

The plaintiff filed 43 grounds of demurrer to these pleas, but the main questions raised by the demurrers are as follows: (1) The pleas purport to declare on an express executory contract, but do not set out said contract fully in words and figures. (2) While declaring on an express executory contract, the pleas do not set out and aver the substance of said contract with precision and certainty. (3) They do not set out all the facts, terms, and conditions constituting said contract. (4) It does not set out with sufficient certainty the consideration for the contract. (5) They do not aver with sufficient precision or certainty the substance of the breach of the contract by plaintiff. (6) There is not averred with precision and certainty the time, manner, and place of payment of the consideration, to whom the payment was to be made, and whether it was payable in cash or not. (7) They do not aver the price per car of the goods and chattels alleged to have been purchased under the contract. (8) It falls to aver or set out whether or not there was any limitation of time upon the privilege of the defendant to take more than one car of sash, and, if there was a limitation, the time of the limitation. (9) The failure to aver all the facts and circumstances under which the contract was made. (10) If the damages claimed were speculative, conjectural, and remote. (11) That the profits claimed as damages were constituent elements of the contract, and that the loss of the same was a natural result of its breach. That pleas 3 and 4 were repugnant and incompatible with the other pleas. (12) That pleas 3 and 4 were pleas of set-off, and the other pleas were pleas of recoupment. (13) That they do not aver that at the time the contract was made the defendant had an existing contract for resale of the knock-down sash, and the plaintiff knew or was informed of the contract of resale. (14) That the pleas do not confess and avoid the allegations of the complaint, nor traverse the same. (15) It does appear that the contract for the doors and blinds was a separate and independent contract from the written contract of the purchaser of knock-down sash; and it further appears that said contracts cannot be connected with each other, so as to form one written contract, without the aid or assistance of the introduction of oral testimony, which cannot be introduced to vary the terms of a written contract.

There were a great many charges requested, some of which were given and some refused to both plaintiff and defendant; but, as they are not noticed in the opinion, they will not be set out.

Brown & Murphy and S. M. C. Amason, for appellant. Walker, Tillman, Campbell & Porter, for appellee.

DOWDELL, J. To the complaint, which was on the common counts, the defendant

filed pleas numbered from 1 to 8 inclusive; the first being the general issue and the rest special pleas. Subsequently the third and fourth were amended, and the second, sixth, seventh, and eighth were withdrawn. By the third and fourth pleas set-off was pleaded as a defense. By the fifth plea recoupment was intended to be pleaded, and, indeed, was so treated by the parties; but it is not shown by the averments in the plea that the damages sought to be recouped arose out of the transaction on which the suit was brought or the complaint was based. Demurrers were interposed to these pleas, but we think they were unobjectionable on any of the grounds assigned. There were replications, rejoinders, and surrejoinders, to which demurrers were interposed, and upon which rulings were had, but which we need not consider, since the pleas that these replications, rejoinders, and surrejoinder related to were subsequently withdrawn.

It is stated by counsel on both sides in their briefs that the main issue in the case hinges upon the construction of what is designated in the record as "Order No. 8,489," which is as follows: "Birmingham, Ala., November 29th, 1900. Order No. 8,489. Rock Island Sash & Door Co., Rock Island, Ill.—Gentlemen: Please enter our order for one car K. D. sash, with privilege of three, at 78 per cent. off the list, specifications first car to be furnished within twenty days, and, if others are taken, both to be furnished by April 1st. Price f. o. b. Rock Island, freight allowed to Birmingham. Yours truly, Moore & Handley Hardware Co." The contention of appellee, defendant in the court below, was and now is that said order formed part of the contract, the foundation of the plaintiff's suit; the said complaint, while on the common counts, being for a balance due on a contract of purchase by the defendant from the plaintiff of a car of doors and blinds, and which contract, while a single and entire transaction, was for the convenience of the parties put in the form of two orders, numbered, respectively, 8,488 and 8,489, the first relating to the doors and blinds, and the latter to the K. D. sash. There was the further contention by appellee that the part of said contract designated as "Order No. 8,489," above set out, was as to the three cars of K. D. sash severable. The contention of the appellant was, and is now, that order No. 8,489 was a separate and distinct contract from the contract for the purchase of the doors and blinds, and, furthermore, was in itself entire and inadmissible.

On the trial the evidence on the part of the defendant tended to show that there was but one contract, and that the two orders constituted a single transaction, and were put in two forms for convenience of the parties. The evidence of the plaintiff, on the other hand, tended to show that the two orders

were wholly separate and distinct transactions; the one having no connection with or reference to the other. The plaintiff objected to the introduction of this evidence, when offered by the defendant, on the ground, that it was an effort to vary a written contract by parol evidence. Where there are two written contracts, it is competent to show by parol evidence that they relate to one and the same transaction and constitute one contract, without offending the rule against varying a written contract by parol evidence. 1 Greenleaf on Ev., (16th Ed.) § 283. Order No. 8,489, set out above, whether taken by itself or in connection with the evidence, we think, shows a severable contract. The goods were to be delivered in installments, and the price was proportioned to and payable on the several installments. The order was for one car, with privilege of three. The option to take belonged to the purchaser. The failure or refusal of the purchaser to furnish the specifications on the first car within the time limit, or, for that matter, the failure or refusal of the purchaser to take the first car, did not furnish the plaintiff with the right to abrogate the entire contract. It would have had its remedy against the defendant for damages for any failure or refusal on the part of the defendant to accept the first car. In other words, the defendant could not have escaped liability for a breach of the contract growing out of a failure on their part to furnish specifications on the first car within the time limit.

The principle governing such contracts is thus stated by the New Jersey court in *Gerli v. Silk Mfg. Co.*, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611: "When the seller of goods has agreed to deliver them in installments, and the buyer has agreed to pay the price in installments, which are proportioned and payable on the delivery of each installment of goods, default by either party with reference to any one installment will not ordinarily entitle the other party to abrogate the contract." As said in *Johnson v. Allen*, 78 Ala. 391, 56 Am. Rep. 34: "Each delivery is considered in the nature of a separate and distinct contract." In *Rugg v. Moore (Pa.)* 1 Atl. 320, it is held that an agreement for sale of six loads of corn, deliverable at different times and payable at a price per bushel on delivery, is a severable contract. In *Osgood v. Bauder (Iowa)* 39 N. W. 897, 1 L. R. A. 855, which seems to be a case in point, there was a contract by a traveling salesman of a coal company for the sale and delivery of 150 cars of Scranton coal at a certain price, shipped as ordered during August and September, and with the privilege of 250 cars more at same price and upon same terms. The buyer ordered 400 car loads before the end of September, but the seller failed to furnish 200 of the cars so ordered. After the agreement

was made the price of coal advanced, and, when the coal company sued the buyer for the purchase price of the coal actually delivered, the defendant demanded that the damages sustained by reason of the failure of the coal company to fill its orders be treated as a counterclaim to any claim held by the plaintiff. The court said: "But the agreement must of necessity be considered as several, for the reason that it consisted of two parts, one of which was, in effect, a contract of purchase and the other a contract for the privilege of purchasing. We shall therefore treat so much of the contract as relates to the 250 car loads of coal as separate and distinct from the remainder.

* * * A right to rescind a contract for a certain amount of coal to be shipped in quantities as ordered, payment to be made for each shipment a certain number of days after shipment is made, is not given by a failure to pay for certain shipments within the time specified, as such failure does not go to the whole contract." In *Sims v. Brewing Co.*, 132 Ala. 311, 31 South. 35, it was held that if a part of a contract to be performed by one party consists of separate items, and the price to be paid is apportioned to each, the contract is severable. The following cases are to the same effect: *Gomer v. McPhee* (Colo. App.) 31 Pac. 119; *Hausen v. Consumers Co.*, 73 Iowa, 77, 84 N. W. 495; *Myer v. Wheeler*, 65 Iowa, 390, 21 N. W. 692; *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60, 27 Pac. 238; *Tucker v. Billing* (Utah) 5 Pac. 554; *McGrath v. Cannon* (Minn.) 57 N. W. 150; *Otis v. Adams*, 56 N. J. Law 38, 27 Atl. 1092; *Lucesco Oil Co. v. Brewer*, 66 Pa. 351; *Gill v. Lumber Co.* (Pa.) 25 Atl. 120.

Applying the foregoing principles to the undisputed facts in the case, we fail to find that any error has been committed, and the judgment appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

BAKER v. HUTCHINSON.

(Supreme Court of Alabama. June 6, 1906.
Rehearing Denied June 30, 1906.)

1. CHATTEL MORTGAGES—CONVERSION—WRONGFUL TAKING—PLEADING.

A complaint alleging that defendant took possession of and converted to his own use cotton raised by a third person on which plaintiff had a mortgage given by such person sufficiently shows that defendant wrongfully took possession of and converted it.

2. SAME—INTEREST OF PLAINTIFF—PLEADING.

The complaint for conversion of cotton, alleging that plaintiff had a lien thereon by virtue of a mortgage executed to him by a third person, who raised the cotton, recorded in a certain book, on a certain date, prior to the taking, in the county where defendant took the property, sufficiently pleads plaintiff's lien; it

being unnecessary to plead the evidential facts to establish it.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 35.]

3. FRAUD—PLEADING.

A general averment of fraud, without a statement of the facts constituting it, is insufficient.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 37.]

4. CHATTEL MORTGAGES—CONVERSION—DEFENSE OF PRIOR LIEN—PLEADING.

The plea in an action by a mortgagee against a third person for conversion of the mortgaged property, alleging that defendant took and converted the property by virtue of a mortgage executed to him by the owner of the property, is bad in not showing that such mortgage was prior or superior to the one relied on by plaintiff.

5. SAME—RELEASE OF PROPERTY—PLEADING.

The plea in an action by a mortgagee against a third person for conversion of part of the mortgaged cotton crop, averring that when the mortgage was executed it was agreed between the mortgagor and plaintiff that enough of the crop should be disposed of by the mortgagor to enable him to secure supplies to make a crop, and that any cotton defendant got of the mortgagor was to pay for supplies to make the crop furnished the mortgagor by defendant, and that said supplies were necessary to be furnished to the mortgagor to make his crop, is insufficient in not showing a release of the cotton in question in accordance with the agreement between the mortgagor and plaintiff.

6. SAME—INTEREST OF PLAINTIFF—EVIDENCE.

Plaintiff, in an action by a mortgagee for conversion by a third person of the mortgaged chattels, may introduce the mortgage and secured notes as links in his chain of evidence and to prove what was due at the commencement of the action.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 352.]

7. SAME—VARIANCE BETWEEN MORTGAGE AND NOTES.

That the name of the wife of the mortgagor does not appear on the notes, as security for which the mortgage was given, as recited in the mortgage, does not impair the mortgage as security for the notes as obligations of the husband.

8. SAME—OWNERSHIP OF CHATTELS—EVIDENCE.

That the mortgagor of a crop of cotton owned the land on which it was grown is sufficiently proved, in the absence of anything to the contrary, in an action by the mortgagee against a third person for conversion of the cotton, by the mortgage dated in 1902 being given on the crop to be raised in 1903, and testimony of plaintiff that the mortgagor lived in 1903 on the land which was sold to him by plaintiff.

9. ACTION—TROVER AND CONVERSION—WAIVER OF TORT.

A mortgagee of chattels, by calling on one who converts them to pay him the amount realized therefrom, does not waive his right to sue him for the conversion.

10. TROVER AND CONVERSION—DAMAGES—EVIDENCE.

Evidence of a conversion by defendant of three bales of cotton, part of a crop mortgaged to plaintiff, its value per pound being shown, authorizes the jury, without proof of the weight of each bale, to find that plaintiff sustained more than nominal damages.

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

"To be officially reported."

Action by Columbus Hutchinson against D. W. Baker. Judgment for plaintiff. Defendant appeals. Affirmed.

The complaint was in the following language: "The plaintiff claims of the defendant the sum of \$200 damages for the wrongful conversion by him, on or about the 15th day of October, 1903, of the following personal property, to wit: Three bales of lint cotton, the property of plaintiff. (2) The plaintiff further claims of the defendant the sum of \$200 damages for this: that on or about the 15th day of October, 1903, the defendant did take possession of and convert to his own use three bales of lint cotton, which was raised by or caused to be raised by W. T. Thomaston in Tallapoosa county, Ala., during the year 1903; and the plaintiff alleges that he has a lien on said cotton by virtue of a mortgage executed by said Thomaston to this plaintiff on the 8th day of December, 1902, and duly recorded in the office of the judge of probate of Tallapoosa county, the county where said property was at the time the same was received by and taken by the defendant, which said mortgage was recorded on the 10th day of December, 1902, in Book 104, p. 327; and the plaintiff alleges that with notice of said lien the defendant took possession of said property and has sold or otherwise disposed of the same to his own use and benefit, so that plaintiff cannot enforce his lien on said cotton."

Demurrers were assigned to the second count as follows: "Said count fails to show that the defendant wrongfully took possession of the property described therein. (2) Said count fails to show that the defendant did wrongfully take possession of and wrongfully convert to his own use three bales of lint cotton, which was raised or caused to be raised by W. T. Thomaston in Tallapoosa county, Ala., during the year 1903. (3) Said count states a mere conclusion of the pleader, where it says that plaintiff had a lien by virtue of the mortgage, when said mortgage nor the substance thereof is not set out. (4) The statements or averments fail to show that plaintiff had a lien on said cotton. (5) Said count fails to show that the mortgage referred to therein constituted a lien on said three bales of cotton. (6) Said count is too vague and indefinite for defendant to join issue on. (7) For aught that appears, the taking of the said three bales of cotton was rightfully done by defendant. (8) Said count does not show with sufficient certainty what the defendant did with the cotton, and fails to show how and in what manner defendant disposed of the cotton. * * * (10) It is stated as a mere conclusion that plaintiff had a lien on the cotton." These demurrers were overruled.

The defendant filed the following plea: "Plea 3. The defendant says the mortgage referred to in the second count of the complaint is void against this defendant, in this:

that the said Thomaston was indebted to this defendant at the time of the execution of the mortgage, and that said mortgage was given for the purpose of hindering, delaying, or defrauding this defendant, and that the plaintiff participated in said fraud." Demurrers were interposed to this plea as follows: "Because said plea is too indefinite to advise the plaintiff what he is called upon to defend. Said plea fails to allege that the plaintiff knew of or took part in the fraudulent giving or taking of the mortgage. Said plea does not allege that the plaintiff had any connection with the fraud therein charged. Because the vendee cannot set up the fraud in the giving of the paper here set out. The plea fails to set out the facts which constitute the fraud." These demurrers were sustained and defendant filed plea 4: "Defendant says, further, that if he got the cotton and property described in said complaint, and converted it to his own use, it was under and by virtue of the authority conferred in a mortgage executed by said W. T. Thomaston to this defendant, and defendant avers that said mortgage conveyed to this defendant the legal title to the property, and that defendant was therefore justified in converting said property to his own use." Demurrers were interposed to this plea as follows: "The same does not show that defendant's mortgage was executed prior to the mortgage of plaintiff described in said complaint. Because said plea does not sufficiently describe the claim asserted to the property by the defendant." These demurrers were sustained. Defendant filed plea 5: "At the time the said W. T. Thomaston executed the mortgage described in the complaint, it was agreed between said Thomaston and the plaintiff that enough of the crop grown by said Thomaston should be disposed of by said Thomaston to enable him to secure supplies to make a crop during the year 1903, and defendant says that any cotton that he got from said Thomaston was to pay for supplies to make said crop furnished said Thomaston by defendant, and that said amount of supplies were necessary to be furnished said Thomaston to make his crop." Plaintiffs demurred to plea 5 as follows: "Because said plea fails to allege that the particular cotton described in the complaint and alleged to have been converted was released by said transaction set out and described in said plea 5."

D. H. Riddle, for appellant. G. A. Sorrel and Thomas L. Bulger, for appellee.

WEAKLEY, C. J. The second count of the complaint was not subject to the demurrer interposed. It was sufficiently definite under our liberal rules of pleading, and made a case of liability for the destruction of plaintiff's alleged lien, growing out of the mortgage. It was not necessary to allege the evidential facts which would, upon the trial, be relied on to establish the existence of the

lien. There was no necessity for more specific averments.

The demurrer to the third plea, as amended, was properly sustained. The plea did not allege the facts out of which the fraud was supposed to arise. When fraud is pleaded at law or in equity, the facts out of which it is supposed to arise must be stated. A mere general averment of fraud without such facts is insufficient. *Reynolds v. Excelsior Coal Co.* 100 Ala. 296, 14 South. 573.

The fourth plea did not show that the mortgage relied on by the defendant was prior or superior to that of the plaintiff, and, as the demurrer pointed out this vice, it was properly sustained.

The fifth plea was lacking in averments to show a release of the cotton in question in accordance with the agreement alleged to have been made between the mortgagor, Thomaston, and the plaintiff at the time of the execution of the mortgage, and was defective.

The plaintiff had the right to introduce the mortgage and notes as links in his chain of evidence to support the complaint and to prove how much was due thereon at the commencement of the suit. Evidence that the sum of \$300 was owing on the notes and mortgage shows that the mortgage was supported by a consideration. The fact that the wife's name did not appear on the notes as the mortgage recited would not impair the mortgage as a valid security for the notes as the obligation of the husband.

It is true that no witness stated in so many words that Thomaston owned the lands on which the cotton was grown at the time the mortgage was executed, yet, taking the date and the recitals of the mortgage in connection with the plaintiff's testimony that Thomaston lived in 1903 on the place sold him by the plaintiff and grew the cotton on that place, the only rational interpretation to be placed upon the evidence, in the absence of anything to the contrary, is that Thomaston bought the place prior to 1903, and that the purchase was made either prior to or contemporaneous with the execution by him of the mortgage to the plaintiff on December 8, 1902. No just inference could be drawn which would authorize a jury to find that the plaintiff took a mortgage upon his own property from Thomaston to secure the latter's debt.

The plaintiff waived no right to sue in this action by calling on defendant to pay him the amount realized on the cotton. We think that evidence of a conversion by defendant of three bales of cotton, its value per pound being shown, authorized the jury, without proof of the weight of each bale, to find that plaintiff had sustained more than nominal damages, and hence the charge limiting the recovery to nominal damages, requested by defendant, was rightly refused.

There was no conflict in the evidence, and

the circuit court committed no error in giving the affirmative charge for the plaintiff.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

MONTGOMERY IRON WORKS et al. v. ROMAN.

(Supreme Court of Alabama. June 30, 1906.)

1. CORPORATIONS—STOCKHOLDERS—TRANSFER OF PROPERTY.

Defendants, as promoters of a corporation, purchased the property of another company for \$25,000, agreeing to pay in addition certain debts, not exceeding \$4,000. They procured the consideration to be stated in the deed as \$50,000, and thereafter subscribed for \$50,000 of the stock in the new company, for which they paid by executing a conveyance of the property, agreeing to receive in addition \$30,000 of an issue of bonds secured by a deed of trust on the property, of which bonds they actually received \$25,000. On a sale of the property under the deed of trust the bondholders realized only 20 per cent. of the amount due on the bonds, and it was proved that \$50,000 was all the property conveyed to the corporation was worth. *Held*, that such stockholders, in a suit by creditors of the corporation, were not entitled to have the whole value of the property applied as payment on the stock, because the bonds were not received until some time after the organization of the corporation.

2. SAME—ACTION BY CREDITORS—LIMITATIONS.

In an action by creditors of a corporation to recover from stockholders an alleged unpaid stock subscription, the statute of limitations did not begin to run until judgment and return of nulla bona against the corporation.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1091, 1092.]

3. JUDGMENTS—CONCLUSIVENESS—RES JUDICATA.

A creditor of a corporation, after judgment and execution returned unsatisfied, instituted a proceeding by garnishment against stockholders for an alleged unpaid stock subscription, as authorized by Code 1896, § 2182. The stockholders answered, denying indebtedness, and, no contest being filed, the garnishees were discharged. The judgment was reversed on appeal, after which one of the stockholders was discharged with plaintiff's consent and two others were fully examined concerning their liability. One of these was discharged, and the judgment affirmed on appeal, and as to the other plaintiff took a nonsuit. *Held* that, as against all of the garnishees except the latter, the judgment in the garnishment proceeding was res judicata against plaintiff's right to enforce their alleged liability by a bill in equity, as authorized by Code 1896, § 823.

Dowdell and Denson, JJ., dissenting in part.

Appeal from City Court of Montgomery; A. D. Sayre, Judge.

"To be officially reported."

Action by Sigmund Roman against the Montgomery Iron Works and others. From a judgment for plaintiff, defendants appeal. Reversed and rendered in part, and affirmed in part.

This was a bill filed by Sigmund Roman against the Montgomery Iron Works and certain stockholders thereof alleged to be solvent, and not filed against certain other

stockholders on account of their alleged insolvency. The case made by the bill is the organization of the corporation, the fixing of the capital stock at \$50,000, and the paying of said stock by a delivery to the corporation of certain land, houses and machinery, alleged to be worth, then and now, not more than \$25,000, and the issuance of bonds for \$50,000, running 10 years, with interest at the rate of 8 per cent., secured by a trust deed on the property of the corporation, with one Hannon as trustee, and with the rights and power of foreclosure usual in such trust deeds on the failure to pay interest coupons attached to the bonds. The bill further alleges that Dimmick, Baldwin, and Craik are the only solvent stockholders; that Dimmick subscribed \$5,000 to the capital stock, Baldwin \$5,000, and Craik \$2,500; and that each had paid only one-half of their subscription. The bill further alleges: That of the \$50,000 worth of bonds issued \$25,000 were put in circulation as follows: To Dimmick, \$5,000; to Baldwin, \$5,000; to Craik, \$2,500; to Chambers, \$5,000; to Bibb, \$7,500. That these bonds were issued and turned over to the above-named parties without pay or promise to pay, without any labor being done, and without money or property actually received for them. That it was a fictitious increase of indebtedness of the corporation. The transfer by all these parties of these bonds before they were due, and the liability of the parties named to the creditors of the corporation for the money value of said bonds, which is alleged to be of the par value of \$100 each. The bill further alleges that the complainant was the holder, for value and without notice of the fraudulent issue of the same, of bonds to the amount of \$2,200, which he alleges he has filed with the trustee under the deed; but, as the assets cannot pay more than 30 or 35 cents on the \$1, this bill is introduced against the defendants for the purpose of having them account for the balance due on their subscription to the stock of the corporation and for the value of the bonds. The bill alleges a judgment in favor of the complainant against the Montgomery Iron Works, an execution thereon, and a return of "No property found." The prayer is for general relief, for service, and for an accounting against Dimmick, Baldwin, and Craik for the balance due on their stock subscription, and for the amount due by them on the bonds. Demurrers were filed to the bill, and motion to dismiss it for want of equity, which were overruled. Afterwards the defendants moved to require the complainant to elect whether he would proceed in this cause by bill herein filed or with the garnishment suit alleged to be pending in the circuit court in Montgomery county issued on a judgment obtained by complainant against the Montgomery Iron Works in which these defendants were garnished. The court required them to elect. The defendants answered the bill, incorpor-

rating therein pleas of the statute of limitations of six years, and in said answer each defendant set up as a bar to the action a garnishment writ sued out at the instance of the complainant in this bill on a judgment obtained by him against the Montgomery Iron Works for the amount he seeks to recover by this bill, the service of garnishment upon each defendant, and the answer of the garnishee thereto denying indebtedness, and averring that no contest was instituted testing the answer denying indebtedness. The other facts sufficiently appear in the opinion.

Horace Stringfellow and Thomas H. Watts, for appellants. Gunter & Gunter, for appellee.

SIMPSON, J. From an examination of the testimony we find that there is no controversy about the facts that the property of the Montgomery Iron Works Company was purchased by the promoters of the new company for \$25,000, with probably an additional agreement to pay certain debts of that company, which are stated to be \$3,000 or \$4,000; that said promoters had the amount of the consideration stated in the deed to them as \$50,000; that said promoters subscribed for \$50,000 of the stock of the new company, and paid for the same by conveying said property, and as a part of the agreement were to receive, in addition to the \$50,000 of stock, \$30,000 of an issue of bonds to the amount of \$50,000, which were to be secured by a deed of trust on the property, and they did receive \$25,000 of said bonds. Afterwards the property was sold under the deed of trust, and the bondholders realized only about 20 per cent. of the amount due on their bonds. There is a good deal of testimony as to the real value of the property which was conveyed to the company, and, taking all of the testimony we think that \$50,000 would be a full estimate of its value.

It is contended by appellants that the bonds were not received until some time after the organization of the corporation; consequently, that the whole amount of property conveyed should be applied to the payment of the stock, and that, whatever liability there may be on account of the bonds, it cannot be recovered in this action under the previous decisions of this case. *Roman v. Dimmick*, 115 Ala. 233, 22 South. 109. This position is not tenable, because it is testified to by the parties themselves that the property was sold to the company for \$80,000, which was to be paid for by \$50,000 of the stock and \$30,000 of the bonds, so that the time of the actual issue of the bonds does not alter the fact that their reception was a part of the original transaction. If a party owes \$50,000, and conveys property worth \$50,000 with a \$25,000 mortgage on it, he certainly has paid only \$25,000 of the debt. So in this case, even at the valuation mentioned, the parties paid only 50 per cent. of the par value of their stock.

There is no merit in the pleas of the statute of limitations, as the statute did not commence to run as to these parties until the judgment and return of nulla bona (*Vaughn v. Ala. Nat. Bank*, 42 South. 64), and the judgment of the city court was correct in holding that the pleas setting up the foreclosure proceeding were "patently insufficient."

It is next insisted that the liability of the respondents on account of their stock subscription is *res adjudicata*, having been determined in the previous proceedings by garnishment, in which the parties as garnishees were discharged. It is replied that, because there was no contest of the answer of the garnishees, there was no determination of the fact as to whether the respondents were liable for a balance due on their stock, but only whether, on the facts disclosed in the answer, there was an indebtedness. There is no dispute about the proposition that, when a matter between the same parties has been decided on its merits by a court of competent jurisdiction, it is *res adjudicata* in all future proceedings between the same parties, and this court has said "the parties must be the same, the point must be directly in question, and the judgment must be rendered on that point." *Gilbreath v. Jones*, 66 Ala. 129, 132. But in the same case, and others, the court holds that "judgments are final and conclusive between the parties, when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but that they are equally conclusive upon all the facts which were necessarily involved in the issue. In a subsequent case this court, while adhering to the former definitions of the doctrine, states that "the inquiry is not what the parties actually litigated, but what they might and ought to have litigated, in the former suit." And in that case, in which a former decree to compel a settlement of an administration was pleaded, and it was replied that the "issue" was not the same, this court goes on to say: "The main controlling issue in the former suit was the liability of the appellant to account for his administration. * * * We do not inquire whether the former bill was skillfully drawn. * * * A party cannot obviate the force and effect of a judgment against him by invoking his negligence or unskillfulness in pleading. * * * If the former bill was, as is now insisted, so defective in its frame that the appellee could not have obtained full relief, the duty of amendment rested on her. To suffer her to speculate on the chances of obtaining a favorable decree on insufficient pleading, and, after an adjudication against her on the merits, to assail it because of the insufficiency of the pleading, would be manifestly unjust, and would encourage negligence and protract litigation. A judgment is conclusive of the entire subject-matter of controversy, of all that properly belongs to it, or that might have been litigated and decided." *Tankersly v. Pettis*,

71 Ala. 179, 186, 187. In a later case this court said: "A judgment is conclusive against every defense that might have been made against it, whether pleaded or not." See, also, *Board of Com. v. Cross* (N. M.) 73 Pac. 615; *Withers' Adm'r v. Sims*, 80 Va. 651; *Francis v. Wood*, 81 Ky. 16; *Hardwicke v. Young*, (Ky.) 62 S. W. 10; *Le Guen v. Gouverneur* (N. Y.) 1 Am. Dec. 121; 1 *Herman on Estoppel*, p. 548, § 456, 457; *Id.* pp. 551, 552, § 459; *Id.* p. 812, § 364; *Wood v. Wood*, 134 Ala. 557, 565, 566, 33 South. 347; 24 *Am. & Eng. Ency. Law*, 795, note; *Id.* p. 814; *Parkes v. Clift*, 9 *Lea* (Tenn.) 524; *Oman v. Bedford Bowling Green Stone Co.*, 134 Fed. 64, 67 C. O. A. 190; *Rowell v. Smith* (Wis.) 102 N. W. 1.

Our statutes and decisions provide two ways of subjecting a stockholder to liability—one by bill in equity (Code 1898, § 823), and the other by garnishment (Code 188, § 2182). In this case the judgment creditor first proceeded by garnishment. Since the enactment of our statute permitting the process by garnishment against a stockholder, without regard to whether a suit could be maintained by the corporation, the issue is the same, whether the proceeding be by garnishment or in equity, to wit, "whether the garnishee is indebted to the debtor in such form as that the debt can be condemned to the satisfaction of the plaintiff's judgment." *Randolph v. Little*, 62 Ala. 396. The plaintiff, having brought the parties in by garnishment, had the right to a full investigation as to the liability of the garnishees, and, if he chose not to contest the answer, or to take other means within the time prescribed by statute to determine the very issue for which he had summoned them, but permitted the matter to go to a final determination on the merits simply on the answer of the garnishee, the matter of indebtedness and liability *vel non* is *res adjudicata* and cannot be again litigated in this proceeding between the same parties. That would be speculating on the chances, as stated in cases *supra*.

We take the statements in the agreement of the parties as to the disposition of the garnishment proceedings, not only because this is the case made out by both parties to this case, but because the seeming discrepancy between said agreement and the transcript from the record of the court may be explained by the fact that the transcript does not purport to set out all the orders and decrees in said cases, but only those referred to as exhibits in the agreement, and it is not an unusual custom in some of the courts to retain the style of the case just as it was at first, notwithstanding some of the garnishees may have been discharged. It appears from the agreement on file in this case that the complainants sued out garnishments against the respondents, *Dimmick, Baldwin, and Craik*; that answers were filed denying indebtedness, and, no contest being filed, said garnishees were discharged, December 23, 1897, and, by consent said order was set aside on December

30, 1897, a motion was made to require them to answer orally, which was refused, and the garnishees discharged again. On appeal this judgment was reversed, and the cases restored to the docket, and at the November term, 1898, the garnishee Craik was discharged "with the consent of the plaintiff." Dimmick and Baldwin answered orally, were examined and cross-examined on all the matters pertaining to their liability, and there was a judgment of the court discharging the garnishee Dimmick, which judgment was affirmed by this court. A paper was filed contesting the answer of Baldwin, who moved for his discharge, and, his motion being overruled, Baldwin appealed to this court, and the appeal was dismissed because no final judgment had been rendered, and on May 28, 1900, the plaintiff took a nonsuit in the cause against Baldwin as garnishee. As between plaintiff and the garnishee the judgment of discharge is res adjudicata. *Rood on Garnishment*, §§ 202, 211; *Henderson v. Hall*. 184 Ala. 455, 510, 511, 82 South. 840, 63 L. R. A. 673. From what has been said it will appear that the court holds that the plea of res adjudicata should have been sustained as to the garnishees Dimmick and Craik; but a dismissal of a suit, by taking a nonsuit, is not a judgment on the merits. *Beadle v. Graham's Adm'r*, 66 Ala. 99. Hence the plea of res adjudicata was properly held to be not sustained as to the garnishee Baldwin. As said by this court in this case, after the nonsuit, "he stands now, as to his legal rights, where he stood before the garnishment." *Baldwin v. Roman* (Ala.) 31 South. 596.

As to the defendants J. W. Dimmick and G. W. Craik the decree of the court is reversed, and a decree will be rendered sustaining the plea of res adjudicata; and as to the defendant A. M. Baldwin the decree of the court is affirmed.

Reversed and rendered in part, and in part affirmed.

WEAKLEY, C. J., and HARALSON and ANDERSON, JJ., concur. TYSON, J., not sitting. DOWDELL and DENSON, JJ., dissent on the question of res adjudicata as to Dimmick and Craik, being of opinion that the doctrine of res adjudicata does not apply in case of discharge of a garnishee on answer when there has been no contest of such answer.

LOUISVILLE & N. R. CO. v. HUBBARD.
(Supreme Court of Alabama. June 30, 1906.)

1. RAILROADS—HIGHWAY CROSSINGS—REPAIR—DUTY OF RAILROAD COMPANY.

When a public road or highway crosses a railroad track, the railroad company is bound to keep the approaches and the crossing in proper repair for the use of the traveling public.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 959.]

2. SAME—PROTRUDING SPIKES—NEGLIGENCE.

That an iron spike was permitted to protrude above the surface of a railroad highway crossing, on which spike horses would be liable to stumble or strike their feet while traveling over the crossing, rendered the crossing unsafe and constituted a breach of the railroad's duty to keep the crossing in repair.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 961.]

3. SAME—PLEADING—CAUSES OF ACTION—JOINDER.

A complaint against a railroad company, alleging that plaintiff was riding a horse on a highway crossed by defendant's right of way, and that defendant's servants negligently and suddenly went forward with an engine and cars attached thereto without any notice or warning, causing plaintiff's horse to take fright, and, so being frightened, strike his foot against a spike, which defendant permitted to be in the highway on its right of way, in consequence of which the horse was injured, was not objectionable as joining two causes of action.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1107-1110.]

4. SAME—CONTRIBUTORY NEGLIGENCE—PLEADING.

In an action for injuries to plaintiff's horse by striking a protruding spike in defendant's railway crossing, it was not necessary for plaintiff to allege in the complaint facts acquitting himself of contributory negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1112.]

5. TRIAL—EVIDENCE—ASSUMED FACTS—QUESTIONS FOR JURY.

Where, in an action against a railroad for injuries to plaintiff's horse by alleged defect in defendant's highway crossing, the evidence, without conflict, established that the crossing was a regular highway crossing, the court might assume such fact without submitting the inquiry to the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 336.]

6. RAILROADS—DEFECTIVE CROSSING—INJURIES TO ANIMALS—EVIDENCE.

Where, in an action for injuries to plaintiff's horse at a railroad crossing by striking his foot against a protruding spike after he had been frightened by the approach of certain cars, evidence that there were show cars on the side track of defendant's main line was admissible to explain the conditions existing near the place at the time of the accident.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1129, 1130.]

7. SAME.

Evidence that the railroad had erected signposts at the crossing was admissible as a recognition of its public character.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1129-1130.]

8. SAME—INSTRUCTIONS.

In an action against a railroad company for injuries to plaintiff's horse at a crossing, instructions that if the jury believed that plaintiff by his own act of negligence proximately contributed to the injury of the horse, etc., he could not recover, were properly refused as not postulating any acts of negligence averred in the pleas.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1195-1204.]

9. SAME.

An instruction that, if the crossing was maintained in such a manner as not to "unnecessarily" impair the usefulness of the public road or interfere with the safe enjoyment of the road, defendant was not liable, was misleading

in the use of the word "unnecessarily" in the place of the word "materially."

10. TRIAL—REFUSAL OF REQUEST.

It is not error for the court to refuse a request to charge properly covered by the instructions given.

11. SAME.

An instruction in part addressed to a count in the complaint which had been withdrawn and which was bad in form was properly refused.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 587, 588.]

Appeal from Circuit Court, Bibb County; John Moore, Judge.

"To be officially reported."

Action by R. H. Hubbard against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for injury to a horse. There were three counts in the complaint, the second of which was eliminated. The first count was in words and figures as follows: "Plaintiff claims of the defendant, a corporation doing business in Bibb county, Ala., \$100 as damages because, he says, that on, to wit, the 14th day of December, 1900, the plaintiff's horse was wrongfully and negligently injured by the agents or servants of the defendant while in the prosecution and employment of the business of the defendant, to wit, that the defendant wrongfully and unlawfully suffered and permitted an iron spike in said railway, at a point where the public highway crosses said railway in Blocton, Ala., to protrude in and above said highway; that while plaintiff's horse was lawfully in and upon said highway, in charge of plaintiff, the same became frightened, and, shying, struck his foot in and against said spike and was injured. Hence this suit." As the third count refers to the second count, it is here copied down to the word "warning": "The plaintiff claims of the defendant, a corporation doing business in Bibb county, Ala., \$900 as damages because, he says, that on the 14th day of December, 1900, plaintiff's horse was wrongfully injured by the carelessness and negligence of the servants or agents of the defendant in manner, to wit: That while plaintiff was riding the said horse in and upon a thoroughfare, which was a public highway, crossed by the right of way used and occupied by the defendant, the servants or agents of the defendant negligently and suddenly went forward with an engine and cars attached thereto without any notice or warning." Third count adds: "And in so being frightened struck his foot in and against a spike which the defendant unlawfully suffered and permitted to be in said highway on its said right of way, the said spike being an obstruction liable to produce injury to persons and animals traveling said highway, and in consequence thereof, was injured." Demurrers were interposed to this complaint as follows: To the first

count, because there is no causal connection shown between the alleged negligent act and the alleged injury. It does not allege that said spike was known by the defendant to be in a dangerous condition. It does not allege that the injury occurred at a public road crossing. It is not shown that defendant owed plaintiff any duty at the point the alleged injury occurred. It does not aver that defendant did not use ordinary care to keep the crossing in reasonably safe and convenient condition. It is not shown that plaintiff was in the usually travelled part of the road when the injury occurred. Because it is shown that the act complained of was too remote to cause the damage or injury alleged. Because it fails to state any facts showing wherein the defendant was negligent in allowing the spike to be in the railway at the crossing. And to the third count, same grounds of demurrer and the following additional: Because it contains an improper joinder of causes of action, in that it claims damages for the negligent backing of the train without warning, and also claims damages for the iron spike being in the railway at the crossing. Because said count contains two separate and distinct averments of negligence. The other facts sufficiently appear in the opinion.

The defendant requested the following charges, which were refused: Charge 5: "If the jury believe from the evidence that the said crossing was maintained by the defendant in such manner as to not unnecessarily impair the usefulness of the public road or to interfere with the safe enjoyment of the said road, then the defendant is not liable." (In this connection we give charge 7, requested by and given for the defendant: Charge 7: "If the jury believe from the evidence that at the time of the accident the crossing in question was reasonably safe and convenient for the traveling public, exercising ordinary care and prudence for their own safety, they must find for the defendant." Charge 10: "If the jury believe from the evidence that Hubbard by his own act of negligence proximately contributed to his injury, then the verdict should be for the defendant." Charge 12: "The court charges the jury that the plaintiff cannot recover in this case if the jury believe from the evidence that plaintiff proximately contributed to the injury of his horse by his own negligence or want of care, and that but for such negligence or want of care on his part his horse would not have been injured." Charge 18: "The court charges the jury that, unless they believe from the evidence that the train was willfully or wantonly backed without regard to the injury which might follow, then they must find for the defendant on the second and third count." There was judgment for plaintiff, and defendant appeals.

Ellison & Thompson, for appellant. J. M. McMaster and W. W. Lavender, for appellee.

WEAKLEY, C. J. The action is brought to recover damages for an injury to plaintiff's horse, sustained by striking its foot against an iron spike which protruded above the surface of the highway at a point where the public road crosses the track of the defendant. The plaintiff was riding the horse at the time of the injury. The case was tried on counts 1 and 3. There are many assignments of error; but, pursuing our usual practice, we will consider those only that are argued and insisted on by counsel for appellant.

When a public road or highway crosses the track of a railroad company, the latter is under a duty to put and keep the approaches and crossing in proper repair for the use of the traveling public. *Southern Ry. Co. v. George Morris*, Adm'r (at November term, 1904-05) 42 South. 17; *Patterson v. S. & N. R. R. Co.*, 89 Ala. 318, 7 South. 437. While the counts are not as carefully drawn as they might have been, yet we are of opinion they are good as against the grounds of demurrer that are insisted on, and we consider no others. The protruding of an iron spike above the surface of the road upon which horses would be liable to stumble or strike their feet while traveling along the highway and over the public crossing rendered the latter unsafe; and that this condition proximately caused the injury sufficiently appears from the counts on which the case was tried. We do not construe the third count as joining two causes of action. Properly interpreted, it presents the negligent moving forward of the engine and cars and the existence of the obstruction on the highway in the form of a spike above the surface as concurrently and in combination causing the injury and damage. *K. C., M. & B. R. R. Co. v. Burton*, 97 Ala. 240, 249, 12 South. 88. Both counts show a breach of duty to plaintiff, a traveler on the highway. It was not necessary to introduce averments acquitting plaintiff of contributory negligence, since such negligence, if it existed, would be defensive matter.

The evidence was undisputed that the crossing was public, and that planks had been placed between the rails to facilitate passage over it. Signboards were also located there. Several of the witnesses for the plaintiff testified without objection that a public road crossed the track at the point of the accident, and the records of the court of county commissioners, introduced in evidence state the establishment of the road as viewed and reported. The testimony of the defendant's conductor whom it offered as a witness, shows the place of the accident was a regular public crossing. Such being the state of the evidence, the court might have assumed that the averment of the complaint as to the public highway was proven, without submitting the inquiry to the jury.

There was no error in allowing a witness to state that there were show cars on the side track of the main line. This merely explained

conditions existing near the place at the time, and was but a part of the photographic view, so to speak, furnished the jury of the surroundings. It was not offered as tending to show negligence, and the circuit court instructed the jury it could not be considered as a negligent act on the part of the defendant.

There was no error in allowing proof that the railroad had signboards at the crossing, as this was a recognition of its public character.

The only insistence in support of the affirmative charge requested by the defendant is that no legal evidence was offered to prove the existence of the public highway across and over the defendant's track. We have already shown there was such evidence.

Charges 10 and 12 were properly refused. Neither postulated the acts of negligence averred in the pleas.

Charge 5, requested by defendant, seems to have been founded upon or suggested by a paragraph in the opinion in *Patterson v. R. R. Co.*, 89 Ala. 318, 321, 7 South. 437, which undertook to define what would be a sufficient discharge of the duty devolving upon a railroad company to put and keep the approaches and crossings in proper repair for the traveling public when its road is constructed across a public highway. By the use of the word "unnecessarily," in place of the word "materially," employed in the opinion in the paragraph mentioned, the charge was rendered inaccurate and misleading, if not positively erroneous. Charge 7, given for the defendant, properly stated the degree of care required of the defendant in respect of the safe and convenient condition of the crossing. There was no error in refusing charge 5.

Charge 18 was rightly refused. Aside from other possible criticisms, it was in part addressed to the second count, which had been withdrawn, and was also bad in form, in requiring a finding for the defendant on the two counts named; there being another count in the complaint.

No reversible error appearing, let the judgment be affirmed.

Affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

ASHE-CARSON CO. v. BONIFAY et al.
(three cases).

(Supreme Court of Alabama. June 30, 1906.)

1. EQUITY—CROSS-BILL—PROPRIETY.

A cross-bill is allowable whenever it is necessary to do complete justice between the parties and to adjust all the equities between them connected with the subject-matter of the original bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 450-454.]

2. SAME—NEW ISSUES.

In a suit in equity new issues in relation to the original matter may be raised by a cross-bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 446-449, 466-468.]

3. SAME—ELEMENTS.

As against the plaintiff in the original bill, a cross-bill need not show any ground of equity or ask equitable relief; and inadequacy of legal remedies is not an essential element, but it is sufficient if the matters alleged therein relate to the subject-matter of the original bill, in which case the cross-bill may raise purely legal claims.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 446-449, 466-468.]

4. SAME—RECOURPMENT—DAMAGES.

Complainants alleged the leasing of certain turpentine lands from defendants and that defendants had violated the lease and cut and hauled away trees that were boxed and being used for turpentine purposes, and prayed damages for the trespasses already committed and an injunction to restrain further trespasses. Defendants filed a cross-bill, averring that they purchased the land for the timber thereon, that complainants had violated the lease in boxing trees smaller than 10 inches at the butt, 25 per cent. of which had died by reason thereof, causing loss to defendants of \$8,000, for which they demanded judgment. *Held*, that the damages sought to be recouped were of the same class as those claimed by complainant, and that the cross-bill was therefore well filed as relating exclusively to the subject-matter of the bill and the things connected therewith.

5. SAME—"CLEAN HANDS."

Where complainants had violated the terms of a lease of land for the manufacture of turpentine in boxing trees under 10 inches at the butt, they were not entitled to relief in equity under such contract against the lessors' alleged trespass on the land and the cutting of boxed trees therefrom for lumber.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 185-187.]

Appeal from Chancery Court, Covington County; W. L. Parks, Chancellor.

"To be officially reported."

Bill by the Ashe-Carson Company against R. A. Bonifay and others, in which defendants filed a cross-bill. From a decree sustaining defendants' pleas to the bill, discharging an injunction on defendants' cross-bill, and overruling a motion to dissolve an injunction granted defendants on their cross-bill on the coming in of the answer to the same, complainant prosecutes separate appeals. Affirmed.

The bill alleges the leasing to appellant by appellees of certain lands for turpentine purposes, and the right to go upon the same, erect stills, box the pine trees, procure the crude turpentine, and manufacture the same into the spirits of turpentine and into rosin. It alleges that appellees have gone upon the land in violation of the lease and cut down and hauled away a lot of trees that were boxed and being used for turpentine purposes, and that they had threatened to continue to do so. It prays damages for the trespasses already committed and to prevent further commission of the trespasses complained of. The appellees filed certain pleas and

cross-bills, setting up a violation of the lease contract by appellant, in that, they had boxed trees on said land of smaller diameter than was permitted by the terms of the contract, and that as a result of the same a large number of their valuable pine trees, not for turpentine purposes, but valuable for lumber, in which business they were engaged, had died or blown down, and that other large numbers would likely die or be blown down, alleging their damages in a large sum, which they offered to set off or recoup against the damages set up in the original bill; and the cross-bill also prays injunctive relief. The other facts sufficiently appear in the opinion.

The first appeal is prosecuted from a decree of the chancellor holding appellees' pleas to the original bill to be good. The second appeal is taken from a decree of the chancellor to discharge the injunction issued on appellees' cross-bill, and the third appeal is taken from a similar order overruling in motion to dissolve the injunction granted appellees on their cross-bill on the coming in of the answer to the same.

Powell, Albritton & Albritton and Stallings & Reid, for appellant. Foster, Samford & Carroll, for appellees.

HARALSON, J. It is well said that "a cross-bill is proper and allowable whenever it is necessary to do complete justice between the parties, and to adjust all the equities between them connected with the subject-matter of the original bill new issues in relation to the original matter may be brought forward. As against the plaintiff in the original bill, it is not always necessary that the cross-bill should show any ground of equity or ask equitable relief. No affirmative relief can be obtained under an answer. It requires a cross-bill to do that." *Davis v. Cook*, 65 Ala. 617; *Morton v. N. O. & Selma Railway Co.*, 79 Ala. 591, 607; *Whitfield v. Riddle*, 78 Ala. 104; *Nelson v. Dunn*, 15 Ala. 501.

Inadequacy of legal remedies in the first place is not an essential element of a cross-bill. It must relate to the subject-matter of the original bill. If it does, it brings forward purely legal claims. *Davis v. Cook*, supra; *Stevens v. Hertzler*, 114 Ala. 564, 578, 22 South. 121; *Wadsworth v. Goree*, 96 Ala. 227, 10 South. 848; *Nelson v. Dunn*, 15 Ala. 502.

"The essential difference between recoupment or reduction on the one hand, and set-off on the other, is that in set-off the ground taken by the defendant is, that he may owe the plaintiff what he claims, but that a part or the whole of the debt is paid in reason and justice by a distinct and unconnected debt which the plaintiff owes him, * * * while on a plea of recoupment, a defendant may deduct from plaintiff's claim all just demands or claims owed by him, or judgments made by him in the very same transaction, or even in other but clearly connected

transactions. They must, however, be so connected as fairly to authorize the defendant to say that he does not owe the plaintiff on that cause of action so much as he seeks, and not that he ought not to pay plaintiff so much, because on another cause of action the plaintiff owes him." 2 Parsons on Contracts, pp. 562, 563.

In *Grisham v. Bodman*, 111 Ala. 200, 20 South. 515, we said: "Recoupment is not merely a cross action, as is set-off; the plea does not confess the indebtedness counted on in the complaint and bring forward a counter indebtedness from the plaintiff to the defendant, as does the plea of set-off; but its proposition is that plaintiff's claim is based upon a particular contract or transaction, that to entitle the plaintiff to the sum he claims it was upon him to comply with certain obligations of the contract or to discharge certain duties which the law imposed upon him in the making or performing of the contract, that he has failed to comply with such obligations or to discharge such duties, and that thereby the defendant has been so damaged in the particular transaction, or in respect of the particular contract, that the plaintiff is not entitled to recover; or, in other words, that the plaintiff has no debt or a less debt than he claims, as the case may be, against the defendant."

"It is not necessary that the opposing claims should be of the same character, but it is sufficient if they arise out of the same transaction or relate to the same subject-matter, and are susceptible of adjustment in one action. Within this principle a claim originating in a contract may be recouped against one founded in tort." 25 Am. & Eng. Ency. Law (2d Ed.) 558, and authorities there cited.

Applying these principles to the case in hand, it plainly appears, that the cross-bill was well filed. The damages sought to be recouped are of the same class as those claimed by the complainant against defendants. The cross-bill, under which they are claimed, relate exclusively to the subject-matter of the bill and things connected therewith.

The plaintiffs in the cross-bill bring forward a number of instances in which the complainant in the original bill is violating his contract with them in respect to the lease of the lands for turpentine purposes. It is averred that complainants in the cross-bill purchased the lands they leased to the original complainant, for the purpose of using the pine timbers thereon to be manufactured by them into lumber for the market, a fact which was well known to said complainant, and that the destruction of the timbers or trees upon said lands would prevent them from being able to use the same for that purpose; that said contract of lease expressly provides, that no pine tree shall be boxed or worked for turpentine, which is smaller than ten inches at the butt, and

yet in violation of their contract, complainants have boxed and worked six thousand trees of a diameter smaller than ten inches at the butt; that twenty-five per cent. of these trees have either died or blown down from this cause, and that at least twenty-five per cent. more of such trees will die or be blown down by reason of being thus boxed; that if complainants are permitted to continue to work such trees for turpentine for another year, practically all the trees of that size on said land will die or blow down, or be so stunted in their growth as never to be of any more value; that by reason of this violation of said agreement by complainants, as above stated, complainants in the cross-bill have sustained a loss of, to wit, \$6,000 in the value of said trees.

It is further averred that boxes for turpentine purposes should be cut in the base of a tree and not above it, and if not thus boxed, it has a tendency to weaken the tree and cause it to die; and especially is this true, if more than one box is cut to the tree, which is of 10 inches in diameter; that complainants have disregarded their duty in this respect, and have caused the trees to be boxed from 4 to 12 inches too high, which resulted in causing a great many of the trees to die and blow down to the damage of defendants in, to-wit, \$4,000; that boxes in trees should not be cut deeper than three inches into the body of the tree, a fact well known and understood by complainants, and in violation of this rule, they cut them from 4 to 5 inches deep, causing great numbers of them to wit, twenty per cent. to die and be blown down from such causes, to the damage of defendants, in to wit, the sum of \$4,000.

It is further alleged that complainants have streaked the boxed trees in a manner described, which is in violation of the custom and rules on the subject, which has caused damage to the defendants in the sum of, to wit, \$2,500.

It is further alleged, that it is the purpose and intent of complainants to work said boxes as stated notwithstanding respondent's repeated protests against it; that if permitted to continue such violations of duty, the damage that will result in the future to defendants will be irreparable, in that they will be deprived of the use and enjoyment of the privilege of sawing said trees into timber; and that the damages to them are not susceptible of ascertainment in a court of law, and they are without remedy except by injunction from the court of equity.

Other violations of the duty of complainants in the manner of performing their contract of lease, are set out, but these, perhaps, are not necessary to be here stated, as those that are specified will subserve the purposes in hand.

An injunction is prayed against these violations of cross-complainants' rights, and for a reference to the register, to ascertain

and report as to these several matters, and the damages occasioned to cross-complainants therefrom, etc.

The defendants in the original suit, filed five pleas, in each of which is separately set up the alleged violations by complainants of their said contract of the lease of said lands, such as have been before noticed, each alleging that for such violations of said contract, and the wrongs done the defendants, complainants have not come into court with clean hands and ought not to be allowed to have and maintain their cause of action against respondents.

Separate motions were made by complainants to dismiss the cross-bill for want of equity; for the same reason to dissolve the injunction granted thereon, and to discharge the same. These motions, together with a demurrer to the bill, and one to test the sufficiency of the pleas, were duly submitted to the chancellor for decrees in vacation, and separate decrees were rendered thereon overruling the demurrer, sustaining the pleas, overruling the motions to dissolve and discharge the injunction theretofore granted, and from the three last named decrees, the appeals are prosecuted, and errors are separately assigned.

It is a fundamental principle of equity, that he who seeks equity must do equity, and he who comes into equity must come with clean hands. "Whenever a party, who, as actor seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." 1 Pom. Eq. Jur. (2d Ed.) §§ 397, 399.

"He who does iniquity, shall not have equity." 11 Am. & Eng. Ency. Law, 162, 163.

The pleas as contended by appellees, fully set up the fact that complainant in the original bill has violated the contract in respect to its express provisions, and also in respect to the objections imposed by law, growing out of the contract in the several matters as shown therein. He is, therefore, in no condition to invoke the aid of an equity court.

It should be added, that the court below, on application of cross-complainants, modified the injunction granted to complainants, on the filing of the original bill. It appears, there was no error in either of the decrees appealed from, and they are severally affirmed. *Coleman & Davis v. Elliott* (Ala.) 40 South. 666.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

FINCH v. SMITH.

(Supreme Court of Alabama. April 3, 1906.
On Rehearing, June 30, 1906.)

1. PARTITION—PROBATE COURT—JURISDICTION—BILL.

Code 1896, § 3178, provides that any property held by joint owners or tenants in common may be decreed to be sold by the probate court on the written application of any one or more of them, when the property cannot be equitably divided or partitioned among them, etc. *Held*, that an averment in a petition for partition under such action that the property could not be equitably divided was jurisdictional, and that on a failure of proof thereof the petition was properly dismissed.

2. SAME—EQUITABLE DIVISION—DETERMINATION.

On a petition for partition in the probate court by a sale of the land, as authorized by Code 1896, § 3178, the fact of equitable division of the property in specie cannot be determined by the efficiency or inefficiency of the mode of allotment provided by section 3169 by lot, requiring the interests to be equal, but must be determined on the answer to the question whether it can be equitably divided in kind by the probate or chancery court.

3. SAME—PROCEEDING IN CHANCERY.

Where land sought to be partitioned can be equitably divided, but the remedy by allotment in the probate court is ineffectual to that end, the party desiring a division should proceed in chancery for an equitable division.

4. SAME—SALE.

Where land sought to be partitioned cannot be equitably divided in kind, a proceeding may be maintained either in the probate or chancery court for a sale of the property.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 93, 94, 97.]

5. JUDGMENT—FINAL DECREE—CONCLUSIVENESS—JURISDICTION.

Where partition is sought in the probate court, whether in kind or by sale, the decree on final hearing is conclusive until reversed on appeal, excluding the jurisdiction of the chancery court, in the absence of some special ground for the interposition of equity.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 990, 1154.]

6. COURTS—CONCURRENT JURISDICTION—ACQUISITION.

Though the statutory jurisdiction of the probate and chancery courts to partition property is concurrent, the tribunal first acquiring jurisdiction is entitled to exercise the same exclusive of the other.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 1229, 1232, 1234.]

Simpson, J., dissenting.

Appeal from Probate Court, Bibb County; W. L. Pratt, Judge.

"To be officially reported."

Action by K. S. Finch against Charleton G. Smith. From a decree dismissing the petition, petitioner appeals. Affirmed on rehearing.

Ledbeater & Johnson, for appellant. Gibson & Davis, J. R. Satterfield, and Ward & Houghton, for appellee.

SIMPSON, J. This was a petition for the sale of certain property for partition among joint owners. The petition as amended alleges that the petitioner and the defendants

own a certain tract of land "subject to a certain lease," etc., and prays that said real estate be sold for partition.

Much of the evidence and also of the argument is devoted to the question as to whether a partition of the land could be made; it being contended that, upon account of the coal and expense of ascertaining how much coal lies under the land, such a subdivision of it would be impossible. The averments and the evidence show that the entire tract of land had been leased for 20 years to a party who has the right to possession of the surface, with the right to dig all the coal, and he is to pay therefor certain amounts annually (not less than a certain minimum) as royalty to a certain bank, which is made the agent of the lessors to receive the money and distribute it among them according to their respective interests. It is evident that the lessors cannot by any voluntary action or proceeding in court change the terms of the contract of the lessees. In fact, the lease was a sale of a certain interest in the land. *Warren v. Wagner*, 75 Ala. 190, 51 Am. Rep. 446; *Crocker v. Cotting* (Mass.) 48 N. E. 1023, 39 L. R. A. 215, 64 Am. St. Rep. 278; *Metcalf v. Miller* (Mich.) 56 N. W. 16, 35 Am. St. Rep. 617, 620. So that all that remains for partition or sale is the interest of the parties in the land, subject to the lease.

The authorities declare that the right of partition is absolute, whatever may be the inconvenience caused thereby. But, although courts of equity by their extensive powers could grant this right to the citizen in almost every case, yet in order to relieve the inequities and inconvenience which sometimes attend an actual partition, it is customary now to provide by the statute for the sale in lieu of the partition in certain cases. 21 Am. & Eng. Ency. Law, § 1197; 3 Pom. Eq. Jur. § 1390. Our own statute provides that "property, real, personal or mixed held by joint owners or tenants in common * * * may be decreed to be sold * * * when the same cannot be equitably divided or partitioned among them." The jurisdiction was at first given to the probate court alone, but was afterwards extended to the chancery court, and, when our decisions of a later date use the expression that the right of partition is absolute, they must mean that the right of partition, either by actual division or by sale, is absolute; otherwise, there never could be a sale. The statutes indicate that the courts declare that partition is preferred, and the sale is allowed only in the cases provided for by statute. Thus, in the case in which a sale was granted for partition, this court refers to the right as absolute. *Mylin v. King*, 139 Ala. 319, 326, 327, 35 South. 998. The court in another case states that two modes of partition are provided for by statute; that is, "actual partition, or partition by sale of the property and division of the proceeds." *McQueen v. Turner*, 91 Ala. 277, 8 South. 863. "Partition

or sale is a matter of right." *Cates v. Johnson*, 109 Ala. 126, 128, 19 South. 418.

Did the fact that the property had been leased, as described, operate as an obstacle in the way of the right of one of the joint owners to a partition either by actual partition or by sale? It is claimed that this is analogous to a reversion, and the case of *Wilkinson v. Stuart*, 74 Ala. 198, is cited to show that there can be no partition of a reversionary interest. In that case, a petition had been filed in the probate court for sale for partition, and a bill was filed in the chancery court for partition (the chancery court, at the time, not having any jurisdiction to sell for partition). It was admitted that the probate court, having acquired jurisdiction, must continue in its exercise unless facts or circumstances of special equitable cognizance are shown to exist which render inadequate the statutory jurisdiction. Page 203. Those special circumstances were shown, and the chancery court took jurisdiction for strict partition. In that case the court of equity was acting upon its original jurisdiction simply to partition, and according to the law it seems that partition could not be had of a reversion under the general jurisdiction of the court. 1 *Washburn on Real Property* (3d Ed.) 584, 428. So the court did not pass upon the right of sale for partition under the statute. In the case of *West v. West*, 90 Ala. 458, 7 South. 830, a part of the lands held by the parties was subject to a dower interest, and the petition for partition omitted that part; the only question decided being that the rule against partition by parcel did not apply to that case, though it does seem to be taken for granted that a partition (not a sale) could not be had of the reversion. *West v. West*, supra.

Our statutes seem to intend that all interests in land shall be subject to partition, either by actual allotment or by sale. However that may be, it seems clear that the existence of a lease is not a bar to a partition of the residue. 21 Am. & Eng. Ency. Law (2d Ed.) 1201. Under a statute similar to ours, the Supreme Court of Nebraska, after a careful examination of the authorities, granted a partition of lands, subject to a lease, providing specially for the preservation of the lease. *Oliver v. Lansing*, 70 N. W. 369, 372, 373. The Supreme Court of Missouri also granted a petition for partition, subject to a mining lease, especially preserving said lease, and providing that the royalties should continue to be paid in accordance with the terms of the lease. *Haeussler v. M. Iron Co.*, 110 Mo. 188, 19 S. W. 75, 16 L. R. A. 220, 33 Am. St. Rep. 431, 435, 436. In this case the court also decided that an agreement not to institute proceedings for partition was an unreasonable restraint on the enjoyment and use of the property, and void. To the same effect is the decision of the Supreme Court of Massachusetts, in the case in which there was an easement of right of way over the

land; the court quoting from Sir William Grant that "a partition never affects the rights of third parties." *Crocker v. Cotting* (Ala.) 48 N. E. 1023, 39 L. R. A. 215, 217, 64 Am. St. Rep. 278. See, also, *Willard v. Willard*, 145 U. S. 116, 12 Sup. Ct. 818, 36 L. Ed. 644; *Woodworth v. Campbell*, 5 Paige (N. Y.) 518.

The question then arises whether, in the case at bar, the petitioner is entitled to a sale of the property, or whether the sale should be refused on the ground that the property can be equitably partitioned among the parties in interest. And at this point it is claimed by the appellee that the meaning of the provision in the statute is that, if a court of equity with its enlarged powers of procedure could effect an equitable partition, then the probate court must refuse the sale. In accordance with the previous decisions of this court, we hold that the two jurisdictions are distinct, that each court proceeds according to its own powers and mode of proceeding, and that the probate court can consider only its own powers in determining whether the property can be equitably divided. If it were otherwise, the probate court might undertake to declare that a court of equity could make a partition, refuse to grant the order of sale, and when the matter reached the chancery court that court might take a different view. The probate court, having first obtained jurisdiction, retains it and proceeds according to its own mode of procedure and powers, unless by reason of there being special equitable grounds the matter is removed to the chancery court. *Wilkinson v. Stewart*, 74 Ala. 198, 203; *Donnor v. Quartermas*, 90 Ala. 164, 170, 171, 8 South. 715, 24 Am. St. Rep. 778; *Marshall v. Marshall*, 86 Ala. 383, 388, 389, 5 South. 475; *Morrison v. Morrison*, 105 Ala. 637, 17 South. 109.

On the question as to whether this land could be equitably divided there is a conflict in the testimony; but, though the witnesses were directing their attention to the matter of distributing the interest in the coal being made by the lessee, which has been eliminated by what has been said, yet there was a preponderance of the testimony to the effect that the land could be equitably partitioned. However that may be, the testimony of petitioner's witnesses shows that the most valuable seam would be worked out in 12 or 18 months, and that very little coal that is workable has been found beyond that, and that lands adjoining have a market value. Of course, no one can tell exactly whether any more coal will be discovered during the 10 years which the lease has to run, or whether better methods may be devised for working which might render seams workable which are now worthless; but it is not necessary to enter into these speculations. It appears sufficiently clear at the present time that the interest of the parties in these lands subject to the right of the lessee has a market value

and could be partitioned with as much accuracy as usually attends the partition of lands, if the interest of the parties was such as to authorize it. So that on that ground there would be no ground for the order of sale.

The most serious ground which presents itself here is that some of the parties own one-eighth and others own one-twelfth interest each, while under our statute and decisions a probate court cannot partition except in the way pointed out by the statute, which is by lot, requiring the interest to be equal. Code 1896, § 3169; *Terrell v. Cunningham*, 70 Ala. 100, 106; *Ward v. Corbett*, 72 Ala. 438. It appears from the petition and answers that there are six persons each owning one-twelfth and four persons each owning one-eighth of the property, the four-eighths being equal to six-twelfths or one-half of the property, and in order to obviate the difficulty suggested the parties who own the four-eighths offer in their answer to receive one-half of the land by allotment as their share, as they desire to hold it together. The court sustained a demurrer which was improperly interposed to this part of the answer, but this is not reversible error, as the matter alleged was no answer to the petition. It would have been better to have stricken it from the answer. This answer could not meet the difficulty, as there was no proposition before the court to partition, but only to sell, and no binding obligation on the parties to accept that kind of allotment in case of such proceedings being instituted. Hence the petitioner was entitled to the sale.

The objection to the introduction of oral testimony by the defendants was properly overruled. Section 3181 of the Code of 1896 requires that the evidence in support of the application must be taken as in chancery cases, but this does not refer to the testimony introduced by the defendant. *Garrett v. Bruner*, 59 Ala. 513; *Garner v. Tony*, 107 Ala. 352, 18 South. 161.

The decree of the probate court is reversed and annulled, and the cause is remanded to the probate court, with the direction that a decree be there entered in this cause providing for the sale according to the statute of the interest of the parties in the lands described, subject to the lease held by the Bessemer Land & Improvement Company and H. F. De Bardelaben, which lease is not to be in any manner disturbed or affected by this decree; the proceeds of said sale to be distributed among the parties in interest in accordance with the statute.

Reversed and remanded.

On Rehearing.

TYSON, J. The jurisdiction of the court, in the opinion, is rested upon the fact that the property cannot be partitioned in kind because it cannot be allotted under the statute (section 3169), on account of the

shares of the respective tenants in common being unequal, instead of upon the necessary averment contained in the petition that it cannot be equitably divided. Section 3178 of the Code of 1896. That this is a jurisdictional averment not only appears from the plain language of the statute, but is also thoroughly settled by a number of our decisions. *Fennell v. Tucker*, 49 Ala. 453; *Morgan v. Farned*, 83 Ala. 367, 370, 8 South. 798; *Inman v. Prout*, 90 Ala. 362, 364, 7 South. 842. It is scarcely necessary to say that this averment must be proven, and, if not proven, the petition should have been dismissed, as was done.

The fact of equitable division of the property in specie cannot be determined upon the efficiency or inefficiency of the mode of allotment provided by section 3169 of the Code, but must be determined upon the answer to the question whether it can be equitably divided in kind by the probate or chancery court. If it can be so equitably partitioned in either jurisdiction, and the remedy by allotment is ineffectual to that end in the probate court, the chancery court can and does afford the remedy, and the party desiring the division should proceed in that court. On the other hand, if it cannot be equitably partitioned in kind, then either jurisdiction may be resorted to for a sale. At all events, whether a partition in kind or for sale is sought in the probate court, the decree on final hearing is conclusive until reversed on appeal, excluding the jurisdiction of the other tribunal unless there is some special equitable ground for the interposition of equity. *Morrison v. Morrison*, 105 Ala. 637, 17 South. 109. Both tribunals, it is needless to say, derive their jurisdiction to sell property for partition under the statutes, and, while concurrent, the tribunal first acquiring jurisdiction is exclusive. *Marshall v. Marshall*, 86 Ala. 383, 5 South. 475. There therefore need be felt on such apprehension as expressed in the opinion of Justice SIMPSON.

The decree appealed from is affirmed. All the Justices concur, except SIMPSON, J., who adheres to his original opinion.

McCREARY et al. v. JACKSON LUMBER CO.

(Supreme Court of Alabama. June 5, 1906.
Rehearing Denied June 30, 1906.)

1. EJECTMENT—POSSESSION—QUESTION FOR JURY.

Where, in ejectment, a witness testified that the grantor of plaintiff's ancestor was in possession when he conveyed the land, whether such ancestor was in fact in possession was for the jury, though the witness enumerated certain possessory acts of such grantor, not in themselves sufficient to show actual possession, but not shown to be the only possessory acts performed.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 307, 308.]

2. SAME—OLDER POSSESSION.

Where neither party in ejectment has the legal title, the older possession gives the better right, which is not defeated by a subsequent entry and occupation by the opposing claimant, until it ripens into a title by adverse possession.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 39.]

3. SAME—POSSESSION—COLOR OF TITLE—CONTINUOUS POSSESSION.

One claiming by prior possession under color of title cannot recover in ejectment, where the evidence fails to show continuous possession to the time of dispossession by the defendant, or an intention to return.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 30-41.]

4. SAME—ADVERSE CLAIM—NOTICE.

Defendant's prior grantor having abandoned the land for 25 years, and her deed to the land not having been recorded until 1890, there was nothing to put plaintiff's grantor on notice that defendant's prior grantor had an adverse claim of possession in 1874, or when the land was sold to plaintiff's ancestor in 1882; and hence, if plaintiff acquired a prior possession through such grantor, he would be entitled to recover in ejectment against a mere trespasser or one claiming under a later possession, provided defendant had not acquired possession peaceably and in good faith under color of title.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 18-20.]

5. SAME—OUTSTANDING TITLE.

Where, in ejectment, defendant proved color of title and a bona fide purchase from those who were in possession of the land, he was relieved of proving an outstanding title by plaintiff's proof that the title was in a patentee with whom plaintiff was in no wise connected.

6. ADVERSE POSSESSION—ELEMENTS—PROOF.

In order to establish a title to land by adverse possession, it must be shown that for a period of 10 years the claimant and those under whom he claims held a hostile possession under claim of right that was actual, exclusive, open, notorious, and continuous.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 65-76.]

7. SAME—QUESTION FOR JURY.

Where the grantor of plaintiff's ancestor had possession of the land prior to the sale thereof for eight years, after which plaintiff's ancestor employed persons to look after and go over the land several times, and he paid the taxes up to the time of his death, and his sons paid the same after his death, whether plaintiff had title by adverse possession was for the jury.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 691-698.]

8. APPEAL—ASSIGNMENT OF ERROR—EXCLUSION OF EVIDENCE—SUFFICIENCY.

Where an assignment of error objected to the exclusion of evidence on defendant's motion, and referred to "_____ page of record," and it appeared that the court sustained two separate and distinct motions to exclude certain evidence, one of which rulings was correct, the assignment was unavailable.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3083.]

9. EVIDENCE—OPINION EVIDENCE—FACTS OR OPINIONS—TITLE.

In ejectment, it was proper to exclude evidence of a witness that he was in possession of the title.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2172.]

10. APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

Where a witness identified a paper which was in fact a deed and was introduced in evidence, the admission of her conclusion or opinion as to what kind of an instrument it was held harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4161–4163.]

11. DEEDS—EXECUTION—WITNESSES.

Where the grantor of a deed writes his own name, it is sufficient if the deed is attested by one witness, as provided by Code 1896, § 982.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 107.]

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

"To be officially reported."

Ejectment by Ida McCreary and others against the Jackson Lumber Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

James F. Jones, for appellants. B. H. Lewis, for appellee.

ANDERSON, J. When this case was here before, the court reiterated the doctrine, so often laid down by the courts of the land, "that a plaintiff in ejectment must recover upon the strength of his own title and must show a valid title in himself, whether the defendant's title be valid or not; and, the defendant being in possession, the plaintiff cannot recover against him without showing a better muniment of title to the land than his or that he has acquired title by adverse possession." *Jackson Lumber Co. v. McCreary*, 137 Ala. 278, 34 South. 850. Upon the former appeal this court held that the defendant was entitled to the general affirmative charge because the plaintiff had shown no legal title, and that the evidence also failed to show sufficiently clear the possession of any one under whom they claimed to hold.

There was no evidence as to the possession of Donaldson. One Morrow does testify that "A. F. Jackson owned and was in possession of said N. E. ¼ of section 36, township 1, range 18, from the time he bought it from W. F. Donaldson until he sold it to John Findley about the year 1882," a period of eight years. It is true that the witness, in detailing the possessory acts of Jackson, did not enumerate sufficient acts to show actual possession; but he nowhere stated that these were the only possessory acts, and, having previously testified to the collective fact that Jackson was in possession, it became a question for the determination of the jury as to whether Jackson was in the actual possession of the land when he conveyed it to Findley, the ancestor of the plaintiffs. If he was, the plaintiffs made out a prima facie case. The defendant claims under the McGuirks, and Mrs. McGuirk testified that "they lived upon the land and were in actual possession from 1861 to the fall of 1865; that she then left and never returned to the land until 1890

(25 years afterwards), when she resided on it for 2 years, and then sold it to the defendant." The McGuirks went into the possession of said property in 1861 under a deed, and it is undisputed that they had an older actual possession. It is settled law that, "when neither party has the true title, the older possession gives the better right, and such right is not defeated by a subsequent entry and occupation by the opposing claimant until it ripens into a title by adverse possession." 3 Mayfield's Dig. p. 122, § 94, and cases there cited. The rule is also settled that one claiming by prior possession under color of title cannot recover where the evidence fails to show continuous possession to the time of dispossession by the defendant, or an animus revertendi. *Newell on Ejectment*, 364; *Smoot v. Lecatt*, 1 Stew. 590; *Sabariego v. Maverick*, 124 U. S. 261, 8 Sup. Ct. 461, 31 L. Ed. 430. Mrs. McGuirk having abandoned the land for 25 years, there was evidently no animus revertendi; and her deed from the Seglers was not recorded until the year 1890, so there was nothing to put Jackson on notice that she had an adverse claim of possession when he bought the land from Donaldson in 1874, or when it was sold to Findley in 1882. Therefore, if the plaintiffs acquired a prior possession through their grantors, they would be entitled to recover as against a mere trespasser on the land or one claiming only under a later possession. "And according to the prevailing rule the plaintiff's right of recovery in such case cannot be resisted by showing that there is or may be an outstanding title in another." 10 Am. & Eng. Ency. Law, 487; *Green v. Jordan*, 83 Ala. 220, 3 South. 317, 3 Am. St. Rep. 711; *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776.

The foregoing rule does not prevail where the defendant has acquired the possession peaceably and in good faith under color of title. 10 Am. & Eng. Ency. Law, 488, and cases there cited; *Doe ex dem. v. Edmondson* (Ala.) 40 South. 505; *Wilson v. Glenn*, 68 Ala. 383. In the case at bar the defendant proved color of title and a bona fide purchase from those who were in possession of the land, and which would enable it to defeat the plaintiffs' recovery by showing an outstanding title without connecting itself with the same. But the defendant was relieved of that in this case by the plaintiffs, who showed the title to be in Thomas Leonard, the patentee, and with whom the plaintiffs were in no wise connected. These facts having been shown, the plaintiffs were then put to establishing a title by adverse possession in order to recover. In order for a party to establish a title to land by adverse possession, it must be shown that for a period of 10 years he and those under whom he claims held a hostile possession under claim of right; that it was actual, exclusive, open, notorious, and continuous. *Chastang v. Chastang* (Ala.) 87 South. 799; *Lawrence v.*

Ala. Land Co. (Ala.) 41 South. 612. Conceding that the possession of Jackson was one for the jury, it covered a period of only eight years and which was insufficient in point of time to establish adverse possession. The evidence shows that after Findley bought the land he had parties to look after it and go over it several times, and that he paid the taxes up to the time of his death and his sons did so after his death. These acts were sufficient to make the question of adverse possession one for the jury, and if the plaintiffs and those under whom they held had been in the adverse possession for ten years before the commencement of the suit and before defendant's possession commenced, they were entitled to recover. The trial court erred in giving the affirmative charge for the defendant.

We find but one assignment of error as to the exclusion of evidence upon the motion of the defendant, and which refers to "_____ page of record," and as we find that the court sustained two separate and distinct motions to exclude certain evidence, we are at a loss to know as to which ruling the assignment relates, and as there was no error in one of them, even if in the other, which we do not decide, the assignment could not avail the plaintiffs. It was proper to exclude the evidence of the witness: "I was in possession of the title."

If there was any error in the question and answer of the witness Mary McGuirk with reference to the deed, it was error without injury, as she identified the paper which was in fact put in evidence and was there to show for itself, and eliminated any conclusion or opinion of the witness as to what kind of an instrument it was, as it was before the court and was in fact a deed. Nor was the objection as to the execution of the deed good, as the signatures of the grantors seem to have been written by them, and, while attested by one witness who signed by mark, it was also attested by another witness who wrote his name. If the grantor of a deed writes his own name, it is sufficient if it be attested by one witness. This is the law now, and was when this deed was executed in 1863. Section 1266 of the Code of 1852, which is included in section 982 of the Code of 1896.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON, TYSON, SIMPSON, and DENSON, JJ., concur.

WILSON v. TAYLOR.

(Supreme Court of Alabama. June 30, 1906.)

1. TRIAL—AFFIRMATIVE CHARGE.

Where issue was joined on defendant's second plea, and evidence under such issue was in conflict, there being evidence tending to support the plea, it was error for the court to

charge of its own motion that under the evidence plaintiff was entitled to recover, etc.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 391.]

2. ASSUMPSIT—ISSUES AND PROOF.

Where a suit was brought on the common counts for the use of certain oxen, plaintiff was not confined to proving a contract to pay a particular price in order to entitle him to a verdict.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Assumpsit, Action of, § 133; vol. 50, Cent. Dig. Work and Labor, § 43.]

Appeal from Circuit Court, Houston County; Terry Richardson, Judge.

"Not officially reported."

Action by J. W. Taylor, as administrator, etc., against W. S. Wilson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action on the common counts, begun by appellee against appellant in a justice court, carried by appeal to the circuit court where the defendant interposed the following pleas: (1) The general issue. (2) That the plaintiff knew for what use the oxen were wanted at the time of the contract, and the defendant avers that said oxen were wholly unfit for said work, and he (defendant) received no benefit for their service on account of not being able to work said oxen. (3) Tender, etc. After the evidence was in, the court in his oral charge to the jury said "that the defendant had failed to prove his plea of tender, and that the jury must find against him on his plea of tender," and also as follows: "Under the evidence the plaintiff is entitled to recover, and you must find for the plaintiff, and the only thing for your determination is, what was the contract price agreed to be paid for the use of the team? Whatever you find was agreed on between the plaintiff and defendant for the use of said team per day will be the amount of the plaintiff's recovery, and you will so find." Thereupon the defendant requested the court in writing to give the following charges, which the court declined to give: "(1) The burden of proof is on the plaintiff to establish the contract price he sets up, and if the evidence on this point is left in a state of doubt and confusion, and from the evidence the jury is not reasonably satisfied that plaintiff has proven his case, they must find for the defendant. (2) The burden of proof is on the plaintiff to establish his contract, and if he has failed to do so the jury must find for the defendant. (3) The affirmative charge for defendant."

Reid & Hill, for appellant. Espy & Farmer, for appellee.

DOWDELL, J. Issue was joined on the defendant's second plea. The evidence under this issue, was in conflict. There was evidence tending to support this plea. The court, therefore, erred in the parts of its charge ex mero motu to the jury, which were excepted to by the defendant.

The suit was on the common counts, and the plaintiff was, therefore, not confined to the establishing of any particular contract to entitle him to a verdict under the issues and evidence in the case. The jury might have found for him on the defendant's theory as to the contract under the issues and evidence. The court, therefore, committed no error in the refusal of the written charges requested by the defendant.

For the error pointed out, the judgment of the court will be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

SMITH v. COLLINS.

(Supreme Court of Alabama. May 8, 1906.
On Rehearing, June 30, 1906.)

1. CANCELLATION OF INSTRUMENTS—FRAUD—DEGREE OF PROOF.

In order to support a decree rescinding or canceling a lease for fraud, the evidence must amount to more than a mere probability of the truth of the charge of fraud or a mere preponderance of the evidence that such charges are true.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 102.]

2. SAME—ISSUES AND PROOF.

On a bill to cancel a lease for fraud, the fraud must be distinctly alleged and clearly proved.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 78.]

3. LANDLORD AND TENANT—CONSIDERATION—INADEQUACY.

Inadequacy of consideration is not of itself a sufficient ground for canceling a lease, unless it is so gross that it shocks the conscience and furnishes satisfactory evidence of fraud.

Appeal from Chancery Court, Jefferson County; John J. Altman, Chancellor.

"Not officially reported."

Bill by W. L. Smith against James A. Collins. From a decree in favor of defendant, plaintiff appeals. Decree modified and affirmed.

This was a bill filed by appellant seeking to have annulled and vacated a lease contract. The allegations of the bill are that there is no consideration for the lease, except \$1, and that the profits to be derived therefrom was royalty on coal to be mined therefrom by said Collins; that the lands were remote from a railroad, and that Collins represented, before the lease was executed, that he had procured an agreement with the Louisville & Nashville Railroad to extend its lines to these lands; that complainant relied on this representation and that this induced him to execute the lease; that Collins represented that he had obtained a large sum of money with which to operate

the mine, and that respondent relied on this representation and was induced thereby to execute the lease; that both of these representations were false and a fraud on orator. There was fraud alleged in the manner in which the signing of the lease was procured. On a submission of the cause, the chancellor decreed on the evidence that the complainant was not entitled to relief asked for, and dismissed the bill.

Vaughan & Davidson and Smith & Smith, for appellant. Shugart & Bell, for appellee.

TYSON, J. The question presented by this record for our determination is one of fact. The degree of proof required to rescind or cancel a contract because of fraudulent misrepresentations is more than a mere probability of the truth of the charge of fraud or a mere preponderance of the evidence that such charges are true. "The representations themselves and that they were false and fraudulently made must be clearly established." The fraud must be distinctly alleged and clearly proven. *Johnson v. Rogers*, 112 Ala. 576, 20 South. 929. The evidence in this case is not, in our opinion, sufficient to convince the judicial mind that the execution of the lease sought to be canceled was obtained by fraud.

Much is said in brief of appellant's counsel attacking the lease upon the ground that it is unconscionable—that the consideration is grossly inadequate. It seems to be the law that, in the absence of other inequitable incidents, inadequacy of price is not a sufficient ground for canceling a contract or conveyance, unless it is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud. "Even then fraud, and not inadequacy of price, is the true and only cause for the interposition of equity and the granting of relief." 2 Pom. Eq. § 929.

There is no proof that the royalty agreed to be paid by the respondent upon the coal to be received by him or his assignee, in the event the lease is assigned, is not a full and adequate consideration for the lease. This court cannot judicially know that it is not. Besides, this ground is not alleged in the bill; and clearly, in the absence of an averment, no matter what the evidence may establish with respect to it, no relief could be had.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

On Rehearing.

PER CURIAM. Decree modified, so as to dismiss bill without prejudice; and, as modified, affirmed.

ABEL v. COLLINS.

(Supreme Court of Alabama. May 8, 1908.
On Rehearing, June 30, 1908.)

Appeal from Chancery Court, Jefferson County; John J. Altman, Chancellor.

"Not officially reported."

Action by John B. Abel against James A. Collins. From a decree in favor of defendant, plaintiff appeals. Modified and affirmed.

Vaughan & Davidson and Smith & Smith, for appellant. Robert N. Bell, for appellee.

TYSON, J. This case is affirmed, on authority of the case of *Smith v. Collins* (Ala.) 41 South. 825

On Rehearing.

PER CURIAM. Decree modified, so as to dismiss bill without prejudice, and application for rehearing overruled.

LOUISVILLE & N. R. CO. v. DUNLAP.

(Supreme Court of Alabama. June 30, 1906.)

1. CARRIERS—INJURY TO GOODS—EXEMPTION FROM LIABILITY—BURDEN OF PROOF.

Defendant, in an action for injury to goods while in its possession as carrier, has the burden of showing its exemption from liability, under the provision of the bill of lading that it should not be liable for injury by robbery, riots, and strikes.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 722.]

2. SAME—INJURY BY ROBBERS.

A mere depredator is not a robber, within a bill of lading exempting a carrier from liability for injury to the shipment caused by "robbery."

3. SAME—NATURE OF POSSESSION OF GOODS—EVIDENCE.

For the purpose of showing that goods, when injured, were in the possession of defendant as carrier and not as warehouseman, evidence that the failure of defendant's agent to deliver the goods on the morning of their arrival, before they were injured, to those plaintiff sent for them, was wrongful, is material.

4. DAMAGES—EVIDENCE.

It is competent for a witness who had seen goods in their damaged condition soon after oil had been poured over them to testify in an action for damages therefor as to their condition six months thereafter, as tending to show the lasting effect the oil had on them.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 462.]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"To be officially reported."

Action by Alex Dunlap against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Tillman, Grubb, Bradley & Morrow, for appellant. Frank S. White & Son, for appellee.

TYSON, J. The defendant is sought in this action to be made liable as a common carrier for damages sustained by plaintiff

to his goods, which were injured by kerosene oil being poured over them while in the depot structure of defendant. It is not insisted that defendant's common-law liability, which is that of an insurer, and therefore absolute, had terminated, and that of warehouseman had commenced, when the injury to the goods occurred. The condition of the goods is not denied, neither is there a controversy that such damage occurred to them while in defendant's possession. But defendant undertook to relieve itself of its common-law liability as an insurer by a special exception contained in the bill of lading which it issued to plaintiff. This exception was made the subject-matter of a special plea. The averment of the plea is that "in consideration of a reduced rate [which was granted to the plaintiff] the defendant shall not be liable for any loss to the property or for damage there-to caused by robbery, riots, and strikes while said shipment was in transit or while in depot at point of delivery, and the defendant avers that the damage to said shipment was caused either by robbers, riots, or strikes while in transit or in depot at point of delivery and without fault or negligence on its part."

It is not doubted but that plaintiff was bound to prove no more than that the goods were delivered to defendant and that they were damaged while in its possession, to make out a prima facie case for a recovery. When this was shown, as was done, the onus was then cast on the defendant to bring in itself within the exception pleaded. In other words, it was incumbent upon defendant to make a prima facie case of exculpation. *Gray's Ex'r v. Mobile Trade Company*, 55 Ala. 387, 399, 28 Am. Rep. 729. And in order to do this it was incumbent upon it to introduce evidence from which the jury would be authorized to find, or at least to infer, that the damage or injury done the goods was the act of a robber, rioter, or striker; for clearly, as to all other acts resulting in damage to them by whomsoever committed, if committed by a person not within the class named, the exception, or rather the exemption from its common-law liability, as shown by the exception, has no application, and that rule of liability is, of course, unaffected, and must govern. It is not insisted that the testimony in any degree shows that the kerosene oil was poured upon the goods by a rioter or striker within the meaning of those terms as employed in the exception. The insistence is that the act of depredation was committed by robbers, and yet it is conceded that it did not constitute legal robbery. The contention on this point is that the word "robbers" is to be taken in its ordinary sense, and not in its technical legal sense; that one of its synonyms is "depredator," etc. In the absence of something in the context to obviously show that the word was used in its ordinary sense, instead of its legal sense, its legal signification must be adopted.

Bragg v. State, 134 Ala. 172, 32 South. 767; *Endlich on the Interpretation of Statutes*, § 75; 17 Am. & Eng. Ency. Law (2d Ed.) p. 13.

The defendant having failed to exculpate itself from its common-law liability, the general affirmative charge, if requested by plaintiff, could have been properly given for him. This, of course, renders it unnecessary to review the exceptions reserved to the oral charge of the court, and its refusal to give the several written charges requested by defendant.

There remains only two other assignments of error to be disposed of. Both are predicated upon rulings of the court in admitting testimony against defendant's objection. The objection interposed to the question propounded to plaintiff on redirect examination was that it called for immaterial testimony. The answer to it was not only not immaterial, but relevant to the issue. It tended to show that the failure of defendant's agent to deliver the goods on the morning of their arrival, before they were damaged, to those whom plaintiff sent for them, was wrongful. In other words, it tended to establish that its station agent whose duty it was to deliver the goods to plaintiff was without proper excuse to do so. The pertinency of this is quite apparent in view of the fact, under the circumstance shown by the testimony, that it was important under the proceedings that defendant's common-law liability be shown not to have been terminated and that of warehouseman begun. *L. & N. R. R. Co. v. McGuire*, 79 Ala. 395.

Nor is there any merit in the remaining assignment. The witness had seen the goods in their damaged condition soon after the oil had been poured over them. It was, therefore, competent to ask him what their condition was six months after that, as tending to show the extent and lasting effect the oil had upon them.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

HEARD v. HEARD & LEE et al.

(Supreme Court of Alabama. June 30, 1906.)

VENDOR AND PURCHASER—CONTRACTS—LEASE—CONTRACT TO CONVEY.

A contract provided that plaintiff leased from the owner of certain land a tract containing 250 acres and agreed to pay \$205 for the year 1905, with the privilege of rerenting the property on the same terms for seven successive years, and that in case of such renewals, on full payment of the rent, the owner on completion of the period would convey the property to plaintiff in consideration of \$1, and the amount, with legal interest, of taxes paid pending the contract. *Held*, that such contract operated as a lease, and the annual payments as rent, so long as it was executory, and on completion of the payments it became a sale, at plaintiff's

option, on his paying \$1, taxes, and interest pending the contract.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 3.]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Chancellor.

"Not officially reported."

Action by George Heard against Heard & Lee and others. From a decree in favor of defendants, complainant appeals. Affirmed.

J. W. Strother and P. H. Watkin, for appellant. Thomas L. Bulger, for appellees.

HARALSON, J. George Heard filed this bill against Heard & Lee and others, respondents. It alleges, that complainant, about the year 1894, entered into a contract in writing with the American Freehold Land Mortgage Company of London, for the purchase of a certain described tract of land, for the sum of \$1,640, payable in eight equal annual installments of \$205, each, on or before November 1st, in each year.

The contract under which this statement of purchase is made, is, in substance as follows. It states, "That party of first part (the American Freehold Land Mortgage Company of London Limited) agrees to lease to the party of the second part (George Heard) a certain piece of land described as follows, (here follows a description of the land) containing 250 acres, more or less, and second party agrees to pay the sum of \$205.00 on or before November 1st, 1905, and do hereby pledge and mortgage for the faithful payment hereof his whole crop of corn and cotton grown and growing upon said land for and during said year, 1905. It is further stipulated and agreed, that the party of the second part shall have the privilege of making a contract for seven successive years after the present one, similar to this contract in all respects except as to amounts to be paid as rent, which for the year 1896 shall be \$205; for the year 1897, \$205; for the year 1898, \$205; for the year 1899, \$205; for the year 1900, \$205; for the year 1901, \$205; for the year 1902, \$205; and should said party of the second part renew his contract aforesaid for said seven years, and make such payment as is stipulated on said land faithfully and truly for the period of eight years successively, including the present year, then the party of the first part agrees to sell said land and make a warranty deed conveying the same to said party of the second part, if the said party of the second part desires to purchase the same, for the consideration of one dollar and the amount of money with legal interest thereon expended in payment of taxes pending this contract." Then follows a clause that this agreement is special and personal to party of second part and his heirs, and forbidding party of second part from selling this privilege, or releasing or purchasing the said land, without the consent in writing of the party of the first part

endorsed on the contract, and if the party of the second part should move off the land, the party forfeits and surrenders the privilege of releasing and purchasing.

The legal effect and operation of the contract is, that it should be considered and treated as a lease, and the annual payments, as rents, so long as it continued executory, and on the completion of the payments it should become a sale, if the party of the second part desired to purchase the same, paying one dollar and the amount paid out for taxes, with interest, pending the contract. *Davis v. Robert*, 89 Ala. 404, 8 South. 114, 18 Am. St. Rep. 126; *Wilkinson v. Roper*, 74 Ala. 140.

It is averred that complainant went into the possession of said land under said contract, and for several years made payments in accordance with its provisions, but that in 1899 the respondents, Heard & Lee, with whom complainant had been dealing for a number of years buying farm supplies from them, by means of misrepresentation and other undue advantage, got possession of said contract from complainant and by their misrepresentation secured from him a paper purporting to be an agreement by complainant to pay them rents for said land in 1899; that complainant did not know the character of the papers he was signing, made no agreement with respondents to sell them the land, or to surrender the interest in the same, and had no intention of doing so.

It was further alleged, that in the fall of 1898, complainant was, by procurement of said respondents declared to be of unsound mind, by the probate court of Tallapoosa county, in a proceeding instituted for that purpose, and that A. B. Lee, of the firm of Heard & Lee was appointed guardian of complainant, and that he has never made any settlement of his guardianship, although quite a considerable amount of property of complainant went into his hands as guardian.

It is averred that respondents claim said lands under and by virtue of said contract, which they have procured by said fraudulent means, took possession thereof, and have been in possession and control since 1900, and that the rent in that time was worth \$200 per year, etc.

Respondents answered denying that the land company entered into a contract of sale of said land to complainant, and agreed, on the payment of his said notes, that it would execute and deliver to complainant a deed to said land, but avers, that on the 10th day of August, 1894, complainant made a contract with said land company, by which he leased or rented said lands for a term of years, from 1894, with the privilege each year, of renting on the same terms, for seven years thereafter,—1895–1902; that it was stipulated in said contract, that if complainant should make payments for the rent of said land for a period of eight years, then,

and in that event, the said land company agreed to sell and convey said lands to complainant, provided he desired to purchase the same. It is averred that complainant failed to pay off any of the amounts agreed to be paid for the rent of said lands for any of said years, and did not express any desire to the land company, to purchase said lands; that at complainant's request and for his benefit, respondents paid off the rent of said lands for the years 1895 up to and including 1898, and in each of those years, complainant became indebted, on other accounts in large sums of money which are specifically set out in paragraph three of the answer.

Respondents admit that in October, 1898, proceedings were had in the probate court to inquire into the soundness of the mind of complainant, but they are not informed as to the result of said proceeding; that respondent Lee was appointed guardian of complainant is not denied, but it is averred that on or about November 24, 1898, said probate court revoked, set aside and annulled all orders and decrees made in said case in October, 1898; and it is positively denied that respondent Lee took possession of complainant's person or property of any kind, and during the time of said guardianship, complainant was at liberty, went when and where he pleased, and had absolute control of his property of every kind. It is denied, that respondents or either of them, had anything to do or any connection with the inquisition that was instituted to inquire into the soundness of the mind of complainant.

It is further averred that, about the 8th day of February, 1899, complainant came to respondents and told them he was unable to comply with his contract entered into with the land company, and solicited them to take said contract off of his hands, at which time they made a trade with complainant by which he transferred and delivered to them his said contract with the land company for a valuable consideration; that on the 8th day of February, 1899, he made a written contract with respondents, by which he released his right as landlord to said land, turned over the possession of the same to respondents, and became their tenant, and as such made a crop on said land in the year 1899.

They deny that they made any representation or practiced any fraud upon complainant in procuring said rental contract from him, but that he signed the same after it was fully explained to and understood by him.

It is positively denied that complainant's signature was procured to said contract by fraud and misrepresentation, and deny that complainant did not know what he was signing, or was ignorant of its contents, or that they took advantage of complainant in any way to procure his signature to said contract.

They aver that at that time, the land company had and held complainant's four promissory notes for the rent of said land, for the years 1899, 1900, 1901 and 1902 of \$205 each, due and payable on the 1st of November of each year, and that by the agreement with complainant, respondents paid off each of said notes, and that the contract between complainant and respondents was ratified by the land company.

It is further averred, that respondents paid to the land company seven of complainant's notes, and, thereafter, on October 15, 1903, the land company executed and delivered a deed to said lands to respondents.

Much evidence was taken on each side but largely more for the complainant than for the respondents. It would be tedious and unprofitable to review it. It has been carefully examined. The evidence of complainant tends to sustain, in a measure, the averments of the bill, but there is some confusion and differences in the statements of witnesses, in it. They were nearly all ignorant persons, who testified from memory alone, to transactions long in the past. The evidence for respondents sustains the averments of their answer, is consistent and largely supported by record or written evidence. It satisfactorily appears, that when complainant transferred his lease to respondents, and entered into a contract to rent the land from them for 1899 no circumvention or fraud was practiced on him, but that everything was open and explained fully to him, and no unfairness seemed to have characterized the transaction. It was done, as appears, at his instance and request. It also further appears, as set up in the answer and proved, that respondents paid the land company each of complainant's notes.

The chancellor held, that the allegations of fraud set up in the bill, whereby respondents are alleged to have acquired or procured a transfer from complainant of his contract with the land company, are not sufficiently proven to entitle complainant to the relief prayed for in the bill, and he dismissed it.

Nothing has been discovered to cause dissent from this decree, but much to sustain it. Beyond this, further inquiry is not necessary.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

BIRMINGHAM RY., LIGHT & POWER CO.
v. CLARKE.

(Supreme Court of Alabama. June 7, 1906.
Rehearing Denied June 30, 1906.)

1. STREET RAILROADS—COLLISION WITH VEHICLE—PERSONAL INJURIES—ACTION—COMPLAINT.

In an action for injuries to plaintiff's intestate in a collision between his buggy and

defendant's street car, an allegation in the complaint that intestate was in a vehicle on a public highway on which defendant's cars were moving, near the intersection with another public highway, was sufficient to show the relation of the parties from which a duty to exercise care could be inferred.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 224.]

2. APPEAL—PLEADING—HARMLESS ERROR.

Where an affirmative charge in favor of defendant was given with reference to a count in a complaint, any error with reference to a ruling on a demurrer to such count was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4105.]

3. STREET RAILROADS—TRAVELERS ON HIGHWAYS—INJURIES—CARE REQUIRED.

It is the duty of operators of street cars to always keep their cars under reasonable control and keep a diligent lookout for persons who may go or be on the tracks in the streets, and on seeing any person on the street in danger of being run upon to use reasonable diligence to avoid injuring him.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 172, 174, 175.]

4. TRIAL—REQUESTS TO CHARGE.

Where an instruction on a material issue is correct, if the party desires any further explanation as to the facts, it is his duty to request explanatory charges.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 623.]

5. STREET RAILROADS—TRAVELERS IN HIGHWAY—INJURIES—LAST CLEAR CHANCE.

If, after the driver of a vehicle by his own negligence has driven within the zone of danger from a street car, the motorman realizes his danger and negligently fails to do all reasonably within his power to avoid a collision, and a collision occurs from which the driver of the vehicle is killed, the driver's negligence would not be the proximate cause of his death, and would therefore be no defense to the negligence of the motorman.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Master and Servant, § 219.]

6. SAME—DUTY OF MOTORMAN.

The motorman of a street car is entitled to presume that a person traveling on a street will remain on that part of the street not occupied by the railway, at least until he shows by his actions that he is going to attempt to cross; and if the traveler, without looking to see whether a car is approaching, turns onto the track so suddenly that it is impossible to check the car in time to prevent an accident, the railway company is not liable for the consequences.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Master and Servant, § 192.]

7. TRIAL—REQUEST TO CHARGE—INSTRUCTIONS GIVEN.

An instruction that a motorman was not required to anticipate that intestate would turn his vehicle before he actually attempted to do so, and if, after he first made such attempt, and when he got on the track on which defendant's car was running, the vehicle was so close to the car that it could not have been stopped by the motorman properly using all the means at hand to prevent the injury, and proper signals were given as the car approached an intersecting avenue, the jury should find for defendant, did not cover a request to charge that the motorman was entitled to presume that intestate would remain on the right side of the street until he gave some outward indication that he was going to cross to the left-hand side, which instruction was erroneously refused.

8. STREET RAILROADS—DRIVERS OF VEHICLES —DEATH—CONTRIBUTORY NEGLIGENCE.

Where deceased drove across a street railway track in front of a moving street car, without stopping to look, and was killed in a collision which immediately followed, he was guilty of contributory negligence precluding a recovery.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Master and Servant, §§ 210, 212, 214, 215.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"Not officially reported."

Action by Peter Clarke, as administrator, etc., against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action for damages for personal injuries to a person traveling the public highway in a buggy struck by defendant's car, and death resulting. The complaint is as follows: "The plaintiff claims of the defendant \$20,000 as damages, for that heretofore, to wit, on the 24th day of March, 1901, defendant was operating a certain car by means of electricity upon and along a railway in and upon grade with a public highway in the city of Birmingham, Jefferson county, Alabama, to wit, South Twentieth street; that defendant so negligently conducted itself in and about the management and control of said car that, when the same was at a point upon said highway at or near the intersection of said highway with Avenue G, which was another public highway in said city, said car collided with a vehicle in or upon which plaintiff's intestate was, or with a vehicle or horse or other animal attached to said vehicle, and as a proximate consequence thereof said intestate was killed."

Demurrers were interposed as follows: "Said count is vague, indefinite, and uncertain. It does not appear from the facts stated therein that the defendant owed plaintiff's intestate any duty which it violated, for that it does not appear that the defendant was guilty of negligence, nor does it appear wherein the defendant was guilty of negligence." These demurrers being overruled, the defendant filed the plea of the general issue and three pleas of contributory negligence: (1) In the way and manner in which he drove and conducted his vehicle in crossing the track where he was struck; (2) driving vehicle on track without stopping, looking, and listening; (3) proximity of car known to deceased and the reckless and negligent driving across ahead of the approaching car.

The evidence tended to show that the deceased was a hack driver, and was driving at night alongside of the tracks of defendant on the avenue or street mentioned in the complaint, and turned across the track in front of an approaching car and was struck and killed. The plaintiff recovered judgment.

Plaintiff requested the following charges in writing, which the court gave: Charge 2:

"It is the duty of operators of street cars running on the public streets of Birmingham to always keep their cars in reasonable control, and keep a diligent lookout for persons who may go or be on the tracks in the streets, and upon seeing any person on the street in danger of being run upon by the car to use due diligence to avoid injuring him." Charge 5: "If, after the driver of a vehicle by his own negligence has driven his vehicle within the zone of danger, the motorman of a car realizes his danger and negligently fails to do all reasonably in his power to avoid killing the driver, and thereby kills the driver, then the previous negligence of the driver would not have proximately contributed to his own death, and would be no defense to the negligence of the motorman." Charge 6: "Even if the jury should believe from the evidence that the motorman could not have avoided striking the vehicle, yet, if the jury are reasonably satisfied from the evidence that the motorman could by the exercise of due diligence have avoided the killing of West Flint, and that he did cause the killing of West Flint as charged in the first count of plaintiff's complaint, then plaintiff's case is made out."

The defendant requested the court to give the following charge, which was refused: Charge 2: "The motorman on defendant's car had the right to presume that intestate would remain on the right-hand side of the street going south until intestate gave some outward indication that he was going to cross to the left-hand side of the street."

Charge 18 given for defendant: "The motorman was not required to anticipate that the intestate, West Flint, would turn his vehicle to the left before he actually attempted to do so, and if the jury believe that after intestate first made such an attempt, and when he got on the track on which defendant's car was running, the vehicle was so close to the car that the car could not have been stopped by the motorman properly using all the means at hand to prevent the injury, and if the jury believe that the proper signals were given as the car approached Avenue G, the jury must find for defendant."

The defendant also requested the affirmative charge, with hypothesis, which was refused.

Tillman, Grubb, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellees.

SIMPSON, J. This is an action brought by the appellee against the plaintiff for damages resulting from a personal injury to one West Flint, causing his death. Taking up the assignments of error in the order made by the brief of the appellant, the first count of the complaint is sufficient under the decisions of this court; the allegations that the intestate was in a vehicle on a public highway on which the cars were moving near

the intersection with another public highway being sufficient to show the relation of the parties from which the duty could be inferred. *L. & N. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Armstrong v. Montgomery St. Ry. Co.*, 123 Ala. 244, 26 South. 349. The record shows that the demurrer to the second count was sustained, that the count was amended, and that the court gave the general charge in favor of the defendant as to that count, so, if there was any error in regard to that matter, it was without injury.

The second charge given at the request of plaintiff asserts a correct principle of law. If the defendant had desired any further explanation as to the facts of this case, it could have asked for explanatory charges. The fifth charge, given at the instance of the plaintiff, asserts a correct principle of law. *R. R. & P. Company v. Brantley (Ala.)* 37 South. 700; *C. of G. Ry. v. Foshee*, 125 Ala. 218, 27 South. 1006.

Appellant excepts to the expression in charge 6, given at the instance of the plaintiff, "the plaintiff's case is made out" because it ignores the doctrine of contributory negligence. If so, the defendant could have requested an explanatory charge. *Sou. Ry. Co. v. Roebuck*, 132 Ala. 412, 31 South. 611; *E. T. V. & G. R. R. v. Clark*, 74 Ala. 443. This charge may have been abstract, but it does not appear that the jury were misled. 2 Mayfield's Dig. 565.

The street car company has a right to the use of its tracks, and the public likewise have the right to use the streets. To hold that the cars must check up whenever a vehicle is on the street near the track would be almost to prohibit the cars from running, except at a very low rate of speed, as vehicles are on the streets at almost all times. Consequently the motorman has a right to suppose that the person traveling on the street will remain on that part of the street not occupied by the railway, at least until he shows by his actions that he is going to attempt to cross, and if the traveler, without looking to see whether the car is approaching, turns into the track so suddenly that it is impossible to check it in time to prevent the accident, the company is not liable for the consequences. Hence the court erred in refusing to give the second charge requested by the defendant. *Birmingham Ry. & Elec. Co. v. Franscomb*, 124 Ala. 621, 624, 625, 27 South. 508.

The giving of charge 18 for the defendant was not equivalent to this charge, as that required also that the proper signals had been given as the car approached Avenue G, the failure to do which would have been simple negligence, and could not overcome the contributory negligence of the plaintiff. The evidence is without conflict that the deceased drove across the track in front of the moving car without stopping to look, and he was clearly guilty of contributory negligence.

There is no evidence of any such conduct on the part of the defendant as would overcome his contributory negligence. Consequently the court erred in refusing to give the third and fourth charges, being the general charge.

For the errors named, the judgment of the court is reversed, and the cause remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

WEBSTER v. DE BARDELEBEN et al.

(Supreme Court of Alabama. June 30, 1906.)

1. INJUNCTION—PRELIMINARY INJUNCTION—DISSOLUTION—DENIAL OF EQUITY.

When the allegations of a bill on which its equity depends are fully, directly, and completely denied in the answer, and none appears by the case made why the preliminary injunction should be retained, it should be dissolved.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 376.]

2. EQUITY—CROSS-BILL—DISMISSAL OF ORIGINAL BILL—EFFECT.

Where defendants filed a cross-bill alleging additional facts relating to the same subject-matter which was the basis of the original bill, but which were not alleged therein, and prayed for affirmative relief, the dismissal of the original bill for want of equity did not dispose of the cross-bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 774.]

3. INJUNCTION—CUTTING TIMBER—CROSS-BILL—SUFFICIENCY.

Defendants filed a cross-bill, alleging that complainant in the original bill, under a lease for the cutting of timber of specified dimensions, had removed timber from the lands without paying therefor under a temporary injunction obtained on the original bill; that complainant had also cut and carried away the most valuable trees, and left standing the less valuable ones which came within the terms of the contract, and had so mixed timber cut from the lands with timber cut from other lands that it was impossible to separate the same; that the value of the timber cut was more than \$1000, and because of such violations of the contract defendants had elected to cancel the contract and had so notified complainant, who paid no attention to such notice, but continued to cut and remove the timber; that complainant was insolvent, and would continue the act complained of, unless restrained; and that defendants would suffer irreparable loss, for which they had no adequate compensation or remedy. Held, that the cross-bill stated a case for equitable relief by injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 105.]

4. INJUNCTION—PRELIMINARY INJUNCTION—AFFIDAVITS.

In a suit for an injunction, affidavits are admissible in support of the allegations of the bill in cases of waste and where irreparable injury might ensue if the injunction was not granted.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 318.]

Appeal from Chancery Court, Elmore County; W. W. Whiteside, Chancellor.

"To be officially reported."

Bill by A. M. Webster against T. E. De Bardeleben and others. From a decree adverse to complainant, he appeals. Affirmed.

The bill in this case was filed by appellant against appellees, seeking to have a contract attached thereto construed and to enjoin appellees from interfering with the conduct of appellant's business in reference to the subject-matter of the contract, and to enjoin an attachment suit begun by appellees against appellant and levied upon certain property of the appellant. Appellees filed an answer specifically denying the allegations of the bill, and a cross-bill asking for affirmative relief, the allegations and purposes of which are sufficiently set out in the opinion. On a final hearing, the chancellor dissolved the injunction, dismissed the bill, but retained the cross-bill, and granted appellees affirmative relief thereunder.

The contract to be construed, as set out in the exhibit to the bill, was in the following language: "That this contract, entered into by and between T. E. De Bardeleben and her husband, E. L. De Bardeleben, of the first part, and A. M. Webster of the second part, made and executed on the 10th day of October, 1904, witnesseth, that parties of the first part have this day bargained and sold to the party of the second part all the pine and poplar trees that will square 20 cubic feet in one stick, which are now or may be growing or situated upon the land herein below described at this time or at any time before the 1st day of January, 1910, and for the price below named and conditions set forth. [Here follows a description of the land.] Now, in consideration of the premises as above set forth, the party of the second part agrees to purchase all the pine and poplar timber that will square 20 cubic feet in one stick, except as otherwise provided, and to cut and remove the same between the 1st day of January, 1905, and the 1st day of January, 1910, and to pay the parties of the first part the price of two cents per cubic foot for all the timber cut under the terms of this contract; the first payment to be made 60 days after the party of the second part commences to cut said timber, and to be for all the timber scaled up to that time at mill. And the party of the second part agrees to pay to the party of the first part at the end of each 60 days thereafter for all the timber which has already been scaled. It is agreed and understood between all of the parties of this contract that the party of the second part shall have the right to make roadways and erect sawmills and other machinery on said land, and to travel over said land, and to do and perform any other act that will be necessary to cut and remove said timber off of said lands, provided the party of the second part does not damage any growing crop on the lands in cultivation. It is agreed that this contract shall go into effect on the 1st day of January, 1905, and expire on the 1st day of January, 1910. It is further understood and agreed between the parties that, should either one of them violate any of the terms of this contract, then the same shall

be null and void, and not binding on the other party." It was signed in duplicate by all the parties thereto on the day and date above written.

F. W. Lull and E. S. Thigpen, for appellant. J. M. Holley, D. D. Askew, and Martin & Martin, for appellees.

HARALSON, J. The case is to be considered in two aspects. The first is, whether under the original bill, as filed by the complainant therein, A. M. Webster, the appellant here, against De Bardeleben and wife, the appellees, he was entitled to the relief he sought in the perpetuation of the preliminary injunction granted to him. The chancellor denied such relief.

When the allegations of a bill, "upon which its equity depends, are fully, directly and completely denied in the answer, and none appears by the case made, why the injunction should be retained," it should be dissolved. *Brooks v. Diaz*, 35 Ala. 601; *Robertson v. Walker*, 51 Ala. 487; *Rice v. Tobias*, 83 Ala. 351, 3 South. 670; 1 High on Injunctions, § 162; *Id.* §§ 1470, 142.

In this case, all the material averments of the bill are denied with that positiveness and clearness required by this rule. In addition the affidavits introduced, as was held by the court below, abundantly fortified the denials of the answer.

There was a difference between the complainant and the defendants, in their construction of the contract between them, as to how the timbers cut by complainant were to be measured, the complainant contending, that he was to pay two cents per cubic foot, measured or scaled after it was squared at the mill, while the contention of the defendants was, that he was to receive two cents per cubic foot measured as round timber. It must be admitted that there is some indefiniteness in the contract as to this matter. The chancellor held, that by a proper construction, the contention of the defendants was the proper one. The contract sets out, that complainant "agrees to purchase all of the pine and poplar timber that will square twenty (20) cubic feet in one stick, except as otherwise provided, and to cut and remove the same, between the 1st day of January, 1905, and the 1st day of January, 1910, and to pay the parties of the first part, the sum of two cents per cubic foot, for all the timber cut under the terms of this contract, the first payment to be made sixty days after the party of the second part commences to cut said timber, and to pay for all the timber scaled up to that time at the mill," and so to pay, at the end of each sixty days thereafter, for all timber which has been scaled.

It was further agreed, "that should either one of them violate any of the terms of the contract, then the same shall be null and void, and not binding on the other party."

One of the purposes of the bill, as indicated in its prayer was and is to obtain a judicial construction of the contract of lease from respondents to complainant. The prayer is, that upon final hearing of the cause, "your honor will construe the contract shown by Exhibit A to this bill, existing between the said De Bardeleben and the complainant, and enforce the rights of the complainant therein, and will direct the register to hold a reference and ascertain thereat, what sum is due by complainant to said De Bardeleben, and for an injunction restraining defendants, their agents and servants, from interfering with, in any manner, the conduct of complainant's business until the further order of this court, by themselves, their agents and employées," etc.

It thus fairly appears, that the purpose of the bill was two-fold,—the construction of the contract of lease and for the injunction on account of alleged interference by the De Bardelebens with complainant in the prosecution of his business, under his lease from them. If the object of the bill were only to have a judicial construction of a disputed stipulation in a lease, no element of trust being involved, it could not be maintained. *L. M. & M. Co. v. Hannon*, 93 Ala. 87, 9 South. 539. But this object may be regarded as incidental to the other purpose of the bill,—to procure the injunction referred to.

The defendants, besides the answer filed, also filed a cross-bill, setting up additional facts relating to the same subject-matter as, but not alleged, in the original bill, and prayed for affirmative relief in reference to it, and this, as we have repeatedly held presents a case of equitable cognizance, and the dismissal of the original bill does not dispose of the cross-bill. It becomes the duty of the chancellor, in such case, if he dismisses the original bill, to grant such relief under the cross-bill as would be proper, under its averments and proof, as if it were an original bill. *Wilkinson v. Roper*, 74 Ala. 141; *Abels v. P. & M. Insu. Co.*, 92 Ala. 386, 9 South. 423; *Davis v. Cook*, 65 Ala. 623; *Bedell v. N. E. M. & S. Co.*, 91 Ala. 326, 8 South. 494; *Meyer v. C. L. Co.*, 133 Ala. 557, 31 South. 938.

Whether such relief can be granted under the cross-bill constitutes the second aspect of the case remaining to be considered.

It is averred in the cross-bill, that the complainant in the original bill, has cut and removed prior to the filing of his bill, a large lot of timber from said lands of the value of \$600 and failed and refused to pay defendants therefore; that he has cut and disposed of timbers without giving defendants an opportunity of measuring the same, and without paying them therefor; that he has done this under the protection of the temporary injunction obtained in the cause, and has dis-

posed of the same in every way and as fast as he could, without reporting the same to defendants, or giving them an opportunity to see to the measurement thereof, and without paying for the same; that complainant has gone over portions of said land and cut and carried away the most valuable trees, and left standing other and less valuable ones which came within the terms of said contract, and that the cutting and disposing of such timbers at the contract price would swell the amount now due to defendants to more than \$1,000; and in addition to this, complainant has so mixed and confused parts of timber cut by him from other lands with timbers cut by him from the lands described in said contract, that it would be impossible to separate the one from the other. It is further averred, that because of these violations of said contract, defendants elected to cancel and annul the same, and thereupon and before the bringing of this suit, they informed complainant of their said election, and notified him to stop the cutting of said timbers, and to cease operations under said contract, but complainant paid no attention to them, and continued to cut and remove said timbers, whereupon complainant filed this bill, and by the unfounded allegations therein procured the said writ of injunction.

The defendants affirm their election to cancel and annul said contract because of the violations thereof by complainant, and ask that the same be canceled. It is averred, that complainant is insolvent, and does not own property above his exemptions of value sufficient to compensate defendants for the damages they have already sustained and will sustain by reason of the cutting and carrying away of said timber, which complainant will continue to do, unless restrained by law; that unless so restrained, defendants will suffer irreparable loss in that said lands will be denuded of their trees, and defendants will be without adequate compensation or remedy therefor.

The prayer of the cross-bill is for an injunction against complainant to prevent his continuance of the alleged waste, for an accounting and ascertainment of the amount due defendants by complainant for the alleged damages he has inflicted on defendants and for general relief.

There can be no doubt but that the cross-bill presents a case for equitable relief by injunction. The defendant therein,—complainant in the original bill,—answered and denied the material averments thereof. The complainants in the cross-bill introduced many affidavits to sustain the allegations of their bill and the defendant introduced others. Such affidavits are admissible in cases of waste, and when irreparable injury might ensue. *Barnard v. Davis*, 54 Ala. 565; *Rice v. Tobias*, 83 Ala. 351, 8 South. 670;

Long v. Brown, 4 Ala. 681, 682; High on Injunctions, § 671.

After due consideration, the chancellor was of the opinion that the complainants in the cross-bill were entitled to temporary injunction against respondent therein, as prayed for, and so ordered, upon their filing an injunction bond in the sum of \$750 payable to complainant and conditioned as prescribed. The appointment of a receiver was denied.

Upon consideration of the case as made by the bill and answer, and the cross-bill and answer thereto, and the affidavits introduced, we are unable to conclude that the chancellor erred in the decree rendered.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

WILLIAMS et al. v. FINCH et al.

(Supreme Court of Alabama. June 30, 1906.)

1. PLEADING—DEFENSES—PLEA.

Defenses which must be sustained, or which may be rebutted by evidence, must be presented by plea, and cannot be presented by demurrer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 426.]

2. EVIDENCE—JUDICIAL NOTICE—STATE OFFICERS—COURTS.

Courts while required to take judicial notice of the commissioned state and county officers are not required to take judicial notice of "de facto officers."

3. DETINUE—BOND—COMPLAINT—ISSUE AND PROOF.

Where a complaint in an action on a detinue bond alleged that the writ was issued by C., who was a notary public and ex officio justice of the peace, it was permissible thereunder to prove that C. was a de facto justice.

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

"Not officially reported."

Action by J. A. Williams and another against Andy Finch and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

This was an action on detinue bond begun by appellants against appellees. The complaint was in the following language: "Plaintiff claims of the defendant the sum of \$65 for the breach of the conditions of the bond under seal executed by the defendant in the sum of \$65. [Here follows a ordinary detinue bond payable in the sum of \$65 from defendants to plaintiffs.] And plaintiffs allege that on the making of said bond the said Andy Finch procured the issuance of a writ of seizure by Couse as a justice of the peace, who placed the same in the hand of P. B. Clifton, and said Finch procured the said Couse as such notary public and ex officio justice of the peace to deputize said Clifton as special constable to execute said writ of seizure, and said Clifton as said deputy constable did execute said writ of seizure by taking into

his possession the property described in the complaint, and plaintiff was compelled to make a replevy bond to regain possession of said property. Plaintiffs aver that the conditions of said bond have been broken in this: The said Andy Finch did begin this suit as set out in said bond, and said Andy Finch did fail in his said detinue suit, and has failed to pay plaintiff the cost and damages that they sustained by reason of the wrongful complaint; and plaintiffs aver that they will be put to great expense and damages in defending said suit as follows: One day's time for each of defendants in making a forthcoming bond for the property claimed after the same had been levied on, and which was reasonably worth \$3. One day's time attending justice court, which was reasonably worth \$3. Six days' time attending circuit court, which was reasonably worth \$18. And plaintiffs aver that they had to employ an attorney to represent them in said suit, and that a reasonable attorney's fee for defending plaintiffs in said suit was \$25, all of which plaintiffs claim as special damages."

The defendants demurred as follows: "(1) The complaint seeks to recover damages for the breach of the detinue bond and fails to show the issuance of a writ of detinue. (2) The complaint seeks to recover damages for the breach of detinue bond, and does not show the issuance or levy of any writ of detinue. (3) The defendant demurs to that part of the complaint as follows, to wit: Time lost in attending justice court, time lost in making replevy bond, time lost in attending circuit court, all of which time was reasonably worth \$24, because the same is too remote. (4) The defendant demurs to that part of the complaint that claims damages for attorney's fees at \$25, because said complaint fails to show or allege that said writ of detinue was levied or otherwise executed. (5) Because it is shown in and by said complaint that no detinue suit has been or was ever commenced by said Finch, or any writ of seizure was issued in said cause, because of the fact that said W. A. Couse was not a notary public and ex officio justice of the peace, nor an officer authorized to issue a writ of detinue or writ of seizure." Demurrers 1, 2, and 5 to the complaint were sustained, and plaintiff, declining to plead over, took a nonsuit, with bill of exception.

D. H. Riddle, for appellants. Felix L. Smith, for appellees.

DENSON, J. We are of the opinion that the demurrer to the complaint should have been overruled. Defects apparent on the face of the complaint can be reached by demurrer, but those defenses which must be sustained or that may be rebutted by evidence must be presented by plea. While the court may be, and doubtless is, required to take judicial knowledge of the commissioned officers of the state and counties, the rule has no ap-

plication with respect of de facto officers. Moreover, the complaint averred that Couse was a notary public and ex officio justice of the peace, and the demurrer confessed the truth of this averment.

Under the complaint it would be permissible to show that Couse was a de facto justice. So, too, if the question raised by the demurrer had been presented by a plea, the plaintiff might have replied that Couse was a de facto justice. And, if he was a de facto justice, the bond was unassailable on the grounds presented by the demurrer. *Cary's Case*, 76 Ala. 78; *Joseph v. Cawthorn*, 74 Ala. 411.

For the error in sustaining the demurrer to the complaint, the judgment of the circuit court is reversed, and the cause remanded. Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

HOYLE v. MANN.

(Supreme Court of Alabama. June 30, 1905.)

1. EJECTMENT—TITLE—COMMON SOURCE.

Where, in ejectment, the parties did not claim entirely from a common source, but as to one-sixth of the property neither party had more than color of title, defendant was not entitled to a general charge on the theory that, as both parties claimed from a common source and defendant had shown a perfect title therefrom, plaintiff, not having proved title by adverse possession, could not recover.

2. SAME—ABSTRACTS OF TITLE—CLERICAL ERRORS—CORRECTIONS.

A clerical error, in an abstract of title furnished defendant in ejectment, as required by Code 1896, § 1531, apparent on the face of the abstract, may be corrected, when not a surprise to defendant.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 216, 217.]

3. ADVERSE POSSESSION—COLOR OF TITLE—EVIDENCE—DEEDS.

An objection to a deed, offered in evidence as color of title, that it did not appear that the grantor had any title to the land, was unsustainable, if the deed was otherwise unobjectionable.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 422.]

4. EJECTMENT—ABSTRACT—OBJECTIONS—TIME.

Where defendant in ejectment is not satisfied with the abstract furnished by plaintiff, as required by Code 1896, § 1531, it should be objected to before trial.

5. SAME—EVIDENCE.

It was improper, in ejectment, to permit a witness to state that he had "sold those lands," referring to lands in controversy.

6. SAME—IDENTITY OF LAND.

In ejectment, evidence that witness made a sale of certain land, not shown to be any part of the land in controversy, or even contiguous thereto, or covered by the color of title of which the land in controversy was a part, was inadmissible.

7. SAME.

In ejectment, questions as to whether anybody living on the land paid witness \$50 therefor, as the agent of B., and whether various persons who had bought the land from B. had been disturbed, were inadmissible.

8. SAME.

In ejectment, questions as to whether defendant said anything to witness about the land in controversy, and when the heirs of B. learned that the lands in Alabama had been sold by their mother, were irrelevant.

9. SAME.

Where, in ejectment, the material issue raised merely the question of title by deed or adverse possession, it was immaterial how or by what means defendant induced the heirs of B. to convey their interest to him.

10. EVIDENCE—HEARSAY.

A chain of title in ejectment cannot be proved by hearsay testimony as to what a person did or did not claim.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1108-1120.]

11. EJECTMENT—COMMON SOURCE OF TITLE.

Where complainant's abstract in ejectment showed that he claimed entirely under adverse possession based on B.'s deed as color of title, regardless of any right, title, or claim which she had, defendant could not force plaintiff back to a common source of title in order to strengthen the title held by defendant.

12. EVIDENCE—BEST AND SECONDARY.

Where it is shown that a writing is out of the state, parol evidence is admissible to prove its contents.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 570, 577.]

13. EJECTMENT—EVIDENCE—ADMISSIBILITY.

Where a person buys land claimed to be in the adverse possession of another, it is immaterial, in ejectment by the purchaser, whether the purchaser knew of such adverse possession; the only question being whether his grantor was barred by the adverse possession.

14. SAME.

A question, asked of a witness in ejectment, "Why did you think it took a deed from both parties to make a good title?" was improper.

15. ADVERSE POSSESSION—ABANDONMENT OF LAND.

Since adverse possession, in order to ripen into title, must be continuous, a temporary abandonment is sufficient to invalidate the claim.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 226-231, 266-270.]

16. TRIAL—REQUEST TO CHARGE—REFUSAL.

It is not error to refuse a request to charge substantially covered by instructions given.

17. ADVERSE POSSESSION—COLOR OF TITLE—DEED.

A deed executed while another is in adverse possession of the land is good as color of title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 422, 423.]

18. SAME—TACKING.

Where land is claimed by adverse possession by a claimant and his successive grantees, claimant must show that each grantee went into possession at the expiration of his predecessor's possession, claiming under or through him, so that there will be no break in his possession.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 213-225.]

Appeal from Circuit Court, Baldwin County; W. S. Anderson, Judge.

"To be officially reported."

Ejectment by Shuah S. Mann against George H. Hoyle. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Gregory L. & H. T. Smith, for appellant. Joel Goldsby and James E. Webb, for appellee.

SIMPSON, J. This is an action of ejectment by appellee (plaintiff) against appellant (defendant). The plaintiff introduces: First. A deed from Louisa Burthe (dated October 31, 1881), who describes herself as the widow of Edmund Burthe, of New Orleans, La., and she conveys, individually and as tutrix of her five children, who are named, and in this deed Henry Chiapella "intervenes" and conveys his one-sixth ($\frac{1}{6}$) interest. This deed is made to Osceola Wilson. Second. A deed from Osceola Wilson and wife to John Bowen, November 8, 1881. Third. A deed from Charles Torrey, as executor of the will of John Bowen, to the plaintiff, dated December 4, 1906. The defendant introduced a deed from certain parties, who are shown to be the heirs at law of said Edmund Burthe, to the defendant, dated June 3, 1902, and it was proven that said widow of Edmund Burthe died March 11, 1891. The defendant, after receiving said deed, placed a fence around the land sued for. The plaintiff claims that Wilson went into possession in 1881, and that such possession has been kept up until the defendant placed his fence around the land.

1. The appellant insists that the court should have sustained his motion to exclude all of the evidence of the plaintiff, on the ground that it did not make out a prima facie case, and, falling in that, the court should have given the general charge in favor of the defendant. This is based, in part, upon the theory that both plaintiff and defendant claimed from a common source, that defendant has shown a perfect title back to that common source, and that the plaintiff has not shown such actual, open, notorious, and continuous adverse possession as will overcome the perfect title from the common source, and present possession. A sufficient answer to this is that they do not claim entirely from the common source, as one-sixth interest was conveyed to Wilson by Henry Chiapella, who is not shown to claim from Edmund Burthe at all. So that, as to that one-sixth interest, neither party had any thing, more than color of title, on which to base a possessory interest. But, in addition to this, after a careful examination of the mass of testimony, we think that the matter as to whether such possession was shown by the plaintiff as to justify a recovery was for the jury to decide under proper instructions from the court.

2. There was no error in allowing the correction of the clerical error in the abstract, which was really apparent on its face. If it had been in a matter which worked a surprise on the defendant, the court would, on motion, have given him proper relief.

3. There is no force in the objection to the introduction of the deed of Charles Torrey, as

executor of Bowen, to Mann. The first objection, to wit, that it did not appear that the grantor had any title to the land, would not go to the introduction of the deed, if it was otherwise unobjectionable, and in this case the deeds were introduced only as color of title. With regard to the statement of the deed in the abstract, the only purpose of section 1531, of the Code of 1896, is to give notice to the opposing party what line of title will be relied upon, and the statement in this case was sufficient. If the defendant was not satisfied with the abstract, and thought it should be fuller, he should have objected to it before going into trial. The definitions of an abstract, as used in conveying, do not apply to this statute.

4. What has been said applies also to the assignments in regard to the admission of the deed from Osceola Wilson and wife to John Bowen; also, to the admission of proof of possession after 1892.

5. The statement of the witness Bromberg, that he had "sold those lands," referring to the lands covered by the plat, should have been excluded on motion of defendant, as it was irrelevant, and although, as suggested by counsel for plaintiff, it may be that it had no effect upon the minds of the jury, yet this court cannot undertake to affirm that proposition.

6. The court erred in refusing to exclude the testimony of John W. Stewart in regard to Mrs. McGill finally buying from Bowen the land upon which she was residing. The testimony of the witness is simply that this land was a part of the land claimed by Torrey. It is not shown that it was any part of the land in controversy, or even contiguous to it, or that it was a part of a contiguous tract of land covered by the color of title, of which the land in controversy was a part. It does not come within the principle decided in the case of *Stiff v. Cobb et al.*, 128 Ala. 381, 28 South. 402, 85 Am. St. Rep. 38, where the defendant's vendor was distinctly in possession of a "single connected block," and the defendant was allowed to show that said vendor, while so in possession, sold one lot out of the block and made a mortgage on the lot in controversy. For the same reason the question to the same witness, "Did anybody living on the land at the time pay you \$50 for it, as the agent of Mr. Bowen?" should have been excluded, and also the further question as to whether various persons who had bought lands from Bowen had been disturbed.

7. The question to the witness Chiapella as to whether the defendant said anything to him about these lands, and other questions to him, including the one as to when the Burthe heirs learned that the lands in Alabama had been sold by their mother, were irrelevant and should have been excluded. In the trial of the issue before the court in this case, it was simply a question of title by

deed or adverse possession, and it was not material how or by what means the defendant induced the heirs of Burthe to convey their interest to him.

8. Plaintiff's objection to defendant's questions to the witness Chiapella as to whether Mrs. Burthe claimed to have acquired title by inheritance from her husband, and that she had no other title, etc., were properly sustained by the court. A chain of title cannot be proved by hearsay testimony as to what a person did or did not claim. Also, the abstract of complainant in this case shows that he claims entirely on adverse possession, simply based on Mrs. Burthe's deed as color of title, without regard to any right, title, and claim which she had, and the defendant could not force the plaintiff back to a common source, in order to strengthen his own title.

9. The only objection made to the question to the witness George Hoyle, asking for the contents of his second proposition to Chiapella, was that it was incompetent to prove by parol the contents of a written instrument. This objection was not well taken. As it had been proved that the writing was out of the state, the court erred in sustaining it. *Manning v. Maroney*, 87 Ala. 563, 567, 6 South. 343, 13 Am. St. Rep. 67; *Young v. East Lake R. R. Co.*, 80 Ala. 100; *Elliott v. Dyche*, 80 Ala. 377; *Ala. Land Co. v. Kyle*, 99 Ala. 474, 13 South. 43; *P. & L. R. R. v. Schaffer*, 76 Ala. 233; *Gordon v. Tweedy*, 74 Ala. 233, 49 Am. Rep. 813. This testimony was also admissible in reply to proof which had been permitted to the plaintiff in regard to the negotiations and propositions between defendant and Chiapella, all of which was illegal, for the reason that in this case it mattered not how the parties were induced to sign the deed; the only material fact being that the deed was executed. *Griffin v. Head*, 122 Ala. 441, 445, 25 South. 185.

10. The overruling of the exceptions to the questions to the defendant as to his finding on the records the entry of the deed from Mrs. Burthe to Wilson, and as to his knowledge of the fact that Mann had bought the land, seems to be based upon the idea that in that way a knowledge could be fixed on him as to the supposed adverse possession of plaintiff and his predecessors. The defendant in this case bought whatever title the Burthe heirs had, so that the question is, not whether the defendant knew of the adverse holding, but whether the holding had been such as to bar his vendors. If he knew that the plaintiffs did suppose that they had a title, but at the same time had reason to believe that the heirs in Louisiana had the real title to the land, he had a right to purchase their title, and on their title he must stand or fall in this suit. The testimony should have been excluded. And the further question to said witness, "Why did you think it took a deed from both parties to make a good title?" was clearly illegal, and should have been excluded.

11. The court erred in charging the jury that selling of parts of the lands were acts of ownership which might constitute adverse possession. See remarks, *supra* (6), showing distinction between this case and that of *Stiff v. Cobb*. The numbers of the land covered by the color of title show that it did not consist of one continuous tract, and the charge would not be correct as to any part which was not a subdivision of the continuous tract including the lands in controversy.

12. The court erred in charging the jury that: "If the claimant of the land goes off the land, with the intention of returning, after he had established adverse possession, that is no abandonment of the land. In order to abandon it, he must intend to abandon it, he must leave it for that purpose." The very gist of the claim by adverse possession is that for 10 years the claimant has occupied the land so openly, visibly, adversely, notoriously, and continuously that the owner is presumed to have known it. It would be a strange principle then, which would allow a man to go on the land, set up adverse possession, and then leave it, and claim that his possession remained adverse, merely because he intended to return. The Supreme Court of Pennsylvania, in condemning a charge very similar to this one, says: "Adverse possession * * * is essentially aggressive, and the stamp of its character must always be preserved by acts on the premises." "The question is, not what did the outgoing occupant intend? but what did he do?" He must "keep his flag flying and present a hostile front to adverse pretensions." "When one leaves the ground personally, he must leave it under circumstances indicating that he has not left the possession." "There must be that in the condition and appearance of the premises themselves that show to the world that there is still a person in possession." *Susquehanna, etc., R. R. Co. v. Quick*, 68 Pa. 189, 199. This case was quoted with approval by this court in *L. & N. R. Co. v. Phil-yaw*, 88 Ala. 264, 268, 6 South. 837. And in a later case this court has said that if a party evacuated a place, "leaving no indicia of a continuing possession, this would be an abandonment of his possession." *Perry v. Lawson*, 112 Ala. 480, 484, 20 South. 611.

13. Referring to the twenty-third assignment of error, it appears that the court, in giving charges 3 and 4 requested by defendant, gave the same in substance as the one here refused, so the court was not obliged to repeat it.

14. The court did not err in refusing to give the charge set out in the twenty-fifth assignment of error. The matters therein mentioned were proper for the jury to consider, in connection with the condition and character of the land, and from these to determine whether the facts showed adverse possession. *Goodson v. Brothers*, 111 Ala. 589, 593, 597, 20 South. 443.

15. The court erred in charging the jury that, "If the plaintiff was in the adverse possession of the land * * * at the time the deed was made to Hoyle, said deed would be void as to defendant," as that principle was not applicable in this case; the deed being only color of title at any rate.

16. There was no error in giving the charge set out in the twenty-seventh assignment of error. The charge is not based on an entry on a part of the land, but it reads, "Enters on the land described in the deed."

17. The charge set out in the twenty-ninth assignment of error should not have been given, as it is predicated merely upon an entry on a part of the land and says nothing about his claiming the entire tract.

18. The vice in the charge set out in the thirtieth assignment of error is that it does not require the jury to ascertain that each successive party received the possession from his predecessor, under the deed. It might be true that the deeds were sufficient color of title to authorize the tacking of the several possessions, and also that each of the parties had continuous adverse possession, yet if, as a matter of fact, one of them did not actually go into possession at the expiration of the possession of his predecessor and under or through him, there would have been a break in the possession. It is a question for the jury whether the possessions were successive.

What has been said covers the assignments noticed in appellant's brief.

The judgment of the court is reversed, and the cause remanded.

MCCLELLAN, C. J., and TYSON and ANDERSON, JJ., concur.

MONTGOMERY et al. v. PERRYMAN & CO.
(Supreme Court of Alabama. May 8, 1906.
Rehearing Denied July 6, 1906.)

1. INSANE PERSONS—GUARDIAN—INSTRUCTIONS FROM COURT.

The guardian of an incompetent, who executed a mortgage on the incompetent's property under a decree, was entitled to apply to the court entering such decree for instructions and authority necessary to the execution of his trust.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, § 116.]

2. SAME—SALE OF PROPERTY OF WARD—CONFIRMATION.

Where property of an incompetent is sold under decree of the court of chancery, the court being the vendor, the sale is not complete, so as to confer rights on the purchaser, until the court has confirmed it.

3. SAME—MORTGAGE OF WARD'S PROPERTY—CONFIRMATION BY COURT.

Where the guardian of an incompetent was authorized to mortgage the incompetent's property by a chancery decree, but the property to be mortgaged was never designated by a decree of the court, its selection being left to the guardian, a mortgage executed by such guardian on property of the incompetent, which was never confirmed by the court, was void.

4. REFORMATION OF INSTRUMENTS—VALIDITY.

Where a mortgage executed by an incompetent's guardian was void because not confirmed by the court conferring the authority, it could not be made the basis of a bill for the correction of a mistake therein.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 20.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

"To be officially reported."

Bill by Perryman & Co. against W. W. Montgomery and others. From a decree overruling demurrers to the bill, defendants appeal. Reversed.

This was a bill filed by the transferee of the mortgagee in a mortgage executed by guardian for a non compos, and sought to reform the mortgage so as to make it convey the property intended thereby to be conveyed originally. The allegations of the bill and its purposes are sufficiently stated in the opinion. The bill was filed against the guardian and the non compos, and demurrers were interposed to the bill by the guardian ad litem of the non compos, and are as follows: "There is no equity in said bill. Complainant is not the equitable owner of said lot 13, block 9. Want of jurisdiction in the court to render the decree permitting the guardian to mortgage the ward's property. The execution of said mortgage was never confirmed or approved by the city court of Birmingham. The power of sale contained in said mortgage was given without authority upon the part of said Strange to grant the same." These demurrers were overruled, and from the decree the guardian ad litem prosecutes this appeal.

George Huddleston, for appellants. L. C. Dickey and James A. Mitchell, for appellee.

TYSON, J. The bill in this cause was filed to reform a mortgage executed by the guardian of a non compos mentis under the decree of the city court of Birmingham in equity. The decree authorized the guardian to borrow the sum of \$300 to be used by the guardian in paying the taxes and other necessary and proper expenses of his ward, and further authorizing him, if necessary, to secure the payment of such loan by the execution of a mortgage on such part of the ward's estate as should be reasonable security for the payment of the note for the sum borrowed. The decree further provided that the cause in which it was rendered should be continued, that such orders and decrees might be made therein as should seem meet and proper. No other orders or proceedings were had, and on the 13th day of November, 1893, the city court of Birmingham rendered a decree dismissing said cause.

It appears from the bill that W. W. Montgomery, the non compos, owned two lots, Nos. 13 and 14, in block 9, in J. W. Montgomery's addition to Wood Lawn, Ala. On lot 13 there were some improvements, but lot 14 was un-

improved, and was worth in the year 1892, when the mortgage was executed, only about \$25. The guardian borrowed \$300 from Mrs. M. E. Jennings, securing the same by a mortgage to her conveying, with other property, lot 14, whereas lot 13 was intended. The sufficiency of the averment showing the mistake is not questioned. The bill further avers that the money borrowed was used for the benefit of the ward, as provided in the decree; that a mortgage upon lot No. 13, with the other property embraced therein, was a reasonable security, and not more than a reasonable security, for the loan, and that lot No. 14, and said other property, was in no sense a reasonable security therefor. The mortgage as executed was duly foreclosed, the mortgagee buying in the property at the foreclosure sale; the mortgagee going into possession of lot No. 13 and using the same as her own. Thereafter on the 14th day of October, 1899, Mrs. Jennings executed a deed to complainant to lot No. 14 for the sum of \$500; complainant going into possession of lot No. 13 thereunder, and improving same to the extent of \$650. R. B. Montgomery, the succeeding guardian, and the non compos mentis, were made parties defendant; the latter demurring to the bill by his guardian ad litem.

The guardian of the non compos, who executed the mortgage under the decree of the city court of Birmingham in equity, had the same right to apply to such court for instructions and authority necessary in the execution of his trust as is accorded to other trustees. The title to the real estate of the ward is not in the guardian, but in the ward, and in the case of a sale thereof under a decree of the court of chancery the court is the vendor. In such case "until confirmed by the court it is not complete and confers no rights." *McEachin v. Warren*, 92 Ala. 558, 9 South. 197. This is true, whether the sale is public or private. A mortgage of the ward's property depends for its efficacy upon the transfer of title and unless the property to be mortgaged is described in the decree, or with the selection of the property thereof is left to the guardian, unless the mortgage is confirmed by the court, and its approval is in no way manifested, so as to make the mortgage its act. In such case the mortgage is invalid and confers no rights, even if the property intended to be covered is correctly described therein. It cannot, therefore, be made valid by means of mistake in such a description. The bill shows that the property of the non compos intended to be mortgaged was never designated by a decree of the court; but the selection thereof was left to the guardian, and no confirmation by the court is shown. The mortgage, therefore, confers no rights, and cannot be made the basis of a bill for the correction of a mistake therein. In short, there is lacking that essential element of mutuality between the owner of the property or any one authorized to bind

him and the mortgagee upon which to found the reformation or correction. *Stephenson v. Harris*, 131 Ala. 470, 31 South. 445; 6 Pom. Eq. Jur. § 675 et seq.

The demurrer interposed to the bill should have been sustained. A decree will be here entered, reversing the decree appealed from and sustaining the demurrer.

Reversed and rendered.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

DECATUR CAR WHEEL & MFG. CO. v. TERRY.

(Supreme Court of Alabama. July 6, 1906.)

1. MASTER AND SERVANT—MINOR SERVANTS—ASSUMED RISKS.

A minor, on entering service, assumes the risks thereof as fully as does an adult.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 601.]

2. SAME—CARE REQUIRED.

The mere fact of minority of a servant does not necessarily impose on the master any other or greater degree of care in respect to the minor than would be imposed on him with reference to a servant of full age.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 139.]

On Rehearing.

3. SAME—WARNING OF DANGER—QUESTION FOR JURY.

In an action for injuries to a minor servant engaged in a rolling mill by the falling of certain car wheels against him, evidence held to require submission to the jury of the question whether the danger from which the injury occurred was such as to require warning and instruction on the part of the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1044, 1046.]

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"Not officially reported."

Action by John Terry, by his next friend, against the Decatur Car Wheel & Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Weatherly & Stokely, for appellant. Denson & Denson, for appellee.

SIMPSON, J. This is an action by the appellee (plaintiff) against the appellant (defendant) for damages on account of an injury claimed to have been received by the plaintiff while in the service of the defendant.

The first assignment of error insisted upon by the appellant is that the general affirmative charge should have been given as to the fifth count. The evidence shows that the plaintiff was a youth nearly 16 years old; that he had been working about rolling mills for about two years, and had been working at rolling these wheels for five days. There is no proof of anything especially dangerous about the situation, except the fact that the back wheels were slightly inclined to the

front and the other wheels were leaned against them, which, if a defect at all, was obvious to any one, but especially so to the plaintiff, who was in a position to see them better than any one else. He explains how the wheels were standing, and he simply withdrew the supporting wheels from those which were resting against them. "A minor, upon entering contractually upon a given service, assumes the risks thereof as fully as does the adult; and the mere fact of minority does not necessarily impose upon the master any other or greater degree of care in respect to the minor than would be upon him had the servant attained full age. It is immaturity of mental and physical faculties and capacities which is incident to some minors, but not all, but not the mere fact of minority, which the master must have special regard for." *Alabama Mineral R. R. Co. v. Marcus*, 115 Ala. 389, 395, 22 South. 185. This count (the fifth) is based on the common-law liability, and the evidence does not show any such liability on the part of the defendant as could justify a recovery. Consequently the defendant was entitled to the benefit of the general charge asked as to this count. *Clements v. A. G. S. R. R. Co.*, 127 Ala. 166, 28 South. 643; *Dresser on Employer's Liability*, pp. 422, 438, 450, 465, 466.

The only other points insisted on by appellant are that the court should have given the general charge, based on the plaintiff's contributory negligence, and that the court should have granted the motion for a new trial. As to the former, we hold that it was a matter for the jury under the evidence whether the position of the wheels was such as to render it so obviously dangerous to remove the wheel in front as to charge plaintiff with contributory negligence in moving said wheel.

It is not necessary to pass on the motion for a new trial.

The judgment of the court is reversed, and the cause remanded.

TYSON, ANDERSON, and DENSON, JJ., concur.

On Rehearing.

PER CURIAM. On rehearing, the majority of the court hold that the question as to whether the danger from which the injury occurred was such as to require warning and instruction was for the jury to determine. Consequently the rehearing is granted, and the judgment of the court is affirmed.

DENNIS et al. v. PRICE et al.

(Supreme Court of Alabama. July 6, 1906.)

1. EJECTMENT—POSSESSION—ADMISSION—PLEA—ISSUES AND PROOF.

Where one of the defendants in ejectment admitted possession, the only plea open to him was the general issue, which would put plaintiffs to proof of their title.

2. SAME.

Where one of the defendants in ejectment admitted possession, it was no bar to plaintiffs' recovery that the other defendant jointly sued was not in possession.

3. SAME—PERSONS LIABLE.

Where plaintiffs in ejectment had title, they were entitled to recover, and to recover costs, against those in possession.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 431-435.]

4. SAME—Costs.

Where, in ejectment, one of the defendants disclaimed, plaintiffs were entitled to judgment on the disclaimer for the land without costs against such defendant, unless they took issue on the disclaimer and proved such issue, in which event they were entitled to judgment for the land and costs, as provided by Code 1894, § 1533.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 431-432½.]

5. SAME—PLEADING—DISCLAIMER.

In ejectment, a plea by one of the defendants jointly sued that he was not in possession of the land sued for or any part thereof; that he was jointly sued with the other defendant, who at the commencement of the suit and still was in active possession of all the land sued for; and that there was therefore a misjoinder of parties defendant in the action, for which the pleader prayed that the suit abate as to him—was in effect a disclaimer, and did not operate as a plea in abatement.

Tyson and Dowdell, JJ., dissenting in part.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 193.]

Appeal from Circuit Court, Chilton County; A. H. Alston, Judge.

"To be officially reported."

Ejectment by Thomas E. Dennis and others against Houston Price and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded.

This was an action of ejectment, begun by appellants against appellees. The defendant Price filed the following plea: "Now comes the defendant Houston Price, and for answer to the complaint in this cause says that he was not at the commencement of this suit, and is not now, in the actual possession of said land, but that he owns and claims the land." The defendant Maddox filed the following plea: "Comes the defendant Maddox, by attorney, and suggests that, while he is in the actual possession of said land, he only holds the said land as a tenant of Houston Price." The plaintiffs moved to strike the plea filed by Houston Price on the ground that the same is not the tender of the general issue, and because the same is not a good plea in bar, and is not a disclaimer, such as is authorized by the statute. Plaintiffs also move the court to strike from the file the plea of Maddox on the ground that the same is irrelevant and frivolous. This motion was granted as to both pleas.

The defendant Maddox then filed the following verified plea, noticed in the opinion as plea 3: "Comes the defendant Maddox, and says that he is now and was at the com-

commencement of this action in the actual possession of all of the lands sued for in this action, and that he is jointly sued with Houston Price, who was not at the commencement of this suit and is not now in the actual possession of any of the lands sued for in this action, and this he is ready to verify, and that there is therefore a misjoinder of parties defendant, and the said defendant Maddox prays that said action abate as to him." The defendant Houston Price also filed the following plea, noticed in the opinion as plea 4: "Now comes the defendant Price, and says that he is not now and was not at the commencement of this action in actual possession of the lands sued for, or any part of said land, and that he is jointly sued with G. W. Maddox, who was at the commencement of this suit and is now in active possession of all of the land sued for in this action, and this he is ready to verify, and that there is therefore a misjoinder of parties defendant in said action, and said Houston Price prays that said suit abate as to him." This plea was also verified.

Plaintiffs demurred to the plea in abatement filed by Price on the ground that the fact, if it be a fact, that said Price was not in possession of the land sued for at the commencement of this suit is a matter to be pleaded in bar and not in abatement; that the fact that defendant Price is sued jointly with defendant Maddox, and that defendant Price was not in possession at the time the suit was brought, and that Maddox was in possession, is the matter to be pleaded in bar, and presents no reason why said suit should be abated as to the defendant Price. Demurrers were interposed to the plea of Maddox raising the same question. The demurrers were overruled to pleas 3 and 4, whereupon the plaintiffs filed a replication alleging that Price was in possession of the land at the time the suit was begun. This replication was stricken on motion of defendant Price. At the conclusion of the testimony, the court gave the general affirmative charge for the defendants.

C. J. Torrey, McCorvey & Hare, and Smith & Middleton, for appellants. William A. Collier, for appellees.

ANDERSON, J. The defendant Maddox in the third plea admitted the possession of the land, and when this was done the only plea open to him was the general issue, which would put the plaintiffs to proof of their title. and it was no bar to their right of recovery that Price, who had been jointly sued with Maddox, was not in possession. If the plaintiffs had title, they were entitled to recover, and to recover cost as to those in possession. If Price disclaimed, the plaintiffs were entitled to a judgment as against him, but without cost, unless they took issue on the disclaimer and proved their issue, in which event they were entitled to a judgment for the land and cost. Code 1896, §

1533; Calumet Co. v. Cordova Coal Co. (Ala.) 40 South. 390; Torrey v. Forbes, 94 Ala. 135, 10 South. 320; McQueen v. Lampley, 74 Ala. 408; Bynum v. Gold, 106 Ala. 427, 17 South. 667; Stapp v. Wilkinson, 80 Ala. 47. Nor would the fact that Price was not in the actual possession of the land bar a prosecution of the suit to judgment against Maddox. The plaintiffs' demurrer to the third plea should have been sustained.

Plea No. 4, of Houston Price, was in effect a disclaimer as to him, and as provided by section 1533 of the Code of 1896. Said section permits the defendant to disclaim possession, which practically assimilates the common-law plea of non tenure. The authorities seem to be in conflict as to whether or not it should be considered a plea in abatement. But our court seems to have established a rule as to the effect of a disclaimer, to which we adhere, as it has become stare decisis. If the plaintiff takes issue on the disclaimer and succeeds in proving same, he not only recovers the land, but is entitled to a judgment for cost and damages. If the plaintiff does not take issue on the disclaimer, he can take judgment on the disclaimer for the land, but without cost or damage against the defendant. So it would seem that a disclaimer neither abates the action nor bars the plaintiffs' right to recover the land. It simply relates to a personal judgment against the defendant. Our court did hold, in the case of Morris v. Beebe, 54 Ala. 300, that the defendant could plead non tenure and defeat a recovery. That case was decided before we had a statutory disclaimer, which first appears in the Code of 1886 and before the promulgation of the rule of this court in reference thereto. The plea of non tenure and a disclaimer seems to have been treated as the same thing in the case of Bailey v. Selden, 124 Ala. 403, 28 South. 909. The substance of the plea, being simply a denial of possession, was in effect a disclaimer, and was not rendered demurrable because of a subsequent declaration of its legal effect or result, which was but a conclusion of law, and does not present a question for proof. The court did not err in overruling the demurrer to the fourth plea, which was but a disclaimer. The plaintiff clearly had the right to take issue thereon, which was doubtless intended by a general replication, but which should have averred an actual possession by Price. The disclaimer denied actual possession, and the replication simply averred a possession, which was not taking issue. Morris Case, supra.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur. TYSON and DOWDELL, JJ., concur in the reversal, but entertain the opinion that the fourth plea is good as a plea in abatement.

PATTERSON v. SIMPSON.

(Supreme Court of Alabama. May 19, 1906.
Rehearing Denied July 6, 1906.)

QUIETING TITLE—MARRIED WOMAN'S DEED—ADEQUATE REMEDY AT LAW.

A deed by a married woman of property belonging to her, given to secure a debt of her husband, being absolutely void at law as in violation of statute (Code 1896, § 2529), the grantor is not entitled to sue in equity to have the same set aside as a cloud on her title, as she has an adequate remedy at law by ejectment.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quietening Title, § 8.]

Appeal from Chancery Court, Coosa County; R. B. Kelly, Chancellor.

"To be officially reported."

Bill by L. A. Simpson against A. K. Patterson. From a judgment for complainant, defendant appeals. Reversed and remanded.

J. M. Chilton and D. H. Riddle, for appellant. W. M. Lackey and Whitson & Dyer, for appellee.

SIMPSON, J. The bill in this case was filed by appellee (complainant), seeking to have a deed which had been executed by complainant to one J. F. Jacobs declared to be a mortgage, and to have the same delivered up and canceled, on the ground that it was merely an attempt to secure the debt of complainant's husband. Said appellant (Patterson), it is alleged, purchased the said property from said Jacobs with full notice of the true facts of the original transaction.

It appears without controversy that the complainant was not, at the time of the filing of the bill, in possession of the land in question, and the first point raised by counsel for appellant is that the complainant, not being in possession of the premises, could not maintain a bill to cancel the deed; her remedy at law being full, adequate, and complete. It is a general principle of law, so often stated as to have become a maxim, that a court of equity will not entertain a bill to remove a cloud from the title, in favor of a party who is not in possession and whose title is legal, so that he could sue in a court of law and recover the property. *Plant v. Barclay*, 56 Ala. 561; *Daniel v. Stewart*, 55 Ala. 278; *Baines v. Barnes*, 64 Ala. 375; 4 *Pomeroy's Eq. Ju.* (3d Ed.) pp. 2753, 2754, § 3399, and note 1; *Brown v. Hunter*, 121 Ala. 210, 25 South. 924. In a case in which the facts were similar to those in this case this court held that the deed was void, and the married woman was allowed to recover in ejectment. *Elston v. Comer*, 108 Ala. 76, 19 South. 324.

It is true that in the cases of *Armstrong v. Connor*, 86 Ala. 350, 5 South. 451, and *Lansden v. Bone*, 90 Ala. 446, 8 South. 65, the expression is used that in cases similar to this a married woman may maintain a bill for cancellation, whether she is in possession or not. It will be noticed, however,

that those cases are based, without argument, on the case of *Snyder v. Glover*, 75 Ala. 879, which was a case in which only a part of the consideration consisted of the debt of the husband, which raised a very different question. But, without stopping to discuss that matter, those cases and others which followed them were based upon the married woman's law, as it stood up to the act of February 28, 1887 (Code 1896, § 2529), and the only reason given in either of them is that it was supposed that under that statute the deed or mortgage was supposed to convey the legal title in the wife. In the *Armstrong-Connor Case*, Chief Justice Stone commences the opinion by stating that, "If the bill in this case had shown that complainant had a legal title to the land on which she could have sued at law, then, being out of possession, she could obtain no relief in chancery on a bill which had no other equitable aim than a removal of a cloud from her title." In a later case this court has called attention to the difference in the two statutes, stating that while, under the former statute, the conveyance carried the legal title, leaving only an equity in the wife, yet under the present statute such instruments are absolutely void, "and the invalidity can be shown at law, as well as in equity, even in defense of an action of ejectment based upon said mortgage" (*Richardson v. Stephens*, 122 Ala. 301, 306, 307, 25 South. 39); and, as the court says in a later case, "no principle is better settled than that where a contract is in violation of a statute, it is void as against public policy, incapable of ratification, and may be shown to be such in any court." *Price v. Cooper*, 123 Ala. 392, 397, 26 South. 238. As shown by the case of *Elston v. Comer*, supra, it makes no difference that the deed was in the shape of an absolute conveyance; the theory being that under the statute, whenever it is shown that the deed was intended as a security for the husband's debt, it is absolutely void, and the married woman can recover in ejectment on her previous title.

The remedy at law being full, complete, and adequate, it results that the bill in this case was without equity. The decree of the court is reversed, and a decree will be here rendered dismissing the bill for want of equity.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

RIORDAN v. SCHLICHER.

(Supreme Court of Alabama. April 20, 1906.
Rehearing Denied July 6, 1906.)

1. GARNISHMENT—EQUITABLE ASSETS—BILL IN EQUITY.

Under Code 1896, § 764, authorizing courts of chancery to issue writs of attachment on legal demands founded on any judgment or con-

tract, express or implied, which shall operate only on the effects of the defendant held by an equitable title, or on demands owing by other persons to which the defendant against whom the attachment issues is in equity entitled, whether due or not, a bill was maintainable to attach by process of garnishment the interest of a cestui que trust in the hands of the trustee and to subject the same to the payment of plaintiff's debt.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 119.]

2. TRUSTS—INTERESTS OF CESTUI QUE TRUST—CORPORATE STOCK.

Defendant was the owner of certain stock in a corporation, the property of which was sold on foreclosure of a deed of trust and purchased by W. with money furnished by the stockholders; W. thereupon executing a declaration of trust, declaring that the stock in the corporation held by the parties furnishing the money constituted the measure of their interest in the proceeds of the sale of the property by the trustee. *Held* that, while the stockholders acquired no interest in the trust by virtue of their stock, they did acquire such interest through the trustee's declaration of trust proportionate to the extent of their stockholdings.

3. SAME—ASSIGNMENT—EQUITABLE INTEREST.

A cestui que trust has power to assign his equitable interest in the trust fund to secure a valid indebtedness as against other creditors.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 192.]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

"To be officially reported."

Bill by Peter Schlicher against W. D. Aiken and others, in which James Riordan intervened and claimed a fund disclosed by the garnishment of one James E. Webb. From a decree awarding the fund to plaintiff, intervenor appeals. Reversed and remanded.

Ward & Houghton, for appellant. G. A. Evans, for appellee.

DENSON, J. Peter Schlicher, a nonresident of Alabama, filed his bill in equity in the city court of Birmingham against W. D. Aiken, also a nonresident, and James E. Webb, alleging that Aiken was indebted to him on certain promissory notes for about \$1,000; that he had not sufficient property in the state of his residence to satisfy the debt, but was the beneficial or equitable owner of lands in Jefferson county, Ala., the legal title to which was in James E. Webb, who, as trustee, was managing and selling said lands and paying the proceeds of the sale to the said Aiken and other equitable owners. The bill prayed for an attachment against the equitable interest of Aiken in said lands, and that Webb be summoned as garnishee to answer what money or other property he held for Aiken under said trust, that the same be condemned to pay complainant's debt, and for general relief. The attachment and garnishment were issued as prayed for, and were properly levied and served. The bill sets out as an exhibit the deed by which the legal title to the property was vested in Webb, and a declaration of trust by Webb, showing that he held the land in trust for certain parties, including

"Geo. Vanderbilt and New Jersey associates." Both these papers were executed in 1891. Aiken answered, practically admitting all the allegations of the bill, except that he was the owner of any interest in the trust property. He averred that before the bill was filed he was indebted to James Riordan, and to secure such debt he transferred to him all his interest in the trust property in the hands of Webb. The bill avers, and the answer admits, that Aiken was one of the New Jersey associates of Vanderbilt, and originally had an interest in the trust property. Webb's answer admits the trust; that he had on hand \$750 arising from the sale of the trust property, and notes and mortgages for the purchase money of such property to the amount of \$2,800; and alleging that he had been informed that Aiken had transferred his interest in the trust to Riordan. Riordan was made a party defendant and propounded his claim, alleging that the property levied on under the attachment and in the hands of Webb was at the time the bill was filed not the property of Aiken, but had prior to that time been transferred by Aiken to the claimant to secure a debt that Aiken owed to the claimant. From a decree overruling a motion to dismiss the bill for the want of equity, and decreeing against Riordan's claim, this appeal was taken.

The bill was filed under section 764 of the Code of 1896, and we think there can be no doubt that the bill on its face shows that it contains equity. *Ware v. Seasongood*, 92 Ala. 156, 9 South. 138.

Riordan alone has assigned errors. There are several assignments of error, but we do not deem it necessary to discuss them in detail. The decisive question in the case is whether or not the transfer of his interest in the trust by Aiken to Riordan was sufficient to invest Riordan with whatever rights Aiken had in the trust property. The evidence is clear that before the bill was filed Aiken assigned in blank and delivered to Riordan 200 shares of stock in the East Birmingham Land & Railroad Company as collateral security for the debt he owed Riordan. It is insisted that by this transaction no right to the trust property or its proceeds passed, because before this time the lands which constitute the corpus of the trust had been sold under a trust deed given by the East Birmingham Land & Railroad Company and no interest remained in the corporation which could be affected by the transfer of the stock. But from the declaration of trust by Webb, who purchased at the mortgage sale, it is shown that the money to buy said property at the mortgage sale, at which Webb obtained the legal title to these lands, was furnished by parties who held stock in the East Birmingham Land & Railroad Company, and the declaration of trust makes the stock in the corporation held by said parties the measure of their interest in the proceeds which may arise from the sale of the property held by

the trustee. As corporate stock it represents no right to nor interest in the trust property, but by the declaration of trust, which has been accepted and must stand as the agreement of the parties, it shows that those who held it have a right to participate in the proceeds of the trust property and the extent of that right.

The bill was filed in October, 1900. The evidence shows that in March, 1899, both Aiken and Rlordan wrote to the trustee, Webb, informing him that Aiken had transferred to Rlordan all his interest in the trust, and that the trustee recognized the transfer and agreed to be governed by it in the distribution of the funds in his hands. The evidence established without conflict that Aiken was indebted to Rlordan when the stock was transferred, and it is clear that Aiken intended to assign to Rlordan, and Rlordan intended to receive from Aiken, by the transfer of the stock, all the interest which Aiken had in the proceeds of the trust property, as security for his debt. *Planters' Co. v. Tunstall*, 72 Ala. 142; *Hanchey v. Hurley*, 129 Ala. 306, 30 South. 742; *Wells v. Cody*, 112 Ala. 278, 20 South. 381; *Lee v. Wimberly*, 102 Ala. 539, 15 South. 444. The right of the cestui que trust to deal with his equitable interest, and to alienate it or incur it at his will, is generally recognized. 28 Am. & Eng. Ency. of Law (2d Ed.) p. 1107.

The claimant, Rlordan, is entitled to have his debt paid out of the proceeds of the trust remaining in the hands of the trustee, and the decree of the city court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

FALKNER v. HUDSON et al.

(Supreme Court of Alabama. July 6, 1906.)

1. SPECIFIC PERFORMANCE—PURCHASE PRICE—ACCOUNTING—REFERENCE.

Where, in a suit for specific performance of a land contract, defendant averred that there was a balance due from complainant on the price, and complainant was otherwise entitled to specific performance, the case should be referred to the register to ascertain the amount due, if any.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 400.]

Appeal from Chancery Court, Chambers County; W. W. Whiteside, Chancellor.

"Not officially reported."

Suit by G. L. Falkner against T. F. Hudson and others for specific performance of a contract for the sale of land. From a decree dismissing the bill, complainant appeals. Reversed and rendered.

The contract sought to be enforced, from the allegations of the bill, was an oral con-

tract for the sale and purchase of certain lands therein described. The allegation is that the complainant bought the lands at an agreed price of \$240, and by such agreement purchase money was to be paid at any time complainant could pay it between the date of said agreement and the following Christmas, and that when it was paid Hudson was to make a deed to him for the land. The bill further avers that about the 10th day of July complainant went into possession of the land under said agreement, had the land surveyed, paid for the surveying, had some of the lands cleared and prepared for cultivation, and made a crop on them the next year. It further alleges the payment to Hudson between the date of purchase and the following Christmas of the sum of \$82, paid under the agreement and so received by Hudson. It also alleges a tender to Hudson of a balance due, with interest, and the refusal of Hudson to accept it, and, on demand, his refusal to make orator a deed.

E. M. Oliver, for appellant. R. J. Hooten, for appellees.

PER CURIAM. The bill is for the specific performance of a contract for the sale of land. The contract sought to be enforced is clearly and distinctly stated in the bill. The answer admits the contract, except as to the allegation as to the time of payment of the purchase money for the land. The answer avers that the payment was to be cash. The bill avers that subsequent to the making of the contract the time of payment was by agreement of the parties extended. The answer denies the allegation as to the extension. The bill avers part payment of the purchase money, and the complainant offers to pay whatsoever balance may be ascertained to be due the respondent, Hudson, on the purchase money. The answer admits payment in part of the purchase price, but denies that complainant has paid in part the amount alleged in the bill. The only denial as to the terms of the contract averred is as to the time of payment of the purchase price. The court is of the opinion that the allegations of the bill in this respect are clearly and satisfactorily sustained by the evidence.

As to the averment of balance due from the complainant to the respondent, this should be ascertained on a reference to the register for that purpose. Our conclusion is that the complainant is entitled to a specific performance of the contract as prayed, and that the chancellor erred in denying the complainant relief and in dismissing the bill. The decree of the chancellor will be reversed, and one will be here rendered granting complainant the relief prayed.

Reversed and rendered.

DOWDELL, ANDERSON, and DENSON, JJ., concur.

BAKER v. DRAKE.

(Supreme Court of Alabama. April 23, 1903.
Rehearing Denied July 6, 1906.)

1. JUSTICES OF THE PEACE—CERTIORARI—MIS-DESCRIPTION OF PARTY IN PETITION.

For the claimant in a suit in a justice court of the property on which execution against the defendant had been levied to describe himself in the petition of certiorari as defendant is but an irregularity, furnishing no ground for dismissing the certiorari, under Code 1896, § 488, providing that cases brought by certiorari or appeal from a judgment of a justice to the circuit court shall be tried without regard to any defect in the proceedings before the justice.

2. EVIDENCE—DECLARATIONS—RES GESTÆ.

The rule that declarations of a party in actual possession of property asserting title in himself are admissible in evidence as part of the *res gestæ*, explanatory of the possession, does not extend to his declarations as to the history and source of such title.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1108, 1111.]

3. SAME—DECLARATIONS IN ABSENCE OF PARTY.

The general rule is that declarations made by a third person in the absence of a party against whom they are offered in evidence are inadmissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1051-1134.]

4. EXECUTION — PROCEEDINGS BY CLAIMANT — EVIDENCE.

The right of an execution creditor, as against a claimant to property levied on, being dependent on whether title thereto was in the execution debtor at the time of the levy, evidence that such creditor did not know, when furnishing the goods to the debtor for which the judgment on which the execution issued was rendered, that the claimant was asserting any title to the property levied on, is immaterial.

5. FRAUDULENT CONVEYANCES.

For one who has sold a horse to rescind the contract of sale and take the horse back in settlement of the purchase-money note is not a fraud on another creditor of such debtor.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 47, 52.]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

"To be officially reported."

Claim proceedings between D. W. Baker, plaintiff in execution, and J. R. Drake, claimant. Judgment for claimant, and plaintiff appeals. Affirmed.

Baker had a waive judgment in a justice court against Bishop, and had an execution issued and levied upon a certain horse alleged to be the property of Bishop. Drake filed a claim thereto. There was judgment for plaintiff in the justice court, and claimant applied for and obtained a statutory certiorari, removing the cause to the circuit court. In the writ he was described as defendant. In the circuit court plaintiff made a motion to dismiss the certiorari because of this fact. This motion was denied. It appeared from the evidence that Drake sold Bishop the horse in question without the payment of the purchase price at the time of the sale, and later the trade was rescinded. Bishop, being unable to pay for the horse,

surrendered it to Drake, and received from Drake his note given for the purchase price of the horse. All this happened before the levy of the execution from the justice court in favor of Baker and against Bishop. The evidence tended to show that at the time of the levy of the execution the horse was found in possession of Bishop.

The plaintiff requested the following written charges, which were refused: "I charge you that if Drake had parted with all title he had to the horse, and the horse was the property of Bishop, unless Drake bona fide bought the horse back from Bishop without any intention to hinder, delay, or defraud Baker, your verdict should be for plaintiff. (3) I charge you that, if you believe from the evidence that Drake has knowingly assisted Bishop in keeping Baker's execution from being levied on the horse, your verdict should be for the plaintiff. (5) General affirmative charge for plaintiff. The other facts sufficiently appear in the opinion.

D. H. Riddle, for appellant. Lackey & Bridges, for appellee.

DOWDELL, J. This cause originated in the justice court, and was carried to the circuit court by writ of certiorari. There was no merit in the plaintiff's motion to dismiss the certiorari. The fact that the claimant in his petition for the writ of certiorari styled himself "defendant" did not alter the fact that he was claimant in the trial, in which the judgment appealed from was rendered. The claimant's describing himself in the petition as defendant was at most a mere irregularity, and furnished no reason for dismissing the certiorari. Code 1896, § 488.

Declarations made by a party while in the actual possession of property, asserting title in himself, are admissible in evidence as a part of the *res gestæ*, explanatory of the possession; but this doctrine cannot be extended to include declarations as to the history and source of such title. Ray v. Jackson, 90 Ala. 513, 7 South. 747; Vincent v. State, 74 Ala. 275.

The general rule is that declarations or statements made by a third party in the absence of a party against whom they are offered in evidence are inadmissible. There is nothing to take the statements of Yarbrough, which were sought to be shown by the witness Ham, without this rule, and the trial court committed no error in sustaining the objections to this evidence.

The plaintiff's right of recovery in this case was dependent upon title to the property levied on being in Bishop, the defendant in execution, at the time of the levy. This was the material issue on the trial, and evidence tending to show that plaintiff did not know, when he was furnishing goods to the defendant Bishop for which the judgment on which

the execution issued was rendered, that the claimant was asserting any claim or title to the property in question, was wholly immaterial. There was, therefore, no error in refusing to permit the plaintiff, as a witness, over the objection of the claimant, to testify to these facts.

The claimant under the evidence could be guilty of no fraud against the plaintiff in rescinding the contract for the sale of the horse to Bishop, and in taking back the horse in settlement of the note given for the purchase price. He had as much right to collect his debt as did the plaintiff. The evidence fails to show any fraud upon the rights of the plaintiff.

The evidence was without dispute that the horse in question originally belonged to the claimant, and that the contract of sale by the claimant to Bishop, the defendant in execution, was by the parties rescinded prior to the time of the levy of the execution by the constable. On this undisputed evidence the general affirmative charge might well have been given for the claimant. The rescission of the contract of sale reinvested the title to the horse in the claimant. This being true, there was no reversible error committed in the refusal of charges requested by the plaintiff.

No reversible error appearing in the record, the judgment will be affirmed.

Affirmed.

HARALSON, ANDERSON, and DENSON, JJ., concur.

FULENWIDER v. RIDGWAY.

(Supreme Court of Alabama. July 6, 1906.)

1. PLEADING—DEMURRER.

Where, before the fifth count of a complaint was filed, demurrers assigning three causes had been filed to the complaint, and thereafter a demurrer is filed assigning grounds of demurrer numbered from 4 to 10, some of them to the complaint generally and some of them to count 2 thereof, an eleventh assignment, on the same paper as the fourth to the tenth, with one signature to all: "Defendant reinterposes all of the above demurrers to the fifth count of the complaint"—does not reinterpose to such count the first three grounds of demurrer.

2. JUDGMENT—ACTION ON JUDGMENT—PLEADING—VARIANCE.

The variance between the complaint in an action on a judgment, describing the judgment as one of a certain date, and proof of a judgment of a different date, is fatal.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1747.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"Not officially reported."

Action by James Ridgway, as receiver, against Andrew L. Fulenwider. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

This cause was originally submitted on motion to strike bill of exceptions and on the

merits. On November 23, 1905, an order was entered granting the motion to strike the bill of exceptions and affirming the case. Application for rehearing was filed December 6, 1905, and on June 27, 1906, the application was granted, and motion to strike bill of exceptions was set aside, and the case was heard on its merits, and affirmed. The fifth count was in words and figures as follows: "The plaintiff claims of the defendant the sum of \$137.14, due on and by a judgment rendered in favor of plaintiff and against the defendant in the sum aforesaid, on, to wit, 15th day of January, 1896, in the Supreme Court of the state of New York for the county of New York, which said judgment, with interest at rate of 6 per cent. per annum, is still unsatisfied, due, and unpaid. Many grounds of demurrer were interposed to this complaint, but they were filed in such a way as shown by the record that they were not considered by the court. The defendant sought to raise the right of the receiver in a foreign state to bring this action in this state by demurrer as follows: Because the complaint fails to show that James Ridgway had any authority to bring this suit as receiver to subject assets of Charles Casper & Co., and because said complaint fails to show any title sufficient to maintain suit in James Ridgway as receiver of the assets and choses in action of the Charles Casper & Co." The defendant requested the general charge, which was refused.

W. K. Terry, for appellant. Joseph T. Collins, for appellee.

SIMPSON, J. Although there appears to be an unnecessary amount of material included in the bill of exceptions, yet the court, on rehearing, in the exercise of the discretion allowed it, overrules the motion to strike the bill of exceptions.

This was a suit brought by appellee (plaintiff) against the appellant (defendant) on a judgment rendered in favor of plaintiff against defendant in the Supreme Court of the state of New York. The original four counts of the complaint were withdrawn, and the case was tried on the fifth count, which had been added. Before the filing of the fifth count, demurrers assigning three causes had been filed to the original complaint. On the same day as that on which the fifth count was filed, a demurrer was filed in these words, to wit: "The defendant assigns a fourth, fifth, sixth, seventh, eighth, ninth, and tenth ground of demurrer in this cause, as follows," and then goes on to assign fourth and fifth to the complaint generally, that it fails to state the place where the court was held, and that it does not describe the names of the parties, and sixth, seventh, eighth, ninth, and tenth to the second count, all relating to failure to allow service on defendant. And then the

eleventh, in these words, "Defendant re-interposes all of the above demurrers to the fifth count of the complaint." On the same day pleas were filed, demurrers were filed to them, and the judgment entry shows that all of the demurrers to the complaint except the eleventh were overruled, before the filing of the fifth count; that it was then filed and demurred to, and the demurrer overruled.

The eleventh cause appears on the same paper as fourth, fifth, sixth, seventh, eighth, ninth, and tenth, with one signature to all, and the "above demurrers" in said eleventh assignment must refer alone to them, and not to the demurrers that had been filed several months previous to that time. Consequently the first three grounds of demurrer, which were assigned to the original counts of the complaint, were not reinterposed to the fifth count on which the trial was had. So the question of the authority of the receiver to sue was not properly raised. Therefore we do not pass upon that point, nor on the question whether the record of the New York court does not show that that matter was judicially ascertained by it.

The fifth count was not subject to demurrer, but the fatal error in the case is that said count describes the judgment of the New York court as rendered on January 15, 1896, and the judgment offered in evidence is shown by the record to have been rendered in June, 1896. The date of the judgment is a matter of description, and the variance is fatal to the right of the plaintiff to recover. Freeman on Judgments, §§ 458, 459; Dryckinck v. Insurance Co., 23 N. J. Law, 279; Phillips v. Am. Co. 110 Ala. 521, 18 South. 104; Harold v. Jones, 97 Ala. 637, 11 South. 747.

The court erred in refusing to give the general charge in favor of the defendant. Therefore the judgment of the court is reversed, and the cause remanded.

HARALSON, DOWDELL, and DENSON,
JJ., concur.

GORDON v. STATE.

(Supreme Court of Alabama. June 14, 1906.
On Rehearing, July 6, 1906.)

1. CRIMINAL LAW—PLEA OF INSANITY—TIME.

Under Code 1896, § 4639, requiring a plea of insanity to be filed at the time of arraignment, it was not an abuse of discretion to refuse to allow such a plea on the date of the trial and after the jury had been impaneled because defendant's attorneys at the time of arraignment were entire strangers to him and had no means of ascertaining that such plea should be interposed, without any statement concerning the proof expected to be offered in support of the plea.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 687.]

2. WITNESSES—CHILDREN—COMPETENCY.

Where a child 12 years of age by other answers showed sufficient knowledge of the obligation of an oath, she was properly allowed to

testify, though she did not understand the question, whether she knew the nature of a judicial oath.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 97.]

3. CRIMINAL LAW—GENERAL CHARGE—DENIAL.

Where there was evidence sufficient to warrant a conviction the refusal of a general charge in favor of defendant was proper.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1727.]

4. SAME—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where, in a prosecution for homicide, the evidence was not entirely circumstantial, a request to charge that, in order to warrant a conviction on circumstantial evidence, the circumstances must be so multiplied as to increase the probability of defendant's guilt to a definite extent beyond the reach of mere calculation, etc., was properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1885.]

5. SAME.

A requested instruction on circumstantial evidence, covered by other charges, may be properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

6. SAME.

An instruction that "unless" the jury, after carefully weighing all the evidence, "cannot" feel an abiding conviction of defendant's guilt, they must find the defendant not guilty, was properly refused.

7. SAME—REASONABLE DOUBT.

A request to charge in a criminal case, using the expression "all doubt," in place of "a reasonable doubt," was properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1906, 1912.]

8. SAME—WEIGHT OF EVIDENCE.

An instruction that defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of his innocence, was properly refused as misleading the jury to believe that the evidence of guilt must be conclusive.

9. HOMICIDE—INSTRUCTIONS.

Where, in a prosecution for homicide, the killing was either murder or nothing, the only defense being a denial, a request to charge that, if the jury had a reasonable doubt as to whether the killing was done deliberately or premeditatedly, then they could not find the defendant guilty of murder in the first degree, and, if they had a reasonable doubt as to whether it was done in malice, then they could not find defendant guilty of murder in either degree, but only of manslaughter, etc., was properly refused.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 590, 591.]

10. CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

An instruction that the jury could not convict defendant on circumstantial evidence, when it was inconsistent with any reasonable theory of innocence, and unless the jury was so convinced that each of them would be willing to act on the decision in matters of the highest importance to themselves, was properly refused as argumentative.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1960.]

11. SAME—INSTRUCTION—REASONABLE DOUBT.

An instruction that if the evidence did not establish the truth of the charge in the indictment beyond a reasonable doubt and to a moral

certainty to wit, a certainty that convinced and directed the jury's understanding and satisfied their reason and judgment, they must acquit, was properly refused as requiring too high a degree of proof.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1913.]

12. SAME—PRESUMPTION OF INNOCENCE.

An instruction that if, after examining and weighing all the evidence carefully, there is left in the minds of the jury a presumption of innocence in favor of accused, they should acquit, was properly refused, as a presumption of innocence is a conclusion of law, having no relation to a condition of mind produced by proof.

13. SAME—CIRCUMSTANTIAL EVIDENCE.

A request to charge in a criminal case that circumstantial evidence "is wholly inferior in cogency, force, and effect to direct evidence" was properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1888, 1262.]

14. SAME.

Where there was direct evidence in a case, an instruction that the evidence in the case should be almost as clear and convincing as direct evidence, in order to justify a conviction, was properly refused as misleading.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1966.]

15. SAME — WITNESSES — WEIGHT OF TESTIMONY.

An instruction in a criminal case that the jury should be very cautious and careful in weighing the testimony of a child who had testified was properly refused as invading the province of the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1772, 1777.]

16. SAME — INSTRUCTIONS — IGNORING EVIDENCE—HOMICIDE—DEGREES.

Where there was evidence justifying a conviction of murder in the first degree, an instruction that the highest degree of murder of which defendant could be convicted was murder in the second degree was properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1986.]

Tyson and Simpson, JJ., dissenting in part.

Appeal from Circuit Court, Macon County;
H. P. Merritt, Special Judge.

"To be officially reported."

Isalah Gordon was convicted of murder, and he appeals. Affirmed.

The indictment in this case charges defendant with killing Frank Fort by striking him with an instrument to the grand jury unknown, and the second count charges the killing by means unknown to the grand jury. The indictment was preferred by Hon. S. L. Brewer, who was solicitor of the circuit, and the cause was called for trial after his election as judge of the circuit, and H. P. Merritt was agreed upon as special judge to try the cause. The facts necessary to an understanding of the opinion sufficiently appear therein. The evidence tended to show that the defendant killed a baby, Frank Fort by name, by picking it up off the bed by one leg and throwing it violently to the floor, breaking and crushing a leg, arm, ribs, and head.

At the conclusion of the evidence the defendant requested the following written

charges, which were refused: (1) General affirmative charge. (4) "To warrant the jury in convicting this defendant upon circumstantial evidence, the circumstances must be so multiplied as to increase the probability of his guilt to an indefinite extent beyond the reach of mere calculation. The evidence must convince the jury of defendant's guilt beyond a reasonable doubt." (8) "If upon the whole evidence defendant is not established to a moral certainty, the jury must find the defendant not guilty." (9) "I charge you, gentlemen, that unless, after carefully weighing all the evidence, you cannot feel an abiding conviction of the defendant's guilt, you must find defendant not guilty." (14) "I charge you, gentlemen, that unless the evidence convinces you beyond all doubt to a moral certainty, and is strong and cogent, you must acquit the defendant." (15) "I charge you that the defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of his innocence." (18) "I charge you, gentlemen, that if you have a reasonable doubt as to whether the killing was done deliberately or premeditatedly, then you cannot find the defendant guilty of murder in the first degree; and if you have a reasonable doubt as to whether the killing was done in malice, then you cannot find the defendant guilty of murder in either degree, but only of manslaughter at most; and if, after considering all the evidence, you have a reasonable doubt as to defendant's guilt of manslaughter by arising out of all the evidence, then you should find the defendant guilty of no offense." (19) "I charge you, gentlemen, that you cannot convict the defendant on circumstantial evidence, when it is inconsistent with any reasonable theory of innocence, unless you are so convinced by it that each of you would be willing to act on the decision in matters of the highest importance to yourselves." (20) "If you do not find that the evidence in this case establishes the truth of the charge in the indictment beyond a reasonable doubt and to a moral certainty, a certainty that convinces and directs your understanding and satisfies your reason and judgment, you must acquit the defendant." (21) "If, after examining and weighing carefully all the evidence, there is left in your minds a presumption of innocence in favor of the accused, you must find the defendant not guilty." (22) "I charge you, gentlemen, that circumstantial evidence is wholly inferior in cogency, force, and effect to direct evidence, and that you must feel, after examining and weighing all the evidence, an abiding conviction of the guilt of the defendant; otherwise, you must acquit him." (A) "I charge you, gentlemen, that you must be very cautious and careful in the weight and credence you give to the testimony of the child Susie Fort." (C) "I charge you, gentlemen, that under the evi-

dence the highest degree of murder you can find against the defendant is murder in the second degree." (D) "I charge you, gentlemen, that the evidence in this case should be almost as clear and convincing as direct evidence, or you must acquit the defendant."

William P. Cobb, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The defendant in this case was convicted of the crime of murder in the first degree and the punishment fixed at death.

The first insistence of the defendant is that the court erred in striking from the files, on motion of the solicitor, the defendant's plea of "not guilty, by reason of insanity." It appears that when the defendant was arraigned he had no attorney, and the court appointed two members of the bar to defend him, and the plea of "not guilty" was interposed. When the day for trial arrived, after the jury had been impaneled, the indictment read, and the defendant pleaded, "as he had pleaded before, not guilty," counsel for the defendant asked leave of the court to file the special plea of "not guilty, by reason of insanity," and the court refused to allow the same. This is the statement in the record, but in the bill of exceptions it is stated that, "after the indictment was read to the jury, the defendant's counsel asked leave to file said plea, which plea was duly filed as shown by the record in this case," and that the solicitor then filed a motion (which is set out) to strike said plea from the file, the grounds being, first, "because said special plea was not filed at the time of arraignment of defendant," and, second, "because said special plea was not filed until the special jury was sworn and impaneled and the indictment had been read to the jury," which motion was sustained. The only statement made to the court by the attorneys for the defendant was that at the time of the arraignment the attorneys were entire strangers to the defendant and had no means of ascertaining that said special plea should be interposed. Nothing was said about whether anything could be proved along that line. The statute requires this plea to be filed at the time of arraignment. We cannot say that in this case there was such an abuse of the discretion which rested in the court to allow such a plea at a subsequent stage of the action as to call for a reversal. Code 1896, § 4939; *Morrell v. State*, 136 Ala. 44, 34 South. 208.

The court properly allowed the witness Susie Fort to testify. She was 12 years old, and showed sufficient knowledge of the obligation of an oath to testify. This she showed by her other answers, notwithstanding she did not understand the question when put in the shape of asking her if she "knew the nature of a judicial oath."

As to her being young when the occurrence took place, and as to the memory of them, these were matters which went merely to the weight of her testimony. *Kelly v. State*, 75 Ala. 21, 51 Am. Rep. 422; *Walker v. State*, 134 Ala. 86, 32 South. 703.

There was no error in the refusal to give charge 1 (the general charge) on request of the defendant, as there was evidence sufficient to warrant a verdict of guilty.

As to the refusal to give charge 4, it is sufficient to justify the refusal that the evidence in this case was not entirely circumstantial, and the charge was misleading.

Without noticing the elliptical nature of charge 6, requested by the defendant, it was substantially covered by charges 5, 7, 10½, and 11, given on request of defendant.

There was no error in the refusal to give charge 9, requested by the defendant. The charge expresses the opposite of what was doubtless intended. Of course, it cannot be said that unless the jury cannot feel an abiding conviction, they should find the defendant not guilty. That would be predicating a conviction on the jury not having the abiding conviction of guilt. The "unless" should have been "if," or the "not" left out.

Charge 14, requested by the defendant, was properly refused, as it uses the expression "all doubt" in place of "a reasonable doubt."

Charge 15 was calculated to mislead the jury to believe that the evidence of his guilt had to be conclusive, and this would exact too high a degree of proof. *Griffith v. State*, 90 Ala. 583, 8 South. 812; *Bones v. State*, 117 Ala. 138, 23 South. 138.

Charge 18, besides being elliptical, was properly refused, as the killing in this case was either murder or nothing; the only defense being a denial that the defendant killed the child. *Hunt v. State*, 135 Ala. 1, 8, 9, 33 South. 329.

Charge 19 was properly refused. *Rogers v. State*, 117 Ala. 9, 13, 15, 22 South. 666; *Amos v. State*, 123 Ala. 50, 54, 26 South. 524; *Nevill v. State*, 133 Ala. 99, 105, 32 South. 596.

Charge 20 was properly refused. This charge is in accordance with the views expressed by the Massachusetts Supreme Court, in explaining the nature of a reasonable doubt; but under our decisions it requires too high a degree of proof. *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 320, 52 Am. Dec. 711; *Griffith v. State*, 90 Ala. 583, 588, 8 South. 812.

Charge 21 was properly refused. A presumption is a conclusion drawn by the law, and has no relation to the condition of mind produced by proof. 23 Am. & Eng. Ency. Law, p. 967.

Charge 22 was properly refused. It is not the law that circumstantial evidence "is wholly inferior in cogency, force, and effect to direct evidence." *Mickle v. State*, 27 Ala. 20; *Faulk v. State*, 52 Ala. 415; *Bland v.*

State, 75 Ala. 574; *Thornton v. State*, 118 Ala. 43, 21 South. 356, 59 Am. St. Rep. 97.

Charge D was also properly refused, as there is no authority for drawing such distinctions between circumstantial and direct evidence. Besides, it was misleading, as there was direct evidence in this case. Authorities *supra*.

Charge A was properly refused. The court was not called upon to make such an invidious distinction as to this witness. It was for the jury to say what weight her testimony was entitled to.

Charge C was properly refused. There was evidence which justified the jury in finding the defendant guilty of murder in the first degree.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

On Rehearing.

PER CURIAM. On Rehearing Justices TYSON and SIMPSON are of opinion that charge 15, requested by the defendant, should have been given; but the majority of the court adhere to the original opinion, on the ground that the jury may have been "misled by it into an erroneous conclusion." *Bay Shore R. R. v. Harris*, 67 Ala. 6, 9; *Gilmore v. State*, 99 Ala. 154, 157, 160, 13 South. 536; *Adams v. State*, 115 Ala. 90, 91, 22 South. 612, 67 Am. St. Rep. 17; *Bodine v. State*, 129 Ala. 107, 112, 29 South. 926.

Motion for rehearing overruled.

WEAKLEY, C. J., and HARALSON, DOWDELL, ANDERSON, and DENSON, JJ., concur. TYSON and SIMPSON, JJ., dissent.

KNIGHT v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. SEDUCTION—EVIDENCE—CONSENT.

In a prosecution for seduction, evidence as to whether prosecutrix had ever consented to have intercourse with a certain witness was irrelevant, where the act was not consummated.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 73.]

2. SAME—IMPEACHMENT OF PROSECUTRIX—REBUTTAL.

Evidence having been offered in a prosecution for seduction to impeach the chastity of prosecutrix, it was proper to admit testimony as to her general character for virtue and chastity.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 73.]

3. SEDUCTION—QUESTIONS FOR JURY.

In a prosecution for seduction, whether the intercourse was the result of force or seduction was a question for the jury.

Appeal from Circuit Court, Pike County; H. A. Pearce, Judge.

"To be officially reported."

Nathan Knight was convicted of seduction, and he appeals. Affirmed.

The evidence tended to show that accused and prosecutrix were engaged, and had been engaged for some time before the alleged act of intercourse was had, and that consent was obtained by means of promise of marriage. Prosecutrix stated that she did not consent to the act, but that defendant took her in his arms, and without her consent and against her will and by force had intercourse with her. The defendant requested the court to charge the jury as follows: "The jury cannot convict the defendant in this case, because Miss Carrie Green testified that the first act of intercourse with defendant was accomplished by force and against her will." The court declined to give it. Defendant was sentenced to the penitentiary for a period of ten years.

Massey Willson, Atty. Gen., for the State.

SIMPSON, J. The defendant in this case was convicted of the crime of seduction. The exception to the question to the witness Windham as to whether the prosecutrix had ever consented to have sexual intercourse with him was properly sustained; the act not having been consummated. Evidence having been offered tending to impeach the chastity of the prosecutrix, it was proper to admit testimony as to her general character for virtue and chastity. *Smith v. State*, 107 Ala. 139, 18 South. 306; *Suther v. State*, 118 Ala. 88, 98, 24 South. 43.

There was no error in the refusal of the court to give the general charge requested in favor of the defendant. Under section 4972 of the Code of 1896 the case was properly triable in Pike county, and there was evidence to justify a verdict of guilty.

There was no error in the refusal of the court to give charge 2, requested by the defendant. The prosecutrix, on cross-examination, described how the act was accomplished; and it was for the jury to determine, from all the evidence, whether the prosecutrix finally yielded under temptation, or otherwise, as mentioned in the statute. In addition, this matter was fully placed before the jury in the most favorable light to the defendant by charges given by the court at the request of defendant.

The judgment of the court is affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

WESTERN UNION TELEGRAPH CO. v. MANKER.

(Supreme Court of Alabama. April 20, 1906. Rehearing Denied July 6, 1906.)

1. APPEAL—REVIEW—SUBSEQUENT APPEALS—LAW OF THE CASE—THEORY OF CAUSE.

Where, on a prior appeal, the Supreme Court held that the averments of the complaint alleged a cause of action *ex contractu*, and both parties on a retrial so treated the cause, a

second appeal would be determined on the same theory.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4358, 4370.]

2. PRINCIPAL AND AGENT—RIGHT OF ACTION BY PRINCIPAL.

A principal may maintain an action against a telegraph company in his own name for breach of contract made by his agent in the sending of a telegram, though the principal's name was not disclosed in the matter.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 502-512, 711, 712.]

3. TELEGRAPHS—DELAY IN DELIVERY—DAMAGES—MENTAL SUFFERING.

In an action ex contractu for a telegraph company's delay in delivering a telegram, breach of contract being shown, damages for mental suffering may be recovered by way of aggravation, though plaintiff's actual damages were nominal.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 69, 70.]

4. SAME—EVIDENCE.

In an action for delay in delivering a telegram, evidence that plaintiff often received telegrams and letters at witness' house, where she boarded, was admissible to show that defendant knew or had information of plaintiff's residence and might have delivered the message within a reasonable time.

5. EVIDENCE—RES GESTÆ—MENTAL SUFFERING.

Evidence that witness was in the house when plaintiff received the telegram, "and saw her crying," was admissible to show mental suffering.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 377-382.]

6. TELEGRAPHS—DELAY IN DELIVERY—ACTION—INSTRUCTIONS.

In an action for delay in delivering a telegram, an instruction that, if defendant's messenger used reasonable effort under all the circumstances to find plaintiff and deliver to her the telegram, they must find for defendant, was properly refused, as ignoring any reference to the knowledge of defendant or its operator of plaintiff's whereabouts and the failure of defendant's agent to inform the messenger where plaintiff might be found.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"To be officially reported."

Action by Matie E. Manker against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for damages resulting from a failure to deliver a telegram. The first count alleges that the defendant was a public telegraph company engaged in sending messages by electricity for hire, and that it received at its office in Kendallville, Ind., from Frank Lash, alleged to be the agent of plaintiff, a certain message, addressed to plaintiff at Birmingham, Ala., for which it received 51 cents, and for which it received and undertook to transmit and deliver said message to plaintiff, alleging a failure to do so for more than a week, and alleging the mental suffering and anguish resulting from the death of the father of plaintiff, about whose condition the message was, and alleg-

ing the actual damages at 51 cents. The second count was the same as the first, except that it declared that the defendant wantonly failed to deliver the message. The third count is the same as the first, except that it alleges that the defendant received said message and agreed to deliver it to plaintiff at Birmingham. The fourth count is the same as the third, with the exception that it alleges a wanton failure to deliver. The defendant moved to strike all the allegations in the complaint referring to mental anguish and suffering, upon the ground that the same are not and cannot be made the basis of an action. It also demurred to the complaint on the same grounds. Both the motion and demurrer were overruled. The defendant then interposed a plea of the general issue and a plea setting up that it transmitted the message promptly and used due diligence to deliver it to the sendee, but failed after due diligence to find her, and this fact was communicated to its agent at Kendallville, who communicated it to the sendee, and asked the sendee for a better address, which was not furnished.

The court, at the request of the plaintiff, gave the following charges: Charge 1: "If the jury believe from the evidence that plaintiff, by her agent, Frank Lash, paid the defendant the charge for sending the telegram described in her complaint, and that the defendant negligently failed to deliver said telegram, the plaintiff would be entitled to recover the amount of said charges, and in addition thereto whatever damages, not exceeding in the aggregate the amount sued for, the jury may believe from the evidence she is entitled to for whatever mental suffering the plaintiff may have sustained by the defendant's said negligent failure to deliver said telegram." Charge 2: "The court charges the jury that if they believe from the evidence that plaintiff's brother, Frank Lash, in compliance with an agreement made with plaintiff, sent for her the message described in the complaint, and paid to the defendant the charges for sending same, this would be such a loss or damage as would entitle plaintiff to recover, if the jury further believe from the evidence that the defendant negligently failed to promptly deliver said message to plaintiff." Charge 3: "The court charges the jury that they have the right to infer mental suffering from all the circumstances in the case, and if from all these circumstances in evidence the jury believe from the evidence that plaintiff did so suffer, and that said sufferings were the proximate result of the defendant's negligence in failing to promptly deliver the telegram described in the complaint, and that Frank Lash, as the agent of plaintiff, sent said telegram, the jury should consider said mental sufferings in determining the amount of damages the plaintiff would be entitled to." Charge 4: "If the jury believe from the evidence that plaintiff's brother, Frank Lash, as her

agent and on her behalf and for her benefit, delivered to defendant at Kendallville, Ind., the telegram described in the complaint, and paid the charges for transmitting same to plaintiff at Birmingham, Ala., and that defendant negligently failed to deliver said telegram to plaintiff, your verdict must be in favor of plaintiff." Charge 5: "The law allows the jury to determine from all the circumstances proven whether or not the plaintiff suffered mental anguish or pain from the failure to promptly deliver the telegraphic message described in the complaint, and if they believe that said mental anguish or pain was the proximate result of the negligence of the defendant in failing to deliver said message to plaintiff with reasonable promptness, the jury should compensate her in damages for said mental anguish or pain."

The defendant requested the following charges, which were refused: (1) Affirmative charge as to count 1. (3) Same as to count 2. (4) Same as to count 3. (5) Same as to count 4. (6) "The court charges the jury that they are not authorized to award more than nominal damages to the plaintiff under the first count, if they find that she is entitled to recover anything under that count." (7) Same charge as to the second count. (9) Same charge as to third count. (8) "If the jury believe from the evidence that the plaintiff's brother, Frank Lash, sent a telegram to the plaintiff at her address in Birmingham during the evening of June 13th, notifying her of her father's death, and that the same was delivered to said address, the plaintiff cannot recover in this action more than nominal damages." (10) "If the jury believe from the evidence that Frank Lash sent the telegram referred to in this case, and that he sent it as agent for the plaintiff, yet if they further believe from the evidence that Frank Lash, at or before the sending of the telegram from defendant's office in Kendallville, Ind., did not communicate to defendant or its agent at the same place that he was acting for plaintiff in sending said message or telegram, then the jury cannot find for the plaintiff under the first count of the complaint." (11) "If the jury believe from the evidence that the defendant's messenger boy used or made reasonable effort under all the circumstances of the case to find plaintiff and deliver to her the telegram from her brother, they must find for the defendant." (12) "The court charges the jury that if they believe the evidence they cannot find for the plaintiff more than nominal damages."

There was judgment and verdict for the plaintiff in the sum of \$500.

George H. Fearons and Campbell & Walker, for appellant. B. M. Allen, for appellee.

HARALSON, J. On a former appeal in this case, it was held that the averments in the complaint alleged a cause of action ex con-

tractu, and not ex delicto. The plaintiff on this trial again treated the complaint as one for breach of contract, and the defendant so treated it by its plea of non assumpsit thereto, upon which issue was taken. The action will, therefore, be considered as an action ex contractu on appeal. *Manker v. W. U. T. Co.*, 137 Ala. 292, 34 South. 839.

It was also held on that appeal, overruling cases asserting a contrary doctrine, that a principal may maintain an action in his own name for breach of contract made by his agent, although his name was not disclosed in sending the message. That conclusion was arrived at, after mature consideration of the court in consultation. We are now asked to review the latter decision and restore the former ones, and this is the main question on this appeal. It is sufficient to say, that we have not been shown any reasons we can approve for adopting this course, and we decline to follow it, and reaffirm what was decided in that case.

It is also contended by defendant, that in actions of this character, damages for mental suffering cannot be recovered. This contention might prevail if the action were ex delicto. But we have seen that the action is one of assumpsit, based upon the breach of a contract to deliver a telegram, in which case, the breach of the contract being shown damages for mental suffering may be recovered, by way of aggravation, and this, when the facts show that no more than actual nominal damages may be recovered. *W. U. T. Co. v. Krichbaum*, 132 Ala. 535, 31 South. 607; 5 *Mayfield's Dig.* 262, § 2.

The plaintiff proposed to show by Blanche Benard, and the court allowed her to testify, against the defendant's objection, "that plaintiff often received telegrams and letters" at the house, and at the address of witness, who was the keeper of the house where plaintiff boarded. The purpose of the evidence was to show, that the company knew, or had information of the residence of the plaintiff, and might have delivered the message in a reasonable time, if it had made diligent effort to ascertain her whereabouts. This evidence, for that purpose, was proper to be submitted to the jury, as tending to show that fact.

This witness further testified, that she was in the house when the telegram was received by plaintiff, "and saw her crying." The defendant moved to exclude the words, "and saw her crying," on the ground that they were irrelevant and incompetent testimony. There was no error in overruling the objection. The evidence was competent as tending to show mental suffering, a question proper for the determination of the jury.

The witness, Lola Smith, shown to have known plaintiff, was asked whether plaintiff ever received any telegram from the defendant company, while she was at Miss Blanche

Benard's house, to which question objection was made, on the ground, in substance, that "messages may be delivered by one messenger knowing where the party resides, when the defendant does not necessarily know the residence." The evidence was properly allowed for the reason given for allowing a similar question propounded to Miss Benard.

The plaintiff requested the court to give charges numbered from 1 to 5 inclusive. We have examined these charges and fail to discover any error in them.

The defendant requested charges from 1 to 12 inclusive. From what has been said above, and according to the decisions of this court, these charges were properly refused.

It may be proper to say of the eleventh charge, that it ignores any reference to the knowledge of defendant or its operator of the plaintiff's whereabouts, which the evidence tends to establish, and the failure of defendant's agent to make known to the messenger where plaintiff might be found. Without this, the charge was defective and misleading.

No error appearing, let the judgment be affirmed.

Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

CROSTHWAITE v. LEBUS.

(Supreme Court of Alabama. April 10, 1906.
Rehearing Denied June 30, 1906.)

1. BROKERS—PERFORMANCE OF CONTRACT—RIGHT TO COMMISSION.

Where a broker was authorized to sell real estate for not less than a specified price, one-third cash and the balance in one and two years, with interest at 6 per cent., the purchaser to pay a proportionate amount of the taxes for the current year, and he sold the property under a contract requiring the seller to furnish an abstract of title at his cost, and authorizing the purchaser to pay the balance "on or before" one or two years, the contract was not a compliance with the broker's authority, and he was not entitled to commission thereon.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, § 72.]

2. ESTOPPEL—ESTOPPEL IN PAIS—ELEMENTS.

One of the essential elements of an estoppel in pais is knowledge of the facts on which the estoppel is sought to be predicated.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 128.]

3. SAME—PRESUMPTION.

An estoppel in pais is never presumed, but must be proved.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 306.]

Appeal from City Court of Birmingham;
C. W. Ferguson, Judge.

"To be officially reported."

Action by J. D. Crosthwaite against Lewis Lebus. From a judgment for defendant, plaintiff appeals. Affirmed.

J. A. Mitchell and Frank Deedmeyer, for appellant. Underwood & Thach, for appellee.

TYSON, J. This cause was tried by the court without the intervention of a jury. The action is on the common counts to recover commissions for the sale of real estate. Two defenses are invoked: (1) That the sale was not consummated according to the terms prescribed by the principal; and (2) that the plaintiff was doing a real estate brokerage business and had not procured state and county license to carry on such business.

The terms of sale prescribed by the principal are contained in a letter from him to plaintiff, and may be briefly stated as follows: "I will let you sell it for the best price you can get, but not less than \$6,000.00, one-third cash, balance in one and two years, interest at the rate of 6 per cent. on deferred payments, or all cash, at option of purchaser."

* * * Also that the purchaser pay a proportionate amount of the taxes for the current year." The plaintiff procured a prospective purchaser, and the memorandum of sale was as follows (after describing the property and acknowledging receipt of \$100 as part payment): "It is understood that the price and terms of sale are as follows: Two thousand dollars (\$2,000.00) cash (less the \$100.00 here receipted for), and the balance of four thousand dollars (\$4,000.00) evidenced by notes, \$2,000.00 each, payable on or before one and two years, respectively, and bearing interest at the rate of 6 per centum. * * * The seller to furnish at his own expense an abstract of title to said property. [Signed] Lewis Lebus, per J. G. D. Crosthwaite, Agent." The sale was not consummated; the seller refusing to make deed upon the terms noted in memorandum of sale.

The rule is well settled that a broker is not entitled to commissions until he has performed the undertaking assumed by him. The right to compensation depends upon a performance of the stipulations and conditions of the contract of agency, and the broker must act strictly according to the authority conferred upon him by the principal. 19 Cyc. pp. 240, 241, and notes. Did the plaintiff do this? We think not. The notes for the deferred payments were to be made payable on or before one and two years. No stipulation for a payment of a proportionate part of the taxes for the current year was contemplated, and the seller was to furnish an abstract of title at his costs.

The question to which an objection was sustained did not hypothesize the terms of sale upon which defendant agreed to sell the property, but contained entirely different stipulations from those prescribed by him. There was, therefore, no error in the ruling of the court. One of the essential ingredients of an estoppel in pais is knowledge of the facts upon which the estoppel is sought to be predicated. No such knowledge on the part of the defendant was shown. On the

contrary, it appears that defendant was not informed by plaintiff that the attempted sale by him was upon terms different from those prescribed by defendant. Indeed, it appears that defendant for the first time learned of this difference after this action was commenced. An estoppel is never presumed, but must be proven.

Entertaining these views, it is unnecessary to consider the other assignments of error.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

THOMAS v. TILLEY et al.

(Supreme Court of Alabama. May 9, 1906.
Rehearing Denied June 30, 1906.)

1. WITNESSES—TRANSACTION WITH DECEASED PERSON.

In an action to establish a gift, the donee was incompetent to testify to what occurred between himself and the donor, since deceased, concerning the making of the gift, as provided by Code 1896, § 1794.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 664.]

2. GIFTS—BURDEN OF PROOF.

In a suit to establish a gift, alleged to have been made by a person since deceased, the burden is on the alleged donee to show by clear and convincing proof that the subject of the gift had passed to him by a valid and effective gift.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, § 81.]

3. SAME—GIFT INTER VIVOS—QUANTUM OF PROOF.

Where a claim of gift inter vivos is not asserted until after the death of the donor, the evidence in support thereof must be as clear, strong, and convincing as in a gift causa mortis.

4. SAME—DELIVERY.

In order to constitute a completed gift of personal property, it is necessary that the article be delivered to the donee.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, § 29.]

5. SAME—SUFFICIENCY.

The admissions of a deceased donor, while admissible, are insufficient to establish a completed gift.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gifts, § 96.]

6. SAME.

In a suit to establish a gift inter vivos after the death of an alleged donor, evidence held insufficient to establish the gift.

Appeal from Chancery Court, Tuscaloosa County; A. H. Benners, Chancellor.

"To be officially reported."

Bill by J. M. Thomas against C. A. Tilley and others. From a decree in favor of defendants, complainant appeals. Affirmed.

Henry Fitts, for appellant. Daniel Collier and M. T. Ormond, for appellee Meadows. H. A. Jones, for appellee Sullivan.

SIMPSON, J. The original and amended bills in the case, filed by appellant, set up the claim that J. W. Thomas, the father of

the complainant, J. M. Thomas, in his lifetime gave to complainant a certain note and mortgage, which is admitted to be due, by J. L. Tilley and C. A. Tilley, defendants; and the prayer is that the court establish the transfer as valid and foreclose the mortgage. The widow and heirs of said J. W. Thomas controvert the fact of the assignment and transfer of said note and mortgage.

The testimony for the complainant, beyond his own, which was properly objected to as violative of section 1794 of the Code of 1896, was, first, by the wife of the complainant, who testified that, shortly after the execution of the Tilley mortgage, John W. Thomas told her that he had sold the land to Tilley and taken the mortgage, in order that he might give it to complainant; also that on one occasion her said husband and his father came to her home together; that her husband had the mortgage and note, and handed it to her, telling her to put it away; that she placed it in a trunk, where it remained until after the death of J. W. Thomas; that other papers of J. W. Thomas were subsequently brought by her husband and placed in the same trunk, which are not claimed by said J. M. Thomas; that on the occasion in question said J. W. Thomas remained at his said son's house from Friday evening until Monday morning, and told her several times "that he had given the paper to Johnny," and as he was leaving told her not to let John (her husband) forget to get other papers which he had left at the courthouse, and he told her again as he was leaving that he had given the mortgage to John. The note and mortgage were on one paper, and were not indorsed by said J. W. Thomas. A son of the complainant, 20 years of age, testified that he remembered when his grandfather came to the house with his father, and heard him tell his mother "that he had given the Tilley mortgage to my father, in the courthouse." The witness Richard Malone testified that John W. Thomas told him on one occasion that he was going to give some notes, which J. L. Tilley and another had made to him, to his son John M. Thomas, because he had never given him anything, and that he believed he (J. W.) would not live long. He never heard him say that he had given them. He states that said J. W. Thomas made this statement to him once when he was going to market at Tuscaloosa, and another time at said J. W. Thomas' home, and that witness' wife, Roxie Malone, was present on the latter occasion.

Gilbert Meadows, a witness for the defendants, a son-in-law of J. W. Thomas, testified to a conversation with said decedent in January or February, 1901, not long before his death, in which said Thomas wished him to take care of the Tilley mortgage and other papers for him. W. K. White, a witness for the defendants, testified to a conversation in the presence of himself and Capt. James White, between J. W. Thomas

and his son, J. M. Thomas, shortly after the Tilley mortgage was made, in which said son was trying to persuade his father to let him have the Tilley land, or land notes, and the father replied that he could not let him have the property, because it would be doing too much for one child and none for the rest. He testified, further, that said J. W. Thomas came to the camp where witness and said Capt. White were on that night, and had a conversation with said Capt. White, in which Thomas said that he did not let his son have the Tilley notes or land, and that he was going to treat all his children alike. Francis Cooper, witness for defendants, testified to a conversation with J. W. Thomas, shortly before he died, in which said Thomas said that he had not given the Tilley mortgage and other papers to his son, but had merely placed them in his hands to take care of them for him, as he was afraid his wife would destroy them. Alabama Sullivant, formerly the widow of J. W. Thomas, testified to a conversation between the father and son, just before the former died, in which the father told his son that he wished this Tilley mortgage to be divided between said witness and said J. M. Thomas and his two girl children. Three witnesses testified that Capt. James White died before the time fixed by W. R. White for the conversation between said J. W. Thomas and said Capt. James White. Willey Sullivant testified in a general way to hearing John W. Thomas say he was going to do something for his son J. M., and giving reasons therefor.

The testimony as to the mental condition of J. W. Thomas was conflicting, and probably not sufficient to show that he was incapable of sensibly disposing of his property. The burden of proof was upon J. M. Thomas to show by clear and convincing proof that the note and mortgage which John W. Thomas held against Tilley had passed from said J. W. to him by a valid and effective gift. "The quantum of proof requisite to support a gift in any case is that which, taking into consideration the situation and relation of the parties and the nature of the subject-matter of the gift, clearly and fully establishes every fact necessary to constitute a valid and complete gift." 14 Am. & Eng. Ency. Law (2d Ed.) p. 1049. It is stated, also, that where the claim is not asserted until after the death of the donor the evidence must be as clear, strong, and convincing as in a gift causa mortis. *Id.*, and note 4.

It is undoubtedly the law that, in order to constitute a completed gift of personal property, it is necessary that the article be delivered to the donee. In an early case in this court, where a special verdict was found that O. had executed a deed conveying slaves to his son, and the jury further found that "a formal delivery of the slaves was subsequently made," the court held that not enough to justify a judgment in favor of

said donee, but reversed the case, in order that a venire facias de novo could be issued. *Sewall v. Glidden*, 1 Ala. 52. Again, where a father called a negro woman into the yard where his daughter was, called witnesses, and said, "In the presence of you all, I give this negro to my daughter Mary," and although he had previously declared his intention to do so, and afterwards referred to his having given the slave to his daughter, this court held that this transaction lacked the essential constituent of delivery to make the gift complete, as the daughter was young, living with her father, and the slave remained with him also. *Sims v. Sims*, 2 Ala. 117. The case of *Blakey v. Blakey's Heirs*, 9 Ala. 391, went off on the point that the party claiming the gift failed to produce a deed of gift which he claimed to have, and that the declarations of the deceased were contradictory, and that it did not appear that he parted with the possession or the right to exercise control. In the case of *Hunley v. Hunley*, 15 Ala. 91, the slaves were worked on the farm of the children's father, in connection with those of the grandfather, who lived with his son, and the grandfather had frequently declared that he "had given them" to said grandchildren; that they belonged to them; and said grandfather and other members of the family frequently pointed them out as the slaves which he had given to said grandchildren. Said children frequently claimed said slaves as theirs, in the presence of their said grandfather, and it seemed to be generally recognized in the family that said slaves belonged to said grandchildren. The grandfather said he had given them to said grandchildren and intended to have a deed recorded to that effect. This court held that the transaction was wanting in the "essential ingredient to consummate the gift, namely, the delivery of the property." While the children's father had possession of the slaves, the court says there was "no evidence that they were delivered to him for any such purpose," and that such declarations ("that he had given the slaves to the children") "cannot constitute a valid gift, in the absence of proof of actual delivery." 15 Ala. 104. In the case of *Wheeler v. Glasgow*, 97 Ala. 700, 11 South. 758, the certificate of deposit was indorsed and delivered to the donee, and a witness testified that the donor used words of gift when he handed the same to the donee. 97 Ala. 702, 11 South. 758. Other authorities hold that admissions, while admissible, are not sufficient to establish a completed gift. 14 Am. & Eng. Ency. Law (2d Ed.) p. 1051; *Rooney v. Minor*, 56 Vt. 527. And another case holds that, even where the donee was already in possession, there should be a delivery to him at the time of donation. *Allen v. Allen* (Minh.) 77 N. W. 567, 74 Am. St. Rep. 442.

Realizing how easy it is, after the death of the supposed donor, to gather up detached expressions, particularly in the pres-

ence of interested witnesses, we recognize the wisdom of the rule that strict proof should be made of all the ingredients of a perfected gift before the same can be established. While in this case the proposed donee had possession of the paper, yet it is proved at the same time that he had all the other papers of the decedent in the same trunk, merely for safe-keeping, and, while it is not, in every sense, absolutely necessary that a note should be indorsed (to pass from one to another), yet it is significant in this case as a circumstance. In addition, it may be noted that even the declarations, such as they, were contradictory. We hold that the evidence in this case was not sufficient to establish the gift, and the decree of the court is affirmed.

Affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

HUGGINS v. SOUTHERN RY. CO.

(Supreme Court of Alabama. June 13, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ACTION—PLEADING—PLEA—SUFFICIENCY.

In an action for injuries to a brakeman defendant filed a plea that plaintiff was guilty of contributory negligence, in that, having contracted with defendant that under no circumstances would he couple cars except with a stick, in violation thereof he went between cars to couple them without a stick, when he was injured. Plaintiff demurred to the plea on the grounds that it set forth a contract and alleged a violation thereof, yet the facts set out did not show a violation; that the plea failed to allege that the coupling could have been made with a stick; that the coupling could not have been made without going between the cars; that the plea failed to show that plaintiff knew that an engine was attached to a train of cars and was approaching when he went in between the cars; that the contract relied on was in contravention of Code 1896, § 1749, in relation to the liability of employers for negligence, and opposed to public policy; that the plea showed on its face that it was an arbitrary rule to require one seeking employment to sign a contract such as the one in question, it being a fraud for the purpose of escaping liability for injury; and that the plea failed to specify the facts which constituted plaintiff's negligence. *Held*, that the plea was not subject to such grounds of demurrer.

2. SAME.

In an action against a railroad for injuries to a brakeman, a plea charging that plaintiff went in between cars to make a coupling when it was unnecessary, and that his going between the cars was the proximate cause of his injury, was good.

3. SAME—REPLICATION.

In an action for injuries to a brakeman, a plea alleged contributory negligence in going between cars to make a coupling when it was unnecessary, and that such going between the cars was the proximate cause of the injury. Plaintiff replied that the coupling could not have been made without going between the cars and that plaintiff had been ordered to make the coupling by his superior employé. Defendant demurred

to the replication on the ground that it was not alleged that defendant's employé who ordered plaintiff to make the coupling had any right to abrogate the rule prohibiting employes from going between cars to couple them, and that the fact that it was necessary for him to go between the cars to make the coupling did not authorize the breaking of the rule. *Held*, that the demurrer was properly sustained, because of the failure of the replication to show that the order was given by one who had authority to order a violation of the rule.

4. PLEADING—AMENDMENTS—COMPLAINT.

The only limitation upon the right of plaintiff to amend the complaint at any time before the cause is finally submitted to the jury is that the form of the action must not be changed and that there must be no substitution of a new cause of action.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 686-709, 710-714.]

5. APPEAL—HARMLESS ERROR—PLEADINGS—AMENDMENTS.

Error in denying an amendment to a complaint is harmless, if the amendment is but a repetition of matter in the original complaint.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4103, 4107.]

6. PLEADING—AMENDMENTS—COMPLAINT.

Where, in an action for injuries to a brakeman, the negligence charged in the original complaint on the part of a superior employé was that he negligently ordered plaintiff to couple certain cars and signaled the engineer to back up while plaintiff was between the cars, and there was also an allegation of wantonness on the part of the superior, it was not error to permit an amendment setting up that the superior negligently allowed the cars to run back, as it was no repetition or substitution of the original complaint.

7. MASTER AND SERVANT—INJURIES TO SERVANT—QUESTION FOR JURY.

In an action for injuries to a brakeman, *held* a question for the jury whether there was negligence on the part of plaintiff's superior employé in failing to signal the engineer to stop or slacken the speed of the engine and cars before striking detached cars while plaintiff was between them endeavoring to make a coupling.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1060.]

8. EVIDENCE—OPINION EVIDENCE—MECHANICAL DEVICES.

In an action for injuries to a brakeman, it was proper to permit a railroad man to give an opinion as to what cars could be coupled without going between them.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2323.]

9. WITNESSES—CROSS-EXAMINATION—SCOPE.

Where, in an action for injuries to a brakeman while coupling cars, a witness for plaintiff had testified on direct examination as to what cars could be coupled without going between them, defendant had the right to the opinion of the witness on cross-examination as to whether it was necessary to go between the cars in question.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 931.]

10. MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE—CAUSE OF INJURY.

In an action for injuries to a brakeman while between cars endeavoring to couple them, there was no error in permitting a witness to testify as to the condition of certain cars and in permitting him to describe the couplings; it appearing that the numbers of such cars corresponded with the two between which plaintiff was injured, as identified by another competent witness.

11. SAME—CONTRIBUTORY NEGLIGENCE—DISOBEDIENCE OF ORDERS.

In an action for injuries to a brakeman while between cars endeavoring to couple them, it was proper to permit plaintiff's superintendent to testify as to what he told plaintiff about going between cars the day he started to work, and of his calling plaintiff's attention to rules whereby servants were forbidden to go between cars.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 940, 947.]

12. EVIDENCE—OPINION EVIDENCE—MECHANICAL DEVICES.

In an action for injuries to a brakeman while between cars endeavoring to couple them, it was proper to permit plaintiff's superintendent to testify that the cars could have been coupled without plaintiff going between them.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2323.]

13. SAME—ADMISSIONS—ACQUIESCENCE.

In an action for injuries to a servant, there was no error in admitting in evidence a statement in regard to the accident, though it was not signed by plaintiff, where one who had signed it testified that, while plaintiff declined to sign it, it was read over to him and he admitted that it was correct.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 779.]

14. TRIAL—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Where, in an action for injuries to a servant, there was no evidence of wantonness on the part of plaintiff's superintendent growing out of any act or omission set out in the complaint, it was proper to refuse a requested instruction to the effect that, though defendant was only charged with simple negligence, yet, if evidence had been introduced without objection showing defendant guilty of wanton or willful negligence on account of the acts of plaintiff's superintendent, the variance might be disregarded and a verdict rendered for plaintiff on account of the willful negligence.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596, 601-603.]

15. MASTER AND SERVANT—INJURY TO SERVANT—INSTRUCTIONS—PROXIMATE CAUSE.

In an action against a railroad for injuries to a brakeman, plaintiff requested an instruction to the effect that if the cars between which plaintiff was injured were in a defective condition, and defendant knew of the defects and failed or refused to put the cars in good condition within a reasonable time, plaintiff was entitled to recover. *Held*, that the instruction was properly refused as seeking to recover, irrespective of whether the defect was the proximate cause of the injury.

16. SAME—INJURIES TO SERVANT—ORDERS—EFFECT.

Where the rules of a railroad company prohibited brakemen from going between cars to couple them, an order to a brakeman from his superintendent to couple certain cars was no implied order to go between them.

17. DAMAGES—PERSONAL INJURIES.

In an action for injuries to a servant, a requested instruction that in case of defendant's guilt plaintiff was entitled to recover what his services had been proven to be worth from the time of his injury to the time he might reasonably expect to live, less what he could earn in his present condition, was properly refused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 237.]

18. SAME.

In an action for injuries to a servant, it was proper to refuse an instruction that one

element of damages was wounded feelings of the plaintiff, his physical and mental suffering, and that, while there was no measure of proof of such damages, it was a matter of inference to be drawn by the jury from the manner and carelessness of the wrong.

19. MASTER AND SERVANT—PROXIMATE CAUSE OF INJURIES—CONTRIBUTORY NEGLIGENCE.

Where a brakeman was negligent in going between cars while in motion, he could not recover for injuries, though the engineer was negligent in backing the cars at an unusual and excessive speed.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 608.]

20. SAME—INSTRUCTIONS—WANTON NEGLIGENCE OF FELLOW SERVANT—CONTRIBUTORY NEGLIGENCE.

It was proper to charge that unless the engineer was guilty of willful or wanton negligence in backing his engine and cars at a great and dangerous speed, and was conscious of the fact at the time that his act was likely to result in an injury to plaintiff, plaintiff could not recover for the negligence of the engineer.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 535.]

21. TRIAL—INSTRUCTIONS—FAILURE OF EVIDENCE ON CERTAIN POINTS.

In an action for injuries to a servant while between cars endeavoring to couple them, it was not reversible error to instruct that there was no evidence that any custom among brakemen of going between moving cars was known to and acquiesced in by defendant, and that there was no evidence that the rule prohibiting employees from going between moving cars to couple them had been rescinded or abandoned.

22. MASTER AND SERVANT—RULES OF EMPLOYMENT—REASONABLENESS.

A rule of a railroad company prohibiting employees from going in between moving cars to couple or uncouple them while in motion is reasonable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 285.]

23. SAME—CONTRIBUTORY NEGLIGENCE—OPERATION OF RAILROAD.

Where a rule of a railroad prohibited employees from going between moving cars to couple them, a brakeman was guilty of contributory negligence in going between moving cars if the cars could have been coupled without his so doing.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 767.]

24. SAME—NEGLIGENCE OF FELLOW SERVANT—ACTS CONSTITUTING NEGLIGENCE—PROXIMATE CAUSE.

Where a brakeman signaled the engineer to back his train while the brakeman was standing on the outside of the track, and the engineer backed the train in the approved manner, and before the cars reached those to which they were to be coupled the brakeman went in between them, and as soon as the engineer discovered such fact he used every means to stop his train, but was unable to do so in time to avoid injuring plaintiff, plaintiff could not recover.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 799.]

25. SAME—PROXIMATE CAUSE.

Where an engineer, in moving cars, was taking his signals from a brakeman, and did not see any signals given by a superintendent, and the brakeman was injured by being caught between the cars, he could not recover for any negligence of the superintendent.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 853.]

26. SAME—RULES—CUSTOMARY VIOLATION.

Where it was contrary to the rules of a railroad for employes to go between cars in order to make couplings, a custom among the employes violative of the rule was not binding upon the road, unless it was known to the road, and acquiesced in, or had prevailed for so long a time that the road was bound to know it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 287.]

Appeal from City Court of Bessemer; B. C. Jones, Judge.

"To be officially reported."

Action by Joseph Huggins against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

This was an action by appellant, who sues under the employer's liability act for damages received while coupling cars in defendant's yards at Selma. The first count avers a defect in the ways, works, plant, and machinery, etc. The second count avers the negligent order of one Porterfield, as superintendent, while in the exercise of such superintendence. The third count avers the negligence of said Porterfield, while in the exercise of superintendence, in negligently giving the engineer signal to back up the train at a great rate of speed while the plaintiff was coupling cars. The fourth count is a practical repetition of the third count. The fifth count attributes the negligence to R. O. Harris, the engineer in charge of the train, in negligently running the engine back against the cars at a great rate of speed. The sixth count is a repetition of the fifth count.

The defendant filed a number of pleas, among them the following: Plea 6: "The defendant, for further answer to the first, second, third, and fifth counts of the complaint, says that the plaintiff was himself guilty of contributory negligence in this: That said plaintiff, under the name of Alex Huggins, on March 30, 1901, entered into a contract of employment with the defendant, which said contract was in words and figures as follows: [Here follows the contract of employment, which provides that under no circumstances shall the brakeman couple or uncouple cars except with a coupling stick, and that no brakeman or others must go between cars under any circumstances for the purpose of uncoupling, or for adjusting pins, where the engine is attached to the car, and assuming the individual duty of going to the railroad company and procuring a coupling stick of sufficient standard length, and of keeping such a stick always on hand. The contract further provides that he will not, in obedience to any orders from anybody, couple without this stick, and no one has any authority to discharge him for failure to couple without this stick.] And defendant says that in violation of the above contract the plaintiff negligently went in between the

cars of the train, when he was injured, and negligently attempted to make a coupling without a stick, and while one section of said car was in motion, and was thereby guilty of contributory negligence." Plea 8 sets up contributory negligence on the part of the plaintiff for violation of a rule of the company prohibiting employes from getting in between moving cars to couple or uncouple them, with a knowledge of said rule. Plea 9 sets up contributory negligence, because plaintiff went in to couple cars when the cars were in motion, and it was unnecessary to go in to make the coupling. Pleas 8 and 9 were filed to the first, second, third, and fifth counts of the complaint.

Demurrers to the sixth plea: "Said plea set forth a contract, and alleges a violation thereof, and yet the facts set out are not sufficient to show a violation. Said plea fails to aver or show that the coupling which plaintiff was making or attempting to make could have been made with a stick. Said plea fails to show that the coupling of the cars which the plaintiff was making or attempting to make when he was injured could be done without going in between the cars. Said plea fails to show that plaintiff knew that an engine was attached to the train or cars and was approaching when he went in between the cars to make the coupling. Said plea sets up a contract which is in contravention of section 1749 of the Code, opposed to public policy. Said plea shows on its face that it is an arbitrary rule of the defendant to require any one who desires to obtain employment with the defendant to sign one of the contracts as set out in the plea, not as a contract to be governed by while the employe is working for defendant, but as an artful scheme and a fraud, for the purpose of trying to escape liability in case of personal injury to the employe. Said plea fails to show or specify the facts which constituted the negligent act of plaintiff in violation of said contract."

Demurrers to eighth plea: "Said plea fails to allege that it was unnecessary for plaintiff to go between the cars to couple the same. Said plea fails to aver that the rule therein named was violated. Because the averments in said plea vary the obligation in said contract the plaintiff would not go in between the cars for the purpose of coupling or uncoupling them when an engine is attached. The facts set out in said plea do not show any violation of the rule alleged in the plea. The plea fails to aver that the coupling in which plaintiff was engaged could be made with a stick. The plea fails to aver that the coupling could be made without plaintiff going in between the cars. It does not allege that there was an engine attached to the cars that plaintiff went in between. Because said plea varies said rule of defendant. Because said plea does not show that plaintiff knew, when

he went in between the cars, that an engine was attached to other cars approaching the one which plaintiff was to couple, and does not show that plaintiff had knowledge of the fact that it was unnecessary for him to go between said cars to couple the same. Said plea does not aver or show that going in between the cars was obviously dangerous, or that plaintiff knew it was dangerous."

The third replication to the eighth and ninth pleas was as follows: "Plaintiff says that the coupling the plaintiff was making at the time of the injury to him could not be made without going between the cars, and that plaintiff had been ordered by his superior employé to make said coupling, and in order to do so it was necessary for plaintiff to go between the cars."

The defendant demurred to this replication as follows: "It is not averred that the defendant's employé who ordered plaintiff to make said coupling had the right or authority to annul or abrogate the rule prohibiting employés from going between moving cars for the purpose of coupling or uncoupling them, and the fact that it was necessary for plaintiff to go in between said cars for the purpose of making said coupling did not authorize or justify him in the breaking of the rule of defendant prohibiting employés going in between moving cars to couple or uncouple them."

The plaintiff requested the following charges, which were refused by the court: Charge 7: "I charge you, gentlemen of the jury, that the law is this: If the defendant corporation is only charged in the complaint with simple negligence, on account of the negligence of the yard foreman, Porterfield, yet if evidence was introduced by the plaintiff, without objection on part of the defendant, showing that defendant was guilty of wanton or willful negligence on account of the acts of Porterfield, and you believe such evidence, then you are warranted under the law in disregarding the variance, and may give a verdict for plaintiff on account of the willful or wanton negligence of said Porterfield." Charge 10: "I charge you, gentlemen of the jury, that if you believe from all the evidence in the case that the car or cars between which Joe Huggins was injured were in a defective condition, and the defendant knew of these defects, and failed or refused to put said car or cars in good condition within a reasonable time, then the defendant is guilty of negligence, and plaintiff is entitled to recover." Charge 11: "I charge you, gentlemen of the jury, that if you believe from all of the evidence in this case that poor Joe Huggins cannot read or write, and that the contract in evidence was not read over to him and fully explained to him, and if you believe further from the evidence that Huggins did not read over said contract in the presence of Walter Huggins, as set up in said contract, then the plaintiff is not

bound by the contract, and you may disregard the same in making up your verdict." Charge 12: "I charge you, gentlemen of the jury, that if you believe from all the evidence in this case that Porterfield was standing near Huggins and could see his perilous position, and failed to use ordinary care to stop said cars or signal the engineer, and the injury to plaintiff resulted thereby, then plaintiff may recover, although plaintiff may have been guilty of contributory negligence in going between said cars." Charge 13: "I charge you, gentlemen of the jury, that if you believe from all the evidence in this case that poor Joe Huggins could not read or write, and that the yard foreman, Porterfield, failed to read over to said Huggins rule No. 10 of defendant, in evidence in this case, and failed to fully explain said rule to said Huggins, then said Huggins is not bound by this rule, and you may disregard the same in making up your verdict." Charge 14: "I charge you, gentlemen of the jury, if you believe from all of the evidence in this case that poor Huggins could not read or write, and that he did not read over said rule 10 in the presence of the yard foreman, Porterfield, as set up in said plea, then Huggins would not be bound by said rule, and you may disregard the same." Charge 16: "I charge you, gentlemen of the jury, that if you believe from all the evidence in this case that Joe Huggins gave the engineer, Harris, the proper signal, and the engineer failed to obey said signal, and thereby the plaintiff was injured, then the plaintiff is entitled to recover." Charge 17: "I charge you, gentlemen of the jury, that if you believe from all of the evidence in this case that the plaintiff, who was a switchman on defendant's road, gave the proper signals to Porterfield, whose duty it was to receive them and transmit the said signals to the engineer, and Porterfield failed to transmit them properly, and injury resulted to plaintiff, the defendant is, under statutory provisions, liable for damages." Charge 18: "I charge you, gentlemen of the jury, that if you believe from the evidence in this case that Porterfield told Huggins to couple or uncouple said cars, then impliedly it was an order to go between said cars and couple them, and plaintiff, in order to recover, is not bound to prove that he had a special order from Porterfield to go between said cars." Charge 20: "I charge you, gentlemen of the jury, that if you find the defendant guilty the plaintiff, Huggins, is entitled to recover what his services have been proven to be worth from the time of his injury up to the time he may reasonably expect to live, less what he can earn in his present condition." Charge 21: "I charge you, gentlemen of the jury, that one element of damages in this case is the wounded feelings of the plaintiff, his physical and mental suffering from his injuries. There is no measure of proof of such damages. It is a

matter of inference, to be drawn by the jury from the manner and carelessness of the wrong."

The court gave the following charges at the request of defendant: Charge 12: "Unless the jury believe from the evidence that Porterfield gave his signal to the engineer to back up said cars, with the knowledge of, or conscious of, the fact that plaintiff was in a dangerous and perilous position, and that the probable result of the cars backing up would be to injure him, then the plaintiff cannot recover under the fourth count of the complaint." Charge 14: "I charge you, gentlemen of the jury, that even if R. O. Harris, the engineer, was negligent in backing up the engine and cars at an unusual and great rate of speed, yet, if you find that the plaintiff himself was guilty of contributory negligence in going between the cars while they were in motion, plaintiff cannot recover under the fifth count of the complaint." Charge 15: "I charge you, gentlemen of the jury, that unless you believe from the evidence that the engineer was guilty of willful or wanton negligence in backing up his engine and cars at a great and dangerous rate of speed, and was conscious of the fact at the time that his act was likely to and probably would result in injury to plaintiff, then the plaintiff cannot recover under the sixth count of the complaint." Charge 16: "The court charges the jury that there is no evidence in this case that any custom among switchmen or brakemen on the defendant's road of going in between moving cars to couple them was known to and acquiesced in by defendant." Charge 18: "The court charges the jury that the rule of the defendant prohibiting employes from going in between moving cars to couple or uncouple them while in motion was a reasonable rule." Charge 19: "The court charges the jury that there is no evidence in this case that the rule prohibiting employes of defendant from going in between moving cars to couple them had been rescinded or abandoned by the defendant in regard to the plaintiff in this case." Charge 20: "If the jury believe from the evidence that the cars could have been coupled without plaintiff going in between them, and believe that the defendant's rule, of which plaintiff had knowledge, prohibited employes from going in between cars while in motion to couple or uncouple them, then, if the plaintiff went in between said cars while in motion for the purpose of coupling them, he was guilty of contributory negligence and cannot recover in this case, unless the jury believe, further, that the defendant's employes, after being aware of plaintiff's perilous position were guilty of negligence that caused his injury." Charge 21: "If the jury believe from the evidence that the plaintiff signaled the engineer to back his train while he was standing on the outside of the track, and the engineer in obedience to said signal backed up his engine and cars in an ordi-

narly prudent manner, and before the cars reached those to which they were to be coupled the plaintiff went in between the cars, and that as soon as the engineer discovered this fact he used all means at hand to stop his train, and could not stop his train before striking the other cars, then the plaintiff cannot recover in this cause." Charge 22: "If the jury believe from the evidence that the engineer was taking his signals from the plaintiff in this cause, and did not see any signals given by Porterfield, then the plaintiff in this cause cannot recover on account of any alleged negligence of Porterfield in giving the signals." Charge 23: "If the jury believe from the evidence that the plaintiff was ordered by Porterfield, the yard conductor, to make the coupling he was attempting to make when injured, the fact that he was ordered to make the coupling did not authorize or justify him in going between the said cars to make the said coupling in violation of the rules of the defendant and of which plaintiff had knowledge." Charge 25: "In regard to the custom as to going in between cars to make couplings, unless you believe from the evidence that such custom was known to the defendant and acquiesced in by it, or had prevailed for so long a time that defendant was bound to know it and would be presumed to have acquiesced in it, then you should not consider such custom in arriving at your verdict." Charge 26: "If the jury believe from the evidence that the plaintiff could have made the coupling by using the drawhead on the car attached to the engine, instead of the one on the stationary car, and could have by doing so made the coupling without going in between the moving cars, it was his duty to do so; and if he failed to do so he was guilty of contributory negligence in going between the moving cars." Charge 27: "There is no evidence in this cause that the contract of employment between the plaintiff and the defendant had been mutually abandoned." Charge 28: "The engineer and conductor had a right to presume that the plaintiff would, if he had knowledge of them, obey the rules of the defendant prohibiting employes from going in between cars for the purpose of coupling them." Charge 29: "If the jury believe from the evidence that plaintiff knew that the rule of the defendant prohibited employes from going in between moving cars for the purpose of coupling them, and it was not necessary for the plaintiff to go in between them while they were moving in order to couple them, he was guilty of contributory negligence."

Rone Ward and Estes & Smith, for appellant. James Weatherly, for appellee.

ANDERSON, J. Without determining the sufficiency of the sixth plea, it was not subject to the grounds of demurrer assigned. And what we say applies to the eighth plea

also. The ninth plea was good. It charges the plaintiff with going between the cars to do the coupling when it was unnecessary, and that his going between the cars was the proximate cause of his injury. If he could have made the switch without going between the cars, he should have done so, and should not have adopted a more hazardous or dangerous way to do so.

The demurrer was properly sustained to the third replication to the eighth and ninth pleas. It does not aver that the order was given by one who had the authority to order a violation of the rules and whose orders it was the plaintiff's duty to obey.

After the evidence was in, but before the case was given to the jury, the plaintiff asked leave to amend the complaint by adding counts 7 and 8. The only limitation upon the right of a plaintiff in a civil action at law to amend his complaint at any time before the cause is finally submitted to the jury, and they have retired, is that the form of the action must not be changed. There must not be an entire change of parties, nor can there be the substitution or the introduction of an entirely new cause of action. *Ga. Ry. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006; 4 *Mayfield's Dig.* p. 448, § 165, and cases there cited. It would be error without injury to deny the amendment, if it was but a repetition of what was in the original complaint. So, too, has it been held not to be error to refuse an amendment offered after the evidence of the plaintiff had closed and which was supported by no testimony. *Beavers v. Hardie*, 59 Ala. 570.

The negligence charged in the amendment was a neglect of duty on the part of Porterfield by allowing or permitting the cars to be run back. The negligence as charged in the original complaint on the part of Porterfield was, in count 2, that he negligently ordered the plaintiff to couple the cars; third, that he directed or signaled the engineer to back up; and the fourth is like unto the third, with an averment of wantonness. The amendment was, therefore, no repetition or substitution of the original complaint; nor can we say that the amendment was unsupported by the evidence. True, the defendant's evidence tended to show that the engineer was acting upon the signals given by the plaintiff; but the plaintiff's evidence was to the effect that the engine and the cars came back upon the signal or direction of Porterfield, who had ordered plaintiff to make the coupling, who knew where he was, when the cars were being backed, and that the cars came back with considerable force, knocking the other cars some distance. Now if the engineer was acting upon the signals of Porterfield, and it was true that he ordered the engine and cars back, it was clearly an inference for the jury to determine whether or not there was negligence on the part of Porterfield, knowing the peril of the plaintiff, in failing to signal or direct the engineer to stop or slacken the

speed of the engine and cars before striking the detached cars. The trial court erred in not permitting the amendment.

There was no error in the ruling of the trial court upon the taking of the evidence of witness, Ed Davis. He was a railroad man, and could give an opinion as to coupling cars. Besides, he had testified on the direct examination what cars could be coupled without going between them, and the defendant had the right to ascertain if it was necessary to go between these cars to make the coupling in question.

We cannot pass intelligently upon the assignments of error growing out of the examination of the plaintiff as a witness, as there is considerable confusion in the record as to the execution of papers by him. Wm. Hagin testified that plaintiff delivered him an application, but that he did not see him sign it. This was no proof of the execution; but the bill of exception does not disclose what paper was introduced—does not show that it was the paper exhibited to the plaintiff when a witness. Neither does the record show that the paper purporting to be signed by the plaintiff was ever introduced, or, if so introduced, that it was the one the execution of which was proved by Hagin. It seems that two papers were introduced when Hagin was on the stand, but whether either of them was the one set out with plaintiff's testimony we cannot say. If such was the case, we cannot identify it as the first or last one testified to by Hagin.

There was no error in permitting the witness Sexton to testify as to the condition of the cars and to describe the couplings, as the numbers corresponded with the two between which plaintiff was hurt, as identified by the witness Porterfield. There was no error in permitting the witness Porterfield to testify to what he told plaintiff about going in between the cars the day he started to work, and of his calling attention to the rules. Nor was there any error in permitting the witness to testify that the cars would couple without the use of the lever, or that it could have been made without the plaintiff putting his hand or arm between the couplers.

There was no error in permitting the introduction of the statement signed by Neely and Beaverly. It is true it was not signed by the plaintiff; but Neely testified that, while he declined to sign it, it was read over to him, and he admitted that it was correct.

Charge 7, requested by the plaintiff, was properly refused. If not otherwise bad, it could have no application to the case under the complaint upon which the case was tried, as there was no evidence of wantonness on the part of Porterfield growing out of any act or omission set out in the complaint.

Charge 10, requested by the plaintiff, was properly refused. If not otherwise bad, it seeks a recovery, whether the defect was the proximate cause of the injury or not. It makes no difference how defective the car

was, unless said defect was the proximate cause of the injury.

We cannot intelligently consider charge 11, refused to the plaintiff, on account of the confusion of the evidence relating to the execution of the contract.

Charge 12 was properly refused, and is fully covered by the discussion with reference to the amendment to the complaint. The complaint upon which the case was tried had no averment of a failure of Porterfield to stop the cars. What we say as to charge 11 relates to charges 13 and 14.

Charge 16, requested by plaintiff, was properly refused. If not otherwise bad, it gives the plaintiff the right to recover, although he may have been guilty of contributory negligence.

The fallacy of charge 17 is shown in what we say as to charge 12.

Charge 18 was properly refused. If not otherwise bad, it was no implied order to go between the cars when told to couple them, when he could so do without going between them.

There was no error in refusing charges 20 and 21, requested by the plaintiff.

Charge 12, given at the request of the defendant, simply required proof of the allegations of count 4 before there could be a recovery thereunder.

Charge 14 was properly given for defendant. It simply instructed the jury that plaintiff could not recover under the fifth count if the plaintiff was negligent in going between the cars, for his going in between the cars was the proximate cause of his injury, and if he did so negligently that would be a good defense to the fifth count, which averred simple negligence.

There was no error in giving charge 15, requested by the defendant. 4 Mayfield's Dig. 300.

Charges 16 and 19 assert the truth, and, while we have heretofore declined to reverse the trial court for refusing such charges, it is not reversible error to give them.

Charge 18, given for the defendant, asserts the law. *M. & C. R. R. Co. v. Graham*, 94 Ala. 545, 10 South. 283.

Charge 20, requested by the defendant, was the law.

There was no error in giving charges 21 and 22 at the request of the defendant.

There was no error in giving charge 23, requested by the defendant. Porterfield may have given him the order to couple, yet it would not justify him in going between the cars, unless he had to do so to comply with the order.

There was no error in giving charge 25, requested by the defendant. If there was a custom among the operatives violative of the defendant's rules, the defendant could not be bound by the custom, unless it knew and acquiesced therein.

There was no error in giving charge 26, requested by the defendant. If plaintiff

could have made the coupling without going in between the cars, he was guilty of contributory negligence in going in between them.

There was no error in giving charge 27, requested by the defendant. Nor was there error in giving charge 29.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

CLEVELAND SCHOOL FURNITURE CO. v. CITY OF GREENVILLE.

(Supreme Court of Alabama. Jan. 20, 1906.
On Rehearing, June 30, 1906.)

1. MUNICIPAL CORPORATIONS—POWERS.

A municipal corporation can exercise only those powers that are granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted, and those indispensable, as distinguished from convenient, to the declared objects and purposes of the corporation.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 144-149.]

On Rehearing.

2. SAME—SCHOOL FURNISHINGS—LIABILITY OF CITY—NOTES.

The Greenville city charter conferred no authority on the city in respect to its public schools. Act Feb. 25, 1887 (Acts 1886-87, p. 629), authorized the city to issue bonds for the purpose of purchasing school lots, erecting school buildings, and furnishing the same; the proceeds of the bonds to be set aside for the exclusive benefit of the schools and used for that purpose, and Act Feb. 28, 1887 (Acts 1886-87, p. 1009), constituted the city of Greenville a separate school district and provided for the management of the public schools therein. *Held*, that the city of Greenville had no authority to pledge its general revenues for the payment of furniture purchased to fit up a school, and that a note executed by the city for such purpose was unenforceable.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1894-1897.]

3. SAME—ESTOPPEL.

Where a city had no power to execute a note binding its general revenues for the payment of furniture purchased for use in a school building, the retention and use of the furniture in the school did not estop the city from denying the holder's right to recover on the note.

Tyson, Dowdell, and Simpson, JJ., dissenting.

Appeal from Circuit Court, Butler County; J. C. Richardson, Judge.

"To be officially reported."

Action by the Cleveland School Furniture Company against the city of Greenville. From a judgment for defendant, plaintiff appeals. Affirmed.

This was an action on a promissory note for the sum of \$790, executed by defendant on the 10th day of July, 1896, due and payable five years after date, with interest payable annually from the 7th day of January, 1895. The pleas were the general issue and, first, want of consideration; *ultra vires*; that the debt was of one *Perdue*, and not of the city; that it was for school furniture fur-

nished the school district of the city of Greenville, and was therefore without consideration. The plaintiff filed replication setting up the facts of the furnishing of the furniture to the schools, the use of it by the citizens of Greenville, the issuance of the warrant by the city to Perdue in payment thereof, a transfer of the warrant so issued to Perdue by him to appellant, the presentation of the warrant so issued to the city council for payment, the making of the notes sued on by the city council by ordinance or resolution, the surrender of the warrant to the city council upon the delivery of the note, the retention of the warrant so issued to Perdue by the city council, and the failure to pay. Demurrers were sustained to this replication. The facts disclosed by the record are that the city council of Greenville, under the authority of an act of the Legislature, issued bonds for the purpose of securing a school lot, erecting school buildings thereon, and furnishing the same. The bonds were sold and put in the hands of a special treasurer. A lot was purchased, and a contract for building and furnishing a schoolhouse was let to James H. Perdue. Perdue purchased the furniture from appellant and put it in the schoolhouse. The city council issued warrants on the special treasurer in favor of Perdue, one for \$790, which was transferred by Perdue to appellants in payment of the debt for the furniture. The warrant was presented for payment, and the reply was, "No funds available for that purpose." The council then passed a resolution authorizing the execution of the note sued on. When the note was executed the warrant was delivered to the city council and has ever since been retained by the city. A payment of eighty odd dollars was made upon it, and no further payments have ever been made. At the conclusion of the evidence, the court gave the general affirmative charge for defendant. There was verdict and judgment for defendant, and the plaintiff appeals.

D. M. Powell, for appellant. J. M. Chilton and R. E. Steiner, for appellee.

ANDERSON, J. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable." *New Decatur v. Berry*, 90 Ala. 432, 7 South. 838, 24 Am. St. Rep. 827; 1 *Dillon on Muni. Corp.* § 89; *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766; *Cook County v. McCrea*, 93 Ill. 236; *Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611; *Eufaula v. McNab*, 67 Ala. 590, 42 Am. Rep. 118. *City of Mobile v. Electric Street R. R.* (Ala.) 38 South. 127. The city of Greenville

had no authority to execute the note sued on or to make the debt, which it evidences, a legal charge against the general fund of the municipality. No such authority was given the municipality by its charter. *Acts 1870-71*, p. 121. Nor by section 2950 of the Code of 1896 and *Acts 1886-87*, pp. 629, 1009. *Police Jury v. Britton*, 15 Wall. (U. S.) 556, 21 L. Ed. 251; *Blackman v. Lehman, Durr & Co.*, 63 Ala. 550, 35 Am. Rep. 57; *Garland v. Board of Revenue*, 87 Ala. 223, 6 South. 402; *Woolf v. Taylor*, 98 Ala. 257, 13 South. 688; *Webb v. City of Demopolis*, 95 Ala. 131, 13 South. 289, 21 L. R. A. 62.

In deciding that the suit cannot be maintained against the municipality, we do not wish to be understood as holding that the claim in question could not be paid out of the fund provided by *Acts 1886-87*, p. 1012, § 10, under the direction of the board of education. Since the power to contract this debt was not granted in express words, we cannot hold that it is a power to be implied as incident to the objects and purposes of the corporation. Educational institutions are not regarded as necessarily belonging to municipal government. "They are important and contribute greatly to the well-being and prosperity of any town or city, as do public buildings, charitable institutions for taking care of the sick, and other like institutions, but all such are of a class and constitute subjects, not germane to municipal organization." *Woolf v. Taylor*, 98 Ala. 254, 13 South. 688.

The matters set up in the replication as an estoppel are facts that should appeal to the moral sensibilities of the board of education, or even to parents, whose children have and doubtless will continue to use the desks and seats, but cannot estop the defendant by acts of ratification from repudiating or disputing an ultra vires act or contract. *Wetumpka v. Wetumpka Co.*, supra; *Eufaula v. McNab*, 67 Ala. 588, 42 Am. Rep. 118.

The trial court committed no error upon the ruling on the pleading; and, as the special pleas were proven, the general affirmative charge was properly given for the defendant.

The judgment of the circuit court is affirmed.

MCCLELLAN, C. J., and HARALSON and DENSON, JJ., concur. TYSON, DOWDELL, and SIMPSON, JJ., dissent.

On Rehearing.

WEAKLEY, C. J. When the majority opinion was promulgated, three of the justices dissented. Upon the application for rehearing, there remained an equal division among those justices who participated in the decision; and, as the fate of the appeal depended upon the conclusion the writer might reach, he has given the briefs of counsel careful consideration. The result is that he

is unable to escape the conclusion at which the majority of the court arrived, as expressed in the opinion of Mr. Justice ANDERSON, however much he may desire the appellant to realize upon its claim. The reasoning by which he is led to this conclusion is the following:

This court has always strongly maintained the doctrine, both as to private and municipal corporations, that contracts made by or with them, outside the pale of their corporate authority, confer no right, and that neither the making of an ultra vires contract nor the receiving of its benefits estops the corporation from setting up its invalidity. *Chewacla Lime Works v. Dismukes*, 87 Ala. 844, 6 South. 122, 5 L. R. A. 100; *Sherwood v. Alvis*, 83 Ala. 115, 8 South. 307, 3 Am. St. Rep. 695, and authorities there cited; *New Decatur v. Berry*, 90 Ala. 432, 7 South. 838, 24 Am. St. Rep. 827. In *Allen v. Intendant and Councilmen of Lafayette*, 89 Ala. 641, 8 South. 80, 9 L. R. A. 497, it was held that, although the town had no authority to borrow money or issue warrants for its repayment, yet, having by its charter express authority to maintain public schools and to purchase real estate for corporate purposes, and the borrowed money having been used to aid in paying for a school lot, the town was liable for the amount, without reference to the warrant; and hence the decision was that a taxpayer could not in equity enjoin the collection of the warrant, which truly represented the amount of the lender's legal demand. It was said in that case, as expressing the kernel of the decision, that the lender had "a valid demand against the town of Lafayette for the amount of money advanced by her, not because the corporate authorities agreed to pay it to her, but because they have legitimately used it for the benefit of the town, in a way and to an end fully authorized by its charter."

The charter of the city of Greenville conferred no authority in respect to public schools upon that municipality; and it is not contended that any such authority was conferred. The right to recover is sought to be derived from the joint operation and effect of the act of February 25, 1887, which authorized the municipal authorities to issue bonds for the purpose of purchasing school lots, erecting school buildings, and furnishing the same (Acts 1886-87, p. 629), and of the act of February 28, 1887, to constitute the city of Greenville a separate school district, and to provide for the management of the public schools of the said district (Acts 1886-87, p. 1009). By the former act the proceeds of the bonds are set apart for the exclusive benefit of the schools, to be used for the purpose of purchasing lots, building schoolhouses thereon, and furnishing the same; but there is an entire absence of any intention, manifested by the Legislature, to authorize the city to bind its general revenue for school furniture. On

the contrary, such intention is rather repelled by the specific provision made for such furniture out of the special fund to be raised, under the terms of the act. By the second act, the board of education is given power, with the approval of the board of mayor and councilmen, to build and furnish school-houses. The act further inhibits the entering into any contract or the disbursement of any funds under its provisions except by the consent and under the direction and control of the city's governing board. The revenues and funds thus placed under the joint control of the mayor and councilmen and the board of education, for the benefit of the schools, are derived from a proportionate part of the public school fund coming to Butler county, the poll taxes collected within the school district, donations, if any were made, and special school taxes, collected from taxpayers of the city; and all funds devoted to school purposes in the school district of Greenville, whether derived from state, county, or city, are required by section 10 of the act above referred to (Acts 1886-87, p. 1012) to "be kept and accounted for, separate and distinct from all other funds belonging to said city," to be disbursed in such manner as the board of education should direct. So far, therefore, from finding a purpose to authorize the city to charge its general fund or revenue for school purposes, such as would result from awarding appellant a general judgment upon its note, there seems to the writer to have been a well-defined and well-guarded intention to provide and set apart a special fund or funds for the benefit of the schools, to be derived, not only from the sources just mentioned, but also from the proceeds of the sale of the school bonds. And this seems to have been well understood by *Perdue*, who provided the school furniture, and who transferred his warrant to the appellant. The warrant was drawn on the special treasurer of the city, who had charge of the funds derived from the sale of the bonds; and the evidence of the mayor is undisputed that it was out of these funds that *Perdue* was to be paid for erecting and furnishing the school building. The appellant as the transferee of the warrant had no higher right than *Perdue*. In executing a note for this warrant, the city authorities exceeded their powers. No estoppel resting on the municipality from having executed the note, nor from the retention and use of the furniture in the public school, appellant was not entitled to recover.

Application for rehearing overruled.

HARALSON, ANDERSON and DENSON, JJ., concur.

TYSON, J. (dissenting.) The erroneous conclusion reached by a majority of the court is made plain by the fact that the act authorizing the issue of bonds by the city of Green-

ville empowers that municipality to erect a school building and to furnish the same, and also authorizes the funds arising from the sale of bonds to be committed to the custody of its own officer, a special treasurer, who was required to execute a bond to the city for their safe keeping; and undoubtedly the power conferred by the act is just as effective as if it had been written in the charter of the city. It is wholly impracticable and unreasonable to suppose that the Legislature intended that the municipality should construct and furnish the building in any other way than by contract. Indeed, this is the only method that could have been adopted for its erection and equipment. It could certainly not have been expected that its officers and agents were to perform the manual labor necessary to the construction of the house had they been sufficiently skilled as artisans to do so; and it is not comprehensible that the Legislature entertained the thought that the city had the necessary material on hand, and of which to build it, and the necessary furniture to put into it. It is therefore entirely clear that it was contemplated that the municipality was either to purchase the material and the furniture and to employ the labor necessary to erect the building, or that it was to make a contract, as it did, for its construction and furnishing.

So, then, whether the one or the other (and it was within the business discretion of the officers of municipality which of these methods they would adopt), the authority and power to construct is necessarily conferred upon the municipality. The authority to contract carries with it the power to bind the city to pay the contract price to the other contracting party; and this, of course, out of whatever fund the municipality may have available when the debt may mature. The fact that a special fund was created by the sale of the bonds, in so far as the rights of the contractor to be compensated under the contract with the city is concerned, is of no consequence. That fund was provided simply to enable the city to discharge such obligations, which we have shown it had authority to assume, under the contract for erecting the building and equipping it. It is absurd to say that the contractor must lose the debt which the city legally owes to him because its officer, to whom the funds were confided, has misappropriated them. He was the trusted agent of the city, and not the contractor. It was the city's funds that he misappropriated, and not the contractor's. The city had the exclusive control over them, and the contractor had none. He could not have been paid without obtaining a warrant from the city on its treasurer. That officer would have been powerless to pay him without some authority from the municipality. And had he and the contractor appropriated any part of the fund, without authority from the city, even to the discharge of the debt legal-

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ly due the latter by the city under the contract with him, this would have, perhaps, made the treasurer guilty of embezzlement. Section 4668 of the Code.

It could, with equal plausibility, be said that a city issuing bonds to be paid out of a fund to be raised by special taxation for that purpose cannot be made to pay them, if its treasurer should misappropriate the fund after its collection and deposit with him.

DOWDELL and SIMPSON, JJ., concur in these views.

GAINES v. STATE.

(Supreme Court of Alabama. May 17, 1906.
Rehearing Denied June 30, 1906.)

1. CRIMINAL LAW—APPEAL—EXTENT OF REVIEW.

Cr. Code 1896, § 4313, authorizes any person convicted of a criminal offense to appeal directly to the Supreme Court from the judgment of conviction, and section 4333 declares that on such appeal the court must consider all questions on the record or reserved by bill of exceptions. *Held*, that under such sections an objection that the indictment was insufficient for failure to allege the means by which the offense was committed, being apparent on the record, was reviewable on appeal from the conviction, though the objection was then raised for the first time.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2627.]

2. INDICTMENT—COMMISSION OF OFFENSE—MEANS.

Under Cr. Code 1896, § 4906, declaring that, when the means by which the offense was committed are unknown to the grand jury and do not enter into the essence of the offense, the indictment may allege that they are unknown to the grand jury, and section 4911, providing that, when the offense may be committed by different means or with different interests, such means or interest may be alleged in the count in the alternative, an averment of the means with which the offense charged was committed is a necessary averment of a valid indictment.

3. SAME—DEMURRER.

The omission to aver the means employed to commit the offense charged, though a defect of substance, must be taken advantage of by demurrer.

4. SAME—DEFECTS IN FORM.

Cr. Code 1896, § 4895, declaring that an indictment must not be held insufficient by reason of any defect or imperfection in matter of form not prejudicial to defendant's substantial rights, has no application to an objection to an indictment for failure to allege the means by which the offense was committed; such failure being a defect of substance.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 626; vol. 26, Cent. Dig. Homicide, §§ 216-218.]

5. HOMICIDE—MURDER—ELEMENTS OF OFFENSE—MEANS.

The means with which the offense was committed are not a constituent element of the crime of murder.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 12, 22.]

6. SAME—APPEAL—PREJUDICE—DEFECTIVE INDICTMENT.

Under Cr. Code 1896, § 4333, providing that the conviction must not be reversed because of error in the record, when the court is

satisfied that no injury resulted to the defendant, a conviction of murder will not be reversed because the indictment failed to charge the means by which the offense was committed, in the absence of proof of prejudice.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 216-218, 705-708.]

7. GRAND JURY—RECORDS—INSPECTION.

Where there was no claim that the grand jury did not have sufficient legal evidence before it on which to find the indictment, accused was not entitled to an inspection of its transactions, minutes, and records, because in the investigation of his case immaterial, irrelevant, and illegal evidence was admitted.

8. CRIMINAL LAW — CONTINUANCE — ABSENT WITNESS—ATTENDANCE—ATTACHMENT.

It was not error to refuse to delay the trial of a criminal case and issue an attachment for a witness who was not shown at the time to be within the jurisdiction of the court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1321, 1322.]

9. SAME—ADMISSIONS TO PREVENT CONTINUANCE.

Where accused stated what he expected to prove by an absent witness, and the state's solicitor offered to admit the showing, if put in writing in legal form, and the evidence sought was merely cumulative, it was not error to refuse to delay the trial because of the absence of such witness.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1342-1347.]

10. JURY—EXCUSING FOR CAUSE—JURISDICTION.

The court has power to excuse a juror "for good and sufficient cause."

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 384-386.]

11. CRIMINAL LAW—APPEAL—RECORD.

Where the cause for which a juror was excused did not appear in the appeal record in a criminal case, the court's action in excusing the jury "for good and sufficient cause" will not be reviewed.

12. JURY—VENIREMEN—SUBSTITUTION.

The court has no authority to substitute one venireman for another excused from service on a criminal case "for good and sufficient cause."

13. SAME — DRAWING JURY — NUMBERING SLIPS.

Cr. Code 1896, § 5009, providing that on the trial of a person charged with a capital offense the names of the jurors summoned for his trial, as well as the names of the regular jurors in attendance, must be written on slips of paper, folded or rolled up, placed in a box, or some substitute, and shaken together, etc., does not require that the slips should be numbered.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 349-351.]

14. SAME—CHALLENGE.

Under the express provisions of Act March 2, 1901 (Acts 1900-01, pp. 2003, 2004), the fact that a juror called to serve in a capital case was not a resident householder or freeholder of the county did not constitute a valid ground of challenge for cause.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 555.]

15. CRIMINAL LAW—VERDICT—CORRECTION.

Where, in a criminal case, there had been no such separation of the jury as would injure or prejudice defendant, it was not error to send the jury back to put their verdict of conviction in proper form.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2112.]

Appeal from City Court of Montgomery;
W. H. Thomas, Judge.

"To be officially reported."

Will Gaines was convicted of murder, and he appeals. Affirmed.

Julius Sternfeld, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted on an indictment for murder, and was sentenced to imprisonment in the penitentiary for life. From the judgment of conviction the present appeal is taken. The indictment which charges murder in the first degree omits to aver the means with which the offense was committed. No objection on this account was raised to the indictment in the court below by demurrer or otherwise. The objection is for the first time raised here.

It is insisted by the state that, as no question of law was reserved by the defendant on the trial below, it cannot here be raised for the first time on appeal, and, further, that, the question not having been reserved on the trial, it could only be brought here by writ of error, which was not done in this case. In support of this contention, the case of *Ex parte Knight*, 61 Ala. 483, is cited and relied on as an authority. Since the decision in that case, a new statute has been introduced into our Code (section 4313 of the Criminal Code of 1896), which brought with it a change in the law as it theretofore existed in respect to appeals in criminal cases. That section, which is found in chapter 126 of the Criminal Code of 1896, reads as follows: "Any person convicted of a criminal offense in the circuit court or other court from which an appeal lies directly to the Supreme Court, may appeal from the judgment of conviction to the Supreme Court." In the same chapter we find section 4333, which reads as follows: "In cases taken to the Supreme Court under the provisions of this chapter, no assignment of errors, or joinder in errors, is necessary; but the court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied no injury resulted therefrom to the defendant." While the remedy by writ of error under the statute, in all cases where applicable, remains the same as heretofore, still under the statutes above set out we see no escape from the conclusion that it becomes the duty of this court, when a case is brought here by appeal from a judgment of conviction, to "consider all questions apparent on the record."

But it is insisted that, as no objection was raised to the indictment in the trial court, the defect was waived, and that there is therefore no error apparent of record. The statute, however, says we must consider all

"questions" apparent on the record. The objection to the indictment is here made a question, and it is one that is apparent on the record. At the common law an averment of the means with which the offense charged was committed was necessary to a good and sufficient indictment for murder. And under the criminal procedure of the Code it is evident that it was the intention of the law-makers that the averment of the means with which the alleged homicide was committed, and which was a necessary averment in a common-law indictment, should not be dispensed with, but, on the contrary, should be observed. The form of indictment No. 63 prescribed in our Criminal Code for murder (page 333), requires an averment of the means with which the offense was committed. So, likewise, form of indictment for manslaughter in the first degree (No. 60, p. 332), and form No. 61, for manslaughter in the second degree, and form No. 64, for killing in a sudden encounter—each and all of these forms of indictment provide for an averment of the means with which the offense charged was committed. Section 4894 declares the forms given in the Code sufficient. Section 4906 provides as follows: "When the means by which the offense was committed are unknown to the grand jury, and do not enter into the essence of the offense, the indictment may allege that they are unknown to the grand jury." Section 4911 provides that, "when the offense may be committed by different means, or with different interests, such means or interest may be alleged in the count in the alternative." So it would seem from these statutory provisions that an averment of the means with which the offense charged was committed is a necessary averment to a good indictment, and without it the indictment would be defective and subject to demurrer. The principle here declared is recognized in *Hornsby v. State*, 94 Ala. 55, 10 South. 522.

It is further insisted that under section 4895 of the Criminal Code of 1896 the indictment should not be held insufficient. That section reads as follows: "An indictment must not be held insufficient, nor can the trial, judgment, or other proceedings thereon, be affected by reason of any defect or imperfection in any matter of form which does not prejudice the substantial rights of the defendant on the trial." Without stopping to discuss the full meaning and scope of this statute, it is sufficient to say that it is without application to the case before us, as the question under consideration is not one of mere defect or imperfection in a matter of form, but, from what we have said above, a defect in substance. The means with which the offense charged was committed, however, is not, in an indictment for murder, a constituent element of the offense. The unlawful killing with malice aforethought, regardless of the means employed, constituted

murder. Every constituent element of murder is averred in the indictment. The omission to aver the means employed, though in a sense a defect of substance, and not one of mere form, yet is such a defect as must be taken advantage of by demurrer. This principle is stated in effect in *Hornsby v. State*, supra. See, also, the following cases: *Oregon v. Bruce*, 5 Or. 71, 20 Am. Rep. 734; *Cathcart v. Commonwealth*, 37 Pa. 114; *Wolf v. State*, 19 Ohio St. 256. Moreover, section 4333 of the Criminal Code of 1896, which we have set out in full above, provides: "But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted to the defendant." This provision was introduced into section 4333 at the time of the adoption of the Code of 1896, and therefore became the law subsequent to the time of the decision of *Maxwell v. State*, 89 Ala. 150, 7 South. 824, and doubtless it was introduced into the Code for the purpose of meeting the doctrine laid down in *Maxwell v. State*, and cases there cited. We are satisfied that no injury resulted to the defendant from the omission of the averment in the indictment. The evidence without dispute showed that the killing was done with a gun.

Before the trial was entered upon, and before the defendant had pleaded to the indictment, he filed a motion that he be allowed to inspect the "transactions, minutes, and records of the grand jury that indicted him," upon several grounds mentioned in the motion, the sum and substance of which were that the grand jury in the investigation of his case had admitted before it evidence that was immaterial, irrelevant, illegal, etc. This motion the trial court overruled and disallowed. There was no pretense that the grand jury did not have sufficient legal evidence before it upon which to find the indictment. The motion under the criminal procedure of this state was without merit. If the grand jury had any legal evidence before it to authorize a bill, all inquiry as to the nature, character, and sufficiency of any other evidence introduced before it is cut off, when sought for the purpose of attacking the validity and integrity of the indictment. The trial court very properly overruled the motion. See *Sparrenberger v. State*, 53 Ala. 481, 25 Am. Rep. 643; *Washington v. State*, 63 Ala. 189; *Carl v. State*, 125 Ala. 89, 102, 28 South. 506; *Hall v. State*, 134 Ala. 90, 112, 32 South. 850.

There was no error in the court's refusal to delay the trial of the case and issue an attachment for the witness Morgan. It was not shown that this witness was at the time within the jurisdiction of the court. *Walker v. State*, 117 Ala. 85, 23 South. 670. Moreover, it appears that the defendant stated what he expected to prove by this absent witness, and the solicitor stated that the state would admit the showing if

put in writing and legal form, and, furthermore, it appears that the evidence of this witness would have been merely cumulative.

The action of the court in excusing the juror Croom "for a good and sufficient cause" was a matter within the power of the court. The cause not being shown in the record, the court's action in this respect cannot be reviewed. *Plant v. State*, 140 Ala. 52, 37 South. 159. There was no authority in the court to substitute another venireman in the place of Croom. Section 5007 of the Code of 1896 provides for the discarding of names in certain cases, and the facts here do not bring the case within the influence of the statute.

It clearly appears that the only mistake in the venire in reference to the juror Thompson was the duplication of the number 76; there being no duplication in the name of the juror. The names of the jurors are numbered as a matter of convenience. Section 5009 of the Code does not require such numbering, and omission to number the names would not affect the venire. See, also, Code 1896, § 4333.

Under the decision in *Parker v. State*, 102 Ala. 128, 15 South. 819, it was held a good cause of challenge that the person was not a resident householder or freeholder of Montgomery county. Section 4331 of the Criminal Code of 1886 (section 5016, Cr. Code 1896), was amended by the act of December 8, 1894 (Acts 1894-95, pp. 33, 34), and this ground of challenge was omitted, and it was held in *Thomas v. State*, 124 Ala. 48, 27 South. 315, that under this act it is not a ground of challenge for cause that the juror had not been a "resident householder or freeholder of the county for the last preceding year." The act of March 2, 1901 (Acts 1900-01, pp. 2003, 2004) contains a provision that this shall not constitute ground for challenge for cause. This is the jury law now in force in Montgomery county.

There were other exceptions reserved to the rulings of the court during the proceedings in selecting a jury for the trial, but it clearly appears from the record that there is no merit in any of these exceptions. Nor do we think there is any merit in any of the exceptions reserved to the rulings of the court on objections made in the admission and rejection of evidence.

There were two charges requested in writing by the defendant, which were refused by the court. Both and each of these charges, besides being bad in other respects, were elliptical, and no error was committed in refusing them.

In sending the jury back to put their verdict in proper form, the court did right. There had been no such separation of the jury as would injure or prejudice the defendant. *Nabors v. State*, 120 Ala. 323, 25 South. 529; *Sanders v. State*, 131 Ala. 1, 31 South. 564.

We find no reversible error in the record, and the judgment will be here affirmed.
Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

GILLESPIE et al. v. GIBBS et al.
(Supreme Court of Alabama. June 13, 1906.)

1. MUNICIPAL CORPORATIONS—ULTRA VIRES ACTS—INJUNCTION—PARTIES.

One of the aldermen of a town is entitled to join in his individual capacity as a taxpayer of the town with other complainants to enjoin ultra vires acts by the town authorities and their officers.

2. SAME—PARTIES DEFENDANT.

The officers of a municipal corporation engaged in the perpetration of ultra vires acts in behalf of the corporation are proper parties defendant, and the corporation a necessary party, to a suit to enjoin such acts or to correct them.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 2198.]

3. SAME—DEFENSES.

The fact that, after suit had been instituted by a taxpayer to enjoin ultra vires acts on behalf of a municipal corporation, the corporation and its officers discovered their error, and revoked the orders under which the acts were directed to be done, and abandoned the illegal scheme, afforded no cause for the dismissal of the suit.

4. SAME—BILL—AMENDMENT.

Where, after the filing of a bill to enjoin a municipal corporation from applying corporate funds to the repair of certain school property and the purchase of an additional lot, the town abandoned the project, but immediately rented for a town hall a portion of the same schoolhouse for five years and paid the rent for the whole term in advance, which was a mere subterfuge to avoid the injunction, an amendment to the bill alleging such facts did not destroy the equity of the original bill.

Appeal from Chancery Court, Cullman County; Wm. H. Simpson, Chancellor.

"To be officially reported."

Bill by F. A. Gillespie and others against T. M. Gibbs and others. From a decree dismissing the bill, complainants appeal. Affirmed.

J. B. Brown, for appellants. George H. Parker, for appellees.

TYSON, J. This is the case of a bill filed by certain taxpayers of the municipality of the town of Hanceville, one of whom was an alderman of the said town, against the intendant and the other aldermen, to enjoin ultra vires acts of the corporation. The particular act complained of was the application of corporate funds to the repair and completion of school property owned by the Hanceville school district situated in the town, and the purchase of an additional lot for the said school. After an injunction had issued, the town authorities, recognizing the want of power to do the act complained of, revoked the orders under which they were directed

to be done, and apparently abandoned the project, but immediately afterwards rented for a town hall a portion of the same schoolhouse for five years, and paid the rent for the whole term in advance, amounting to \$250. Thereupon amendments to the bill were interposed, setting up these facts, alleging that they were a mere subterfuge for avoiding the injunction, and making new parties. Motions were made to strike the amendments as departures, to dismiss the bill for want of equity, and to dissolve and discharge the injunction, and at the same time demurrers were interposed to the whole and to parts of the bill. The chancellor dissolved the injunction, struck the amendments, sustained the demurrers, and, finding in his decree that the bill could not be amended so as to give it equity and that complainants made no effort to amend, dismissed the bill. The appeal is brought by the complainants below to reverse this decree.

We do not doubt the right of one of the aldermen to join in his individual capacity as a taxpayer of the town with the other complainants to enjoin ultra vires acts by the town authorities and their officers. One does not lose his character and capacity and rights as a citizen by becoming an officer of the town in which he lives, and he by no means complains of himself by joining with others in the institution of a suit in his capacity as a citizen and taxpayer against the corporation and its officers other than himself. Nor do we doubt that the officers of the corporation engaged in the perpetration of ultra vires acts in behalf of the corporation are proper parties defendant to a suit to enjoin such acts, or to correct them. In such case there may be a personal liability in favor of the corporation, to be imposed upon the officers engaged in the illegal acts complained of. Nor does the fact that, after a suit has been instituted, complaining of ultra vires acts about to be done, the corporation and its officers discover their error and revoke the orders under which the acts were directed to be done, and abandon the illegal scheme, afford any cause for the dismissal of a suit properly instituted to prevent the acts complained of, although such matters be set up as amendments to the bill as having occurred. *McMinn v. Karter*, 123 Ala. 502, 26 South. 649. Such acts of recantation by the corporation and its officers, as stated in the case cited, strengthened the case made by the original bill, and confirmed the title to relief therein alleged, and by no means have the effect of destroying the equity of the original suit. The amendment in this case, while it might not give the complainants any right to relief against the acts complained of therein, in reference to the renting of a portion of the schoolhouse as a town hall, on the ground that the municipal authorities have a legislative discretion in reference to such matters, which cannot be inquired into, and particularly so in a case of

this kind, instituted for a different purpose, did not interfere with the equity of the original bill to have the judgment of the court in striking the amendments, which is necessarily an act antecedent in its nature to the dismissal of the bill, would certainly leave the bill unimpaired by the amendments.

But there is a defect about the original bill which seems to render the sustaining of the demurrer thereto unobjectionable. The suit is in reference to corporate property and alleged corporate conduct. Ordinarily the corporation itself would be the proper complainant to bring such suit, but, being under control of officers who were united in the project of misapplying corporate funds, the right to prevent such injuries to the corporation by the institution of suits such as this by the taxpayers of the town is undoubted, and it is fully recognized; but the municipal corporation in its corporate capacity is a necessary party defendant to the proceeding, when it is not a plaintiff. When the suit is one to vacate a charter and restrain persons from acting as a corporation, it was improper, prior to section 3423 of the Code of 1896, to make the alleged corporation a party defendant, since it would be an admission of its existence. *State ex rel. Sanche v. Webb*, 97 Ala. 111, 12 South. 377, 88 Am. St. Rep. 151. But when the suit is in behalf of a corporation, and to preserve its property against illegal acts done in its name by its officers, the corporation as such is certainly an indispensable party. The analogy in such cases between municipal corporations and private corporations, when suits are instituted in behalf of the latter by corporators, is perfect. 10 Cyc. pp. 995, 996, and authorities there cited; 2 Dillon on Corporations, §§ 913, 916. Though the inhabitants of a town are, as stated in *City of Eufaula v. McNab*, 67 Ala. 589, 42 Am. Rep. 118, the corporators, and the officers are but public agents of the corporation, the corporation itself is the legal owner of all the property standing in its name, as much as a private corporation, and neither can be dispensed with as a party defendant to a legal proceeding such as this. *Ency. Pl. & Pr.* vol. 10, p. 914; *Id.* vol. 14, p. 224; 36 Cent. Dig. col. 3126; *New Orleans M. & C. R. Co. v. Dunn*, 51 Ala. 123; *Turner v. Cruzen*, 70 Iowa, 202, 30 N. W. 483; *Moore v. Held*, 73 Iowa, 538, 35 N. W. 623.

The demurrer in this case on the ground of the absence of the corporation as a party to the suit was distinctly made, and was sustained in term time, and the complainants, by not offering to amend, stood by their bill. There was thus no alternative left but to dismiss the bill, since "no court can adjudicate directly upon a person's right without the party being either actually or constructively before the court." *Mallow v. Hinde*, 12 Wheat. (U. S.) 198, 6 L. Ed. 599; *Shields v. Barrow*, 17 How. (U. S.) 130, 15 L. Ed. 158; 3 Brick.

Fig. 373. As this point is decisive, and must result in the affirmance of the decree of the lower court, it is unnecessary to consider other matters in the case.

The decree of the lower court is therefore affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

KELLY v. LOUISVILLE & N. R. CO.
(Supreme Court of Alabama. July 6, 1906.)

1. WITNESSES—IMPEACHMENT—COLLATERAL AND IRRELEVANT MATTERS.

Where the issue was whether a release signed by plaintiff, and relied on as a defense, was signed by him when so intoxicated as to render him unconscious of his act, and plaintiff's witness testified that plaintiff had been a hard drinker for years, that he saw him early on the morning of the day that the release bore date, before witness went to work, and that he saw him take several drinks, and that he appeared to be drinking heavily, and on cross-examination he was asked and answered in the negative, the question whether he had not told V. that plaintiff had left his home on such morning to go to see his doctor and settle his case, and had not then asked V. if plaintiff did settle his case, V. may not testify for defendant that plaintiff's witness had stated to her that on the day of the date of the release plaintiff left home for the purpose of seeing his doctor and settling the case, and that he asked her if the case had been settled, as not only may a witness not be cross-examined as to a fact collateral and irrelevant to the issue, but, if he is so examined, his answer may not be contradicted by the party who asked the question.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1243-1245, 1273.]

2. TRIAL—MISLEADING INSTRUCTIONS.

Judgment for defendant will not be reversed on the ground that it was calculated to mislead the jury to charge that under the pleadings, if the jury were reasonably satisfied from the evidence that plaintiff compromised his claim, as alleged in the plea, they should find for defendant, though they believed from the evidence that plaintiff was hurt by reason of defendant's negligence, as alleged in the complaint.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"To be officially reported."

Action by Michael Kelly against the Louisville & Nashville Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed and remanded.

This was an action for damages for personal injury, brought under the employer's liability act. The complaint contained seven counts, to which a great many demurrers were interposed and overruled. It is not necessary to here set them out. The defendant filed pleas of the general issue, contributory negligence, and special plea 3 setting up a written release, signed by plaintiff, acknowledging receipt of \$300 in full satisfaction and compromise of the claim against the railroad company from any and all liability on account of said injury. Plaintiff

filed replication to this plea, setting up the fact that at the time he signed the release he had no knowledge of the fact of signing the same, or of having received any money from defendant; that he was unconscious of the act committed by him, and incompetent to determine by reason of intoxication.

The court, at the request of the defendant, gave the following charge: "Under the pleadings in this case, if you are reasonably satisfied from the evidence in the case that the plaintiff compromised and settled his claim for damages, as alleged in the third plea of defendant, you will find a verdict in favor of the defendant, although you may also believe from the evidence that plaintiff was hurt by reason of the negligence of defendant, as alleged in plaintiff's complaint."

Denson & Denson, for appellant. Tillman, Grub, Bradley & Morrow, for appellee.

TYSON, J. The main contested issue of fact, as shown by the record, was whether the plaintiff executed and obligated himself by the release invoked as a defense in defendant's third special plea. The execution of the release was not denied, but the testimony in plaintiff's behalf tended to support the allegations of his special replication that he was in such a state of intoxication at the time of its signing and delivery as to render him unconscious of his act on that occasion.

Practically only one ruling of the trial court is presented for review on the admission of evidence. It is this: The defendant was permitted, against plaintiff's objection, for the purpose of impeachment, to show that plaintiff's witness Jack Crawford had stated to Miss Vigo that on Friday, after the supposed execution of the release on the Monday preceding, plaintiff had left home for the purpose of seeing his doctor and settling his case, and asked her if the case had been settled. Crawford on direct examination testified that plaintiff had been a heavy drinker for 18 years; that he saw him early Monday morning, October 5, 1903, the day the release bears date, before witness left his house to go to work; that he appeared to be drinking heavily; saw him take several drinks. On cross-examination, without objection, the witness was asked whether on Friday following Monday, October 5, 1903, and on the occasion of his visit to the office of W. I. Grubb, he had not stated to Miss Vigo that plaintiff had left home on the morning of October 5, 1903, for the purpose of going to see the doctor and settling his case, and whether he did not then ask Miss Vigo if plaintiff had settled his case. This question was answered by the witness in the negative. It was for the purpose of contradicting his testimony that Miss Vigo was allowed to testify as first above stated. "It is a well-settled rule that a witness cannot be cross-examined as to any fact which is col-

lateral and irrelevant to the issue merely for the purpose of contradicting him. And if a question which is collateral or irrelevant to the issue is put to a witness, his answer cannot be contradicted by the party who asked the question, but is conclusive against him." *Blakey's Heirs v. Blakey's Ex's*, 33 Ala. 619; *L. & N. R. R. Co. v. Quinn* (Ala.) 39 South. 756. It will be observed that Crawford had not testified as to the plaintiff's purpose when he left home on that morning, or that plaintiff left home on that morning at all, or as to his mental condition, etc. Clearly his declarations to Miss Vigo were "res inter alios acta" as to the plaintiff, and did not bind him; nor was it competent as corroborating defendant's witness' statement that plaintiff visited his doctor on that morning and did go to see about settling his case. The objection of plaintiff to Miss Vigo's testimony should have been sustained.

The only objection that can be urged against the charge given at defendant's request is that it was calculated to mislead the jury. This is not a ground of reversal.

Reversed and remanded.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

STATE ex rel. HAMILTON v. KITCHENS.
(Supreme Court of Alabama. May 31, 1906.
Rehearing Denied June 30, 1906.)

1. APPEAL—FINAL JUDGMENT—NEW TRIAL—MOTION—EFFECT.

A motion for a new trial or rehearing, seasonably made, suspends the judgment, which does not become final for the purposes of limiting the time to appeal until the motion is disposed of.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1895.]

2. QUO WARRANTO—APPEAL—TIME OF TAKING.

Where a motion for a new trial in quo warranto was denied April 22, 1905, and the clerk certified that petitioner, on April 25, 1905, prayed an appeal, which was granted on petitioner's giving security for costs, which was given on the same day, the appeal was in time, under Code 1896, § 3437, authorizing appeals in quo warranto proceedings within 10 days after judgment, etc.

3. JUDGMENT—PLEADINGS—DEMURRER.

Where a judgment entry recited that defendant demurred to the petition as amended, whereupon it was considered and adjudged by the court that the demurrers to the petition as amended be sustained, and, plaintiff declining to plead further, it was adjudged that the information be dismissed at petitioner's cost, the entry showed a proper judgment sustaining the demurrer.

4. QUO WARRANTO—PETITION—PARTIES.

Where a petition for a writ of quo warranto recited: "Your petitioner and relator, the state of Alabama, by the relation of H., respectfully represents," etc., it sufficiently appeared therefrom that petitioner was joined with the state as a party plaintiff, as required by Code 1896, § 3426.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quo Warranto, § 42.]

5. SAME—OFFICES TO WHICH APPLICABLE—SCHOOL TRUSTEES.

The office of school district trustee, created by Gen. Acts 1903, p. 289, is a public office, so that quo warranto was available, as provided by Code 1896, § 3429, to try the title to the office, which petitioner alleged he was entitled to hold because of respondent's disqualification therefor.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quo Warranto, § 11.]

Appeal from Circuit Court, Walker County; A. H. Alston, Judge.

"To be officially reported."

Quo warranto by the state, on relation of H. W. Hamilton, against Calvin Kitchens. From a decree dismissing the petition, relator appeals. Reversed and remanded.

The application was as follows: "Your petitioner and relator, the state of Alabama, on the relation of H. W. Hamilton, respectfully represents unto your honor that he is a householder and freeholder, and resides in school district 35, in Walker county, Alabama, and that on the 1st Saturday in July, 1904, an election was held in said school district of the qualified electors thereof, at which said election three school trustees for said district were regularly elected, to wit, Frank Ellis, Robert Kilgore, and relator, as was by law provided. (2) That relator was regularly elected at said election as trustee, and has at all times since been ready and anxious to assume and discharge the duties of the office, but that he has been prevented from so doing by reason of the fact that Calvin Kitchens has usurped the functions of said office and still exercises the same without authority of law. (3) Your petitioner and relator sheweth further that Lige Dutton received only one legal vote and five illegal votes at said election, and that petitioner received four legal votes, and that Lige Dutton was disqualified from holding said office, in that he was not a householder and freeholder of said school district, and that Calvin Kitchens received one illegal vote at said election, and, further, that your petitioner received a majority of the legal votes cast at said election for Lige Dutton, Calvin Kitchens, and petitioner, and that Calvin Kitchens is disqualified from holding said office in that he is unable to read and write as the law requires. And that Calvin Kitchens has usurped all the duties and functions of said office and is acting, discharging the same, and enjoying the privileges thereof, regardless of petitioner's right. (4) That, notwithstanding relator was voted for and elected trustee as aforesaid, he having received more of the legal votes cast at said election than the said Lige Dutton, a vacancy was declared to exist by the then acting superintendent of education, R. D. Argo, and a second election was ordered by him to be held on the — day of —, 1904, by the qualified electors of said district, to fill the alleged vacancy caused by the disqualification of said Dutton, and for the holding of which election there is

no provision of law. At the second election Calvin Kitchens was chosen trustee, and has thereafter usurped and performed all the duties of such trustee, regardless of the fact that your relator has at all times since the first Saturday in July, 1904, been ready and willing to assume the duties himself, but that he has been illegally restrained from so doing as above set out." The prayer was that Calvin Kitchens show by what warrant or right he is exercising the function of school trustee for said school district, and that the said Calvin Kitchens be declared to be usurping the function of said office, and that he should be excluded from further exercising said duties, and that relator's rights to such trustee be established.

The respondent demurred to the petition on the following grounds: "(1) Said petition is filed in the name of the 'State of Alabama ex rel. H. W. Hamilton.' (2) Said petition is not in compliance with section 3426 of the Code of 1896. (3) Hamilton is not joined in said petition as relator or plaintiff. (4) Said petition is inconsistent and repugnant, in that it declares that both Hamilton and Dutton were elected to fill the office of school trustee. (5) It does not allege any acts committed by respondent showing that he has usurped any of the duties of the office. (6) Quo warranto is not the proper method of determining who was regularly elected to this office. (7) Relator has his remedy of contest to said election. (8) Petition shows that there was a vacancy in said office by the disqualification of Dutton, and that respondent was elected to fill same. (9) Petition shows that the proper remedy was mandamus, directed to the county superintendent, to issue credentials or commission to fill same to relator. (10) Because that a school trustee is not a public officer."

There was judgment sustaining demurrers, and the relator, declining to plead over, brings this appeal.

Shere & Cooner, for appellant. Bankhead & Bankhead, for appellee.

HARALSON, J. The case was heard and decided, dismissing the petition, on March 18, 1905.

On March 24th, the relator made an application for a new trial, which was continued to be heard at an adjourned term. On April 22, 1905, the motion for a new trial was heard and denied.

The Code provides that appeals may be taken in quo warranto proceedings, within ten days after judgment, on application to the clerk giving security for costs of the appeal. Code 1896, § 3437.

A motion for a new trial or rehearing seasonably made, suspends the judgment, and it does not become final, for the purposes of an appeal, until the motion is disposed of. *Flurence Cotton Mill v. Field*, 104 Ala. 471, 16 South. 538. The date for computing the time within which the appeal could be taken,

therefore, was the 22d of April, 1905, the date on which the motion for a new trial was denied.

The clerk of the court certifies that the petitioner did, on the 25th of April, 1905, pray from an appeal from said judgment, to the Supreme Court, which appeal was granted on his giving security for the costs of the appeal.

The record shows, that on the same day, petitioner executed an appeal bond in the sum of \$25, which was approved by the clerk of the court. The appeal, therefore, was in time.

The judgment entry recites: "Defendant demurs to petition as amended. It is considered and adjudged by the court, the demurrers to the petition as amended be and the same are hereby sustained. Plaintiff declines to plead further. The same being considered by the court, it is the order and judgment of the court that the information be dismissed at the cost of petitioner," etc. This entry shows a proper judgment sustaining the demurrer. *McDonald v. A. M. R. Co.*, 123 Ala. 229, 26 South. 165, and authorities there cited; *F. M. Co. v. W. R. of Ala.*, 128 Ala. 167, 29 South. 203.

Objection is raised, that H. W. Hamilton, was not joined as a party plaintiff. Section 3420 of the Code of 1896 provides for "an action in the name of the state (for usurpation of office or franchise) against the party offending: (1) When any person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state." The petition in its opening sentence states: "Your petitioner [H. W. Hamilton] and relator, the State of Alabama by the relation of H. W. Hamilton, respectfully represents," etc. From this it sufficiently appears, that petitioner was joined with the state as a party plaintiff. Code 1896, § 3426; *West End v. State*, 138 Ala. 295, 36 South. 423.

It is again insisted, and the court in its rulings on demurrer to petition so ruled, that the office of district trustee, under the act of September 30, 1903 (Gen. Acts 1903, p. 289) is not a public office. In *Montgomery v. State*, 107 Ala. 372, 18 South. 157, quoting from 2 *Spelling on Extraordinary Relief*, § 1780, it was said: "There are three principal tests for determining whether one performing duties of a public nature is a public officer in the sense of subjecting his incumbency or employment to a quo warranto proceeding: First, whether the sovereignty, either directly through legislative enactment or executive appointment, or indirectly, as through a municipal charter, is the source of authority; second, whether the duties pertaining to the position are of a public character,—that is, due to the community in its political capacity; and, third, whether the tenure is fixed and

permanent for a definite period fixed by law." See, also, to same effect, Dillon on Municipal Corporations, § 58.

In this case, according to the act referred to, the duties prescribed for the trustees were of legislative creation; the duties were of a public character; the tenure of office was for a definite period, and the emolument or pay was regulated by law; and under these conditions we have no difficulty in declaring the office to be a public one.

The testing of defendant's title to the office of school trustee is the principal object of the proceeding. The said act makes no provision for contesting the election of school trustees, and if plaintiff is not entitled to this writ, he is without remedy to oust Calvin Kitchens, the alleged usurper of the office, who, as alleged, is disqualified to hold said office, in that he cannot read and write, and to which relator was regularly elected. If the facts stated in the petition are true, the office has been usurped and relator defrauded of it, and under section 3429 of the Code of 1896, judgment may be rendered upon the right of the defendant, and also upon the right of the relator, as justice may require.

It was competent for the court, to issue a rule nisi, as prayed for, and on its return to try the case on the facts.

Our conclusion is, that the demurrer was improperly sustained to the amended petition, for which the judgment below must be reversed.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concurring.

CUTCLIFF v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama. July 6, 1906.)

1. TRIAL—ORDER OF PROOF—REBUTTAL.

Where, in an action for injuries to a street car passenger, after defendant had proved that plaintiff was on the car next day after her alleged injuries, plaintiff was reintroduced in rebuttal and testified that she went to church the next morning, not knowing the extent of her injuries, a question as to how long after that before she went out from home again was objectionable as not proper rebuttal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 149.]

2. APPEAL—MISCONDUCT OF COUNSEL—ASSIGNMENT OF ERROR.

Where the court sustained an objection to arguments of defendant's counsel, and defendant excepted, plaintiff was not entitled to assign the same for error on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3591.]

3. SAME—RIGHT TO ALLEGE ERROR.

Where plaintiff consented to the giving of an instruction asked by defendant, which had been refused, plaintiff could not thereafter assign the same for error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3611.]

4. CARRIERS—STREET RAILWAYS—INJURIES TO PASSENGER—FAILURE TO TAKE SEAT—CONTRIBUTORY NEGLIGENCE.

Where an injury to a street car passenger was alleged to have resulted from defendant's negligence in starting the car with a sudden and unusual jerk, plaintiff was not guilty of contributory negligence as a matter of law in failing to take her seat before the car started, though she had time to do so and there were vacant seats.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1402.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"To be officially reported."

Action by Mary A. Cutcliff against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action for damages, brought by plaintiff, a passenger, for personal injuries alleged to have been received occasioned by the car starting with a sudden jerk while plaintiff was attempting to alight. A number of demurrers were interposed, not necessary to be here set out. Issue was joined on the general issue and two pleas, setting up contributory negligence, to the seventh count in the complaint. On the trial of the cause the bill of exceptions shows that after defendant had introduced testimony showing that plaintiff was on the car the next day, plaintiff was reintroduced as a witness in rebuttal and testified that she went to church next morning, not knowing the extent of her injuries. Plaintiff's counsel asked witness: "How long after that before you went out from home again?" Objection was sustained to this question, because it was not in rebuttal of anything brought out by defendant, and plaintiff excepted. The defendant's counsel said to the jury: "Gentlemen of the jury, you have been selected as jurors because of your intelligence and fairness. Mr. Lane, one of plaintiff's attorneys, has clients on the jury; but the defendant has taken them knowing that they would decide justly and fairly." Plaintiff excepted to the foregoing remarks, and requested the court to instruct the jury that they were improper and should not be considered. The bill of exceptions then shows the following: "The presiding judge said: 'Yes; I sustain the objection. There is no proof in the case that Mr. Lane has clients on the jury.' And to the court's sustaining the objection the defendant excepted."

The charge is as follows: "It was not the duty of defendant to keep its car standing until plaintiff had taken her seat in the car, but only until she had reached the inside of the car." The fourth charge, requested by the plaintiff and refused under circumstances stated in the opinion, is as follows: "(4) I charge you, gentlemen of the jury, at the request of the defendant, that it was not the duty of the defendant to keep the car standing until the plaintiff had taken her seat

in the car, but only until she reached the inside of the car; but I charge you, further, that if the defendant's motorman knew, or in the exercise of reasonable care would have known, that she had not taken her seat, and the said motorman operating the car negligently started said car with a sudden and unusual jerk, and that the same caused the plaintiff to fall, and that the fall injured her, and that said negligence of the motorman was the sole proximate cause of plaintiff's injuries, then the plaintiff is entitled to recover." The following charges were also given at the request of the defendant: "(2) If the jury find from the evidence that the plaintiff by the exercise of reasonable diligence could have reached and taken her seat before the car started, and failed to do so, then the plaintiff was guilty of negligence. (3) If, after a fair and full consideration of all of the evidence in this case, any individual juror believes that the car did not start with an unusual jerk, the jury cannot find a verdict in favor of the plaintiff."

W. K. Terry and A. O. Lane, for appellant. Tillman, Grubb, Bradley & Morrow, for appellee.

ANDERSON, J. There was no error in sustaining the objection to the question asked plaintiff when examined, as it was not in rebuttal to anything brought out by the defendant.

It is needless for us to determine whether so much of the argument of counsel excepted to by the plaintiff was improper or not, since the plaintiff is in no position to complain if it was. "To bring questions growing out of improper argument of counsel under review, the trial court must first be appealed to, to remedy the wrong by eradicating any effect the argument may have had on the minds of the jury, through appropriate instructions given them at the time and otherwise. If the court fails to act, upon such appeal being made to it, or acts erroneously, an exception reserved to the act or omission of the court, and that alone, will bring the question before us. But we cannot revise judgments here on account of sayings and doings of counsel. We review only the action of nisi prius courts." *Stone v. State*, 105 Ala. 60, 72, 17 South. 114; *King v. State*, 100 Ala. 85, 14 South. 878. In the case at bar the court did what the plaintiff asked, and the defendant, and not the plaintiff, reserved an exception to the action of the court.

The record recites that charge 1, requested by defendant, was at first refused, and so marked, and that the plaintiff's counsel, after examining it, consented for it to be given. We do not think the plaintiff is in a position to complain of the court's action in giving this charge. When counsel, actuated, no doubt, by a confidence in the finding of the jury in favor of their client, consent to rulings of the court on doubtful questions, to

deprive the other side of what might be reversible error, they cannot be permitted to afterwards charge error because the jury disappointed them by their verdict.

Charge 4, requested by the plaintiff, doubtless, was intended as a qualification or avoidance of charge 1, requested by defendant, but which would be meaningless and bad if the jury did not have before them said charge 1, requested by defendant. It appears from the record that, when the judge acted on and refused this charge of plaintiff, he had previously refused charge 2 of defendant. So, with charge 1 out when acting on this charge, it was properly refused. After the court had refused both charges, the plaintiff consented to the giving of defendant's charge 1, and, as conditions were changed by her acts, we think that plaintiff should have requested another charge to meet the change in the ruling of the court brought about by her action in consenting, or should have, at least, brought her charge to the attention of the court after the action had been reversed as to charge 1, and we cannot reverse the trial court for not having given this charge.

Charge 3 simply required that the finding of the jury must be unanimous, hypothesizing the issue in the case. The only count left in the complaint, No. 7, charges negligence only by a "sudden and unusual jerk."

The trial court erred in giving charge 2, requested by the defendant. We cannot affirm as matter of law that a failure of the plaintiff to take her seat before the car started rendered her guilty of negligence, notwithstanding she had time to do so and that there were many vacant seats. The defendant's evidence showed that the proper way to start the car was slowly and smoothly, and without a sudden jerk; and, if a passenger had no ground to anticipate that it would be started with a jerk, we cannot say that she would be guilty of negligence by a failure to take a seat before the car started, and think the question of contributory negligence was one for the jury. *Armstrong's Case*, 123 Ala. 233, 26 South. 349; *Birmingham Ry. & Elec. Co. v. James*, 121 Ala. 120, 25 South. 847. It is stated on page 682 of 5 Am. & Eng. Ency. Law: "But it has been held that if a railway train stops a reasonable time at the depot to allow passengers to enter the cars and a reasonable time thereafter for them to be seated, a passenger who fails to sit down, and is thrown down and injured by the starting of the train after the usual signal is sounded, is guilty of contributory negligence. A different rule has been declared where the passenger enters a car and finds no seats vacant, and is injured while looking about for a seat." This quotation is not supported by the case cited. *I. & G. R. R. Co. v. Copeland*, 60 Tex. 325. There the court did not hold that it was negligence per se on the part of the plaintiff for failing to take her seat before the train started.

but that the trial court erred in charging the jury that the defendant was guilty of negligence, if the conductor failed to see that the passengers were seated before starting.

The judgment of the city court is reversed, and the cause is remanded.

TYSON, DOWDELL, and DENSON, JJ., concur.

CROSS v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. HIGHWAYS—PUBLIC LANDS—PRESCRIPTION.

A roadway used by the public over government land does not become a public highway from mere user for 20 years, or by prescription, under Rev. St. § 2477, [U. S. Comp. St. 1901, p. 1567], granting a right of way for the construction of highways over public lands not reserved for public uses.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 5.]

2. TRESPASS—OFFENSES—EVIDENCE.

In a prosecution for trespass after warning, evidence that prosecutor agreed with R. on the day of the alleged trespass that prosecutor was leaving the road in controversy open until it was settled whether he had the right to close it or not was inadmissible, as furnishing no excuse for defendant's trespass on prosecutor's land after warning.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 171.]

3. SAME.

In a prosecution for trespass after warning, it was immaterial that prosecutor gave another than defendant permission to haul lumber over the road in controversy after he had warned defendant not to go thereon.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 171.]

4. CRIMINAL LAW—EVIDENCE MADE COMPETENT BY ADMISSION OF OTHER EVIDENCE.

Where, in a prosecution for trespass after warning, defendant proved that the roadway in question was the only way of reaching a railroad station from defendant's sawmill, it was not error to permit prosecutor to testify that when he closed up the old roadway he cut a new way, which was used by people to reach the points to which the old roadway led.

5. WITNESSES—BIAS.

In a prosecution for trespass after warning, it was not error to permit the state, on cross-examination of defendant, to show that defendant had sworn out a warrant for prosecutor's arrest, as bearing on defendant's feeling of bias.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1201.]

6. CRIMINAL LAW—TRIAL—ORDER OF PROOF.

It is within the discretion of the court to permit the re-examination of a witness in rebuttal over accused's objection.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1618.]

7. SAME—INSTRUCTIONS—EXCEPTIONS.

An exception to an uncompleted sentence in the court's oral charge is unavailable.

8. HIGHWAYS—ESTABLISHMENT—MODE.

A highway can only be established in Alabama by proceedings by the board of revenue or county commissioners, by dedication, or by prescription.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 1, 25-27.]

Appeal from City Court of Bessemer; William Jackson, Judge.

"To be officially reported."

Z. Cross was convicted of trespass after warning, and he appeals. Affirmed.

The prosecution was begun by warrant and affidavit. The facts sufficiently appear in the opinion. The court in its oral charge said: "Evidence upon the part of the state shows defendant on the 8th day of August passing along on the property of Vandeford." There was objection to this statement. Further charging the jury orally, the court said: "I charge you as a matter of law that there are only three ways in Alabama to establish a public road; that one is by board of revenue or county commissioners, one by dedication, and one by prescription. A public road must be a road even authorized by board of revenue or county commissioners and authorize the board of revenue or county commissioners the law requires and application must be made to the board or commissioners. Such application must be made by petition and at least 30 days' notice of the intended application must be given by advertisement at the courthouse door and at three other places in the county, two of which should be in the immediate neighborhood of the place where road is to be established. The court must then issue a notice to seven disinterested householders of the county to view out the road and mark out the route for such proposed road and assess the value of the lands of the landowners; then mark out the route of the road and return their report to the court under oath, and a day is set for the hearing of the same; or a public road may be dedicated by the owner of the land through which it passes; or by prescription—prescription is the claim or title to the land or road by virtue of immemorial use or enjoyment—the right of title acquired by possession during the time and in the manner fixed by law." Further charging the jury orally, the court said: "I charge you, regarding the United States statute law, that the statute only gives permission, and it is only permission by the government, to enter on public land to establish a highway; but before it becomes a public road the state law would have to be applied, and before it could become a public road the state authorities would have to take hold of it and make it a public road according to the law of the state." The jury retired and returned and stated to the court that they desired instructions on one point in the case—if the continued use of the road 20 years or more by the people would make it a public highway over the public land. The court replied: "I charge you as a matter of law that under the United States statute a road used for 20 years or more while the land belonging to the government or was a part of our public domain would not make it a public road, un-

less it was made so by the laws of Alabama, and that it must be established by the laws of the state of Alabama and authorized in this way or it could not be a public road." Exceptions were reserved by the defendant to all these instructions. At the request of the state, the court gave the following written charge: "The court charges the jury that under the undisputed evidence in this case they should convict the defendant, unless they are reasonably satisfied that he had a legal cause or good excuse for entering upon the premises of Vandeford at the time for which he is prosecuted." A number of charges were requested by the defendant, and refused, which are not necessary here to be set out.

Pinkney Scott, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The prosecution in this case was commenced on affidavit and warrant, in which the defendant was charged with trespass after warning. The evidence without dispute showed that the prosecutor, Vandeford, was the owner and in possession of the land at the time of the alleged trespass, and that he had warned the defendant prior to the alleged trespass and within six months not to go upon the land. The land was entered by the prosecutor as a homestead, the same being government land, six years prior to the alleged trespass, and the prosecutor had built upon and improved the same and perfected his right of entry in 1904. While the land was yet government land, a roadway traversed the same, which had been used and traveled by the people of the vicinity for more than 20 years. It was not shown to have ever been recognized by any act of the county as a public highway. Did it become one by its being used and traveled by the people of the vicinity and the public generally for more than 20 years? We think not. Such use will be presumed to have been permissive, and not adverse to the government. The federal statute (section 2477 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 1567]), which provides that "the right of way for the construction of highways over public lands not reserved for public uses, is hereby granted," cannot be construed to mean that a roadway used by the public over government land may become a public highway from mere user or by prescription. The purpose of this statute is to authorize the construction of highways over public lands not reserved for public uses, by authority of law; that is, by the laws of the state or territory in which the lands are situated.

There was no error in the court's ruling on the objections to the questions asked the witness Vandeford by the defendant on cross-examination, in which it was sought to be shown that the prosecutor agreed with one

Russell, on the morning of the 8th day of August, 1905, the day of the alleged trespass, that he (the prosecutor) would leave the road open until it was settled whether he had the right to close it or not. It was not pretended that any such understanding or agreement was made with the defendant, and it certainly furnished the defendant no legal cause or good excuse for going upon the prosecutor's land after he had been warned not to do so. There was no error in refusing to allow the defendant to prove that the prosecutor told the witness J. H. Russell, in the presence of Tom Russell and others, on the 19th day of August, that he had agreed to leave the road open until that day. The fact that the prosecutor gave Charlie Sellers permission to use and haul lumber over the road furnished no excuse to the defendant for going upon the land after he had been warned not to do so.

There was evidence on the part of the defense tending to show that the old roadway in question was the only way of reaching Kimbell, a station on the railroad, from the defendant's sawmill. This evidence being offered by the defendant, it was not error to permit the state to show by the prosecutor that, when he closed up the old roadway, he cut a new roadway, which could be and was used by people to reach the points to which the old roadway led. It is not reversible error to permit immaterial evidence to be rebutted by immaterial evidence.

There was no error in allowing the state, on the cross-examination of the defendant as a witness, to show that he (the defendant) had sworn out a warrant for the arrest of the prosecutor. This evidence was competent for the purpose of showing bias or feeling on the part of the witness.

There was no error in allowing, against the objection of the defendant, the re-examination of the witness Green in the rebuttal. This was a matter in the discretion of the court and is not revisable. *Braham v. State* (Ala.) 38 South. 919.

The first exception reserved to a part of the oral charge of the court to the jury, as set forth on page 19 of the record, shows that the portion excepted to is a part of an uncompleted sentence. We are unable to review this part so excepted to, for the reason that we are unable to say, in the absence of the omitted part of the sentence, what was the statement of the law by the court to the jury. *McNeill v. State*, 102 Ala. 121, 15 South. 352, 48 Am. St. Rep. 17.

The court, in its oral charge as to what was necessary to establish a public road or highway, correctly stated the law. *Harper v. State*, 109 Ala. 68, 19 South. 901; *Lewman v. Andrews*, 129 Ala. 170, 29 South. 692; Code 1896, § 2448.

On the undisputed evidence in this case the court committed no error in giving the general charge at the request of the solicitor.

The court's action in refusing the several written charges requested by the defendant was free from error. *Wilson v. State*, 87 Ala. 117, 6 South. 394.

We find no error in the record of which the appellant can complain, or that is injurious to the appellant, and the judgment appealed from will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

MURPHY v. BLACK & LAIRD.

(Supreme Court of Alabama. June 30, 1906.)

1. RELEASE—RECEIPTS—EFFECT.

Code 1896, § 1805, provides that all receipts, releases, and discharges in writing, whether of a debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties thereto. A receipt certified that plaintiff had received \$50 from the J. county sanitary commissioners, acting for J. county in full settlement of claims and satisfaction for all damages to crops, and other property including improvements thereon of every character whatever, caused by the construction of the Valley Creek sewer through any and all of plaintiff's lands through which the sewer was constructed, and also on or to any of the property caused or done by the contractors constructing said sewer, their agents or employes, it being understood that the settlement should not include damages caused by stock, arising from the negligence of contractors, to crops in the fields outside of the right of way. *Held*, that the receipt was acquittance of all claims plaintiff had at the time against defendant, except damages caused by stock to crops brought about by defendant's negligence.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, §§ 78-82.]

2. EVIDENCE—PAROL—EXPLANATION OF RECEIPT.

In the absence of fraud or mistake, parol evidence is inadmissible to contradict the plain terms of a receipt.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1829-1842.]

3. RELEASE—CONSTRUCTION—QUESTION FOR COURT.

Where a receipt was unambiguous, it was the duty of the trial court to interpret it and declare its effect to the jury.

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

"Not officially reported."

Action by Patrick F. Murphy against Black & Laird. From a judgment for defendant, plaintiff appeals. Affirmed.

Pinkney Scott, for appellant. W. T. Hill, for appellee.

DENSON, J. The plaintiff (appellant), being the owner of S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 6, township 19, range — W., in Jefferson county, for the consideration therein expressed, executed to Jefferson county a paper writing, conveying and granting to said county the right and privilege to enter upon said land for the purpose of constructing

and maintaining a sanitary sewer along or across said land, and the further right and privilege to construct, maintain, inspect, and repair a sanitary sewer "as now surveyed, located, and laid off on, upon, along, or across said land." The conveyance provides that the county shall keep closed all gates and fences except when in actual use, and provide, further, that the county shall be liable for all damage to crops on said land. The county employed the defendants to construct the sewer, and they constructed it. After the sewer was constructed, the plaintiff received from the county \$50 and executed to the county a receipt in these words and figures: "Received of Jefferson county sanitary commissioners, acting for Jefferson county, Alabama, fifty dollars (\$50.00) in full settlement, claims, and satisfaction for all damages to crops, lands, or other property, including improvements thereon, of any and every character whatever, caused by the construction of the Valley Creek sewer through any and all of my lands through which said sewer is connected, and also on any or to any of said property caused or done by the contractors constructing said sewer, their agents or employes. It is understood that this settlement is not to include damages caused by stock arising from negligence of contractors to crops in the fields outside of right of way, this December 27th, 1904."

Plaintiff testified that he did not object to defendant entering on land to construct sewer, and consented for them to enter to the sewer. He further testified that he did not claim anything of defendants for damages to the right of way, but it was for damages done his lands and crops off of the right of way. Section 1805 of the Code of 1896 provides that "all receipts, releases and discharges in writing whether of a debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties thereto." It seems to us, under the evidence and circumstances of this case, that the receipt is an acquittance which must operate in discharge of all claims plaintiff had at the time against the defendants, except damages caused by stock to the crops which were brought about by negligence on the part of the defendants. The plaintiff knew that the county, being a corporation, must, in constructing the sewer, act through agents. Plaintiff knew defendants were the constructors employed by the county to construct the sewer, and consented for them to enter and construct it. Indeed, he could not have objected after the conveyance was executed. He further knew that no other persons entered upon the lands, or did any damage to it or the crops, in the course of construction, save the defendants. Therefore it seems clear that in presenting his claim to the county for \$200 he presented it on the basis that the defendants were the only parties who had any damage,

and that plaintiff was looking to the county, and not to the defendants, for all trespasses, if any were committed, that the negotiations looked to a settlement of the entire damages. The exception at the close of the receipt, construed in connection with the conveyance, seems to be conclusive of the correctness of this view. The body of the receipt states that the sum was receipted for "all damages done on or to any of said property caused or done by the contractors constructing said sewer, their agents or employees." If it was not the intention to make the receipt an acquittance and extinguishment of plaintiff's claim against defendants, why put the exception in at all?

The general rule is that receipts are open to explanation by parol evidence. But the exception to the rule is that, when a receipt imports a contract, it cannot be explained by parol. *Gravlee v. Lamkin*, 120 Ala. 210, 24 South. 758. However this may be, there is no rule, in the absence of fraud or mistake, that will permit parol evidence to contradict plain terms of a receipt. There is no error in the rulings of the court on the admissibility of evidence. Here the receipt is unambiguous, and it was the duty of the trial court to interpret it and declare its effect to the jury. Its legal effect is an acquittance for any trespasses that may have been committed by the defendant and afforded a complete defense puis darrein continuance, under the facts and pleadings in this case.

Both of the counts in the complaint are in trespass. It appears that recovery under them could not have been had, even if it be conceded that the defendant's negligence suffered cattle to enter and destroy the crops. So, on the whole case, the defendants were entitled to the affirmative charge with hypothesis, and the court committed no error in giving it. There is no error, and the judgment is affirmed.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

WRAY v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. CRIMINAL LAW — PRELIMINARY PROCEEDINGS—COMMITMENT.

On an application for bail, the judge of the criminal court, as conservator of the peace, was authorized to hear evidence de novo and hold petitioner to answer an indictment without bail, independent of the validity of the original commitment.

2. HABEAS CORPUS — HEARING — RIGHT TO OPEN AND CLOSE—APPLICATION TO ADMIT TO BAIL.

On habeas corpus to procure bail, the state has the right to open and conclude the argument.

Appeal from Criminal Court, Jefferson County; D. A. Greene, Judge.

"To be officially reported."

Habeas corpus by Richard H. Wray to obtain his discharge from imprisonment on bail. From an order denying bail, petitioner appeals. Affirmed.

The allegations of the petition are that the defendant is entitled to bail and that he is restrained without authority of law, in that the justice who tried the case and issued the mittimus, one W. P. Russell, was a justice of peace in beat 11, Jefferson county, Ala., and that he tried the case in beat 22, in said county, and issued his mittimus therefrom. After the conclusion of the evidence the defendant claimed the right to open and conclude the argument. This right was denied by the court, and the state was permitted, over the objection of defendant, to open and conclude the argument. The bill of exceptions then recited: "After argument by the state and by petitioner, the judge ruled that petitioner was not entitled to bail and committed the defendant on the mittimus without bail. To this action of the judge the petitioner excepted." The judgment of the court on the application is not otherwise shown by the transcript.

B. M. Allen and Shugart & Bell, for appellant. Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. Pretermittin any question as to the regularity or validity of the mittimus issued by Magistrate Russell, the judge of the criminal court is a conservator of the peace, authorized to hold offenders to answer indictments. He could hear evidence as upon a trial de novo, and upon sufficient proof command the imprisonment of the petitioner independent of the validity of the original commitment. *Pruitt v. State*, 130 Ala. 147, 30 South. 451, and cases cited.

We hold that the state has the right to open and conclude the argument in habeas corpus proceedings. The judge of the city court had the witnesses before him, and after a careful consideration of the evidence we are not prepared to say that he erred in denying the defendant bail, and the judgment is affirmed.

Affirmed.

TYSON, SIMPSON, and DENSON, JJ., concur.

WALKER v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. CRIMINAL LAW — PRELIMINARY PROCEEDINGS—JURY LIST—SERVICE.

Code 1896, § 5005, declares that, when the day set for the trial of a capital case is a day of the same week in which special jurors are drawn, such special jurors, together with the panel of jurors organized for the week, shall constitute the venire from which the jury to try the case shall be selected, and, when the day set for trial is a day of a subsequent week of the term, the special jurors and the jurors drawn and summoned for such subsequent week

shall constitute such venire. *Held*, that where court convened on March 13th, and on the 18th, which was Saturday of the first week, the trial judge drew a special venire and set Thursday, the 23d, as the day for the trial of a capital case, an order directing the sheriff to serve a list of jurors drawn and summoned for "this week" of the present term on the defendant, together with a list of special jurors drawn for the trial of the case, was erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1445, 1443.]

2. SAME—PERSONS NOT SUMMONED.

A list of jurors served on accused, containing the names of four persons who were drawn, but not summoned, was erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1441.]

3. JURY—QUALIFICATIONS—OPINION.

Where jurors called to try a capital case answered that they had fixed opinions as to the guilt or innocence of the defendant that would bias their verdict, and also replied that they would try the case according to the evidence, they were not subject to challenge for cause, though they also stated that it would take evidence to remove their opinion.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 461-465.]

4. GRAND JURY—NUMBER.

Where the number of grand jurors was reduced below 15, the trial court was authorized by Code 1896, § 5023, to complete the jury, and it was immaterial that the number was increased beyond 15.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Grand Jury, §§ 3-6.]

5. INDICTMENT—HOMICIDE—DESIGNATION OF DECEASED.

In an indictment for homicide, the state was entitled to designate deceased by different names in different counts.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 272-279.]

6. HOMICIDE — EVIDENCE — DYING DECLARATIONS—PREDICATE.

Where decedent, on the second morning after her injuries, said she could not live, that she had been murdered, such statements constituted a sufficient predicate to make her dying declarations concerning the homicide admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 430-437.]

7. CRIMINAL LAW — DECLARATIONS OF DECEASED PERSON—MATERIALITY.

In a prosecution for homicide, a question asked by deceased of witness if he knew whether the negro that drove a certain team was married or single was immaterial.

8. SAME—RES GESTÆ.

In a prosecution for homicide, a dying declaration that defendant knocked J. in the head and jerked deceased out of bed, and that she got up and secured J.'s pistol, and turned up the light, and tried to shoot defendant, but the pistol would not fire, whereupon defendant wrenched the pistol out of her hand and hit her over the head with it, and that she begged him to spare her life and let her raise her children, was competent as *res gestæ*.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 811, 814, 819, 820.]

9. SAME—EVIDENCE—MENTAL CAPACITY.

Nonexpert evidence is admissible to show that deceased was conscious at a particular time.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1043-1045.]

Appeal from Circuit Court, Walker County; A. H. Alston, Judge.

"To be officially reported."

Henry Walker was convicted of murder, and he appeals. Reversed and remanded.

The defendant was indicted, tried, and convicted for killing Maggie Dickerson by striking her with an ax or pistol, or with some instrument unknown to the grand jury. He was sentenced to be hanged. There was motion made to quash this indictment on the ground that the commissioners drew the names of 18 persons only to serve on the grand jury, that the jury was reduced by exemptions and excuses below 15, and the court organized the same by impaneling to serve as grand jurors 19 persons. The facts with reference to the motion to quash and the grounds of said motion are sufficiently set out in the opinion. When one Coker and others were drawn as jurors and called, in answer to the questions of the court they replied that they had a fixed opinion as to the guilt or innocence of the defendant that would bias their verdict. The court then asked whether they would try the case according to that opinion or by the evidence, if they should be selected as jurors. The jurors replied that they would try it by the evidence. By permission of the court the defendant was permitted to ask the jurors if they had such a fixed opinion as to the guilt of the defendant as that it would take evidence to remove such opinion. The witnesses answered that they did. The court declared them competent jurors and put them upon the state. The state accepted them, and the court put them upon the defendant, who moved to challenge each for cause. The court overruled the motion and required the defendant to accept or reject them. To this the defendant excepted. The first count in the indictment alleged that the person killed was "Maggie Dickerson." The second count alleged the killing of "Maggie Dickerson, alias Maggie Dickinson." The demurrer to the indictment raised the question of the difference of names in the two counts.

John Dickerson was allowed to testify, over the objection of defendant, that Mrs. Dickerson began to talk on the second morning after the injuries were inflicted on her; that she said she could not live; that she had been murdered. He further testified, over the objection of the defendant, that Mrs. Dickinson asked him if he knew whether the negro that drove Capt. Long's team was married or single. Witness further testified, over the objection of defendant, that Mrs. Dickinson said he knocked Joe in the head and jerked her out of bed; that she got up and secured Joe's pistol, and turned up the light, and tried to shoot him, but the pistol wouldn't fire, and he wrenched the pistol out of her hand and hit her over the head with it; that she begged him to spare her life and let her raise her little children. The

defendant moved to exclude this last statement, but the court overruled the motion. Witness further testified that he found a cut place in the floor where the blood was, and there was hair in it. The state asked the witness the following question, to which the defendant objected: "Was the hair you found there the color of the hair of Mrs. Dickerson." The court overruled the objection, and the witness answered that in his best judgment it was. The defendant moved to exclude the answer, and the motion was overruled. The witness was also permitted to answer what Mrs. Dickerson said about what became of her husband's pistol. He was also permitted to testify, over the objection of defendant, that at the time Mrs. Dickerson made these statements in his judgment she was conscious. What is said in reference to this witness and the question propounded to him apply to the other witnesses in the case.

Gray & Coelman, for appellant. Massey Wilson, Atty. Gen., for the State.

ANDERSON, J. Section 5005 of the Code of 1896 reads as follows: "When the day set for the trial of a capital case or cases is a day of the same week in which the special jurors are drawn as provided in the preceding section, the special jurors so drawn, together with the panel of petit jurors organized for the week, shall constitute the venire from which the jury or juries to try such case or cases shall be selected; and when the day set for the trial is a day of a subsequent week of the term, the special jurors so drawn, together with the jurors drawn and summoned for such subsequent week, shall constitute such venire." The court convened March 13th, and on March 18th, which was Saturday of the first week, the trial judge drew the special venire and set Thursday, the 23d, as the day for the trial. The judgment entry concludes as follows: "The sheriff was also ordered to serve a copy of the indictment in this case, together with a list of the jurors drawn and summoned for this week of the present term on the defendant or his attorney at least one entire day before the day set for the trial of this case; also a list of the special jurors drawn for the trial of this case." The case being set for Thursday of the second week, the special jurors drawn by the judge and the regular jurors drawn and summoned for the second

week of the term constituted the venire to try the case, and the jurors drawn and summoned for the week constituted no part of the venire. The order was made when this case was set, and "this week" related to the first, and not the second, week, and was therefore erroneous.

The bill of exceptions is not clear on the subject, but indicates that the sheriff served a list of the jurors drawn for the second week, and the proof shows that the list so served contained four persons who were drawn, but not summoned. Said four persons, not having been summoned, were improperly served on the defendant, as they constituted no part of the venire to try the case. *Carwile v. State* (Ala.) 39 South. 220, and cases there cited.

The trial court did not err in putting the jurors objected to upon the defendant. They showed upon the examination that their opinion was not so fixed as to bias their verdict.

There was no merit in the motion to quash the indictment. The number of grand jurors was reduced below 15, and the trial court complied with section 5023 of the Code of 1896 in completing the grand jury. It makes no difference that the number was increased to over 15. *Sanders v. State*, 129 Ala. 69, 29 South. 841.

The demurrer to the indictment was properly overruled. The state had the right to aver the deceased by different names in separate counts.

A sufficient predicate had been established to make the declarations Mrs. Dickinson made to Davidson admissible. But what she asked him as to "whether the negro driver was married or single" was immaterial. The other evidence of Dickinson was competent as part of the *res gestæ*. Nor did it require an expert to testify that Mrs. Dickinson was conscious.

The other objections are against the evidence of Mrs. Dickinson's declarations as detailed by different witnesses, and it is sufficient to say that a proper predicate was established in each instance to make her declarations legal evidence.

For the errors above designated, the judgment of the circuit court must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

VAUGHN v. STATE.

(Supreme Court of Florida, Division B. Aug. 3, 1906.)

1. WITNESSES—CROSS-EXAMINATION—BIAS.

It is error to refuse to permit the defendant, on the cross-examination of a state witness, to interrogate such witness as to whether he had made threats of doing violence to the defendant. Great latitude is allowed in the cross-examination of a witness that tends to expose the animus of such witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1192-1198.]

2. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

It is error to charge the jury that a reasonable doubt is "a doubt which would satisfy a reasonable man."

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1904-1922.]

(Syllabus by the Court.)

Error to Criminal Court of Record, Escambia County; E. D. Beggs, Judge.

John B. Vaughn was convicted of manslaughter, and brings error. Reversed.

Jones & Jones, for plaintiff in error. W. H. Ellis, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, hereinafter referred to as the defendant, upon information charging him with murder in the second degree, was convicted of the crime of manslaughter in the criminal court of record of Escambia county, and seeks relief here by writ of error.

To one J. C. Nichols, the state's leading witness, on cross-examination, the defendant's counsel propounded the following question, after the witness had answered that on the day of the homicide he had seen Bob Getna and Philip Moore: "Is it not a fact that you said to Cary Hall, and stated in the presence of William Moore and Bob Getna, that you were going to kill that red-headed son of a bitch; that you were going to kill him?" The state interposed a general objection, without stating any ground of objection, which objection was sustained, and the question excluded, to which exception was taken, and error is assigned thereon. This ruling was error. It was in a fight and difficulty with this witness that the defendant through mischance shot and killed the deceased; the shot that killed the deceased, who was a bystander, being aimed by the defendant at and intended for this witness. The defendant had the right on his cross-examination to show the animus of this witness towards him, and the witness' threats, if any were made, bore directly upon the question of his animus towards the defendant, and thereby affected the witness' credibility. *Driggers v. State*, 38 Fla. 7, 20 South. 758; *Wallace v. State*, 41 Fla. 547, 28 South. 713; *Bryan v. State*, 41 Fla. 643, 26 South. 1022; *Fields v. State*, 46 Fla. 84, 35 South. 185; *Alford v. State*, 47 Fla. 1, 36 South. 438. The evidence sought to be elicited

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ed by the excluded question was vitally important to the defendant for still a further reason. The question whether the defendant was justified in firing the shot that resulted in the death of a bystander depended in large measure upon the fact as to who was the aggressor in the difficulty between the witness and the defendant. This witness had so shaped his evidence as to endeavor to make it appear that he was the innocent victim of an assault by the defendant. If threats were made by the witness towards the defendant, such fact bore directly upon the truth of the question as to who was the aggressor, the witness or the defendant. *Garner v. State*, 23 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232.

Other assignments of error are predicated upon the exclusion of questions to witnesses; but, without reciting them here, there was no error in such exclusions. Various charges given are also assigned as error. We discover no error in any of the charges given, except the fifth. This charge is so framed as to confuse and mislead the jury, and upon another trial it had best be reconstructed by omitting from it all of the latter part thereof, after and including the word "unless."

The expression, "a doubt which would satisfy a reasonable man," should be omitted from charge No. 9 on the subject of reasonable doubt. *Hampton v. State* (Fla.) 39 South. 421.

All four of the charges requested by the defendant stated correct propositions of law, and should have been given.

For the error found, the judgment of the court below is reversed, and a new trial awarded, at the cost of Escambia county.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

HIERS v. STATE.

(Supreme Court of Florida, Division B. July 31, 1906.)

1. INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE—PRESUMPTIONS.

The third section of chapter 4030, p. 58, Laws of 1901, makes proof of the delivery of liquor and receipt of money therefor only prima facie evidence that the party so delivering the liquor and receiving the money therefor is the owner of such liquor, and the courts should so instruct juries in such cases, and they should be further instructed that the defendant may rebut this presumption by proving, if he can, that he was not in fact the owner of either the liquor delivered or of the money received for same, and was not acting as the agent of the seller or owner in making the delivery of the liquor and in receiving the money therefor, and that if he so proves then he cannot be convicted. A mere purchaser of liquor for one's self or for another does not in so purchasing violate the laws against the sale of liquors.

2. SAME—SALE BY AGENT.

It is well settled that one who, in violation of law, sells intoxicating liquors as the

servant of another, is liable personally, as well as his principal, to indictment, although he acted without compensation in making the sale. If he actually does the selling of the liquor, either on his own account as the owner thereof or as the servant or agent of the owner, he should be convicted; but if he does not make the sale, and has no interest in the liquor sold or in the price received for it, but merely acts in the transaction as the purchaser or agent of the purchaser of the liquor sold, he cannot be convicted.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 187-192.]
(Syllabus by the Court.)

Error to Circuit Court, Suwannee County; Bascom H. Palmer, Judge.

Darnell Hiers was convicted of selling intoxicating liquors, and brings error. Reversed.

Roberson & Small, for plaintiff in error.
W. H. Ellis, Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, hereafter called the defendant, was indicted, tried, convicted, and sentenced in the circuit court of Suwannee county for the crime of selling intoxicating liquors in a county that had by an election adopted prohibition, and for relief from such judgment presents writ of error here.

The undisputed facts in the case are substantially as follows: On or about the 17th of April, 1906, the defendant got a jug of whisky from the express office for his father, one Sam Hiers, who was a bedridden cripple residing at the defendant's house, and carried it home to his father, whose property it was. On his way home with the jug he met a state's witness, and asked her if she would not like to have some whisky, and, on her replying in the affirmative, told her that he had some in that jug, and that he would wait for her at the shop, and she could come there for it. About an hour afterwards she went to the shop, but he was gone, whereupon the witness went to where defendant lived, and found him and his wife in the yard catching chickens, preparatory to removing, as they said, next day to another place. Upon seeing the witness defendant came to her, and she gave him a \$1 bill and told him she wanted a pint of whisky. He went into his house with the money, and returned in a few minutes with a pint of whisky and 25 cents in change, that he delivered to the witness. This witness had frequently before that time bought whisky from Sam Hiers, the father of defendant, at the latter's house, but had never before that time obtained any directly from the defendant. The city marshal of Live Oak was concealed close by when the defendant took the money from the witness and carried it into the house, and saw him come back and hand something to the witness, whereupon the marshal stepped up and arrested the defendant, took the pint of whisky from the

witness that he had just given her, and took the defendant into the house, where he found Sam Hiers, the defendant's father, lying on a bed, and found in his pocketbook, lying on the bed with him, the \$1 bill that the witness had just sent in for the whisky. The defendant and his father, Sam Hiers, both testified that the whisky sold on this occasion and the money received for same belonged entirely to Sam Hiers, and not to the defendant, and that the latter had no interest therein whatever. Sam Hiers, without contradiction, testified very frankly that he had been engaged for several years in the illicit sale of liquors, and for some time past had conducted the business at his son's house, with whom he lived; that he ordered his liquors from elsewhere, having them sent to him by express, and he would get various people to bring the liquors to him from the express office, paying them for so doing, and would sometimes get his sons to bring it to him from the express office, paying them for so doing the same as he paid others for the same service; that he was a bedridden cripple, and had been for many years, and could not make a living in any other way; that his son Darnell Hiers had no interest whatever either in the whisky sold that night or in the money received for it; that he (Sam Hiers) alone owned the whisky and sold it, and he alone owned the money received for it.

The third section of chapter 4930, p. 58, Laws of 1901, under which the defendant was indicted makes proof of the delivery of liquor and receipt of money therefor by the defendant prima facie evidence of the ownership of the liquor by the defendant. In giving this section of the statute in charge to the jury, the judge should explain to them that proof of the delivery of the liquor and receipt of money therefor by the defendant was only prima facie evidence that he was the owner of said liquor, and that the defendant could rebut this presumption by proving, if he could, that he was not in fact the owner of either the liquor delivered or of the money received for same, and was not the agent of the seller or owner in making the delivery of the liquor and receiving the money therefor, and that if he so proved then he could not be convicted. *Goode v. State*, 39 South. 461; *Anderson v. State*, 32 Fla. 242, 13 South. 435. For this reason the court below erred in refusing to give the following charge requested by the defendant: "If you believe from all the evidence in this case that the defendant had no interest in the whisky alleged to have been sold, and no interest in the money received for it, at the time of the sale, but merely acted as the agent or friend of the purchaser, then it is your duty to render a verdict of not guilty."

It is well settled that one who, in viola-

tion of law, sells intoxicating liquors as the servant of another, is liable personally, as well as his principal, to indictment, although he acted without compensation in making the sale. *State v. Bugbee*, 22 Vt. 32; *Marshall v. State*, 49 Ala. 21; *Davidson v. State*, 27 Tex. App. 262, 11 S. W. 371; *Hays v. State*, 13 Mo. 246; *State v. Chastain*, 19 Or. 176, 23 Pac. 963; *Wason v. Underhill*, 2 N. H. 505; *Baird v. State*, 52 Ark. 326, 12 S. W. 566; *Commonwealth v. Hadley*, 11 Metc. (Mass.) 66; *State v. Finan*, 10 Iowa, 19; *Roberts v. O'Conner*, 33 Me. 496. Therefore it became material in this case for the court to instruct the jury that if they found from the evidence that the defendant actually did the selling of the liquor, either on his own account as the owner thereof, or as the servant or agent of the owner, he should be convicted, but if he did not make the sale, and had no interest in either the liquor or the money received for it, but merely acted in the transaction as the agent of the purchaser, he could not be convicted.

For the error found the judgment of the court below is reversed, and a new trial awarded, at the cost of Suwannee county.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

BRUCE v. SEABOARD AIR LINE RY.

(Supreme Court of Florida, Division B. July 17, 1906.)

1. DEDICATION—MADE BY OWNER OF ABSOLUTE FEE.

Only the owner of an absolute fee can make an absolute and final dedication of land to a public use, for streets, etc.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 5-7.]

2. SAME—LANDS IN ADVERSE POSSESSION.

A party claiming title to land that is in the actual adverse possession and occupancy of another cannot, as against such adverse occupant, make an absolute and final dedication of such land to a public use by the filing and public record of a map subdividing the part thereof held adversely into streets, lots, and blocks, and by selling other parts thereof not held adversely to other parties by reference to such map.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 5-7.]

3. EMINENT DOMAIN—CONSTRUCTION OF ROAD—RIGHTS OF LANDOWNER.

Where a railroad company tortiously builds its road, depot buildings, etc., on land owned by O., and subsequently to the establishment of such road, buildings, etc., O. sells and conveys the land to H., the latter cannot recover of such railroad company damages for the tort, but the right of action therefor remains alone in O.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 407-416.]

(Syllabus by the Court.)

Appeal from Circuit Court, Hillsborough County; Joseph B. Wall, Judge.

Bill by George B. Bruce against the Seaboard Air Line Railway. Decree for defendant, and complainant appeals. Affirmed.

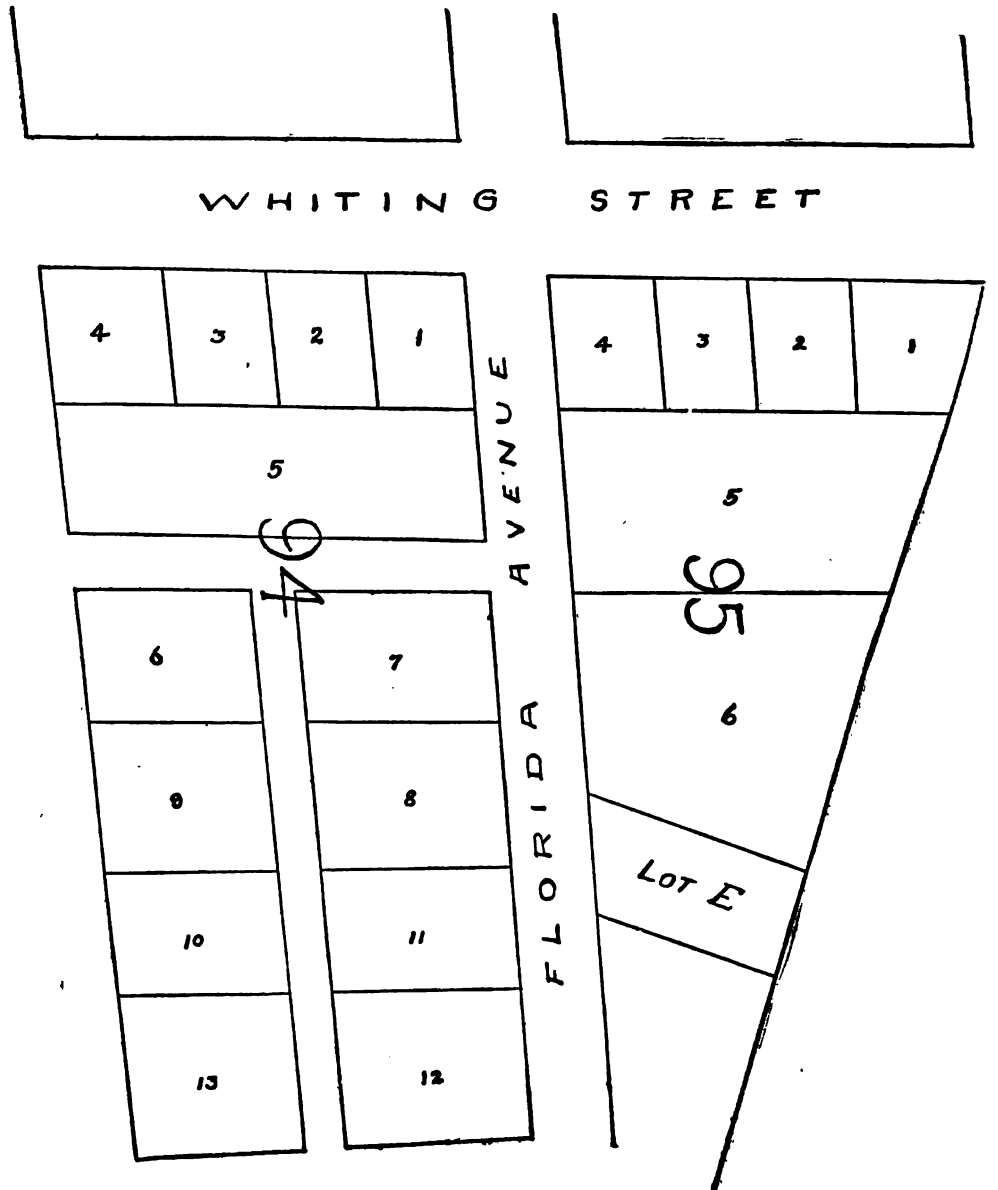
Macfarlane & Glen, for appellant. Geo. P. Raney and P. O. Knight, for appellee.

TAYLOR, J. The appellant, as complainant below, filed his bill in equity in the circuit court for Hillsborough county against the appellee, as defendant below, to restrain and enjoin it from closing up or blocking up an alleged street called Florida avenue in one of the additions to the city of Tampa, with its depot buildings, or by permitting its trains of cars from standing across said avenue. The defendant fully answered the bill, replication was filed, and the cause submitted upon the bill, answer, and an agreed statement of facts. Final decree was rendered adjudging the equities to be with the defendant, and dismissing the bill at the cost of the complainant. From this decree the complainant appeals to this court.

The facts of the case, as disclosed by the bill, answer, and agreed statement of fact, are as follows: Prior to the year A. D. 1884, lot 9 of section 24, township 29 south, in range 18 east, adjacent to the town of Tampa, in Hillsborough county, was the public property of the United States, held in reserve by it for military purposes. During the year 1884 the reservation was removed, and the land thrown open to homestead entry by the Interior Department of the federal government. During the year 1884 Lizzie W. Carew made homestead entry upon said lot 9 through the United States District Land Office. The defendant railway company is the successor in title and interest of its predecessor, the Florida Central & Peninsular Railroad Company. Said last-named railroad company, in the spring of the year 1890, while said lot 9 was occupied by Lizzie W. Carew under her homestead entry thereof, built the extension of its road from Plant City across said lot 9 and erected thereon its depot, platforms, and side tracks without any objection or protest whatsoever on the part of the homestead occupant, Lizzie W. Carew, and said railroad company and its successor, the defendant herein, has continuously since that time to the present occupied that part of said lot 9 that it first located upon with its track, sidings, depot, and platforms as its Tampa terminal. Prior to the issuance of the patent by the United States to Lizzie W. Carew for the said land embraced in her homestead entry, the defendant's predecessor, the Florida Central & Peninsular Railroad Company made serious contention before the Interior Department of the United States that it was entitled, under the laws of Congress, and under a map showing the definite location of its line of road across said land filed in the General Land

Office of the United States at Washington on December 14, 1860, to its right of way across the same, and that its claim to such right of way was paramount to the homestead rights of said Lizzie W. Carew, and that said right of way should be reserved and excepted in the patent to be issued to said Lizzie W. Carew, but that it was decided by the Interior Department not to make any reservation or exception in said patent, for the reason that whatever prior rights the said railroad company had therein would not be affected by the patent covering all the land embraced in the homestead entry of Lizzie W. Carew. Patent issued from the United States on July 30, 1896, to Lizzie W. Carew for the said

lot 9 as embraced in her homestead entry thereof. Lizzie W. Carew on May 20, 1896, conveyed by deed to W. W. Hampton a portion of said lot 9 that embraced the railroad tracks, depot, sidings, and platforms of the defendant railway company, and generally all of the premises in controversy herein. W. W. Hampton on July 27, 1899, had the portion of said lot 9 that had been conveyed to him surveyed, subdivided, and platted into blocks, lots, streets, and alleys, and on that date caused a map of such subdivision to be filed and recorded in the public records of Hillsborough county, a portion of which map, sufficient to show the premises in dispute, is as follows:



By reference to this map, W. W. Hampton on April 12, 1902, conveyed lot 6 of block 95 as delineated on said map, abutting on and bounded by what is designated on said map as "Florida Avenue," to the complainant, and at sundry times sold divers other lots by reference of said map to divers other persons. When the defendant railroad in 1890 first located and established its roadbed, sidings, etc., across said lot 9, it located the same on the territory designated on said map as lot 5 of block 95, and from thence across what is on said map designated as "Florida Avenue" on and across lot 5 of block 94, and then established its depot, platforms, etc., across said Florida avenue between lot 1 of block 94 and lot 4 of block 95, and has continuously occupied said ground with its tracks, sidings, depot, platforms, etc., from that time to the present. The city of Tampa through its council expressly declined to accept said "Florida Avenue" as designated on said map as and for a street of said city, and expressly repudiated it as such, and did nothing in recognition of it as being a street or highway of said city. During the year 1897, W. W. Hampton instituted suits in the circuit court of Hillsborough county against the Florida Central & Peninsular Railroad Company, the predecessor in interest of the defendant, to recover possession of all the lands occupied by it in blocks 94 and 95 as designated on said map and in said Florida avenue, which suits were defended and litigated until August, 1903, when all of the matters in dispute were settled between the parties, in which settlement W. W. Hampton conveyed to the defendant company lots 1, 2, 3, 4, and 5 of block 94 by reference to said map, and executed a quitclaim deed to that portion of the territory designated on said map as Florida avenue that lies between lots 1 and 5 of block 94, and lots 4 and 5 of block 95. On the 13th of July, 1904, the city of Tampa through its proper officials also executed to the defendant company a quitclaim deed to the said last-described portion of Florida avenue. At the time of the filing of the bill herein, October 12, 1904, the wooden depot building of the defendant, that had theretofore occupied that portion of Florida avenue, as shown on said map, intervening between lot 1 of block 94 and lot 4 of block 95, had been removed by the defendant company for the purpose of constructing in its place and stead a more substantial, commodious, and handsome depot building of brick. The erection of this brick building is what the complainant protests against in his bill as being an obstruction to Florida avenue on which his lot 6 abuts. The chief contention of the complainant is that the filing and public record of said plat by W. W. Hampton, his grantor, was a dedication of said Florida avenue to the public as and for a street and public highway, and that the sale and conveyance to him of lot 6 by reference to said plat abutting upon said Florida avenue gave to him a particular inter-

est in said avenue, and the right to have it unobstructed by the depot buildings and trains of cars of the defendant company.

Under the facts as stated and agreed upon we think the court below made the proper decree, dismissing the bill, and we think so for the following reasons: At the time of the subdivision and platting of the premises in dispute by W. W. Hampton, and the alleged consequent dedication by him of Florida avenue as and for a street, the defendant railway company and its predecessor in interest was in the actual adverse occupancy and possession of the territory delineated on said map as Florida avenue, occupying the same with its railroad tracks, depot building, and platforms, and had so occupied the same for many years—since 1890. This adverse holding by the defendant company was contested by W. W. Hampton by litigation in the courts for many years, resulting finally in an amicable settlement by which Hampton conveyed all the lots involved in the litigation and made a quitclaim deed to that part of Florida avenue that was then, and had been for years, occupied by the defendant company with its tracks, depot building, platforms, and sidings. Under these circumstances W. W. Hampton could not at the time of the filing and record of his map make an absolute and final dedication for street purposes of that part of Florida avenue then held and occupied adversely to him and all the world by the defendant company, for the reason that an absolute and final dedication of lands to a public use can only be made by the owner of an absolute fee. *Ward v. Davis*, 8 Sandf. (N. Y.) 502; *City of Hannibal v. Helrs & Adm'r of Draper*, 36 Mo. 332; *McShane v. City of Moberly*, 79 Mo. 41; *City of Sarcorie v. Wild*, 64 Mo. App. 403; *Ogle v. Philadelphia, W. & B. R. R. Co.*, 3 Houst. (Del.) 802. It can make no difference, so far as the complainant herein is concerned, whether or not the original occupancy of the premises by the defendant railway company was a trespass or wrongful. At that time he (the complainant) had no interest in the premises and was not concerned therein. If it was a wrongful trespass, no one was concerned therein or injured thereby but Lizzie W. Carew and her grantee, W. W. Hampton, and the defendant railway, while still maintaining its adverse occupancy and possession of the premises, subsequently settled all disputes and contentions over its holdings with the only person having a right to contest the same, by taking quitclaim deeds from such person, thereby ripening its former adverse possession, whether tortious or not, into a lawful and undisputed title. If its original possession was tortious, the complainant has no redress therefor as against the defendant company, because he became the owner of part of the premises subsequently to the commission of the tort, and he purchased with full knowledge of the status of affairs in the locus in quo. *Yellow River R. Co. v. Harris*, 35 Fla. 385, 17 South.

568; *Pensacola & Atlantic R. R. Co. v. Jackson*, 21 Fla. 146.

W. W. Hampton was made a party defendant to the bill along with the defendant railway company, but the bill prays no relief against him. He answered the bill disclaiming any interest in either the subject-matter of the suit or in the controversy between the parties. The decree appealed from, though it finds the equities to be in favor of the defendants generally, adjudges nothing either for or against W. W. Hampton.

The decree appealed from is hereby affirmed, at the cost of the appellant.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

KEIGANS v. STATE.

(Supreme Court of Florida, Division B. Aug. 3, 1906.)

1. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

The trial judge should not single out and give undue prominence to the testimony of the defendant and the fact of his interest in the result of the trial by instructing the jury to remember "the interest he necessarily must have in the result of the trial," in considering the testimony of the defendant who has testified as a witness in his own behalf.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1895–1898, 1969–1971.]

2. HOMICIDE — TRIAL — INSTRUCTIONS — PREMEDITATED DESIGN.

In a trial for murder in the first degree the trial judge gave the following charge to the jury. "The premeditated design to kill may have existed in the mind of the slayer for a month, a week, a day, or an hour, or may have been formed a moment before the fatal shot was fired. If you believe from the evidence that the defendant shot and killed Hansel Norman as charged in the indictment, that he killed him without legal justification or excuse, and that at the time he fired the shot which killed Hansel Norman he intended to kill him, it would make no difference at what precise time he made up his mind to take Norman's life. If, when he fired the pistol, he intended to kill, he is guilty of murder in the first degree, even although he may not have had in his mind any such intention at the time he drew his pistol."

In the opinion of Taylor, P. J., and Hocker and Parkhill, JJ., this charge is erroneous and misleading in definition of murder in the first degree. Shackleford, C. J., and Cockrell and Whitfield, JJ., not concurring. The question presented by this charge is, therefore, not decided.

3. CRIMINAL LAW — TRIAL — INSTRUCTIONS — FORM OF VERDICT.

Under Rev. St. § 2383, it is proper for the trial judge to instruct the jury as to the form of the verdict in case of conviction, directing them to specify in the verdict the degree of unlawful homicide of which they may find the defendant to be guilty.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1933.]

(Syllabus by the Court.)

Error to Circuit Court, Pasco County; Joseph B. Wall, Judge.

Dow B. Kelgans was convicted of murder and brings error. Reversed.

J. A. Hendly, G. W. Dayton, and Samuel Fletcher, for plaintiff in error. W. H. Ellis, Atty. Gen., H. S. Phillips, and Thomas Palmer, for the State.

PARKHILL, J. The plaintiff in error was indicted in the circuit court of Pasco county for the murder of Hansel Norman. was tried and convicted of murder in the first degree, and from the sentence of death imposed by the court seeks relief here by writ of error.

I. The following charge, given by the court to the jury and duly excepted to, is assigned as error: "The jury are the sole judges of the evidence and of the weight and sufficiency of the evidence. It is your peculiar province to determine which of the witnesses or what portions of their testimony you will believe, and which, if any, you will not believe. If there are conflicts in the testimony, you should reconcile them, if in your power to do so. But, if you find yourselves unable to reconcile such conflicts, then it will become your duty to entirely discard from consideration such portions of the testimony as you may not believe, and to base your verdict solely upon the part of it which you believe to be the truth, bearing in mind the interest in the result of the trial, if any, which may induce any given witness to falsify or color his evidence. You should treat the testimony of the defendant as you do that of any other witness, and that is, give it just such weight as you think it entitled to, remembering the interest he necessarily must have in the result of the trial."

The last clause of the last sentence of this charge is objectionable because it singles out and gives undue prominence to the testimony of the defendant, and the fact of his interest in the result of the trial. It is calculated to unduly impress the minds of the jury and prejudice the defendant. The direction here is mandatory that the jury remember the interest the defendant necessarily must have in the result of the trial.

Immediately preceding the sentence under consideration the court instructed the jury in weighing the testimony of witnesses to bear in mind "the interest in the result of the trial, if any, which may induce any given witness to falsify or color his evidence." The juxtaposition of the sentences and the difference in their phraseology would naturally lead the jury to understand that the one clause was mandatory, and the other only permissive; that, so far as the defendant was concerned, he necessarily must have an interest in the result of the trial, which the jury must remember in considering his testimony; and that, in considering the testimony of the other witnesses in the case the

jury will determine whether a witness has an interest in the result of the trial, and, if so, to bear in mind the interest which may induce him to falsify or color his evidence. This charge does not place the defendant in precisely the same attitude with reference to the case as other witnesses are placed, although the court told the jury that they should treat the testimony of the defendant as they would that of any other witness. It is doubtless true that the defendant necessarily must have an interest in the result of the trial; but, as was said in *Hicks v. United States*, 150 U. S. 442, 14 Sup. Ct. 144, 37 L. Ed. 1187, "it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one, if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability."

Chapter 4400, p. 162, Acts of 1895, makes a defendant at his option a competent witness. It confers upon him a substantial right and benefit. Under its provisions, he has the right to submit his testimony to the jury and have them judge of his credibility.

Section 1088, Rev. St. 1892, provides that the judge presiding shall charge the jury only upon the law of the case. To tell the jury about the interest a man necessarily must have when he is on trial for his life neutralizes or impairs the legislative act that makes him a witness. *Green v. State*, 40 Fla. 191, text 199, 23 South. 851; *Lang v. State*, 42 Fla. 595, text 601, 28 South. 856; *Hampton v. State* (Fla.) 39 South. 421; *Buckley v. State*, 62 Miss. 705; *Woods v. State*, 67 Miss. 575, 7 South. 495; *Muely v. State*, 31 Tex. Cr. R. 155, text 168, 169, 18 S. W. 411, 19 S. W. 915; *Harrell v. State*, 37 Tex. Cr. R. 612, 40 S. W. 799; *Purdy v. People*, 140 Ill. 46, 29 N. E. 700. See, also, *Barber v. State*, 13 Fla. 675, text 681; *Miller v. State*, 15 Fla. 577, text 584; *Andrews v. State*, 21 Fla. 598, text 610. A contrary doctrine is held by the courts in some states of our Union, under statutes materially different from the statutes of this state on the subject. *Muely v. State*, supra.

II. It is assigned as error that the court erred in charging the jury as follows: "(4a) The premeditated design to kill may have existed in the mind of the slayer for a month, a week, a day, or an hour, or may have been formed a moment before the fatal shot was fired. If you believe from the evidence that the defendant shot and killed Hansel Norman as charged in the indictment, that he killed him without legal justification or excuse, and that at the time he fired the shot which killed Hansel Norman he intended to kill him, it would make no difference at what

precise time he made up his mind to take Norman's life. If, when he fired the pistol, he intended to kill, he is guilty of murder in the first degree, even although he may not have had in his mind any such intention at the time he drew his pistol."

This charge is erroneous and misleading. We do not think it conforms to the definition of murder in the first degree under our statute. "The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed, or any human being," is declared, by section 2380, Rev. St. 1892, to be murder in the first degree. Manslaughter is "the killing of a human being by the act, procurement, or culpable negligence of another in cases where such killing shall not be justifiable or excusable, nor murder according to the provisions of this article." Section 2384, Rev. St. of 1892.

In manslaughter, there may be an intent to kill existing in the mind of the slayer at the time the fatal shot is fired. In order to constitute murder in the first degree, there must be not only an intention to kill on the part of the slayer, but there must be a premeditated design to kill or effect death also. This charge does not distinguish in this respect between manslaughter and murder in the first degree. It permits the jury to find the defendant guilty of murder in the first degree if, when he fired the fatal shot, he intended to kill the deceased, without requiring the defendant to have formed and acted in pursuance of such a design as the law would know as premeditated. While the first sentence of the charge states that "the premeditated design to kill may have existed in the mind of the slayer for a month, a week, a day, or an hour, or may have been formed a moment before the fatal shot was fired," without saying that the action of the slayer must be the result of such premeditation, it goes a step further in whittling away and shortening the time within which the defendant must have formed a premeditated design to kill the deceased; and, by saying that it would make no difference at what precise time he made up his mind to take Norman's life, if at the time he fired the fatal shot he intended to kill him he is guilty of murder in the first degree, the charge does away entirely with the requirement of the law "that there must be such an interval of time between the intent and the act as will repel the presumption that it was done upon a sudden impulse, conceived and executed almost instantaneously." *Carter v. State*, 22 Fla. 553, text 559. This charge loses sight of the difference between premeditated design to effect death, which is essential to the crime of murder in the first degree, and an intention to kill which may exist in manslaughter, and permits the defendant to be convicted of murder in the first degree upon proof of what might be termed instantaneous or flashlight premedi-

tation. As was said by this court (eighth headnote, all the justices concurring) in *Cook v. State*, 46 Fla. 20, 35 South. 635: "There may, in contemplation of law, be an intention to kill a human being, which may not amount to a premeditated design to kill. Shooting a man intentionally, and killing him, is not necessarily the same as doing so with a premeditated design to kill. There may be an intention to kill, without its having been premeditated. In order to convict the defendant of murder in the first degree, the jury must be satisfied from the evidence beyond a reasonable doubt that the defendant not only had an intention to kill the deceased, but that he actually had a premeditated design to kill him." See, also, *Garner v. State*, 23 Fla. 113, 9 South. 836, 29 Am. St. Rep. 232; *Olds v. State*, 44 Fla. 452, 33 South. 206. Or, as it was expressed by this court in *Lovett v. State*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705: "There must have been, previous to the act of killing, deliberation by the slayer upon the question of killing the deceased, resulting in a distinct determination or well founded design to kill." It will not do to say that the first sentence of the charge assumes that a premeditated design is an essential element of murder in the first degree. Neither will it do to say that the words "as charged in the indictment," used in this instruction, refer to the indictment in its entirety, and thereby sufficiently charge that the killing was perpetrated from a premeditated design to effect the death of the deceased, where the trial judge, as he does in this case, does not stop with the expression "as charged in the indictment," but goes on in the charge to erroneously enumerate and state the elements of murder as charged in the indictment to be "that he killed him without justification or excuse, and that at the time he fired the shot which killed Hansel Norman he intended to kill him, etc., and thereby erroneously defined the essential element of murder in the first degree, to wit, the premeditated design to effect death.

We cannot explain away the expression in the instruction, "and that at the time he fired the shot which killed Hansel Norman he intended to kill him," by saying that it was unnecessary. This expression was harmful to the defendant, because it entirely changed the charge in the indictment from one of murder in the first degree to manslaughter, it substituted for the element of premeditated design charged in the indictment the element of intent to kill, and yet the instruction called for a verdict of murder in the first degree.

The error in this charge followed naturally from a preceding charge given by the trial court as follows: "Premeditated design means an intent to kill. Design means intent, and both words imply premeditation." In giving the charge last quoted, the trial judge followed literally the utterance of this

court in *Ernest v. State*, 20 Fla. 383. Since that time this question was considered here in *Cook v. State*, *supra*. The court, however, was equally divided, and the question presented by this charge was not decided. Undoubtedly design means intent. Premeditated design, therefore, means premeditated intent. Premeditation is composed of "pre" and "meditation," and means the act of premeditating; previous deliberation; forethought. In *Lovett v. State*, *supra*, the words are used as synonyms. "Premeditated" implies an interval, however short, between the formation of the intent or design and the commission of the act. *Standard Dictionary*. As was said by the court of appeals of New York: "Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection or consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. The human mind acts with celerity which it is sometimes impossible to measure." *People v. Majone*, 91 N. Y. 211; *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018. See, also, *Lovett v. State*, *supra*; *Savage v. State*, *supra*; *Carter v. State*, *supra*. The question of premeditation is one of fact for the jury, and whether a premeditated design to kill was formed must be determined from all the circumstances of the case. *Carter v. State*, *supra*; *Hicks v. State*, 25 Fla. 535, 6 South. 441; *Lovett v. State*, *supra*; *Blige v. State*, 20 Fla. 742, 51 Am. Rep. 628; *People v. Majone*, *supra*; *People v. Decker*, *supra*; *Adams v. State*, 28 Fla. 511, 10 South. 106. From what has been said, therefore, we think that a charge in the following language will give the jury a fair definition of murder in the first degree under our statute: "In order that the defendant be found guilty of murder in the first degree the evidence must show beyond a reasonable doubt that he unlawfully killed Hansel Norman by shooting him, as charged, from a premeditated design to effect Hansel Norman's death. There must not only be an intention to kill, but there must also be a premeditated intention or design to kill. Design means intent, and premeditated means meditated or thought upon beforehand. Such design must precede the killing by some appreciable space of time; but the time need not be long. It must be sufficient for some reflection or consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. The human mind acts with celerity which it is sometimes impossible to measure, and whether a premeditated design to kill was formed must be determined by the jury from all the circumstances of the case. If the evidence convinces the jury beyond a reasonable doubt that the defendant unlawfully killed Hansel Norman, by shooting him as charged, from such a premeditated design as already defined, the jury will

and the defendant guilty of murder in the first degree."

The above discussion and conclusion with reference to the charge of the court below marked "4a" has the unanimous approval of the three members of the court comprising division B; but, as it is not concurred in by the three members of the court comprising division A, the question presented by such charge is not now decided.

III. Exception is taken to the following charge given by the court: "If the jury should find the defendant guilty, they must in their verdict set forth the distinct degree of homicide of which they find him guilty, viz.: They must say whether they find him guilty of murder in the first degree, or murder in the second degree, or of murder in the third degree, or manslaughter, and the form of the verdict should be in the following or like form: 'We, the jury, find Dow B. Keigan, the defendant, guilty of,' etc. [Here filling in the degree of the crime.] If you find him not guilty, you will say, 'We, the jury, find the defendant not guilty.'" There was no error here. The court was only instructing the jury to comply with section 2383 of the Revised Statutes of 1892, as follows: "When the jury find the defendant guilty under an indictment for murder, they shall ascertain by their verdict the degree of unlawful homicide of which he is guilty." It would have been better form to have used the words "unlawful homicide," instead of simply the word "homicide," in the charge given; but there is nothing at all in the contention made here by counsel for plaintiff in error that "in this charge the court has failed to give the exceptions mentioned in the statute, where killing is declared to be justified or excusable, and assumes that it is murder in the first, second, or third degree, or manslaughter, and that the charge further assumes that there was no evidence other than that to prove the material facts to constitute murder in the first, second, or third degree, or manslaughter, and further than this the jury could not go, that it was one of the crimes set forth above." It is perfectly plain that, if the defendant is guilty of any crime known to the law, it must be one of the crimes mentioned by the court in this charge.

As this case must be reversed because of the errors already noted, we deem it unnecessary to notice other assignments of error. It may be well, however, to say that under the circumstances of this case we think the testimony of the witness John A. Nelson to the effect that shortly before the death of Norman the defendant said he would kill any white man who interfered with him while he was whipping a negro was permissible, as this testimony tended to disclose a motive for the homicide.

There are copied into the transcript many charges, numbered from 15 to 44, both in-

clusive, that are not signed by the judge or indorsed as having been given or refused, nor ordered to be filed; neither are they contained in the bill of exceptions. These charges are, therefore, not so authenticated as that they can properly be considered by an appellate court. We do not know, therefore, whether they were in fact given to the jury or not; but, as there will have to be another trial of the cause, we do not wish to be considered as having sanctioned such charges by our silence. Several of them are in conflict with the views herein expressed, and others of them infringe upon other rules of law and other decisions of this court. The entire charges in the case should be recast and made to conform to the law as herein expressed.

For the errors found, the judgment of the circuit court in this cause is reversed, at the cost of Pasco county, and a new trial awarded.

TAYLOR and HOCKER, JJ., concur in the opinion.

WHITFIELD, J., concurs in the reversal.

SHACKLEFORD, C. J., and COCKRELL, J., dissent.

WHITFIELD, J. (concurring). In disposing of the assignment of error considered in subdivision numbered II of the opinion it does not appear to be necessary to overrule any former decisions of this court, and I do not concur in that subdivision of the opinion.

The error assigned is the giving of the following charge: "The premeditated design to kill may have existed in the mind of the slayer a month, a week, a day, or an hour, or may have been formed a moment before the fatal shot was fired. If you believe from the evidence that the defendant shot and killed Hansel Norman as charged in the indictment, that he killed him without legal justification or excuse, and that at the time he fired the shot which killed Hansel Norman he intended to kill him, it would make no difference at what precise time he made up his mind to take Norman's life. If, when he fired the pistol, he intended to kill, he is guilty of murder in the first degree, even although he may not have had in his mind any such intention at the time he drew the pistol."

The first sentence of the charge assumes that a premeditated design is an essential element of murder in the first degree, and states that it may have existed in the mind of the defendant for a month, a week, a day, or an hour, or may have been formed a moment before the fatal shot was fired. This proposition does not appear to be erroneous, and it is in accordance with decisions of this court. See *Carter v. State*, 22 Fla. 553;

Lovett v. State, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; Olds v. State, 44 Fla. 452, 33 South. 296.

The second sentence of the charge in effect is that if the jury believe from the evidence that the defendant shot and killed the deceased, as charged in the indictment, without legal justification or excuse, and that at the time the defendant fired the shot which killed the deceased the defendant intended to kill the deceased, it would make no difference at what precise time he made up his mind to kill deceased. In Clifton v. State, 26 Fla. 523, 7 South. 863, where the words "as charged in the indictment" were used in a charge given, this court held that "the charge referred to the indictment in its entirety, including, of course," the allegation of the offense, "and consequently the charge was not defective" in failing to state an element of the offense. In this case the indictment is for murder in the first degree, and of course it charges the killing to have been done unlawfully and from a premeditated design to effect the death of the deceased. This being so, these words are to be taken as constituting a part of the charge of the court, and the charge should be so construed. The additional expression, "and at the time he fired the shot which killed Hansel Norman he intended to kill him," was unnecessary; but it cannot be harmful to the defendant; as the word "intended" means "designed," and the phrase last above quoted is immediately followed by the expression, "it would make no difference at what precise time he made up his mind to take Norman's life," which necessarily means that there must have been premeditation on the subject of killing the deceased, and the formation of a design to kill him, before he fired the fatal shot. Thus read, the second sentence of the charge, when considered in connection with the first sentence, stating that the premeditation may have existed in the mind of the slayer an hour or longer, or may have been formed a moment before the fatal shot was fired, is not, in my judgment erroneous.

The third sentence of the charge is: "If, when he fired the pistol, he intended to kill, he is guilty of murder in the first degree, even although he may not have had in his mind any such intention at the time he drew his pistol."

When taken in connection with the first sentence of the charge, stating that the premeditated design to kill may have existed in the mind of the slayer for an hour or more, or may have been formed a moment before the fatal shot was fired, and considered with the second sentence of the charge, that if the jury believe the defendant killed the deceased, as charged in the indictment, without legal justification or excuse, and that at the time defendant fired the shot which killed deceased he intended to kill him, it would make no difference at what precise time he made up his mind to kill him, the

third sentence of the charge cannot be said to be error, at least when the opinion does not contain any of the testimony as to the length of time between the drawing of the pistol and the firing of it at the deceased, unless this sentence is a charge upon the facts.

The other subdivisions of the opinion are concurred in.

SHACKLEFORD, C. J. (dissenting). I regret exceedingly that I am unable to concur in the opinion which has been prepared in this case by Mr. Justice PARKHILL and in which Presiding Justice TAYLOR and Mr. Justice HOCKER have concurred. Actuated by a conscientious desire to reach a like conclusion with them, if possible, and wishing to have the benefit of all the light which could be shed upon the matters discussed in the opinion, I have availed myself of the privilege conferred by section 2, c. 5124, p. 65, Laws of 1903, and have procured the record, assignments of errors, and briefs of the respective counsel, and subjected them to a careful examination.

Right at the threshold I find myself confronted with the serious question as to whether or not any of the charges or instructions of the court which are discussed in the opinion are before us for consideration.

Before proceeding to discuss this question I wish to call attention to the imperfect manner in which the transcript of the record is prepared, though I shall not take the time to point out the various defects and irregularities apparent therein. As to the importance of having the record properly prepared, and the duty counsel owe clients, as well as the court, in this respect, see State v. Madoll, 12 Fla. 151, text 155; Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 South. 392, and authorities therein cited; Akin v. Morgan, 50 Fla. 172, 39 South. 534; Porter v. Ewing (Fla.) 39 South. 993.

I find that the bill of exceptions does not set forth any of the charges or instructions, either those given by the court of its own motion or at the request of counsel. Neither does it contain any of the instructions which were requested by counsel and refused. The only reference found in the bill of exceptions to charges either given or refused is in the motion for a new trial. This is not sufficient to bring any of the charges before us for consideration. See Broward v. State, 9 Fla. 422, text 424; Mountain v. Roche, 13 Fla. 581; Dukes v. State, 14 Fla. 499; McNealy v. State, 17 Fla. 198; Livingston v. L'Engle, 22 Fla. 427; Stearns v. Jaudon, 27 Fla. 469, 8 South. 640; Parrish v. Pensacola & A. R. Co., 28 Fla. 251, text 277, 9 South. 696; Richardson v. State, 28 Fla. 349, 9 South. 704; Pinson v. State, 28 Fla. 735, 9 South. 706; McSwain v. Howell, 29 Fla. 248, 10 South. 588; American Lead Pencil Co. v. Wolfe, 30 Fla. 360, 11 South. 488; Garner v. State, 31 Fla. 170, 12 South. 638; Watrous v. Morrison, 33 Fla. 241,

14 South. 805, 39 Am. St. Rep. 139; Lovett v. State, 33 Fla. 369, 14 South. 837; Freeman v. State, 50 Fla. 38, 39 South. 785. I would call especial attention to the full discussion of the office performed by a motion for a new trial in *Richardson v. State*, 28 Fla. 349, text 354 et seq., 9 South. 704, and would commend the following language found on page 355 of 28 Fla., page 706 of 9 South.: "Statements in motions for new trials have never been regarded by this court as evidence or proof of the truth of the facts asserted therein, either expressly or by implication, when the motion has been overruled. In such cases the presumption of appellate courts, in the absence of affirmative evidence in the record supporting the statement, is that the motion was overruled by the lower court because the statements were not true; and this as well to charging juries as to other matters." This language is strikingly applicable here, as in his order overruling the motion for a new trial the circuit judge states that "some of the matters set forth in the motion are not founded on the facts," specifying some of them, and further stating therein that "all of the charges of the court are not embraced in the motion."

Immediately after the signature of the judge to the bill of exceptions follows in the transcript what purports to be the charge given by the judge to the jury; the prefatory statement thereto reading as follows: "And the said judge, the parties having concluded to submit their testimony and the several matters and things aforesaid, did then and there deliver his charge to the jury as follows." Then something over three typewritten pages are set forth, containing numbered sections or paragraphs from 1 to 14, inclusive. After the paragraph marked 7 appears the following: 8—9—10—11. Charges Nos. 8—9—10—11 were not given by the trial court. O. L. Dayton, Clerk." And at the close of paragraph 14, as though intended to form a part thereof, is the following language: "Signed, filed, and made a part of the record in the cause this 20th day of October, A. D. 1905. J. B. Wall, Circuit Judge." Then immediately after this signature appears other paragraphs, numbered from 15 to 44, inclusive, embracing between six and seven typewritten pages, but nowhere does it appear whether they were given or refused. They are not identified in any way, and we cannot tell for what purpose they were transcribed into the record. They are not marked "Signed" or "Filed," and we are not informed whether they formed part of the charge given by the judge of his own motion or were charges requested by the state or defendant. The motion for a new trial copies some of these charges, numbered from 15 to 44, and recites therein that they were given and excepted to; but, as we have already seen, this statement is no evidence of the truth thereof, especially not in view of the written statement made by the judge in his order overruling the motion for a new

trial. Nowhere from the beginning to the end of those charges or instructions, from No. 1 to No. 44, do we find any exceptions noted. Just after No. 44 appears the following words: "Charges for Deft."—after which are set forth certain instructions which are marked given and signed by the judge. Then come certain other instructions requested by the defendant, which are marked "Refused," an exception noted, and are signed by the judge.

"The general rule is that, in order to review a charge in this court upon the ground that it is not law, there must be an exception to it." *Southern Express Company v. Van Meter*, 17 Fla. 783, text 795. To the same effect see *Coker and Scheiffer v. Hayes*, 16 Fla. 368, text 378; *Godwin v. Bryan*, 16 Fla. 396, text 399; *Reed, Story & Sullivan v. State*, 16 Fla. 564; *Potsdamer v. State*, 17 Fla. 895; *Phillips v. State*, 28 Fla. 77, 9 South. 828; *McSwain v. Howell*, 29 Fla. 248, text 253, 10 South. 588; *Williams v. State*, 32 Fla. 251, 13 South. 420; *Williams v. La Penotiere*, 32 Fla. 491, 14 South. 157; *McCoy v. State*, 40 Fla. 494, 24 South. 485; *Pittman v. State*, 45 Fla. 91, 34 South. 88; *Bynum v. State*, 46 Fla. 142, 35 South. 65; *Parnell v. State*, 47 Fla. 90, 36 South. 165. As was well said in *Pittman v. State*, supra: "The long-settled rule here is that charges not excepted to in the court below cannot be assigned as error or considered in an appellate court." Also see other authorities cited therein.

Unless, then, exceptions to the charges complained of are clearly made to appear to us, we cannot consider the assignments based thereon.

Although it is not so stated in the opinion prepared by Mr. Justice PARKHILL, it is contended that the charges treated in the opinion and which are declared therein to be erroneous, for which errors the judgment must be reversed, constitute or form part of a statutory or special bill of exceptions, and that, having been excepted to in the motion for a new trial, they are properly before us for consideration. Is this position tenable? I think not, and will proceed to set forth the reasons which impel me to this conclusion.

Prior to the enactment of chapter 2096, p. 42, Laws of 1877, section 8, c. 138, p. 10, of the Acts of 1848, regulated the giving of instructions in criminal cases and prescribed the duty of the judge in regard thereto, while chapter 140, p. 11, of the Acts of 1848, performed a like office in civil cases. Both section 8 of chapter 138 and the entire chapter 140 were repealed by chapter 2096, p. 42, Laws of 1877. See *Southern Express Company v. VanMeter*, 17 Fla. 783, text 793 et seq., 35 Am. Rep. 107. Chapter 2096, pp. 42, 43, Laws of 1877, was as follows:

"An act to define the duties of judges of the circuit court in charging juries.

"The people of the state of Florida, represented in Senate and Assembly, do enact as follows:

"Section 1. Upon the trial of all common law and criminal cases in the several circuit courts of this state, it shall be the duty of the judge presiding on such trial to charge the jury only upon the law of the case; that is, upon some point or points of law or exceptions to evidence arising in the trial of said cause, and such charge shall be wholly in writing. If either of the parties or their attorneys present to the judge instructions in writing on the point or points of law or exceptions taken arising on the trial, it shall be the duty of the judge to declare in writing to the jury his ruling thereupon as presented, and pronounce the same to the jury as given or refused.

"Sec. 2. Provided, that the several judges of the circuit courts of this state may charge juries trying all appeals from justices of the peace in civil or criminal cases, and all felonies not punished capitally, and misdemeanors, orally, unless they are requested by the state's attorneys or attorneys for defendants or plaintiffs, or the parties themselves, to charge said juries in writing as declared in the foregoing section, which request shall be in writing, before the evidence in the case is closed.

"Sec. 3. That of said instructions, as well those given as those denied, and also as well those prayed for by the parties or their attorneys as those declined by the said judge, shall be signed and sealed by the said judge, and be by him filed in the case and form a part of the record in the case, immediately after delivered.

"Sec. 4. That all laws and parts of laws in conflict with this act be and the same are hereby repealed.

"Approved March 2, 1877."

The first three sections of this chapter were brought forward into the Revised Statutes of 1892, with some modifications, constituting sections 1088, 1089, 1090, and 1091, to which sections I shall have occasion to refer hereafter in this opinion. It should be noted that these sections of the Revised Statutes appear under the caption "Charge to the Jury in Civil Cases," but section 2920 of the Revised Statutes of 1892 makes them applicable in all criminal cases, "except as to the charge in capital cases, which shall be wholly in writing and upon the law of the case only." Chapter 2096, p. 42, of the Laws of 1877, remained unmodified until chapter 3431, p. 54, of the Laws of 1883, was enacted, which was as follows:

"An act regulating the practice in filing exceptions to the charges of the judges of the circuit courts to juries in causes, civil and criminal, in this state.

"The people of the state of Florida, represented in Senate and Assembly, do enact as follows:

"Section 1. That in all civil causes in the circuit courts of this state, either party, plaintiff or defendant, may at any time after

the jury retires, and before verdict rendered, except to any portion of the charge delivered by the judge, and the said judge before whom such cause is being tried may, if he deem such exception well taken, recall the jury and make any alteration or addition of or to such charge as may be deemed necessary and proper.

"Sec. 2. It shall be lawful for either party in any civil cause, or for the defendant in any criminal cause, in said courts, after verdict rendered, to embody in a motion for a new trial any portion of the charge of the judge which may be deemed erroneous, which shall be taken as an exception to said charge, and if such motion for a new trial, upon the hearing, shall be refused, such refusal, together with the subject-matter of the charge contained in such motion, may be made the subject of review by the Supreme Court.

"Approved March 10, 1883."

The only portion of this chapter which appears in the Revised Statutes of 1892 is embraced in section 1092, which reads as follows: "1092. Portion of charge embodied in motion for new trial considered as excepted to.—Either party after verdict rendered may embody in a motion for a new trial any portion of the charge of the court which he may deem erroneous, which shall be taken as an exception to said charge."

These chapters and sections have frequently been before this court for consideration and construction, and I shall now refer to some of the decisions. It is undoubtedly settled that prior to the enactment of chapter 3431, p. 54, of the Laws of 1883, "it must appear by the transcript, not only that the instructions were given or refused at the trial, but also that the party who complains of them excepted to them while the jury was at the bar." *Coker & Scheiffer v. Hayes*, 16 Fla. 368, text 379; *Reed, Story & Sullivan v. State*, 16 Fla. 564; *Coleman v. State*, 17 Fla. 206, text 211; *Gallaher v. State*, 17 Fla. 370, text 379; *Baker v. State*, 17 Fla. 406; *Burroughs v. State*, 17 Fla. 643; *Southern Express Co. v. VanMeter*, 17 Fla. 783, 35 Am. Rep. 107; *Potsdamer v. State*, 17 Fla. 895; *Stewart v. Mills*, 18 Fla. 57, text 60; *Metzger v. State*, 18 Fla. 481; *Jones v. State*, 18 Fla. 889; *West v. Blackshear*, 20 Fla. 457, text 466; *Carter v. State*, 20 Fla. 754; *Blige v. State*, 20 Fla. 742, text 750, 51 Am. Rep. 628; *Willingham v. State*, 21 Fla. 761, text 784; *Baker v. Chatfield*, 23 Fla. 540, text 545, 2 South. 822; *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 South. 696; *Richardson v. State*, 28 Fla. 349, 9 South. 704; *Hodge v. State*, 29 Fla. 500, text 505, 10 South. 556.

In the petition filed for a rehearing in *Potsdamer v. State*, 17 Fla. 895, text 904 et seq., it was ably and ingeniously contended that, as chapter 2096, p. 42, of the Laws of 1877, required the judge to file all the

instructions, those given as well as those prayed for and refused, and the charges when so filed became a "part of the record in the case," error could be assigned upon them without the necessity of exceptions thereto, though exceptions might still be resorted to, and so either of these modes might be selected in order to obtain a review by this court of errors assigned on the charges. A Pennsylvania statute, similar to the Florida statute, and certain decisions of the Pennsylvania Supreme Court construing said statute, were relied upon to support this contention. Chief Justice Randall, in an able opinion upon the petition for rehearing, found in *Potsdamer v. State*, 17 Fla. 914 et seq., said: "Upon considering the petition for a rehearing in this case and a review of the opinion already filed, we are still satisfied that we have conformed in our decision to the established rules of law prevailing here from the time of the organization of this court, and in all the states excepting Pennsylvania. That rule is that where it is alleged that an error has been committed by the judge upon a trial, except in rendering a judgment upon demurrer or plea in abatement, motion to quash, change of venue, and the like, or in rendering final judgment, the record must show that an exception was taken to the action of the court." Also see the able opinion in *Barnes v. Scott*, 29 Fla. 285, 11 South. 48, as to the office performed by a bill of exceptions, and as to when it is necessary to take or note exceptions to rulings upon which a review is desired by an appellate court.

An exception, then, has always been necessary in order to have the action of the trial judge in giving or refusing instructions reviewed by this court. The question now to be answered is in what way can or must the matter be presented to this court for review. As was said in a clearly reasoned and exhaustive opinion rendered by Chief Justice Raney, admittedly one of the ablest jurists that ever graced this court, from which opinion we have already quoted and shall doubtless have occasion to quote still again in this opinion: "For reasons of a similar nature we are precluded from considering the charge set out in a motion for a new trial, and complained of as being erroneous. There is before us no legal evidence that any such charge was ever given. Intervening the act of March 2, 1877, as to charging juries (sections 84, 85, 86, p. 338, *McClell. Dig.*) and that of March 10, 1883, as to excepting to such charges in motions for a new trial, chapter 3431 of the statutes (page 54 of the *Session Laws of 1883*), there were but two ways in which a charge given to a jury could be made a part of the record: First, by a bill of exceptions, general or special; and, second, by the judge signing and sealing them, and filing them in the cause in accordance with the third section of the former act. *Southern Express Co. v. VanMeter*, 17 Fla. 783; *Pots-*

damer v. State, 17 Fla. 895. And during this period a charge, whether given or refused, could not be reviewed or considered by this court, unless the giving of the same, or the refusal to give it, was duly excepted to in the circuit court before the jury retired, and the charge was also incorporated into a bill of exceptions duly made up and therein stated to have been given or refused by the judge to the jury, and the ruling to have been excepted to, or unless the instruction or charge given was indorsed as being given or refused by the judge and excepted to, and all this was signed by the judge, and the whole filed in the cause. *Potsdamer v. State*, supra; *Southern Express Co. v. VanMeter*, supra; *Sherman v. State*, 17 Fla. 888; *Stewart v. Mills*, 18 Fla. 57; *Jones v. State*, 18 Fla. 889; *Myrick v. Merritt*, 22 Fla. 335. This latter proceeding constitutes of itself a special bill of exceptions, and a charge thus shown to have been given and excepted to, or offered and refused, and the refusal excepted to, became as much the subject of review in the appellate court as if the same appeared in the more ordinary form of a bill of exceptions, duly settled after the trial, keeping in mind, of course, the rule as to the necessity for a presentation of the evidence to which the charge was applicable." *Richardson v. State*, 28 Fla. 349, text 351 et seq., 9 South. 704.

It is perfectly clear to my mind that prior to the enactment of chapter 3431, p. 54, *Laws of 1883*, while charges given or refused, upon which error was predicated, might be brought up to this court for review by a special bill of exceptions, yet this special bill of exceptions had to be complete in itself; that is, it had to show a strict compliance with the statute as to the signing, sealing, and filing by the judge, and, further, that an exception was duly noted thereto. See authorities already cited, especially *Richardson v. State*, supra, and authorities cited therein. I would also refer to *Hodge v. State*, 29 Fla. 500, text 505, 10 South. 556; *Sammls v. Wightman*, 31 Fla. 10, text 44, 12 South. 528; *Williams v. La Penotiere*, 32 Fla. 491, text 495 et seq., 14 South. 157.

What change, if any, was wrought in this respect by chapter 3431, p. 54, *Laws of 1883*? I cannot answer the question better than by quoting the fourth and fifth headnotes of the opinion in *Parrish v. Pensacola & A. R. Co.*, 28 Fla. 251, 9 South. 696:

"4. The embodiment of a motion for new trial into a bill of exceptions is not evidence of the truthfulness of any statement of fact set forth in such motion, but is evidence only that such a motion in the form presented was in fact made before the court. And when such motion sets out or quotes a charge purporting to have been given or refused by the court, the giving or refusal of which is not evidenced anywhere else in the record, or in any other manner except by the transcript thereof into such motion, this court cannot

consider such charge for the want of proper evidence that it was in fact given or refused.

"5. Section 2, c. 3431, p. 54, Laws Fla. 1883, does not change this rule, but simply enlarges the time within which exceptions may be taken to charges actually given. The meaning of said act is that, when a charge actually given is embraced in a motion for a new trial, it shall be taken as an exception to such charge, whether exception was taken thereto at the time it was given or not; but it does not constitute such a motion evidence of the truthfulness of anything contained therein. The fact that such charge was actually given must be evidenced otherwise than by being incorporated in such motion, either by being included as a part of the bill of exceptions, or by the indorsement of the judge thereon, over his signature, as being 'Given' or 'Refused,' as is provided in chapter 2006, p. 42, Laws of 1877; otherwise, such charge cannot be considered by this court."

Also see text of the opinion, pages 276 and 277. I would also again refer to *Richardson v. State*, 28 Fla. 349, text 352 et seq., 9 South. 704, from which I quote the following: "The question remaining to be considered is that of the effect of the act of 1883, referred to above, upon the practice as it stood at the time of the approval of such act. Its title is, 'An act regulating the practice in filing exceptions to the charges of the judges of the circuit courts to juries in causes civil and criminal in this state,' and it provides (section 1) that either party to a civil cause in the circuit court may at any time after the jury retires, and before verdict rendered, except to any portion of the charge delivered by the judge, and the judge may, if he deems the exception well taken, recall the jury and make any alteration of, or addition to, the charge as he may deem proper, and (section 2) that it shall be lawful for either party in any civil cause, and for the defendant in any criminal cause, in such court, after verdict rendered, 'to embody in a motion for a new trial any portion of the charge of the judge which may be deemed erroneous, which shall be taken as an exception to said charge, and if such motion for a new trial, upon the hearing shall be refused, such refusal, together with the subject-matter of the charge contained in such motion, may be made the subject of review by the Supreme Court.' We have already held at this term in a case (*Parrish v. P. & A. R. R. Co.*, 9 South. 696) differing from this point only in that some of the charges set out in the motion for a new trial did appear in the bill of exceptions, whereas others did not, that the only purpose of the second section of this act was to relax the former rule, which required exceptions to charges to juries to be taken at the time they were given, or before the jury retired (*Godwin v. Bryan*, 18 Fla. 396; *Reed v. State*, Id. 504), and to permit the parties to a civil case, and the ac-

cused in a criminal case, to defer excepting until moving for a new trial, and secure to an exception made in such a motion the same benefit of review as if it had been made according to the old practice before the jury retired. We are upon further consideration entirely satisfied with this conclusion, and that it was not the purpose of the second section, nor of any part of the act, to constitute a motion for a new trial a substitute for or equivalent of a bill of exceptions, or to make it record or other evidence of anything that has previously occurred on the trial as to charging the jury, or a substitute for or the equivalent of the provisions of the act of 1877 for making the charges given or refused a part of the record, without which, or other provisions changing the common law, such charges could not become a part of the record of the cause, or be considered by an appellate court, except through the instrumentality of a bill of exceptions, general or special.

"A motion for a new trial is, from its nature, not intended as evidence of previous action by the court. It is a proceeding taken by a party to a cause, and after verdict, and its purpose is to secure a new trial on account of alleged errors, which it assumes to designate, that may have occurred on the trial or in the proceedings in pais, as contradistinguished from proceedings evidenced by the record proper, the errors in which are reached by motions in arrest of judgment (*Sedgwick v. Dawkins*, 18 Fla. 335; *Murray v. State*, 9 Fla. 246), of which matters in pais no record is ever made, except by a bill of exceptions at the instance of a party wishing to have them reviewed, or by specific statutory provision, as in the case of the act of 1877, *supra*, as to charges to a jury. The court, or judge, neither superintends, directs, nor controls the preparation of a motion for a new trial (*Broward v. State*, *supra*), and for the reason that it is not intended as a memorial or record of the court's doings; but he does, and it is his duty to, see that the bill of exceptions speaks the truth, and nothing more or less, as to what it pretends to represent, and to make it do so, and to authenticate it as doing so, and for the reason that it is the only legal evidence or record of the proceedings in a common-law case not evidenced by the record proper—i. e., the *præcipe*, process, pleadings, the judgment, and the ordinary record entries."

Also see *Shepherd v. State*, 36 Fla. 374, 18 South. 773, from which I copy the fourth headnote. "Under the provisions of section 2, c. 3431, p. 54, Acts 1883 (section 1092, Rev. St. 1892), only such charges as were actually given by the court, and that were deemed erroneous, can be made the subjects of exception through the medium of embodiment in a motion for new trial. Exceptions to rulings of the court 'refusing to give requested instructions' cannot be taken or re-

served by embodying such refused instructions in a motion for new trial; but such exceptions must be taken and reserved at the time of the court's refusal of the request to give them." The principle enunciated in this headnote still remains the settled law of this court and has been followed and approved time and again. See *Lester v. State*, 37 Fla. 382, 20 South. 232; *Mathis v. State*, 45 Fla. 46, 34 South. 287.

If the foregoing principles are correct, and they seem to have been established by the cited decisions, then it would follow, it seems to me, as a corollary or necessary sequence, that the special or statutory bill of exceptions should be complete in itself, without reference to the ordinary or regular bill of exceptions. This seems to have been the view taken by this court in *Savannah, F. & W. R. Co. v. Brink*, 44 Fla. 713, 33 South. 245. I think a careful reading of the opinion will so indicate to any mind. I quote the following language from page 718 of 44 Fla., page 246 of 33 South.: "Neither is there any evidence in the record, except as is made to appear by the bill of exceptions, that the judge's refusal to give these instructions was duly excepted to at the time of such refusal; and it is well settled that unless there is an exception to a charge given, or to the refusal to give one requested, it cannot be assigned as error in an appellate court, no matter how effectually such charge or refusal to charge may be evidenced in the transcript of record on writ of error." Also see *Baggett v. Savannah, F. & W. Ry. Co.*, 45 Fla. 184, 34 South. 564; *Parnell v. State*, 47 Fla. 90, 36 South. 165; *Colson v. State* (Fla.) 40 South. 183. The writer of this opinion was also the writer of the opinions in *Parnell v. State*, supra, and *Colson v. State*, supra, and he entertained then, as now, the views herein expressed. See, especially, the fourteenth headnote in the case of *Colson v. State*, supra, which reads as follows: "The special statutory bill of exceptions authorized by sections 1090 and 1091 of the Revised Statutes of 1892 should be complete in itself, without reference to the regular bill of exceptions." I am strengthened in this conclusion by the fact that, as has been well said, "the very expression itself, being a 'bill of exceptions,' shows that it must contain exceptions." *United States v. Jarvis*, 3 Woodb. & M. 217, Fed. Cas. No. 15,469; *Kearney v. Snodgrass*, 12 Or. 311, text 312, 7 Pac. 309. Also see 1 Words & Phrases Judicially Defined, 783 et seq., topic "Bill of Exceptions." If this be true of the general expression "bill of exceptions," why is it not equally true of the terms "special bill of exceptions" and "statutory bill of exceptions"? In other words, does not either term *ex vi termini* imply exceptions? Can there be such a thing as a bill of exceptions, whether regular, ordinary, special, or statutory, with no exceptions contained therein? I think not. If so, it

would resemble the play of Hamlet with the part of the melancholy Dane omitted.

I am still further strengthened in this conclusion by the full and exhaustive discussion of the origin and office of a bill of exceptions in the opinions in *Brown v. State*, 29 Fla. 543, 10 South. 736; *Glaser v. Hackett*, 38 Fla. 84, 20 South. 820. Also see the authorities cited in these two opinions. While chapter 3431, p. 54, Laws of 1883, gave a party the privilege of excepting to a charge given in his motion for a new trial, it did not relieve him of the necessity and duty of properly evidencing the charge to an appellate court. This he could do by having it copied into and made a part of his regular bill of exceptions, of which bill the motion for a new trial, with the ruling thereon and exception thereto, all form a part.

There is still another argument which influences me in reaching the conclusion which I have announced. If, as was said by this court in *Parrish v. Pensacola, & A. R. Co.*, 28 Fla. 251, 9 South. 696, chapter 3431, p. 54, Laws of 1883, "simply enlarges the time within which exceptions may be taken to charges actually given," how can it be claimed that it modified the preparation of bills of exceptions or changed any of the requirements as to the contents thereof? What effect did or could this act have upon what has been designated in opinions of this court as "special bill of exceptions" or "statutory bill of exceptions"? Can it be successfully contended that it eliminated the requirement as to the showing of an exception to the given charge therein? I have already demonstrated from the decisions of this court which I have cited that this requirement existed under chapter 2096, p. 42, Laws 1877, and still existed after the enactment of chapter 3431, p. 54, Laws 1883, as to charges refused, whether they be brought up in the regular or special bill of exceptions. This is the requirement now under section 1092 of the Revised Statutes of 1892. It is not apparent to my mind, when given charges are set forth in a special or statutory bill of exceptions, that the necessity for embodying an exception therein to the given charges as to which complaint is made has been obviated by the act of 1883 or section 1092 of the Revised Statutes. I can read no such change into the statutes. As was said in *Willingham v. State*, 21 Fla. 761, text 784: "Acts 1883, p. 54, c. 3431, permitting a postponement of an exception to a charge to a jury till after verdict, relates to nothing else." Also see *Richardson v. State*, 28 Fla. 349, text 356, 9 South. 704.

It necessarily follows from the foregoing reasoning that, as the special or statutory bill of exceptions contains no exception to any of the given charges, in my opinion none of the assignments based upon any of said charges is properly before us for considera-

Instructions to Juries, §§ 374, 375; 2 Ency. Pl. & Pr., 479, 482.

If it be true that all the instructions are required to be properly before the appellate court, as I believe it is, then, in the absence of all the instructions, this fact alone would prevent such court from declaring reversible error upon certain portions of the charges or instructions upon which errors are assigned.

I might stop here; but, as it is a capital case in which the death sentence has been pronounced, in *favorem vitæ* I am willing to go still further in my examination of the errors assigned.

Subjecting the two charges copied in subdivisions I and II of Mr. Justice PARKHILL'S opinion to a searching analysis, I find that each one of such charges contains two or more distinct propositions of law, and yet each of the charges was excepted to as a whole. It is settled law in this court that such an exception must fail, if any one of the propositions in the charge so excepted to is correct. See *Wood v. State*, 31 Fla. 221, 12 South. 539; *May v. Gamble*, 14 Fla. 467, text 492; *John D. C. v. Julla*, 16 Fla. 554; *Dupuis v. Thompson*, 16 Fla. 69; *Burroughs v. State*, 17 Fla. 643; *Carter v. State*, 20 Fla. 754; *Post v. Bird*, 28 Fla. 1, 9 South. 888; *Pinson v. State*, 28 Fla. text 735, 9 South. 706; *Smith v. State*, 29 Fla. 408, 10 South. 894; *Campbell v. Carruth*, 32 Fla. 264, 13 South. 432.

I shall not undertake now to analyze these two charges set forth in Mr. Justice PARKHILL'S opinion, which he declares contain reversible error. A most casual examination discloses that each one has two or more propositions of law therein, and there is at least one correct proposition of law in each charge which is sound, therefore these assignments must fail.

One other point I think it well for me to touch upon. I find in the transcript, immediately after charge numbered 44, the following:

"Charges for Deft.

"(2) The premeditation which the law requires to constitute murder in the first degree need not be for any particular length of time; that it is sufficient if the premeditation was but for a moment, provided that the action of the slayer was the result of such premeditation. The use of the word 'moment' does not imply less time than was necessary for deliberating upon the subject of the killing, and forming a distinct design or determination to kill of which the defendant was fully conscious before firing the fatal shot. The premeditation or deliberation need not be for any particular length of time; but it, of course, must be of sufficient duration to enable the slayer, under the circumstances of each case, to form a distinct and conscious intent to kill.

"(3) The question of premeditation is

one of fact for the jury, who must say whether the killing was the result of an intention formed upon premeditation of the subject, and consequently murder in the first degree, or, on the contrary, that the circumstances were such that the killing was not preceded by deliberation on the subject resulting in the formation of such a design to kill.

"(4) An intention may not be murder in the first degree, when done in the heat of passion or anger and following a sufficient provocation so close in time as to raise the presumption that it was the result of sudden impulse and without premeditation, or when committed under such circumstances as to show that the mind was not fully conscious of its own intention. Given. J. B. Wall, Judge."

As we see, the charge was marked "Given"; but we have no evidence that it was ever filed and made a part of the record, as seems to be required under the cited decisions of this court. However, in my opinion, this charge is just as much before us for consideration as any other. The similarity between this charge and the one copied in subdivision II of Mr. Justice PARKHILL'S opinion, upon which the defendant predicates error, will be apparent at a glance. I understand the law to be well settled that a party will not be permitted to be heard to complain in an appellate court of the giving by the trial court of any instruction, even though erroneous, which was substantially similar to one requested by him. See 3 Cyc. 248, and numerous authorities cited in note 88; 2 Ency. Pl. & Pr. 525, and authorities cited.

It does not seem necessary for me to say more, though I have carefully examined every error assigned which has been urged before us, and I do not hesitate to declare that I have been unable to detect any reversible error therein.

COCKRELL, J. (dissenting). My views of this case differ in some respects from the views of my Brothers, and for this reason I shall state them briefly in a separate opinion.

Assuming for the moment that the two charges set forth at length in the first and second subdivisions of the opinion by Mr. Justice PARKHILL are legitimately in the record and proper bases for assignments of error, the assignments actually filed, as appears not only from the statement of them in that opinion, but likewise from the transcript which has been examined by me, are too broad in their scope to be sustained.

The charge upon the duties of the jury as triors of fact is in large part taken from repeated adjudications of this court and is not subject to criticism. It is broken up into distinct sentences, embracing separate subject-matters, and only the last sentence, which contains a distinct and complete proposition

of law, is found to be objectionable. Under the decision of this court in *McCoggle v. State*, 41 Fla. 525, 28 South. 734, the defect cannot avail the plaintiff in error for want of a proper assignment. This difficulty did not actually exist in the *Hampton Case* (Fla.) 39 South. 421. There the specific portion of the charge found objectionable formed a distinct "ground" in the motion for a new trial, which was assigned for error.

The same fixed, settled rule of this court applies equally and fatally to the second charge, in my opinion. The last sentence in the charge may be subject to the criticism that it tends towards a charge upon the facts; but the assignment is not directed to this point, though the argument of counsel for the plaintiff in error apparently is.

The trial judge was not in this charge attempting a definition of the statutory words "premeditated design." That we must assume had been given in some previous charge, and if we go to the transcript and can consider the charges therein it will be found the court gave the definition taken from the *Lovett Case*, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705. Each charge should produce some progress, and it would be a never-ending process, should we require a trial judge to repeat a full and complete definition of each element of the law bearing upon the offense whenever that element is mentioned. The analysis of the charge in the opinion of Mr. Justice WHITFIELD shows its conformity to our previous decisions.

I should be content to rest here and simply record myself as being for an affirmance, in so far as the record is disclosed in the opinion concurred in by division B, except that I feel so keenly the attempt to overthrow a long line of unanimous decisions of this court, beginning with *Savage and James v. State*, 18 Fla. 909, decided in 1882, and coming down as late as *Olds v. State*, 44 Fla. 452, 33 South. 296, decided in 1902. This question was gone into at great length in *Cook v. State*, 46 Fla. 20, 35 South. 665, and I shall not repeat here the arguments there used, except to say that to one reading the various opinions in that case these facts clearly appear: Our statute covering murder in the first degree stands exactly as when originally enacted in 1868, at which time New York and Wisconsin had similar statutes, upon which the same construction had been placed by the highest courts of those two states as was subsequently adopted by us in *Savage and James v. State*, supra, the opinion being delivered by Chief Justice Randall, a native of New York, who was admitted to the bar in that state, subsequently practiced law in Wisconsin, whence he came to this state, and was appointed Chief Justice of this court the year the statute was enacted. There were those in New York who did not approve the statute as there defined, but the remedy applied was not through the courts by a reversal of its definition, but through the Legislature by

a change of the statute, incorporating therein the words "deliberate and" before the words "premeditated design." This change in the statute not only justified, but necessitated, a change in the judicial definition.

Since 1868 there have been many trials for homicide in Florida, and charges taken from *Savage and James* and the *Ernest Cases* have been most numerous given. If hardships have resulted, the Legislature has met in session after session, with no attempt, so far as I am advised, to change this statute. Certainly no change has been made; while there have been changes in the statutes affecting lower grades of homicide. There has been, moreover, two general revisions of the statutes; still no change in the law. Until the *Cook Case* this court was consistent and unanimous; but even the strenuous opinion there filed urging a change in the law through the fiat of this court did not effect a legislative change in the crime of murder in the first degree.

Personally I feel that the drafting of model charges should be left to the text-book writers. The sphere of activity, belonging exclusively to the court, involved in the authoritative decisions of the actual questions presented on the record, is sufficiently comprehensive to absorb all our time, energies, and capacities. As to the charge proposed here, I shall say merely that it bears a striking similarity or kinship to the one disapproved in strong terms by this court in the *Savage and James Case*, supra.

Should we go to the record, and be able to consider instructions requested by the plaintiff in error, marked "Given," and signed by the trial judge, we would there discover that the accused himself secured instructions based on the *Ernest* and kindred cases. Can he be heard to complain because the court followed his construction of the law?

THOMPSON v. STATE.

(Supreme Court of Florida, Division A. July 31, 1906.)

1. CRIMINAL LAW—CHANGE OF VENUE—CERTIFICATE OF CLERK.

A circuit court in the proper county acquires jurisdiction on a change of venue in a criminal case, even though the clerk's certificate substitutes for the statutory words "relating to the case" the words "so far as the same relates to the indictment against A. for murder," and actually transmits two indictments for murder against A.; it clearly appearing that all the proceedings on the change of venue had reference only to the second indictment, which is sufficiently identified.

2. SAME—CERTIFICATE.

Section 2934 of the Revised Statutes of 1892 as to the clerk's duty in transmitting record on change of venue requires certification only of the copies of the record entries. Original papers are to be transmitted by the clerk, but no certificate is required.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 202, 203.]

3. SAME.

Even though the clerk transmits on change of venue two original indictments for the same crime, jurisdiction is not lost thereby, when it clearly appears upon which indictment the change was made and trial was had.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 265, 265.]

4. JURY—DISQUALIFICATION.

A jury drawn from the box by the court at the end of a calendar year to serve for the ensuing week of a regular term does not become disqualified to sit by reason of the fact that before a case is actually called a new jury box has been prepared for the year by the county commissioners. The drawings are to be made from the box provided at the time of the drawings.

5. CRIMINAL LAW—VIEW.

The refusal of the trial court in a criminal case to order a "view" in another county will not be disturbed; no abuse of discretion being shown.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3053.]

6. SAME—OBJECTION TO QUESTIONS.

Objections to questions that may bring out proper testimony are properly overruled.

7. SAME—EVIDENCE—MOTION TO STRIKE.

A motion to strike testimony must not be too broad. Where part of the testimony so sought to be stricken is clearly proper, the motion may for that reason be denied.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1643.]

8. SAME—REBUTTAL.

Testimony for the state in rebuttal, to contradict a material fact brought out by the defense, is proper.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1615.]

9. SAME—SENTENCE—FINE—DEFAULT IN PAYMENT.

The primary penalty imposed being a money fine and costs, and in default of payment imprisonment in the state prison, the judgment is reversed for proper sentence. *Dean v. State*, 26 South. 638, 41 Fla. 291, text 294.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3320, 3321.]

(Syllabus by the Court.)

Error to Circuit Court, Marion County; William S. Bullock, Judge.

J. Shaw Thompson was convicted of manslaughter, and brings error. Reversed.

R. L. Anderson, for plaintiff in error. W. H. Ellis, Atty. Gen., for the State.

COCKRELL, J. J. Shaw Thompson was indicted on April 12, 1905, in Citrus county, for the murder of James M. Tillis. A change of venue was granted at his instance, and the trial had in Marion county, where he was convicted of manslaughter, and after overruling motions for a new trial and in arrest of judgment the court, on January 13, 1906, sentenced him to pay a fine of \$3,000 and costs, and in default thereof to imprisonment in the state prison at hard labor for five years. From this he seeks relief here by writ of error, assigning 45 errors.

Taking up such errors as are material and properly presented, we shall dispose of them in their logical and chronological order.

First, then, to be considered is the attack

on the proceedings upon the change of venue. The change was made from Citrus county to Marion county, an adjoining county in the same, the Fifth judicial circuit, and the only section of the statute which we are called upon to consider is as follows:

"2934. Clerk to transmit record.—When a change of venue is ordered, the clerk shall immediately enter the proceedings of record and transmit all the original papers filed in the case, with a certified copy of the entries in the record relating to the case, to the clerk of the circuit court of the county to which the venue has been changed, retaining, however, a copy of all the papers transmitted."

It appears that the clerk of Citrus county transmitted five pages of copy taken from his court minutes which he certifies "contain all the minutes of the circuit court of said county at its spring term, 1905, so far as the same relates to the indictment against J. Shaw Thompson for murder." These minutes disclose that there were two indictments filed on the same day against Thompson for the identical offense, to each of which he pleaded not guilty. It further appears, however, that when he was arraigned upon and pleaded to the "second indictment" he moved for a continuance of "this cause," which being denied, "this cause" was set for April 14, 1905, and a venire for 75 persons ordered. "Then the defendant presented affidavits" showing excitement and prejudice against the defendant. It was ordered that a change of venue be had herein, and that this cause be changed to Marion county, Florida, in this circuit, for trial, and that the case be set for trial on Monday, the 8th day of May, 1905, at the courthouse in Ocala, of said county, etc.

There may be some confusion in the minds of the hypercritical as to the use of the words "cause" and "case" in the order of the court, as also in the language of the certificate of the clerk substituting for the statutory phrase "relating to the case" the words "so far as the same relates to the indictment against J. Shaw Thompson for murder." From the collocation, the immediate sequence, it appears with sufficient clearness and definiteness that the venue was changed only as to the case made by the second indictment against Thompson for the murder of Tillis, and while the clerk of Citrus county construed the words "relating to the indictment" as being broader in their meaning than would be the statutory phrase, and so actually transmitted the first indictment and proceedings thereunder, yet every essential prescribed by the statute for change of venue has been complied with.

A criticism is further made that the clerk did not certify to the transmission of the original papers. The quoted section of the law does not require certification of anything other than the copies from the record entries. He is ordered merely to transmit the original papers which appears to have been done.

It is further objected that there is confu-

sion as to the indictment upon which he was tried. As we have said, only the second indictment was transferred. There was some uncertainty in our minds from the transcript as originally presented to us as to which of the indictments copied therein was filed first, a penciled mark, "#2," only being placed upon the one copied last therein; but upon a suggestion from this court to the clerk of Marion county this uncertainty has been cleared away by a proper certificate from said clerk. The difficulties encountered by the court in *Curry v. State*, 17 Fla. 683, are not present here, and the decision there is in no wise affected or modified by what we now say.

II. Next, as to the drawing of the jury: We may say here parenthetically that a plea in abatement based upon the drawing of the grand jury was offered and its filing refused. This point sought to be raised by this plea has recently been overruled by this court in *Colson v. State* (Fla.) 40 South. 183, and is no longer insisted on. It is urged that the court erred in drawing from the jury box on December 28, 1905, regular venire for the ensuing week, and a special venire for this cause returnable January 3, 1906. The theory of the plaintiff in error is that all the jurors so drawn and summoned are incompetent and disqualified to serve in a cause set for January 3d, by reason of the fact that on said day the county commissioners had met in regular session, selected jurors for the year 1906, and completed the jury box for that year. This theory is altogether untenable. The statutes prescribe that the county commissioners shall make out a new jury box each year at their meeting to be held the first week in January in each year, or "as soon thereafter as practicable," but does not prescribe any particular tenure or time when those whose names are so placed in the box shall be eligible or liable to service as jurors. That the act is not to be construed so as to make the eligibility or liability cease in January is made manifest by the provision that the judge shall draw at the close of each term a jury for the next regular or special term, and in the large majority of the counties of Florida the drawing at the regular fall terms would be for the regular spring terms, which carry over much beyond January, as the words "fall" and "spring" indicate. It is clear that the only sensible, practicable construction of the jury statute is that the "drawings" are to be made from the box provided by law at the time of the drawing, but that the time during which those so drawn may be required to serve is regulated by other provisions of the act. The objection was properly overruled.

Before closing his evidence the defendant demanded a view of the premises, tendering the necessary costs and expenses attendant thereon. In his application he says under oath that it is not possible to obtain a correct,

full, and adequate understanding of the places and objects to which the evidence relates from the study of plats or maps, and the testimony of witnesses, and that a view is necessary because of the peculiar character of the case attempted against him. This affidavit is accompanied by the joint affidavit of five others, who say they are familiar with the locality, but who fail to state they are familiar with the evidence actually adduced at this trial. It is at least doubtful whether error can be assigned on the refusal in a criminal case to order a view of the premises, especially is there doubt when the application is made during the progress of the trial and before the evidence is completed, and the grant of the application would require the removal of the jury to another county. In civil cases, where the statute seems to be broader, we have held that the necessity for ordering the view is in the sound discretion of the trial court. *Coker v. Merritt's Ex'r*, 16 Fla. 416. In criminal cases the statute is very meager. It says simply: "The court may order a view by the jury." Rev. St. 1892, § 2918. It is probably true that in a majority of cases a view of the premises may be more satisfactory than plats or oral testimony; but the convenience and dispatch of the public business would be seriously impeded if it were the rule, rather than the unusual exception, to order a "view," and, should we assert our power to revise the court's action, we can find nothing in the record before us calling on us to exercise it now.

Upon the trial exceptions were reserved upon the overruling of one question and the refusal to strike certain testimony. One witness, having testified that he, with Tillis, the deceased, and two others, constituted a hunting party encamped near Shaw Thompson's house, was asked what they were doing the afternoon of the shooting, and stated they were shooting squirrels. He was further asked when he last saw Tillis, and answered, "Just before sundown, about 5 o'clock." The shooting occurred about three hours later. Then this question was asked: "Did you have any conversation with him the last time you saw him alive as to what he was going to do?" and, answering in the affirmative, was told to "State what passed between you." To this an objection was interposed and overruled. There was no error here. The question might well have brought out proper testimony. The witness detailed the meeting between him and Tillis, who gave him a squirrel and in return received some matches. Tillis inquired if he could go around the head of the springs to the camp, and, being told that it was possible, replied that he would undertake it and shoot squirrels on the way. The defense then moved to strike the answer of the witness, detailing what the deceased did and said, and also moved to strike the answer to a former question, in

which it was stated that the deceased and others were hunting squirrels. The first motion was not acted upon, except in so far as it was embraced and observed in the last motion, which must therefore be treated as one single motion. There was but one exception taken to the denial of the motion. The grounds of the motion are stated to be that the answer is incompetent, that the acts and declarations of the deceased in the absence of the defendant and not known to him are inadmissible, that there is no sufficient foundation laid for the introduction of such testimony, and, generally, that it is otherwise improper and inadmissible. The motion was too broad, and was properly denied for that reason. It sought to strike, not only what may have been said by Tillis, but also the explanation of a fact, testified to by the witness of his own knowledge, which tended to explain the presence of Tillis in that locality. There might be some difficulty in justifying the refusal to strike the uncommunicated statement of Tillis in Thompson's absence, had such point been properly presented in the record; nor is its materiality overmanifest. This difficulty has, however, been obviated by the form of the motion, and it is not insisted here that the other testimony included in the motion was improper.

It is next argued there was error in the refusal to strike the testimony to the effect that the gun found under the body of the deceased was cocked the next morning by Lee Thompson, a cousin of the accused. This testimony was in rebuttal. A witness for the defense had testified that on the morning after the homicide the gun of the deceased was found cocked. The state, in rebuttal, recalled a witness or witnesses who testified the gun was not cocked when first seen by them, but that the cocking was done that morning by Lee Thompson. No argument is required to show the pertinence and propriety of this evidence.

Various assignments are predicated upon the instructions given and refused. Many of them are based upon charges relating wholly to the crime of murder. The defendant was acquitted on this aspect of the indictment, and under repeated rulings of this court error cannot be predicated on such charges. The charges given by the court bearing upon the crime of which the accused was convicted have been approved by this court in many opinions, and the instructions requested by the defense, which were refused in so far as they were correct, were fully covered by those given by the court.

The evidence is not wholly satisfactory to us; but, after a careful consideration and comparison of the whole record, we cannot say that the court erred in refusing a new trial, based upon the insufficiency of the evidence to support the verdict.

The errors urged upon us have been examined, and all are overruled. There is, however, an error in the sentence, which

we think calls for a reversal of the judgment and sentence, and that the cause be remanded for proper sentence. *Webster v. State*, 47 Fla. 108, 38 South. 584.

"The primary penalty imposed here was a money fine and the costs of prosecution; but, in case of default in the payment of such fine and costs, the defendant was sentenced to imprisonment in the state penitentiary. This court has repeatedly held that under the provisions of chapter 4026, p. 55, Acts of 1891, where the primary punishment imposed was a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail, instead of in the state penitentiary, for nonpayment of such fine and costs." *Dean v. State*, 41 Fla. 291-294, 26 South. 638, citing *Bueno v. State*, 40 Fla. 160, 23 South. 862; *Eggart v. State*, 40 Fla. 527, 25 South. 144.

Reversed and remanded for proper sentence; the costs of this appeal to be taxed against Citrus county.

SHACKLEFORD, C. J., and WHITFIELD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

KELLY & MIDDLETON v. HORSLEY.
(Supreme Court of Alabama. June 14, 1906.)

1. APPEAL—ATTORNEYS—DISMISSAL—FEES—REFERENCE TO DETERMINE.

An appeal will not lie from an order dismissing the petition of certain attorneys for a reference to ascertain the compensation reasonably earned by them prior to their discharge, and for an order declining to give effect thereto until compensation for their services has been secured and paid.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 735.]

2. ATTORNEY AND CLIENT—DISCHARGE—FEES—LIEN.

A client may dispense with the services of an attorney at law, subject to the attorney's lien on a fund brought into court through his efforts on a judgment obtained by his services.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 111, 122.]

3. SAME—PROPERTY TO WHICH LIEN ATTACHES.

An attorney's lien does not attach to lands or things other than moneyed judgments.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 399-406.]

4. APPEAL—DISCHARGE OF ATTORNEY—DISCRETION—REVIEW.

The right to control the discharge of an attorney is within the sound discretion of the court having jurisdiction of the cause, and will not be reviewed on appeal, unless it clearly appears that the discretion was abused.

5. MANDAMUS—SCOPE OF REMEDY—ADEQUATE REMEDY AT LAW.

Where attorneys after their discharge had an adequate remedy at law to recover for their services by action under their contract or an quantum meruit, mandamus would not lie to compel the court in which the cause which the attorneys were prosecuting was pending to re-

fuse to recognize relators' discharge until their fees for past services had been paid or secured. [Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Mandamus, §§ 8, 34.]

Appeal from Chancery Court, Jefferson County; A. H. Banners, Chancellor.

"To be officially reported."

Petition by Kelly & Middleton against D. M. Horsley. From a decree denying petitioners' relief, they appeal. Dismissed.

Richard B. Kelly, for appellants. Peyton H. Moore, for appellee.

TYSON, J. This is a petition addressed to the chancellor asking a reference to ascertain the compensation reasonably earned by petitioners, as attorneys, for services rendered respondent in a chancery suit, and for a decretal order declining to give effect to petitioners' discharge until their compensation for services has been paid or secured, or until further orders from the court. The case made by the allegation of the petition is that petitioners were employed by respondent to represent him in a suit pending in the chancery court of Jefferson county wherein one Cole was complainant and this appellee respondent; that pending said employment they rendered valuable services to respondent in advice and the preparation of his defense; that petitioners have been notified that their services were no longer required by respondent in conducting his defense; and that petitioners have not been paid anything for services rendered, nor have they been tendered any payment or securities for the same. On motion of respondent the petition was dismissed for want of equity.

The cause is submitted upon the record and upon a motion for a rule nisi to the chancellor for a mandamus, or other remedial writ, commanding him to show cause why he should not be required to decline to give effect to the discharge of the petitioners as solicitors for respondent until respondent shall have first either paid or secured the said petitioners a reasonable compensation for services they have already rendered him. As an appeal will not lie from the order dismissing the petition, the record is considered for the sole purpose of ascertaining whether the rule should issue as prayed. It must be observed, from reading the petition and motion, that the question of substitution without compensation is not presented for decision. The gravamen of the charge is the discharge of the attorneys without payment for services rendered, or the tender of payment or security, and a request to require payment as a condition precedent to a discharge. It is not alleged that the court has refused to recognize the attorneys as appearing of record for the defense, or that other attorneys have been substituted, or are about to be substituted, by order or with the consent of the court. Hence it follows that the only question presented is the right of the court, in

a proceeding of this character, to require of defendant the payment to his attorneys of fees for services rendered, or to properly secure the payment of such fees.

The weight of authority seems to hold to the proposition that a client may dispense with the services of an attorney at will, and upon whatever whim, and that a motion for substitution will be granted as a matter of course, subject to the attorney's lien upon a fund brought into court through his efforts, or on a judgment obtained by his services. 3 Am. & Eng. Ency. Law (2d Ed.) 409, and note; 5 Century Dig. p. 113. Our court has never extended the lien beyond a moneyed judgment, but has often held that no lien attaches to lands or other things, other than moneyed judgments. Higley v. White, 102 Ala. 604, 15 South. 141; Hinson v. Gamble, 65 Ala. 605. At most, the right to control the discharge of an attorney is within the sound discretion of the court having jurisdiction of the cause, and will not be reviewed, unless it clearly appears that there has been an abuse of the discretion.

Pretermittting this inquiry, however, it does not appear that movants have not an adequate remedy at law. If they have rendered service under contract, they may recover under it in a court of law; and if not, and the respondent has received the benefit of such service and accepted it, they must recover on a quantum meruit. It is only in cases where there exists a clear legal right, and there is no other adequate remedy, that mandamus will issue. If the right is doubtful, mandamus is not proper. It follows from what has been said that the chancellor properly dismissed the petition. It is also clear that the rule should not issue.

The appeal on petition is dismissed, and the rule nisi denied.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

STATE ex rel. GAMBLE v. HUBBARD.
(Supreme Court of Alabama. July 6, 1906.)
STATUTES—AMENDING CHARTERS—LOCAL AND SPECIAL LAWS.

Act March 4, 1901 (Acts 1900-01, p. 2323), establishing a recorder's court in a certain city and conferring on it exclusive jurisdiction of certain offenses, being an independent act, complete within itself, and making no reference to any other act, though inconsistent with the charter of such city, which had conferred such jurisdiction on the mayor, does not amend the charter, but merely repeals it, to that extent, by implication, so that Act Oct. 6, 1903 (Loc. Acts 1903, p. 512), repealing Act March 4, 1901 (Acts 1900-01, p. 2323), does not amend the charter of the city within Const. § 104, subd. 18, providing that the Legislature shall not pass a special, private, or local law amending, confirming, or extending the charter of a municipal corporation.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 97, 98.]

Denson and Haralson, JJ., dissenting.

Appeal from Circuit Court, Pike County; H. A. Pearce, Judge.

"To be officially reported."

Quo warranto by the state, on the relation of John Gamble, against G. J. Hubbard. From an adverse judgment, defendant appeals. Reversed and rendered.

This was a petition, on relation of John Gamble, addressed to the judge of the Twelfth judicial circuit, asking for an order to G. J. Hubbard to show by what right or authority he was holding the office and exercising the rights and powers of recorder in the town of Troy. The case made by the petition is that under Acts 1869-70, p. 123, a charter was established by the city of Troy and among other powers granted therein the right to have and exercise the powers and jurisdiction of a justice of the peace within the corporate limits of the said city was conferred upon the mayor. By said act he was given exclusive original jurisdiction to hear and determine all suits, prosecutions, or other proceedings for a violation of the charter, ordinances, or by-laws of said city. On March 1, 1901, there was a local act passed by the Legislature of Alabama creating a court of criminal and quasi criminal jurisdiction, to be located at Troy, which court had and was given exclusive jurisdiction of all violations of the by-laws and ordinances of the city of Troy, together with concurrent jurisdiction with the state court to hear and determine certain misdemeanors committed within the police jurisdiction of said city. Said act also provided for a judge of said court to be elected in December, 1903, and each two years thereafter, by the qualified electors of said city, and, in case of a vacancy by removal, resignation, or death, said vacancy was to be filled by an election by the mayor and councilmen of the city of Troy. Such judge was known as the "recorder." On the 6th day of October, 1903, the Legislature passed an act undertaking to repeal the act of March 4, 1901, abolishing the recorder's court and the office of recorder, which act was to take effect in December, 1905. Loc. Acts 1903, p. 512. At the general election held for city officers in December, 1905, there was no provision made whereby the electors of said city should vote for a recorder, and no votes were polled for a recorder, and none was elected. The two years having expired since the election of the recorder, and the said office being vacant by virtue of no election having been held for that office in the general election for city officers of Troy, the mayor and councilmen of Troy, assuming that the act of October 6, 1903, was void as in violation of the Constitution, proceeded to elect a recorder, and elected G. J. Hubbard, who is alleged to be now holding said office and exercising its powers and jurisdiction. Hubbard appeared and answered, admitting the facts above stated and

alleging the unconstitutionality of the act of October, 1903, as violative of section 104, subd. 18, of the Constitution of 1901. The court decreed said act unconstitutional, and held that Hubbard was rightfully exercising the powers and jurisdiction of the recorder of Troy under his election by the city council. From this decree this appeal is prosecuted.

Foster, Samford & Carroll, for appellant G. J. Hubbard and W. E. Griffin, for appellee.

TYSON, J. Under the act "to establish a charter for the city of Troy in Pike county" (Acts 1869-70, p. 123), all the powers and jurisdiction of a justice of the peace in civil and criminal cases, within the corporate limits, were conferred on the mayor; and "exclusive original jurisdiction to hear, adjudge and determine all suits, prosecutions or other proceedings for the violation of the charter, by-laws or ordinances of the corporation." Jurisdiction was also conferred upon him of "all proceedings by motion, scire facias, or other suits on any penal bonds payable to the mayor, taken under the act or ordinances of said corporation, including proceedings and suits of the officers of the corporation and the sureties on their official bond, for the nonpayment of taxes or other moneys collected or received, or for other delinquencies or defaults in office." Acts 1869-70, p. 127, § 12. By the act establishing an inferior court of criminal and quasi criminal jurisdiction, to be known as the "recorder's court," and providing a judge therefor, approved March 4, 1901, exclusive jurisdiction is conferred upon that court "of all offenses against the by-laws and ordinances passed and ordained by the mayor and councilmen of Troy, within the territory embraced within the police jurisdiction of said city, and of all misdemeanors, concurrently with the criminal court of Pike county, committed within said territory embraced within said police jurisdiction, except violations of the revenue laws of the state, adultery, concealed weapons, assault and battery when a stick or other weapon is used and larceny and kindred offenses when the value of the property exceeds ten dollars"; also to examine all persons charged with felonies and to commit the same to jail, admit them to bail or discharge them as the law and evidence in the case may require. The other provisions of the act, comprising 16 sections, simply provide the machinery for carrying out and effectuating the exercise of the powers or jurisdiction conferred upon the court, not necessary to be here set out. Acts 1900-01, p. 2323.

It will be observed that no reference whatever is made in this act to the charter act. It does not assume in terms to revise, alter, or amend that act, or any section of it. The act itself is complete, and its meaning and scope plain and apparent. While its effect was to alter or change to a certain ex-

tent an existing power conferred on the mayor, that effect was produced by the later act, repealing pro tanto, by implication, the section of the charter act which conferred it, and not by anything on its face evincing that it was of an amendatory character. In other words, it is an independent act of legislation, and repeals by necessary implication because inconsistent with that provision of the charter act conferring jurisdiction on the mayor. To this extent, and only to this extent, did it change or alter that act. A repeal is one thing, and an amendment is quite another and different thing. A repeal of a statute involves necessarily a change in the law; and this is true, whether it be the only statutory enactment on the subject dealt with in the repealed act. Would any one contend that a statute in derogation of the common law was an amendment of it, simply because it altered or changed it? We think not. If not, it cannot be asserted with any show of logic that because an independent act, full and complete within itself, repeals by implication any portion of a statutory system, it is amendatory of the remaining statutes of that system, to which no reference is made. It is undoubtedly true that such an act alters or changes the system; but this change or alteration is and must be ascribed to the repeal wrought by the independent act, and not to the change or alteration consequent upon the repeal. So, also, an amendment involves some change or alteration in the existing statute law, and may also operate as a repeal of some of its provisions; but such change or alteration made by the amendment is direct and not consequential, as is the case of a repeal, and therefore the difference between the two is plain. There is also another marked difference. An amendment may not, and often does not, operate as a repeal, but merely as an addition to the statute of which it is amendatory. This can never be the effect or operation of a repealing statute, whether the repeal be by implication or be direct. A repeal is properly defined to be "the abrogation or destruction of a law by a legislative act." Amendment in legislation is "an alteration or change of something proposed in a bill or established as law. Bouv. Dictionary.

The jurisdiction to try offenses against ordinances of the municipality, civil cases, and offenders violating the criminal laws of the state, conferred upon some municipal officer, is not necessary to the act of incorporation. An independent act, conferring jurisdiction of offenses against city ordinances and of offenses against the criminal laws of the state upon any other judicial tribunal, would not offend the Constitution or charter act creating and conferring corporate powers upon the municipality; and where such a tribunal was established, as here, by an independent act, the corporate powers granted the municipality

were neither enlarged nor diminished by it. It is true the jurisdiction of the mayor of the municipality was diminished because his right to try certain offenses was taken away; but we apprehend this did not affect the corporate powers of the municipality. His right to exclusive jurisdiction as a court was not derived from the corporation, nor as mayor was he *virtute officii* possessed with such a right. This being true, the repeal effected by the act creating the inferior court, known as the "recorder's court," in no proper sense amended the charter of the corporation. That act was and did not become in part the charter power of the municipality. To repeat, it simply repealed by implication certain powers conferred upon an officer of the municipality—the mayor.

These views are in full accord with, and are supported and sustained by, all the decisions of this court except the case of *Little v. Huey*, 137 Ala. 659, 35 South. 134, from which the writer dissented. In *Ex parte Pollard*, 40 Ala. 77, the question was presented whether an independent act, which repealed by implication certain other statutes, was an amendment of those statutes within the meaning of the constitutional prohibition that "no law or any section of any law, shall be revised or amended by reference to its title and number; but the law or statute revised or amended shall be set forth at full length." The court held that it was not. It was then said: "The law is not void because it amends or revises other laws. It only repeals laws contravening its provisions. Its effect is analogous to repeal by implication. It was never intended by the Constitution that every law which would affect some previous statute of variant provisions on the same subject should set out the statute or statutes so affected at full length. * * * The constitutional provision reaches those cases where the act is strictly amendatory or revisory in its character." In *City Council of Montgomery v. Birdsong*, 126 Ala. 647, 28 South. 522, it was said: "Nor does the enactment offend that other provision of said section of the state Constitution, touching the revision, amendment, and extension of laws. That provision has been repeatedly held to apply to statutes strictly amendatory, and not to such as are independent and complete within themselves, although they adopt by reference merely the provisions of the other statutes on the same subject, there appearing in more enlarged and extended form." See, also, *Sisk v. Car-gile*, 138 Ala. 164, 35 South. 114; *Thomas v. State*, 124 Ala. 54, 27 South. 315; *Cobb v. Vary*, 120 Ala. 263, 24 South. 442; *Bates v. State*, 118 Ala. 102, 24 South. 448; *B. U. Ry. Co. v. Elyton Land Co.*, 114 Ala. 70, 21 South. 814; *Ex parte Thomas*, 113 Ala. 1, 6, 21 South. 369; *State ex rel. v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520; *Gandy v. State*, 86 Ala. 20, 5 South. 420; *Falconer v. Robinson*, 46 Ala. 340, 348; *Lockhart v.*

City of Troy, 48 Ala. 579. In the case last cited (*Lockhart v. City of Troy*) it was held that a supplemental act was not an amendment within the constitutional prohibition. It is then said: "A supplemental act merely adds something that was left out of the original act. It does not necessarily revise it or amend it in the more technical sense. An amendment is what may be incorporated into the original on its passage. A supplemental act is an independent law, and a healing act is one that cures some defect in a proceeding which the Legislature could have authorized in the first instance." Other quotations might be indulged to the same effect, but these will suffice to show that this court is unqualifiedly committed to the proposition that an independent legislative act, complete within itself, inconsistent with other statutory provisions on the same subject, is not an amendment, but a repeal. This being the settled interpretation of the constitutional provision, the incorporation of the same language in the present Constitution must be regarded as an adoption of that interpretation. *Alford v. Hicks*, 142 Ala. 355, 38 South. 752; *White v. State*, 134 Ala. 197, 32 South. 320.

It is also a well-settled rule of construction that a word or phrase repeated in a statute or Constitution will bear the same meaning throughout the statute or Constitution unless a different intention appears. 2 Lewis' *Sutherland*, Stat. Cons. § 399. Has the word "amending," used in subdivision 18 of section 104 of the present Constitution, a different signification from the word "amended," as used in section 45 of the same instrument, and, indeed, in the same article of the same instrument? The language of the latter section is: "No law shall be revised, amended or the provision thereof extended or conferred by reference to the title only." The language of the former is: "The Legislature shall not pass a special, private or local law in any of the following cases: * * * Amending, conferring or extending the charter of any private or municipal corporation," etc. Both are prohibitions against legislative action with respect of laws which could be exercised if they did not obtain. There is clearly nothing in the language of the latter to indicate that the framers of the Constitution intended that the word "amending" should be interpreted differently from the word "amended" in the former. This being true, must it not be presumed that it was advisedly and intentionally used with reference to the well-settled construction which this court had placed upon the same word in section 45? We think the answer must necessarily be in the affirmative. Any other conclusion would violate every well-known rule of statutory construction and impute to the Constitution makers a want of knowledge of the decisions of this court, and of all the courts of other jurisdictions where a similar constitutional provision obtains.

Having shown that the recorder's court act was not an amendment of the charter

act, within the meaning of the constitutional prohibition against amending municipal charters by local laws, it necessarily follows that the act repealing the recorder's court act, approved October 6th, 1903 (*Loc. Acts 1903*, p. 512), after the adoption of the present Constitution, is not offensive to that provision. It is true this act is a local one, but no objection is taken to its constitutionality upon any other ground than that it is violative of subsection 18 of section 104. And this contention of necessity proceeds upon the theory that it repeals an amendatory act—the recorder's court act—of the charter of the city of Troy, and in that way amends the charter, by taking from it that which the recorder's court act added to it. The case of *Little v. State ex rel. Huey*, *supra*, is directly opposed to the principles we have declared, and must be overruled.

The judgment appealed from will be reversed, and one will be here rendered excluding the respondent from the illegal exercise of the functions and powers formerly conferred by the recorder's court act.

Reversed and rendered.

WEAKLEY, C. J., and DOWDELL, SIMPSON, and ANDERSON, JJ., concur.

DENSON, J. (dissenting). The mayor and councilmen of Troy is a municipal corporation, by virtue of an act of the General Assembly of Alabama which was approved on the 17th day of February, 1870. By the twelfth section of the act of incorporation (*Acts 1869-70*, p. 127) jurisdiction was conferred on the mayor to hear and determine all suits, prosecutions, or other proceedings for the violation of the charter, by-laws, or ordinance of the corporation. At the session of 1900-01 of the General Assembly an act was passed, which is entitled "An act to establish an inferior court of criminal and quasi criminal jurisdiction in the city of Troy, to be known as the 'recorder's court,' to define its powers, and to provide a judge therefor." This act was approved by the Governor, March 4, 1901. *Acts 1900-01*, p. 2323. By the first section of the act the court as designated in the title was established, with exclusive jurisdiction of all offenses against the by-laws and ordinances passed and ordained by the mayor and councilmen of Troy, within the police jurisdiction of said city, and of all misdemeanors, concurrently with the criminal court of Pike county, committed within the police jurisdiction of the corporation except certain misdemeanors named in said section. The second section (page 2324) of the act provided for a judge of said court, who should be known as the "recorder." It also provided for the election of the recorder by the mayor and councilmen of Troy immediately after the passage of the act, and provided that he should hold office until the time for the regular election of the city officers on the second Tuesday in

December, 1903. It further provided that on the second Tuesday in December, 1903, and every two years thereafter, a recorder should be elected by the qualified voters of the city of Troy, who should hold his office for a term of two years, and until his successor should be elected and qualified. It is further provided by section 2 that the recorder shall receive a salary of \$600 a year to be paid out of the treasury of the mayor and councilmen of the town of Troy. It is also provided by section 2 that if the office of recorder shall at any time become vacant by death, removal, or resignation, the mayor and councilmen of Troy shall elect a competent and suitable person to fill the vacancy, etc. Section 3 (page 2325) of the act requires the recorder to keep an office in Troy in such place as the mayor and councilmen shall provide, furnish, and direct. Section 4 of the act provides that the recorder shall give bond in the sum of \$2,000, payable to the mayor and councilmen of Troy, etc. Section 11 (page 2328) of the act provides that the marshal and police officers of the city of Troy shall be officers of the recorder's court. Section 17 (page 2330) of the act provides that all laws and parts of laws in conflict with the provisions of the act are repealed.

Under the Constitution of 1875 "the Legislature had plenary power to alter, amend, withdraw, or repeal at pleasure, either by a general law, operating upon the whole state, or by special statute, the charter, or any particular authority conferred on a municipal corporation." *City Council of Montgomery v. Shoemaker*, 51 Ala. 114; *Little v. State*, 137 Ala. 659, 35 South. 134. Did the act of March 4, 1901, have the effect to amend, alter, change, or extend the charter of the municipal corporation, mayor and councilmen of Troy? It would seem that there could not have been a more effectual amendment of the charter if the act of 1901 had expressly repealed that part of section 12 of the original act which conferred on the mayor jurisdiction to hear, adjudge, and determine prosecutions for violations of the by-laws and ordinances of the city. There can be no reconciliation of the two acts with respect of the jurisdiction of the mayor and that of the recorder's court. By the original act the jurisdiction is conferred on the mayor. By the act of 1901 the recorder's court is created, and the exclusive jurisdiction is conferred on it of all offenses against the by-laws and ordinances of the city, and the presiding judge of said court—the recorder—is an official of the city, and a distinct individual from the mayor. So there can be no question that it was intended by the enactment of the act of March 4, 1901, to take away from the mayor the jurisdiction to hear and determine prosecutions for violations of the by-laws and ordinances of the corporation and to establish a court with such jurisdiction to be presided over by a recorder. And we think there can be no doubt that the act is in effect

an amendment of the charter of the corporation. *Little v. State*, 137 Ala. 659, 35 South. 134, *State v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520; *Cobb v. Vary*, 120 Ala. 263, 24 South. 442; *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 South. 522.

The Legislature at the session of 1903 passed an act repealing the act of March 4, 1901, above referred to. The repealing act was approved October 6, 1903. *Loc. Acts 1903*, p. 512. It is insisted that the repealing act was enacted in violation of section 104 of the Constitution, which provides that "the Legislature shall not pass a special, private or local law in any of the following [31] cases," the eighteenth of which is, "Amending, confirming or extending the charter of any private municipal corporation," etc. That the act of October 6, 1903, is a local act within the definition given of a local act in section 110 of the Constitution, seems too plain for argumentation. Having reached the conclusion that the act of March 4, 1901, is an amendment of the charter of the municipal corporation, then, if the act of October 6, 1903—the repealing act—is to operate as an amendment of the charter of the corporation, it seems that the insistence that it was not constitutionally enacted should prevail. While the word "amend," in legal phraseology, does not generally mean the same thing as "repeal," "it does not follow that amendments of a statute may not often be accomplished by repeals of some of its parts, and in this way to better the condition, and change from bad to better." As the act of March 4, 1901, operated as an amendment of the charter of the corporation, and thereby became a part of the charter, I think it is consistent with reason and entirely logical to say that an act repealing the act of 1901 would operate as an amendment of the charter of the corporation. This view, it is conceded in the majority opinion, finds support in the case of *Little v. State*, supra. But by the majority opinion that case is overruled. I think the case asserts sound doctrine and should stand as authority.

My conclusion is that the effect of the act of October 6, 1903, in repealing the act of March 4, 1901, would be to amend the charter of the corporation, and, consequently, that it was not constitutionally enacted. Section 104 of the Constitution. Therefore I dissent from the views expressed and the conclusion reached by my Brethren.

HARALSON, J., concurs in the foregoing opinion of DENSON, J.

SLOSS-SHEFFIELD STEEL & IRON CO. v. JOHNSON.

(Supreme Court of Alabama. July 6, 1906.)
HIGHWAYS—OBSTRUCTION—REMEDIES OF PRIVATE PERSONS—INJUNCTION.

The owner of property abutting on a street, who is compelled by reason of the dumping of slag in the street to take a circuitous route

along other streets in travelling between his property, is entitled to injunctive relief as suffering special damages from a public nuisance.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 432, 435.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

"To be officially reported."

Suit by C. Atwell Johnson against the ~~Slow~~-Sheffield Steel & Iron Company. From a decree in favor of complainant, defendant appeals. Affirmed.

Tillman, Grub, and Bradley & Morrow, for appellant. Cabaniss & Weakley, for appellee.

TYSON, J. This is the case of a bill filed by the appellee to abate a public and private nuisance arising from obstructing streets in the city of Birmingham by dumping therein slag from a furnace. The appellant demurred to the bill, and, the demurrer being overruled, this appeal is prosecuted to reverse the decree of the lower court.

The complainant is the owner of a block of city property, which, it seems, is east of the alleged obstructions placed in the streets by the appellant; and the allegation making out the public nuisance is that the streets are, and long have been, dedicated to public uses as highways, and that the appellant by dumping slag therein totally obstructs the use thereof. The allegation, to give the appellee a standing in court to have this public nuisance abated, is that he is the owner of the property, an entire square, in the vicinity, and that the obstructed highways are streets leading from his property to the city of Birmingham and are the direct way for travel, and that by the obstructions he is deprived of the use of this direct route and is compelled to take a circuitous one into other streets to the north or south of the obstructions. It is conceded that the facts alleged make out a public nuisance, and the only point at issue is whether they show such a peculiar injury to the complainant below as to give him a standing in court.

The general rule is that a private individual, who suffers no damage different from that sustained by the public at large, has no standing in court for the abatement of a public nuisance; but, if he sustains an individual or specific damage in addition to that suffered by the public, he may sue to have the same abated if the remedy at law is inadequate. *Rosser v. Randolph*, 7 Port. 238, 31 Am. Dec. 712; *Columbus v. Witherow*, 82 Ala. 190, 3 South. 23; *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91, 9 L. Ed. 1012; 3 Notes U. S. Rep. 710; *State v. Penn. v. Wheeling B. Co.*, 13 How. (U. S.) 518-564, 14 L. Ed. 249; *In re Debs*, 158 U. S. 587 et seq., 15 Sup. Ct. 900, 39 L. Ed. 1092; *Jones v. Bright (Ala.)* 37 South. 79. This position is not denied, but it is insisted that no special damage is shown in this case to the complainant below, and that if such damage is shown the remedy at law is ade-

quate in a suit for damages. As to special damages, the rule is that the injury, to be special, must be one different in kind, and not mere degree, from that suffered by the general public from the act complained of. *Bigley v. Nunan*, 53 Cal. 403; *Crowley v. Davis*, 63 Cal. 461; *Decker v. E. S. & N. R. Co.*, 123 Ind. 493, 33 N. E. 349; *Gundlach v. Hamm*, 62 Minn. 42, 64 N. W. 50; *High on Injunctions*, § 589.

The situation shown by the bill is that the nuisance is the obstruction of the two streets bounding the complainant's block of land on the north and south, and extending directly into the city of Birmingham; the obstruction being two blocks distant in a westerly direction from complainant's property, and compelling all travel between his property and the city to take a circuitous route north or south of the two obstructed streets into other streets leading into the city, instead of pursuing the direct course along Second and Third avenues, which are the obstructed streets. So the question is whether forcing the owner of land out of his direct public street or road into a circuitous route in his commerce and intercourse with the outside world is a peculiar or special injury to him, not suffered by the general inhabitants of the state, county, or city. *Spencer v. London & Birmingham Co.*, 8 Sim. 198. The statement of the proposition seems to give the affirmative answer to the inquiry. If the direct and usual route of travel may be obstructed, there could certainly be no reason why the indirect routes might not also be closed one by one, until the lawful and criminal invasion of public roads put the unfortunate owner's property in a cul-de-sac, compelling a day's time instead of a few moments of time, in going to business, church, or market. An individual might be entirely inclosed, and the value of his property destroyed, without affecting the public. The injury is thus clearly individual and special. In the case of *State of Penn. v. Wheeling Bridge Co.*, 13 How. (U. S.) 518, 14 L. Ed. 249, the state of Pennsylvania entirely as an individual filed its bill to abate the obstruction by a bridge of a public waterway in the state of Virginia which interfered with the general commerce and travel feeding its connecting railroads and canals; and after elaborate consideration relief was granted on the ground that the bridge, though a public, was also a private, nuisance, on account of the special injury to the complainant. There can be no question that the obstruction of a route of communication with the public community enjoyed by a property owner is a private or special injury, although it may be at the same time a public nuisance, entitling the injured party to appeal to a court of chancery for protection if the injury is substantial, and the remedy at law is not adequate. 13 How. (U. S.) 567, 14 L. Ed. 269; *Jones v. Bright (Ala.)* 37 South. 79.

The only question, then, is whether or not

the obstruction of the streets in this case could be fully and adequately remedied by an action at law for damages. This question seems to be precisely decided in the case of 18 How. 562, 14 L. Ed. 267, where the court, speaking of the obstruction of a public waterway changing the line of transportation over the complainant's railroads and canals, says: "This injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily, prosecutions for the wrong done; and from the nature of that wrong the compensation could not be measured or ascertained with any degree of precision. The effect [of the injury] would be, if not to reduce the tolls on these lines of transportation, to prevent their intercourse with the increasing business of the country." The obstruction of the streets in this instance is continuing, but may be temporary or permanent, and the injury to the complainant, whether embracing the present or prospective injury to his property, is entirely incapable of any precise measurement. These obstructions might direct the line of city development away from the plaintiff's property. There is thus no full, adequate, and complete remedy open to the plaintiff for his individual injury, save in this court. *Roberts v. Mathews*, 137 Ala. 523, 34 South. 624, 97 Am. St. Rep. 56; *Cabell v. Williams*, 127 Ala. 320, 28 South. 405; *Whaley v. Wilson*, 112 Ala. 627, 20 South. 922; *Jones v. Bright* (Ala.) 37 South. 79; *City of Georgetown v. Alexandria Co.*, 12 Pet. (U. S.) 98, 9 L. Ed. 1012; *State of Penn. v. W. B. Co.*, 13 How. (U. S.) 567, 14 L. Ed. 269; *Stetson v. Faxon*, 31 Am. Dec. 123, and note; *Sampson v. Smith*, 8 Sim. 272; *Spencer v. London & B. Co.*, 8 Sim. 193.

There was no error in the decree of the lower court, and therefore it is affirmed. All the Justices concur, except **WEAKLEY**, C. J., not sitting.

HAYES v. JASPER LAND CO. et al.

(Supreme Court of Alabama. June 30, 1906.)

1. RECEIVERS—APPOINTMENT—SEQUESTRATION.
The power to appoint a receiver and sequester property will be exercised with great caution, and only where it appears that without it plaintiff will sustain irreparable loss.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 14, 21–23.]

2. SAME—APPOINTMENT BEFORE DECREE ON MERITS.

To justify the appointment of a receiver in limine before the decree on the merits of the bill, it must appear that there is, first, a reasonable probability that complainant will succeed ultimately in obtaining the general relief sought, and, second, imminent danger to the property, the subject of the suit.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 24–28.]

3. SAME—OTHER REMEDIES.

A receiver should not be appointed at any stage of the proceedings, if any other remedy

would afford adequate protection to the applicant.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 12.]

4. SAME—CORPORATIONS—DIRECTORS AND OFFICERS—MISAPPROPRIATION OF ASSETS—APPOINTMENT OF RECEIVER.

The fact that the directors and officers of a corporation are fraudulently misappropriating the assets thereof does not alone constitute ground for the appointment of a receiver; for, if such directors and officers are solvent, they can be brought to an accounting, which will afford complete relief, and is therefore an adequate remedy.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 12; vol. 12, Cent. Dig. Corporations, § 1433.]

5. SAME.

That the president of a corporation purchased the majority of the stock thereof with its funds, in violation of his trust as president, thus giving the corporation the option of holding him to an accounting for the misappropriation of its funds, or ratifying his transaction and claiming the shares of stock so purchased, would not authorize a court to appoint a receiver at the instance of a minority stockholder; the remedy by accounting being adequate.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 12.]

Appeal from Chancery Court, Walker County; Alfred H. Benners, Chancellor.

"To be officially reported."

Bill by J. H. Hayes against the Jasper Land Company and others. From an order refusing to appoint a receiver, complainant appeals. Affirmed.

London & London, for appellant. Davis & Fite and E. H. Cabaniss, for appellee.

DOWDELL, J. The bill in this case is by a minority stockholder, and in which the corporation and its president are made respondents. The purpose of the bill is to require an accounting by the respondent Musgrove, the president of the corporation, for certain alleged dealings and transactions by him as such officer, and the bill also prays for the appointment of a receiver for the respondent corporation, and is accompanied by a petition to the chancellor for such appointment. On the hearing of this petition the chancellor refused to appoint a receiver, and it is from this order refusing to appoint that the present appeal is prosecuted.

The equity of the bill, and the right of the complainant as a minority stockholder to file the same, are questions that we need not consider. The chancellor, in his opinion accompanying the decree, upheld the equity in the bill, and there is no contention by counsel for appellees that the ruling of the chancellor in denying the petition for a receiver should be here considered with reference to these questions, but solely with references to the question of any necessity for a receivership, on the facts as presented by the petition, bill, answer, and affidavits, on which the application for the appointment of a receiver was heard.

The bill, as amended, avers that of the

4,990 outstanding shares of the capital stock of the Jasper Land Company, the complainant owns 22½ shares, having purchased the same on the 2d day of September, 1905; that the respondent Musgrove has controlled the affairs of the land company since the 29th day of April, 1901, owning or controlling over 4,700 shares of said capital stock; that he has abused his control of said corporation and his trust as vice president and general manager, and later as president; that he has loaned to himself, and to companies owned and controlled by him, large sums of money belonging to the land company; that he has called stockholders' meetings without notice, and has presented and had allowed by the stockholders and directors unfounded claims and demands against the land company; that on September 13, 1905, he procured to be declared a dividend of \$29.50 per share of the stock of the land company, which was paid out of the capital assets of the company; that he has taken and is now taking from the treasury excessive sums in the form of salaries and expenses; that he is in the absolute control of the said land company, and of its money and assets; and that, unless the same is taken from him and protected by a court of equity, he will continue to appropriate the same to his own use, under various guises and devices, which would make it difficult, if not impossible, to trace and recover the same. It is not averred in the bill that either Musgrove or the respondent corporation are insolvent. The bill further shows that the defendant corporation has a board of directors and officers that have the management and control of its business and affairs, and it is not denied that these officers are administering the business purposes of the corporation, though it is charged that the board of directors are under the domination and control of the said Musgrove, and that through his mismanagement and fraud the corporation will ultimately be destroyed. The answer of Musgrove denies, circumstantially and in detail, the various charges of fraud and mismanagement, and avers that he is perfectly solvent and able to respond in any amount that may be found to be due to the land company upon any of the charges set forth in the bill. He offers to come to an accounting with the company and pay whatever may be found to be due from him to the company. It is further alleged in his answer that both he and the land company are entirely solvent. It is also averred upon information and belief that the complainant is not the bona fide owner of the 22½ shares claimed by him, but that the transfer to him was merely colorable, in furtherance of a conspiracy to harass the respondent Musgrove by bringing this suit. The answer of the land company adopts the answer of Musgrove.

The general rule is well established that the power to appoint a receiver and sequester property will be exercised with great

caution, and a resort to this remedy can only be had in extreme cases, and where it appears that without it the plaintiff will sustain irreparable loss. *Alderson on Receivers*, § 49; *High on Receivers* (3d Ed.) §§ 18, 19; *Randle v. Carter*, 62 Ala. 95; *Pt. Payne Furnace Co. v. Iron Co.*, 96 Ala. 472, 11 South. 439, 88 Am. St. Rep. 109; *Ensley Dev. Company v. Powell* (Ala.) 40 South. 137; *Gilreath v. Union Bank & Trust Company*, 121 Ala. 204, 25 South. 581. Another principle of law, which seems to be as well settled, is that, to justify the appointment of a receiver in limine before the decree upon the merits of the bill, two grounds must appear: First, a reasonable probability that the complainant will succeed ultimately in obtaining the general relief sought; second, imminent danger to the property, the subject of the suit. 3 *Pomeroy's Equity Jurisprudence* (2d Ed.) 1331; *Ashurst v. Lehman*, 86 Ala. 370, 5 South. 731; *Bank of Florence v. U. S. Savings & Loan Company*, 104 Ala. 297, 16 South. 110; *Warren v. Pitts*, 114 Ala. 69, 21 South. 494; *Pollard v. Fertilizer Company*, 122 Ala. 413, 25 South. 169. Again, a receiver should not be appointed at any stage of the proceedings if any other remedy will afford adequate protection to the party applying. *Thompson v. Tower Manufacturing Company*, 87 Ala. 733, 6 South. 928; *Word v. Word*, 90 Ala. 81, 7 South. 412; *Etowah Mining Company v. Wills Valley Mining Company*, 106 Ala. 497, 17 South. 522; *Bridgeport Dev. Company v. Tritsch*, 110 Ala. 274, 20 South. 16; *Roman v. Woolfolk*, 98 Ala. 219, 13 South. 212.

It has been ruled by this court that the fact that the directors and officers of a corporation are fraudulently misappropriating the assets of the company will not alone of itself constitute ground for the appointment of a receiver. If they are solvent, they can be brought to an accounting, which will afford complete relief and is therefore an adequate remedy. *Briarfield Iron Works v. Foster*, 54 Ala. 622; *Alabama Coal & Coke Company v. Shackelford*, 137 Ala. 224, 34 South. 833, 97 Am. St. Rep. 23; *Donald v. Export Company* (Ala.) 38 South. 841. The facts in the case before us are much like the facts in the case of *Alabama Coal & Coke Company v. Shackelford*, supra, and clearly distinguish the case at bar from that of *Morris v. Elyton Land Company*, 125 Ala. 263, 28 South. 513. Without more, on the facts here presented, we might safely rest the determination of this case on the principles stated in the case of *Coal & Coke Company v. Shackelford*, supra, and hold on the authority of that case that no sufficient reason or necessity exists for the appointment of a receiver in this case.

It is insisted by counsel for appellant in argument that the respondent Musgrove purchased the majority of the stock held and claimed by him in the respondent corporation with funds of the defendant company, that in so doing he violated his trust as president

of the corporation, and that this gives to the beneficiary corporation the option of holding him to an accounting for the misappropriation of the company's funds, or of ratifying his transaction and claiming the shares of stock in the defendant company so purchased. The insistence in argument by counsel is then made that the exercise by the beneficiary corporation of the option to claim the stock would put into the ownership of the corporation a majority of its own stock, which would, of necessity, under the law, destroy corporate existence. It is conceded by counsel for appellant that the corporation would not have the right to go into the market and purchase its outstanding capital stock. This being true, it is hardly to be supposed that a court of equity, in such a case as the one before us, where a complete remedy is afforded by having an accounting from the delinquent trustee, would lend its aid at the instance of a minority stockholder to an act of *felo de se* by the corporation in the application of the equitable doctrine of the right of election of a beneficiary under ordinary conditions and circumstances. The argument is ingenious, but we think, unsupported by sound reasoning.

We concur in the conclusion, reached by the chancellor, that the facts in the case do not justify the appointment of a receiver; and his decree will be affirmed.

Affirmed.

HARALSON, SIMPSON, and DENSON,
JJ., concur.

KNIGHT v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. CRIMINAL LAW—RECORD—ARRAIGNMENT.

A judgment convicting defendant of embezzlement recited that defendant, being arraigned on the indictment, for his plea thereto said that he was not guilty, whereupon, issue being joined on the plea, and the jury having found defendant guilty it was adjudged, etc. The bill of exceptions showed that defendant was arraigned by the solicitor reading the indictment to the jury in the presence of defendant, after both had announced ready for trial and a jury had been selected, whereupon defendant's counsel announced to the jury in the presence of defendant in open court that the defendant pleaded not guilty. *Held*, that the record sufficiently showed defendant's arraignment.

2. INDICTMENT AND INFORMATION—VARIANCE.

An indictment for embezzlement alleged the name of the person whose money was claimed to have been embezzled as "H. G. Kilgore," while the proof showed that his name was "Howell Green Kilgore." He testified that such was his name, and that his initials were H. G., that he signed checks and received mail by the name of "H. G. Kilgore," and that his letter-heads were so printed. *Held*, that the variance was not a material one, so as to entitle defendant to a general charge, as provided by Code 1896, § 4233.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 551-555.]

3. EMBEZZLEMENT—ELEMENTS OF OFFENSE—ISSUES AND PROOF.

The first count of an indictment for embezzlement alleged that the property embezzled was "fifty dollars, lawful money of the United States of America," and the second count charged only that it was "money to the amount of fifty dollars." There was no proof to sustain the allegation in the first count as to the kind of money, and there was neither allegation in the second count nor proof that the money therein referred to was of any value. *Held*, that such defects were fatal to a conviction, and entitled accused to the general charge in his favor.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 42-45, 55, 58.]

4. SAME—VENUE—QUESTIONS FOR JURY.

Where, in a prosecution for embezzlement, evidence showed that the money was delivered to defendant in C. county, to be carried to T. county and there deposited in a bank, and that he did deposit a portion of the money in such bank, the embezzlement as a matter of law could not be said to have been committed in C. county.

5. EMBEZZLEMENT—COMMON CARRIER.

Where prosecutor was accustomed to deliver money to defendant, a mail carrier, to be carried from prosecutor's place of business to and deposited in a bank in another county, for which prosecutor paid defendant, and defendant embezzled a portion of the money, such facts were insufficient to constitute defendant a common carrier, so that a charge that from the time the money was deposited with him by prosecuting witness it became the money of the bank, was properly refused.

Appeal from Circuit Court, Coosa County;
A. H. Alston, Judge.

"To be officially reported."

Jim Knight was convicted of embezzlement, and he appeals. Reversed.

The judgment of the court is as follows: "April 18, 1906. On this day came W. B. Bolling, solicitor of the Fifth judicial circuit of Alabama, and also comes the defendant in his own proper person and by his attorney, and being arraigned upon said indictment and for his plea thereto the defendant says that he is not guilty. Issue being joined upon said plea, and after hearing the evidence, thereupon came a jury, etc., who upon their oaths say: 'We, the jury, find the defendant guilty as charged in the indictment.' It is therefore considered and adjudged by the court that the defendant, Jim Knight, is guilty as charged in the indictment, and the state of Alabama, for the use of Coosa county, have and recover of Jim Knight the cost of this prosecution, for which let execution issue. Again, on this 18th day of April into open court comes the defendant, Jim Knight, in his own proper person. Being asked by the court if he has anything to say why the sentence of the law should not now be pronounced upon him, says nothing. It is therefore considered," etc. The bill of exceptions contains the following: "The defendant was arraigned in the following manner: The state announced ready for trial, and the defendant announced ready for trial, and after the jury had been selected and impaneled, the solicitor read the

indictment to the jury in the presence of the defendant, and the defendant's counsel announced to the jury in the presence of the defendant in open court that the defendant pleads not guilty. The defendant raised no objection to the manner of this arraignment, or any of the preliminary proceeding had in this cause." The evidence showed that Kilgore paid defendant 15 cents for taking \$163 for him from his place of business at Weogufka, in Coosa county, to the Merchants' & Planters' Bank at Sylacauga, in Talladega county, to be deposited in said bank to the credit of Kilgore, and that he deposited only \$110 in money and a \$3 check. It further appeared from the evidence that the defendant was a mail carrier, and that he received from Kilgore compensation on several occasions for carrying money to Sylacauga and depositing it.

The court at the conclusion of the testimony gave the general affirmative charge to the state, and refused like charges for the defendant. Defendant also requested charges requiring the jury to believe that the offense was committed in Coosa county before conviction, and also charges requiring an acquittal of defendant if they had a reasonable doubt as to whether the crime was committed in Coosa or Talladega county. Charge 9 was as follows: "I charge you that if you believe from the evidence in this case that the defendant was in the habit and had been regularly engaged to carry money by Kilgore to the bank at Sylacauga and deposit it in Kilgore's name subject to draft, and that the money described in the indictment was delivered to him in this way and for this purpose, that the transaction would constitute the defendant the common carrier, and from the time the money was delivered to the defendant, to be delivered to the bank, the money was the property of the bank, and the defendant could not be convicted as charged in the indictment." This charge was refused.

D. H. Riddle, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. The defendant in this case was convicted under an indictment charging embezzlement. No demurrer was interposed to the indictment, nor any supposed defects brought to the attention of the court in any legal way. Code 1896, § 4895; 10 Ency. Pl. & Pr. 564. The record sufficiently shows a continuous proceeding and the presence of the defendant throughout the trial. *Suduth v. State* (Ala.) 27 South. 487. The arraignment is also sufficiently shown. *Fernandez & White v. State*, 7 Ala. 511.

It is claimed that there is a variance between the allegations in the indictment and the proof, in that the indictment gives the name of the person whose money is alleged to have been embezzled as "H. G.

Kilgore," while the proof shows his name was "Howell Green Kilgore." Kilgore testified himself that his name was H. G. Kilgore, and on cross-examination stated that his name was Howell Green Kilgore; that people called him "Howell"; that his initials were "H. G."; that he signed checks and received mail by that name; that people who knew his name called him "Howell", and those who did not called him "H. G."; and that his letterheads were printed "H. G. Kilgore." There was no dispute as to the identity of the party, and this court "is satisfied that no injury resulted therefrom to the defendant." This was not such a variance as to entitle the defendant to the general charge. Code 1896, § 4333; *State v. Root*, 42 Kan. 419, 22 Pac. 626; *State v. Flack*, 48 Kan. 146, 29 Pac. 571; *Franklin v. State*, 37 Tex. Cr. R. 312, 39 S. W. 680; *Thompson v. State*, 48 Ala. 165; *Franklin v. State*, 52 Ala. 414; *Lyon v. State*, 61 Ala. 224; *Lowe v. State*, 134 Ala. 154, 32 South. 278; *Crittenden v. State*, 134 Ala. 145, 32 South. 278.

The first count in the indictment alleges that the property embezzled was "fifty dollars, lawful money of the United States of America," and the second count alleges only that it was "money to the amount of fifty dollars." There was no proof to sustain the allegation in the first count, as to the kind of money; and there was no allegation in the second count, and no proof that the money therein referred to was of any value. These being the facts of the case, the court erred in giving the general charge in favor of the state and in refusing the general charge in favor of the defendant. *Burney v. State*, 87 Ala. 80, 6 South. 391. For another reason it was error to give the general charge for the state, to wit: The evidence showed that the money was delivered to the defendant in Coosa county to be carried to Talladega county, and that the money which he did deposit was carried to and deposited in the bank in Talladega county. The court could not say as a matter of law that the embezzlement took place in Coosa county. *Henderson v. State*, 129 Ala. 104, 29 South. 799.

Without going specifically into an examination of each charge refused, it is sufficient to say, in connection with what has already been said, that in order to sustain a conviction in this case the burden was on the state to show that the property described in the indictment was embezzled in Coosa county. The facts detailed in the evidence did not constitute the defendant a common carrier, and the charge based on that theory was properly refused.

The judgment of the court is reversed, and the cause remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

(117 La.)

No. 16,011.

DOULLUT v. SMITH et al.

In re SMITH et al.

(Supreme Court of Louisiana. June 4, 1906.
Rehearing Denied June 30, 1906.)

1. APPEAL—JURISDICTIONAL AMOUNT.

The appellate court properly determines the question of its jurisdiction, quoad the amount in dispute, from the facts disclosed by the transcript in the particular case under consideration.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 99.]

2. SAME—REVIEW.

Where an exception of no cause of action is tried with the merits in the district court, without objection on the part of the defendant, who obtains judgment on the merits, and prays for no amendment on the appeal, the appellate court properly hears the case, as it was heard in the district court, on the merits.

3. TAXATION—TAX DEED—QUIETING TITLE—DEFENSES.

Where, in a suit to obtain possession under a title derived from a tax sale and for the quieting of such title, the defendant alleges the nullity of the sale by reason of the prior payment of the tax for which it was made, and also alleges that the vendor, under whom the plaintiff claims, in acquiring his alleged title, intended to redeem the property for his (defendant's) account, there is no such inconsistency of allegation as to estop the defendant from proving the nullity of the tax sale.

Provosty, J., dissenting.

(Syllabus by the Court.)

Certiorari to Court of Appeal, Parish of Orleans.

Action by Milton P. Doullut against Louisa Smith and others. Judgment for defendants was reversed by the Court of Appeal, and they apply for certiorari or writ of review. Reversed and judgment of the district court affirmed.

A. E. & O. S. Livaudais, for applicants.
James Wilkinson and John Dymond, Jr., for respondent.

Statement of the Case.

MONROE, J. Plaintiff, claiming (through Haspel & Davis, who acquired from H. C. Huntington, adjudicatee) under a tax title resulting from a sale made June 15, 1895, for the taxes of 1893 and 1894, brings this suit against the defendants, as the former owners of the property sold, alleging that the period of redemption has expired, that "the property has never been redeemed," * * * that it is more than three years since the registration of said tax deed, and that petitioner, under the section 65 of Act No. 85, p. 134, of 1888, is entitled to a writ of seizure and possession * * * commanding the sheriff * * * to place him in full possession of said property, * * * and under the provisions of section 3 of Act No. 101, p. 128, of 1898, carrying into effect article 233 of the Constitution of 1898, is entitled to have his title to the property quieted by means of the proceedings therein provided, and praying for the necessary order

and judgment in the premises, and, agreeably to the prayer of his petition, a writ of possession issued, which was duly executed on March 14, 1905, by the eviction of the defendants and the putting in possession of the plaintiff." In the meanwhile, that is to say, between the dates of the filing of the petition and the execution of the writ, the defendants (the widow and heirs of James Smith) filed an exception of no cause of action, which was subsequently referred to the merits, whereupon, reserving the benefit of their exception, they answered, setting up title to the property claimed, alleging that they had been in uninterrupted possession, as owners, from the date of the death of their author until evicted by the writ herein issued, and that the sale of said property for the tax of 1894 was null for insufficient advertisement, and for the tax of 1893 because the same had been paid; that the alleged transfer of the property from Huntington to Haspel & Davis was void because not conforming, in several particulars, to the law regulating the transfer of real estate; and further alleging that the amount paid for the property, by Huntington, was advanced by Haspel & Davis for account of Antoine Jones, undertutor of the minor children of James Smith, who intended to redeem the property, "the said Haspel & Davis purchasing as agent, and for the benefit of said minors and your other respondents, and that the said amount has been refunded to said Haspel and Davis by your respondents"; and they pray that the title set up by plaintiff be decreed null, and that they be recognized as the owners of the property and replaced in possession. Thereafter the plaintiff filed a supplemental petition, asking to be allowed to call Haspel & Davis and H. C. Huntington in warranty, to which defendants excepted, that a call in warranty could not be made by the plaintiff, and that the petition disclosed no cause of action. This was followed by the filing, on behalf of Haspel & Davis, of a petition of intervention (in which interveners join plaintiff in his demand and set up a variety of defenses against the reconventional demand of the defendants), and by an answer on behalf of Huntington (to the call in warranty), in which the appearer admits the sale of his right, title, and interest in and to the land in question to Haspel & Davis, but denies the warranty. It was then agreed that the exceptions, as filed, should stand as exceptions to the intervention as well as to the supplemental petition of the plaintiff, and thereafter they were overruled. Defendant then filed an answer to the intervention, and the case was tried on its merits, with the result that there was judgment for plaintiff in which the original exception of no cause of action was specifically overruled. The then judge of the district court was, however, made a member of the Court of Appeal before the judgment so rendered became

final, and his successor in the district court granted a new trial, and, after hearing on the merits, gave judgment for the defendants, decreeing them to be the owners of the property in dispute, and ordering that the inscriptions of the titles relied on by the plaintiff and interveners be canceled; which judgment, upon the original hearing, was affirmed, but, on rehearing, was reversed, by the Court of Appeal.

Opinion.

The defendants allege in the petition for review which has been presented to this court that the ruling last mentioned is erroneous in certain particulars which will be considered, *seriatim*, to wit:

1. In overruling defendants' motion to dismiss the appeal, which was based on the allegation that the amount or value in controversy exceeded \$2,000, defendants seemed to rely, in support of this motion, upon the fact that in two suits (*Bayou Cook Navigation Co. v. Doullut et al.*, 111 La. 517, 35 South. 729, and *Louisiana Navigation & Fisheries Co. v. Doullut et al.*, 114 La. 906, 38 South. 613), brought by corporations, or supposed corporations, of which plaintiff was president, for the expropriation of the property here in question, appeals were taken to and entertained by this court. The question of jurisdiction does not, however, appear to have been raised, or to have attracted attention in either of those cases. In any event, from the evidence in the record which has been brought up from the Court of Appeal, it appears that the property in question is worth less than \$2,000, and that court correctly held that the question of jurisdiction was to be determined from that evidence.

2. In declining, for the reason that the defendants had not joined in the appeal or asked for any amendment of the judgment, to consider their exception of no cause of action, which, as they allege, over their objection, the trial judge had referred to the merits, and did not thereafter rule on. We find from the record that on the first trial in the district court the exception was referred to and decided with the merits, and we do not find that on the second trial defendants made any request that it should be tried separately. As the case was presented to the Court of Appeal, therefore, the rights of the defendants in that respect appeared to have been waived, and the Court of Appeal properly considered the case, as the district court had done, upon its merits.

3. In holding that defendants, whose main contention and plea was that of the nullity of a tax sale, on the ground of payment of the tax prior to the sale, were estopped by subsequent allegations in their answer, alleging other and further grounds of nullity in said sale, to prove that said tax had been paid.

Upon this subject, the Court of Appeal says:

"Further consideration of the issues involved, and of the authorities cited, have persuaded us that we erred in holding that defendants were not estopped by the pleadings from making proof that the taxes on the property sued for, for the year 1893, had been paid previous to the tax sale, and that the estoppel could not be urged by way of objection to the proffered evidence. * * * The answer, after averring that the tax sale was null because the taxes of 1893 were paid, and that therefore no title was conferred on Huntington, the tax purchaser, adds, 'Respondents further aver that the amount advanced by the firm of Haspel & Davis [who acquired the property from Huntington]' and paid over to Henry C. Huntington, being the amount by him paid at tax sale for the property and penalties and costs added, was, at the time, intended as a redemption of the property by Haspel & Davis for the account of one Antoine Jones, the undertutor of the minor children of James Smith, who intended to redeem the same, the said Haspel & Davis purchasing as agent, and for the benefit of the said minors and your other respondents, and that the said amount has been refunded to the said Haspel & Davis by your respondents.

"Here is a distinct averment that the purchase by Haspel & Davis from Huntington was nothing more nor less than a redemption of the property, sold for taxes, by Haspel & Davis for, and on behalf of, and for the benefit of, defendants, and that the amount so paid by Haspel & Davis was repaid by defendants.

"The validity of the tax sale being thus judicially admitted by the averments of the answer, all evidence offered for the purpose of showing its invalidity was properly objected to, hence the ruling of the lower judge [duly excepted to and bill reserved] was error. Disregarding, therefore, any evidence which may be in the record as to the payment prior to the tax sale of the taxes of 1893, there is left nothing in defendants' case for consideration, except their averment that Haspel & Davis redeemed for them, and that they refunded the amount so paid. A careful survey of the evidence satisfies us that no such fact has been established. Indeed, this branch of the case seems not to be seriously pressed. At any rate, it is without any proof to sustain it."

And there was judgment for plaintiff.

It will, perhaps, conduce to a better understanding of the case to state the facts in connection with which these deductions and rulings have been applied.

By the death of James Smith, in 1877, the title to the property in controversy (consisting of a tract of land measuring one arpent front on the Mississippi river by forty arpents in depth) vested in Louisa Smith, his widow, and their minor children; and, the widow having qualified as natural tutrix, and Antoine Jones having qualified as undertutor of the minors, the family continued to occupy the property as their home.

The Smiths are negroes, and, although the record is silent as to the amount of information possessed by the others, it appears that Louisa, the mother of the family, is wholly illiterate, and is now past 70 years of age. It also appears that the family have at times had dealings with Haspel & Davis (who conducted a business consisting, in part, of making advances and selling goods to small farmers), and that they have had some difficulty in getting along, as they were obliged

at one time to let go the only property owned by them, other than that here claimed, in order to satisfy a debt due to that firm. They, however, preserved their homestead, and paid the taxes up to and inclusive of the year 1893. But the taxes of 1894, for some reason not explained, were left unpaid, and in May, 1895, the property was advertised to be sold (and was sold) on June 15, 1895, for the taxes, not only of that year, but also of the year 1893, which latter had been paid 12 months before; the adjudicatee being H. C. Huntington, the stepson of the sheriff and ex officio tax collector, and himself, a deputy sheriff. According to the deed, the taxes of 1894, with all penalties and costs added (including an item "advertisement and cost \$4.10") amounted to \$22.85, and the taxes of 1893, with interest, etc., and with the item "advertisement and costs \$4.10" duplicated, amounted to \$14.65, making a total of \$37.50. On June 23, 1896, Huntington executed an instrument somewhat in the form of a quitclaim deed, in which, for the consideration of \$62.90 said to have been paid to him, he transferred to Haspel & Davis his interest in the property. He testifies that the amount stated was the exact amount that he paid for the property, including all costs and interest, but under what law the \$37.50 paid by him had in little more than a year become \$62.90 we are not informed. Within a few days after this last transaction, John Smith, one of the defendants, then a minor, called on the sheriff in regard to the property, and took further action, of which he gives the following account, to wit:

"He [the sheriff] said he had seen Mr. Haspel in town a couple of days before and he [Mr. Haspel] had received a letter from Antoine Jones [the boys' undertutor] for him to pay the taxes on the property, because Antoine Jones had a \$150 mortgage on the property. So I goes down to see Antoine Jones and asked what about the taxes, and he told me I had to go to see Mr. Haspel. I went to town, me and my brother, Toney, went to town, and I saw Mr. Haspel about the taxes, and Mr. Haspel told us that the property belonged to him, and that he had paid five years' taxes on it. Mr. Haspel, or this gentleman [witness pointing to Mr. Davis, who is in the courtroom], Mr. Isaac Haspel. I told him that the property belonged to my father, and so he kept talking about it, and he said the taxes had amounted to \$200, and he said it was no use to go to law about the property because the property belonged to him, and the only way for us to save the property was to pay him down \$100. Q. Did you pay him any money? A. Yes, sir. Q. How much did you pay him? A. \$60, the first payment. * * * Q. Did you ever pay him anything else? A. I think, in August, I paid him \$40. * * * Q. Did you ever pay him anything else? A. Toney went the last time, and paid him \$40. Tony said he paid him in cash. I was not there. Q. Did you ever pay him in any other way? A. We shipped him eight or nine barrels of rice."

When Mr. Davis (whom the witness in thus testifying had mistaken for Haspel) was being examined on behalf of his firm, he was asked:

"Q. Do you remember meeting Mr. Tibaut [the sheriff] on the street, in the city of New Orleans, a few days before you purchased this property, and you telling him to send you a statement of how much was due on that property, as you proposed to pay it for Antoine Jones?"

This question was objected to (as were all similar questions) by counsel for the plaintiff, on the ground that parol evidence was inadmissible to prove agency affecting the title to real estate, and counsel for interveners joined in the objection, which was sustained by the court. Subsequently, however, the objections of the interveners were withdrawn, and such testimony was admitted, as against the interveners, but not as against the plaintiff. And under this ruling there was introduced a letter from the tax collector to Louisa Smith, of date June 13, 1896, in which the writer regrets that he is unable to give further time (in the matter of the redemption of the property) on payment of \$20 in cash, and informs Louisa Smith that the property belongs to his son, who is demanding the full amount, \$60.50. He also informs her that Davis had told him a few days before, in New Orleans, to let him know the amount required, and that he would pay it for Antoine Jones; that he (Tibaut) had sent a statement of the amount to Davis, and was every day expecting the money; and that the only thing for her (Louisa Smith) to do was to pay Huntington the full amount before the 18th of the month. The witness (Davis), being still on the stand, was then asked with whom he had bargained for the property, and how he knew that Huntington had it for sale, and his cross-examination proceeds as follows:

"A. How did I know? Q. Yes? A. Why, the undertutor of the minors, Antoine Jones, wrote me about it—wrote me or told me—that these people were unable to pay their taxes, and that the property had been sold, and that if Haspel & Davis would buy this property from Huntington it would be a favor to him, in this way; that if the said Smith could not redeem the property at the end of the year, that the estate owed him \$150. Q. [Interrupting] That is Antoine Jones you are speaking of? A. Yes, and not being able to get the money out of the estate, he owing Haspel & Davis money, thought we ought to assist him in that way; and if the property was left to us after the expiration of the year, that we ought to try and hold him, and get this property at this nominal sum, to assist and give him credit for that \$150; but there was no understanding, there was no understanding at all; he merely asked us to buy it as a stranger had a right to buy it. Q. Now, Mr. Davis what became of that letter? A. I don't know whether it was a letter from Antoine Jones or whether he told it to me, personally. He has been doing business with Haspel & Davis for years. He is a colored man; but I must say he is a very honest colored man. I purchased this property because it was worth the money to us and if he had not told me, perhaps I never would have purchased it. He merely called my attention to it. He would rather have seen me get it than a stranger, as it was to his interest. * * * Q. As I understand it Mr. Davis, Antoine Jones owed you some money; is that it, at the time you purchased this property? A. I believe he did? Q. Now, didn't you state so just now? A. I believe he did. Q. He

owed you some money? A. Now, I don't remember whether he asked me to credit his account or give him the money. I believe he owed us money and asked us to credit his account. * * * Q. And you considered that they [the Smiths] were entitled to redeem it at the end of the year? A. They had not only the right to redeem it from me but from the original purchaser."

Somewhat later the witness was asked whether the Smiths had made any demand for the transfer of the property, to which he replied:

"They did not, at that time, or at any other time. They never made any such demand of Haspel & Davis. The fact is, they knew better. They knew that we had bought this property; that we owned it; that we leased it to them, thinking they would try to rebuy it from us."

Cross-examination:

"Q. Did you ever see Louisa Smith? A. Never. Q. Now, how do you know what she knew. You said she knew, how do you know that she knew that you had bought it? A. From the simple fact that the tutor and her friend knew. Q. The tutor and your friend to whom you had given the \$150 to defraud them out of their property? A. He did not defraud them. Q. When you gave him the \$150, didn't you defraud them? A. No, sir. Q. Was it a legitimate transaction, Mr. Davis? A. Of course it was legitimate. The time to redeem the property had run out, and Mr. Huntington could have kept it. They had no more title to it, and I, wishing to help Antoine Jones to get his money, bought the property."

The witness undertakes to make it appear that Haspel & Davis have in some way (he is unable to remember how) made good to Antoine Jones the debt of \$150 said to be due him by the estate of Smith, and, in testifying as to the amount which the property in question has cost his firm, he includes the \$150 thus mentioned, with interest at 8 per cent., from a remote date, and produces an unsecured note, purporting to have been
her
signed by Louisa X Smith, dated January 4,

mark

1893, and payable to the order of Antoine Jones, but without his indorsement. All that the witness knows about the alleged debt to Jones is that the latter told him that it was due by the estate of Smith, together with the existence of the note, the mark attached to which he says he witnessed, though, as will be observed, he also testifies that he never saw Louisa Smith. There is testimony going to show that at some time, the date not being fixed, Haspel & Davis executed a written instrument in the shape of an option, consenting that the Smiths should redeem, or purchase, the property from them for \$500, but the instrument has been lost, and we are unable to arrive at any definite opinion in regard to it. It is admitted that after the execution of the quitclaim from Huntington to Haspel & Davis, the Smiths paid the latter \$135, on account of this property; the contention of Haspel & Davis being, that the payments were made in an effort to buy the property back, at \$500, whilst John Smith, the minor

with whom Haspel & Davis appear to have dealt, testifies that the payments were made under an agreement that Haspel & Davis were to let go the property when they were paid \$100.

When the defendants undertook to prove that the taxes of 1893 had been paid before the sale, there was objection from plaintiff (and interveners as well) on the ground that, by alleging that Haspel & Davis had intended to buy the property for Jones, the undertutor of the minors, and for them, they had estopped themselves to attack the validity of the sale, but the objection was overruled, and the proof, as admitted, shows conclusively that the tax was paid on June 18, 1894, and that the credit was duly entered in the book which the law (Act No. 85 of 1888, p. 139, §§ 85, 86) requires the sheriff and tax collector to keep for that purpose. In February, 1902, Haspel & Davis sold the property to the plaintiff, Doullut, who found the defendants in possession. His attempts, as a witness in this case, to show that they recognized him as the owner, are wholly ineffectual. What he has succeeded in showing is that he built a fence on the property, and that the Smiths cut or removed it, and reasserted their possession; that he then began a prosecution against Tony Smith for trespass, but abandoned it, and, in his capacity as president of the Bayou Cook Navigation & Fisheries Company, Limited (a concern which was engaged in business on the property adjoining), brought suit to expropriate this property, in which suit he was defeated on grounds relating to the legality of the organization of his company (Bayou Cook Navigation & Fisheries Co., Ltd. v. Doullut et al., 111 La. 517, 35 South. 729), and that it was not until March 14, 1903, more than a year after his purchase, that, in the proceeding now before the court, he caused the writ to issue under which the defendants were evicted. It will be seen from the foregoing that the propositions upon which the plaintiff and interveners rely are: (1) That defendants should not be permitted to prove their allegation with reference to the intention of Jones, or of Haspel & Davis, to redeem the property for their account, because that would be to allow them to defeat, and to establish, title to real estate by parol evidence; and (2) that they are estopped to prove that the tax sale by which their own, registered title is said to have been divested was an absolute nullity, because of the inconsistency of that position with the allegation above mentioned; whereby they, in effect (it is said), admit the validity of the tax title. It will also be seen that the result of the maintenance of the propositions thus stated will be the absolute suppression of the truth, and the wresting from defendants of property of which they have never been legally divested, for no better reason than that, in their efforts to defend themselves, they have made allegations both of

which may be true, in point of fact, but which are thought to be inconsistent with each other, as a matter of pleading.

If it should be conceded that the allegations in question are inconsistent, nevertheless, there is nothing immoral in the inconsistency, and no injury to any human being has resulted, or can result, therefrom, unless it be held that, thereby, and for no other reason, the defendants must lose their property. We very much doubt, however, whether even the most liberal regard for the doctrine of estoppel requires such a subversion of the plainest principles of justice. That doctrine, whilst said by Lord Coke to be odious, because used to suppress the truth, is considered by more modern authorities a salutary one, odious only "when applied without the support of sound legal principles. It has, however," say the same authorities, "been guarded with great strictness, not because the party enforcing it, necessarily, wishes to exclude the truth, but because the estoppel may exclude the truth." 11 A. & E. Ency. of Law (2d Ed.) p. 388.

It has been said by this court that:

"Estoppel is not favored in law, and should not be permitted except in clear cases to defeat the object of the administration of justice, which is to discover and apply the truth," and that, "in order to justify the application of this plea, it must be certain to every intent and is not to be sustained on argument or by inference." *Hornor v. McDonald*, 52 La. Ann. 896, 27 South. 91 (citing *Bigelow on Estoppel*).

That mere inconsistency in pleading does not estop is included in the rule that one is not estopped by allegations unsuccessfully pleaded. Thus it has been held that one who is defeated in an attempt to recover property alleged to have been conveyed or covered by a simulated title, is not estopped thereafter, to sue for the price upon the basis of a bona fide conveyance (*Goodwin v. Neustadt*, 47 La. Ann. 851, 17 South. 471); that defendant who sets up that his title is not valid, when sued for the price, is not estopped to defend his title, when sued for the land (*Morgan v. Kinnard*, 23 La. Ann. 645); that a bankrupt is not estopped to plead the nullity of a judgment because he has placed it on his schedule in the descriptive list of claims against him (*King v. Pickett*, 32 La. Ann. 1006). It is true that those were cases in which the inconsistent pleas were set up in different suits, but the principle involved is that where a litigant is entitled to recover in one of two positions, which conflict, he does not, by losing in the one position, estop himself from recovering in the other, merely because it conflicts with the position originally taken, and where it is the plaintiff who brings inconsistent demands, the only penalty is the dismissal of one of them; though it has been held that:

"Where all the promises and contracts are set out in the pleadings, if any one will authorize judgment, the court should render it. Irrelevant or useless matter does not vitiate the good." *Rawle v. Skipwith*, 19 La. 207.

If the allegations of the defendants which are thought to estop them were susceptible of no other construction than that which has been accepted by our learned brothers of the Court of Appeal, they are, at worst, merely inconsistent, and, at best, useless and irrelevant, since there is no allegation of a counterletter, and no attempt to establish title by means of interrogatories on facts and articles; and they, therefore, establish no basis for the defeat of plaintiff's title even if the facts alleged could have been sustained by proof. We think, however, that those allegations may be otherwise construed. The plaintiff sets up title through *Haspel & Davis*, who acquired from the adjudicatee at the tax sale. The defendants deny the allegations of the petition, save as specially admitted, and set up a title derived from *James Smith*, coupled with uninterrupted possession for many years. They aver the nullity of the tax sale, and allege that it conferred no title upon "the purchasers or any other person." They aver that the alleged transfer by the adjudicatee to *Haspel & Davis* was void and of no effect (1) because not acknowledged or authenticated; (2) because *Haspel & Davis*, being a commercial firm, could not acquire real estate; (3) because the instrument of transfer is not accepted by the transferee; (4) because there was no delivery, or taking possession; (5) because said instrument does not purport to be a sale. They, then, aver:

"That the amount advanced by said firm of *Haspel & Davis* and paid over to *Harry C. Huntington*, being the amount by him paid at tax sale of the property and costs and penalties added, was at the time intended as a redemption of the property by *Haspel & Davis* for the account of one *Antoine Jones*, the undertutor of the minor children of *James Smith*, who intended to redeem the same; the said *Haspel & Davis* purchasing as agent, and for the benefit, of the said minors and your respondents, and that the said amount has been refunded to *Haspel & Davis* by your respondents."

The main defense with which the answer begins, therefore, is that the tax was void "and conferred no title on the purchasers or any person." Then follows the averment that the alleged conveyance from the adjudicatee to *Haspel & Davis* was void, for reasons entirely apart from the want of title in the adjudicatee; a fact which had already been alleged. And then follows the allegation that the alleged transfer by the adjudicatee to *Haspel & Davis* conferred no title, for the further reason that it was "intended" as a redemption of the property by *Haspel & Davis* on behalf of *Jones*, the undertutor, and of the defendants. But as defendants had already alleged that their title had not been divested at the tax sale, the allegation that *Haspel & Davis* and *Jones* intended to redeem does not amount to an allegation that they did redeem or could have redeemed property which was no more subject to redemption than if the tax collector had never attempted to sell it. The allegation in question was made by defendants, as we take it, merely by way of

showing, as additional aggravation resulting from plaintiff's attack on their title, that under no circumstances could it be said that plaintiff's authors (Haspel & Davis) had ever acquired any title to the property which they undertook to sell; first, and fundamentally because the tax sale to the adjudicatee (their alleged author) was void; second, because the alleged transfer from the adjudicatee to them was void by reason of nullities of its own; third, because, even granting that the adjudicatee had acquired a title, and granting that the land, having been legally sold for taxes, was subject to redemption, it was the intention to redeem it for account of the minors and the defendants. There is, therefore, in our opinion, no such inconsistency between the allegations of the defendants' answer as to have estopped them to prove the nullity of the tax sale, and the evidence on that subject was properly admitted.

Interveners attempted to show that defendants had acknowledged their ownership of the land in question by renting from them, or by agreeing to purchase, and are precluded by another species of estoppel; but, as is patent from what has been said as to the contents of the record, the attempt has been unsuccessful. People who are kept in ignorance of their rights are not readily estopped by admissions in cases of this character. "It may be laid down as a general rule," says a well-recognized writer, "that where an irregularity of such a character as to effect the power of the officer to sell, takes place in any part of the proceedings, and the owner of the land, being aware of the fact, is silent, and takes no steps to prevent the sale, but permits it to proceed, or, even actually consents to waive the irregularity, a sale under such circumstances will not be recognized in a court of law. The officer derives his authority from the law, and not from the consent of the owner. He must obey the law, and not the order of a private individual. When he keeps within the pale of his authority, minor irregularities may be cured or waived by the party in interest, without injuring the official character and validity of the proceedings; but the authority itself or any substantial link in the series of acts which are necessary to establish the existence of the power, cannot be supplied or enlarged so as to give official character and validity to acts not authorized or sanctioned by the plain provisions of the statute." Blackwell on Tax Titles (4th Ed.) p. 513.

It only remains to be said that the sale of the property for taxes, part of which had been paid, was void, and that such a sale is not protected by the prescription of three years established by the Constitution. *Rougélot v. Quick*, 34 La. Ann. 123; *Lefebvre v. Negrotto*, 44 La. Ann. 792, 11 South. 91; Const. art. 233.

It is therefore ordered, adjudged, and de-

creed that the judgment of the Court of Appeal, which has been made the subject of review, be annulled, avoided, and reversed, and that the judgment herein rendered by the district court be now affirmed, at the cost of the appellants. It is further adjudged and decreed that said appellants pay the cost of this application.

PROVOSTY, J., dissents, and hands down dissenting opinion.

PROVOSTY, J. (dissenting). As the defendant was in possession, the constitutional prescription of three years does not apply, and therefore I concur in the decree; but I dissent from the conclusion that the prescription is rendered inapplicable by the fact that the taxes of one of the years for whose taxes the sale was made had been paid.

The language of the Constitution is that:

"No sale of property for taxes shall be set aside for any cause, except on proof of dual assessment, or of payment of the taxes for which the property was sold prior to the date of the sale."

Payment of "the taxes" does not mean payment of part of the taxes, but of the whole of them.

I believe it is well known that the purpose of this provision was to do by constitutional provision what the Legislature had theretofore undertaken to do by the various curative statutes which had theretofore been passed, but to which this court had found itself compelled to deny full operation because of constitutional limitations, and that the purpose was to make the provision as drastic as could possibly be done. If so, I do not see why it should not cure the defect resulting from part of the taxes having been paid; which is a defect far less serious than the want of notice or of an assessment in the name of the owner, both of which are admittedly cured. Such a case as is here presented comes within the express terms of Curative Act No. 82, p. 104, of 1884.

If the assessment has been regular, and due notice has been given, and part of the tax is due, the officer has full authority to make the sale, and there is no reason why the constitutional prescription should not apply. The two exceptions of dual assessments and prior payment of the tax provide for cases where, there being no tax due, the officer is without authority to proceed; and where, as a consequence, the sale is a mere and absolute nullity.

CENTRAL OF GEORGIA RY. CO. v. KEY-TON.

(Supreme Court of Alabama. June 30, 1906.)

1. WATERS AND WATER COURSES—SURFACE WATER—RIGHTS OF ADJOINING PROPRIETORS.

An owner of higher land is entitled to the uninterrupted flowage of water caused by rainfall, so that the proprietor of the lower land

has no right to make embankments whereby the flowage may be averted and accumulated on the land of his neighbor.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 128.]

2. SAME—RAILROADS—EMBANKMENTS—CULVERTS.

Where, for the purpose of constructing a railroad, it becomes necessary to erect an embankment, a proper culvert must be provided, with ample capacity to carry off the flow of water and of such capacity as to protect the upper land against all water likely to be thereon, except flowage caused by an extraordinary and excessive rainfall.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 128.]

3. SAME—CONSTRUCTION BY RAILROAD COMPANY.

Where a sewer, under a railroad company's embankment, was insufficient to carry off the water likely to be in it, so that the water on account of such insufficiency would dam up and spread dangerously from its natural course, and the railroad company with knowledge of such condition maintained it, it was immaterial to the railroad's liability that it did not construct the sewer.

4. SAME—PLEADING—DIVERSION.

Where, in an action against a railroad company by an adjoining landowner for damages caused by the alleged insufficiency of a sewer under its embankments, the complaint alleged that by reason of the insufficiency of the sewer to receive and carry it away the water arose in the open ditch and overflowed plaintiff's lot, the complaint sufficiently charged that the water was diverted from its natural course.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 139.]

5. PLEADING—DAMAGES—DEMURRER.

An improper claim of damages in a complaint cannot be reached by demurrer.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 439.]

6. RAILROADS—DEFECTIVE CULVERTS—INJURIES TO PROPERTY—ACTION—PLEAS.

In an action against a railroad for damages caused by the overflow of land resulting from a defective culvert, defendant pleaded that there was a ditch along the railroad, and between it and plaintiff's property, which carried off the water which accumulated during rainfalls, and that where such ditch crossed a certain street defendant put in a system of sewage to receive and carry off the water which accumulated in and came down the ditch; that the sewer was amply sufficient to carry off such water on the day of the alleged injury, but the water which accumulated in the ditch and of which plaintiff complained accumulated from the streets of the town, etc., and debris placed in the streets by other persons than defendant, which filled up the ditch and caused the water to back up over plaintiff's property. *Held*, that such plea was objectionable for failure to show that the ditch was not the usual outlet for water which accumulated on the streets of the town, and in failing to show that the sewer was of sufficient capacity to carry off the water naturally flowing into the ditch from such streets.

7. SAME.

In an action for damages from water flowing over plaintiff's land, through the alleged insufficiency of defendant's culverts, defendant pleaded that there was a ditch between its railroad and plaintiff's property which carried off the water that accumulated in that vicinity, that defendant had put in a system of sewage to carry off all the water which by natural flow would accumulate and go into the ditch, but that before the date of the injury the town diverted a large quantity of water from its

natural flow into the ditch, and by reason of such diversion more water accumulated in the ditch than the sewer was capable of receiving and carrying away, which was alone the cause of the injury complained of. *Held*, that such plea was demurrable for failure to show that defendant, acting with reasonable diligence, had not a sufficient opportunity to enlarge the sewer to receive the additional water so turned into it.

8. SAME—DAMAGES—EVIDENCE.

In an action against a railroad company for injuries to plaintiff's property by the overflow of defendant's drain, caused by the alleged insufficiency of its culvert, evidence that after the water subsided a stench was left in plaintiff's houses, which were inundated, was admissible as showing a diminution of the rental value of the property.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 140.]

9. EVIDENCE—OPINION OF WITNESS—CONCLUSION.

In an action for damages to plaintiff's property by the overflow of a drain, a question asked plaintiff as a witness to state the effect of the overflow on plaintiff's houses and lots was not objectionable as calling for the opinion or conclusion of the witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2150, 2151.]

10. SAME.

In an action for injuries to plaintiff's property by the overflow of a drain, evidence that the effect of the overflow was to damage plaintiff's property a very great deal was objectionable as an opinion of the witness and as invading the province of the jury.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2150, 2151, 2187.]

11. SAME.

A question asked plaintiff, "State if your property was damaged by the overflow" of certain water, was improperly allowed as calling for the witness' conclusion.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2150, 2151.]

12. WATERS AND WATER COURSES—SURFACE WATERS—OBSTRUCTION—RAILROADS—INSUFFICIENT CULVERT—DAMAGES—EVIDENCE.

In an action against a railroad company for damages caused by the overflow of a drain, plaintiff could not recover for damages caused by other overflows than the one pleaded in the complaint, and hence evidence as to the extent of other rainfalls was inadmissible.

13. EVIDENCE—CONCLUSIONS.

In an action for damages to plaintiff's property by the overflow of a railroad drain, questions asked of plaintiff as to whether the overflow necessitated any repairs and whether it affected the property "as tenant property" was objectionable as calling for the conclusion of the witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2150, 2151.]

14. SAME—OTHER SIMILAR ACTS.

In an action for damages by the overflow of defendant's railroad drain, evidence of other overflows before the suit was brought, but after defendant began to maintain the drain, was competent to prove the consequences of the overflow or backing of the water under similar circumstances.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 410.]

15. DAMAGES—ASSESSMENT—EVIDENCE—MARKET VALUE.

In an action for damages caused by the overflow of a railroad drain, evidence of the rental value and of the market value of the

property just prior to the overflow was admissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 484.]

16. WATERS AND WATER COURSES — SURFACE WATERS — OBSTRUCTION — RAILROAD CULVERTS — INSUFFICIENCY — PUNITIVE DAMAGES.

Where, in an action against a railroad company for the overflow of a drain, there was evidence justifying a finding that defendants were guilty of gross negligence or wantonness in maintaining the drain, etc., if the jury so found they were entitled to award plaintiff punitive damages.

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

"Not officially reported."

Action by J. T. Keyton against the Central of Georgia Railway Company. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

This was an action by appellee against appellant for damages accruing to appellee's realty by reason of an overflow of the same, alleged to have been caused by the insufficiency of a sewer or culvert maintained by appellant under its railroad embankment to carry off the accumulation of rainfall. There were two counts in the complaint; the first averring simple negligence on part of defendant in maintaining a sewer insufficient to carry off the water accumulating on a certain side of its railroad embankment, and having an outlet only through said sewer, by reason of which the water rose in an open ditch, and overflowed plaintiff's lots, and rose several inches above the floor of the buildings thereon. Count 2 was practically the same as 1, only it counted on willfulness or wantonness. Demurrers were interposed to these counts, raising the question of proper allegation of duty on the part of defendant to maintain a sewer sufficiently large to carry off the water accumulating at that point; that the count failed to allege that the water which caused the injury was diverted from its natural flow or course and turned into the ditch and sewer by reason of the construction or operation of the railroad described therein; that it failed to allege or show that the ditch or sewer described therein was made or cut by reason of the construction or operation of the railroad; that it fails to show that the defendant at the time of the alleged injury was negligently maintaining, or was unlawfully maintaining, the ditch or sewer described, and on other grounds not necessary to be set out. These demurrers were overruled and the defendant filed the following pleas: (1) The general issue. (2) "For further answer to said complaint the defendant says that it did, on the date mentioned therein, operate and control a railroad that adjoined plaintiff's property, and that there was a ditch along the railroad, and between the railroad and plaintiff's property, which carried off the water which accumulated during rainfalls, and that where said ditch crossed

St. Andrews street the defendant put in a system of sewerage to receive and carry off the water that accumulated in and came down said ditch; that said sewer was amply sufficient to carry off the water that would accumulate and come down said ditch that emptied into said sewer on the date of the alleged injury, and that said sewer was kept open by the defendant, but the water which accumulated in said ditch on said date, and of which plaintiff complains, accumulated from the streets of the town and drifted trash and rubbish, which were thrown or placed in said street by other persons, other than defendant, over which defendant had no control, into the mouth of said sewer, which caused it to fill up, thereby causing the water to back up and overflow plaintiff's property. (3) For further answer to said complaint, defendant says that it did operate a railroad on the date of the alleged injury, which adjoined plaintiff's property, and that there was a ditch between the railroad and plaintiff's property, which carried off the water that accumulated in that vicinity, and that where said ditch crosses St. Andrews street defendant put in a system of sewerage to receive and carry off all water which by natural flow or drainage would accumulate and go into said ditch, but that before the date of the alleged injury the town of Dothan diverted a large quantity of water from its natural flow, and turned the same into the ditch between the railroad and plaintiff's property, and that by reason of the diversion of said water by said town from its natural flow more water accumulated in said ditch than said sewer was capable of receiving and carrying away, and it was alone the cause of the diversion of the water by said town from its natural flow into said ditch that caused the water to back up and overflow plaintiff's property and inflict the damages complained of." Demurrers were interposed and sustained to these pleas on the ground that the plea sought to raise as a defense to the action an immaterial issue, in that the water came from the streets of Dothan, and fails to allege that the defendant's sewer was sufficient to carry it off without injury to plaintiff, or that said sewer was so constructed as to prevent the accumulation of drift, trash, or rubbish in it, and said pleas admit a servitude upon its said property in the town of Dothan, but fails to aver that it adopted proper and necessary measures, or did anything to take care of water accumulating upon its said property by reason of said servitude, so as to discharge the same without injury to plaintiff; because said plea does not negative the negligence charged in the complaint, and avers no fact which shows nonliability of defendant for the injury complained of. The facts are sufficiently set out in the opinion. It is deemed unnecessary to set out the charges, as they are all referable to the pleas to which demurrers were sustained,

except those of an affirmative nature. There was judgment for plaintiff, and defendant appeals.

Espy & Farmer, for appellant. A. E. Pace and R. H. Walker, for appellee.

DENSON, J. This action was commenced on the 16th day of September, 1904, by J. T. Keyton against the Central of Georgia Railway Company. From a judgment against the defendant, it appealed.

It is sought by the action to recover of the defendant damages to two houses owned by plaintiff, which damages were caused by an overflow of rainwater. The complaint shows that the houses were located in Dothan, Ala., on a lot bounded on the east by St. Andrews street, and being adjacent or near to the right of way of a railroad operated by the defendant; that along and on said right of way, adjacent or near to plaintiff's lots, is an open ditch, connecting at the point where the railroad track crosses St. Andrews street, with an underground brick sewer, which said ditch and sewer, it is averred, are maintained by the defendant for the purpose of receiving and carrying off water in times of rain. It is averred that the sewer is wholly insufficient for carrying off the water in times of heavy rainfall, and that on the 15th day of August, 1904, the water from a heavy rainfall accumulated in said ditch by reason of the insufficiency of said sewer to receive and carry it away, and overflowed plaintiff's lots, rising up several inches on the floors of his houses. It is averred that the defendant was guilty of negligence in maintaining the sewer of dimensions insufficient to receive and carry off the water in time of heavy rainfall, and by reason of such negligence plaintiff suffered the damages to his property as averred.

It will be observed that the complaint contains no averment that the ditch and sewer were constructed by the defendant. For lack of such averment the defendant demurred. "The prevailing doctrine in this country seems to be that the owner of the upper land has a right to the uninterrupted flowage of water caused by falling rain, and that the proprietor of the lower land, to which the water naturally descends, has no right to make embankments whereby the current may be averted and accumulated on the property of his neighbor. So if, for the purpose of constructing a railroad, or for any other purpose, it becomes necessary to erect an embankment, a proper outlet or culvert must be provided, of ample capacity to carry off the flow of water, so that it may not be obstructed and thus accumulated on the upper and adjacent lands of others; for, as regards coterminous estates, no one can legally assume the right to alter the condition of things so as injuriously to affect pre-existing rights of his neighbor. The outlet must, therefore, be carefully and skillfully constructed, so that

no damage may result to contiguous property. The rule is that the outlet must be of ample capacity to carry off all the water likely to be in it. The rule, of course, is not applicable to extraordinary and excessive rainfall, which is held to be vis major. With this exception in relation to extraordinary floods, the rule is as already stated." Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Savannah, American & Montgomery Ry. v. Buford, 108 Ala. 303, 17 South. 336; A. G. S. R. Co. v. Shahan, 116 Ala. 302, 22 South. 509; Shahan v. A. G. S. R. Co., 115 Ala. 181, 22 South. 449, 67 Am. St. Rep. 20; Sou. Ry. Co. v. Plott, 131 Ala. 312, 31 South. 33; Ohio & Miss. Ry. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279, 5 Am. St. Rep. 532; Philadelphia, Wilmington & Baltimore R. Co. v. Davis, 68 Md. 281, 11 Atl. 822, 6 Am. St. Rep. 440; Sullens v. Chicago, Rock Island & Pac. Ry. Co., 74 Iowa, 639, 38 N. W. 545, 7 Am. St. Rep. 501; Harrison v. Great Northern Ry. Co., 3 Hurt. & C. 236.

Whether or not the defendant constructed the ditch and sewer would make no difference with respect to plaintiff's rights and defendant's liability, if the sewer was insufficient to carry off the water likely to be in it, so that the water on account of such insufficiency would dam up and spread dangerously from its natural course, and defendant with knowledge of its harmful character maintained it. This principle was expressly recognized by us in the case of Southern Ry. Co. v. Plott, 131 Ala. 312, 31 South. 33.

With respect to the insistence that it is not shown by the complaint that the water was diverted from its natural course, we think the averments of the complaint answer the insistence. It is averred that "by reason of the insufficiency of the sewer to receive and carry it away the water rose in said open ditch and overflowed plaintiff's lot."

If there was an improper claim of damages in the complaint, this could not be reached by demurrer. The complaint was not subject to the demurrer made to it, and the court properly overruled the demurrer.

The demurrer to pleas 2 and 3 was properly sustained. The second plea falls short of showing that the ditch was not the usual outlet for the water that accumulated on the streets of Dothan, and in this respect, taking the intendments most strongly against the pleader, it fails to show that the sewer was of sufficient capacity to carry off the water that would naturally flow into the ditch from the streets of Dothan. So it may be said of the plea that, while it undertakes to set up the acts of others over which it avers defendant had no control, it fails to show that defendant's own negligence did not contribute proximately to the injury complained of. Shahan v. Ala. Gr. Sou. R. Co.,

115 Ala. 181, on p. 193, 22 South. 449, 67 Am. St. Rep. 20.

Plea 3 is defective in several respects pointed out by the demurrer. We will notice only one or two. It is a plea to the entire complaint. It is alleged in the second count that defendant "had noticed that plaintiff's property was adjacent or near to said ditch, and knew that the probable result of said insufficient sewer would be the overflow and consequent damage of plaintiff's property." It is averred in the plea that before the "date of the alleged injury the town of Dothan diverted a large quantity of water from its natural flow and turned the same into the ditch between the railroad and plaintiff's property." It does not appear from the plea that the water was not rightfully diverted. If the volume of water was increased, it was the duty of the defendant in maintaining its sewer, if it proved too small, to increase its capacity to properly guard against probable injury to adjacent property. At what particular time the diversion of the water by the town of Dothan occurred is not made to appear by the plea. It may have been a sufficient length of time to have afforded defendant, acting with reasonable diligence, opportunity to enlarge the sewer. This is a reasonable construction of the plea, when read in connection with the second count of the complaint. So, without noticing other defects, we conclude the demurrer to the third plea was well sustained.

This brings us to consideration of the questions presented by the bill of exceptions. The evidence for plaintiff tended to show that his houses mentioned in the complaint were located as there alleged; that on the 15th of August, 1904, his lot overflowed, and the water backed over the lots and rose in the houses on the lots over the floors to a depth of six or eight inches; that he did not live in the houses, but had them rented to tenants. The evidence further tended to support plaintiff's case as made by the complaint. The plaintiff testified, among other things, that there were closets on the ditch; that on the day of the overflow the water stood on his lot from 1½ to 3 hours; and that when the water receded a stench was left in the houses. The bill of exceptions recites that the answer, "A stench was left in his houses," was given as answer to a question propounded by plaintiff's counsel, "State the condition of the houses after the rain." We can see no legitimate objection to the answer. It was entirely competent to prove the condition of the property after the overflow, and it was open to the jury to say whether or not the stench was a result of the rain or the overflow; also it might be a matter to be considered in fixing the damages. Any proximate result of the overflow that would tend to make the houses less desirable as tenant houses—as places for habitation—would depreciate their rental value, and diminution in rental value is an ele-

ment of damages in such cases. *Tenn. Coal Co. v. Hamilton*, 100 Ala. 252, 14 South. 167, 46 Am. St. Rep. 48; *Rouse v. Martin*, 75 Ala. 515, 51 Am. Rep. 463; *Hundley v. Harrison*, 123 Ala. 292, 26 South. 294.

The plaintiff as a witness was asked by his counsel to "state to the jury the effect of the overflow on your houses and lot." We think this was a proper question. It did not necessarily call for an opinion of the witness, and it was the right of the plaintiff to prove all actual damage he knew he had sustained as a proximate result of the overflow, and as a predicate for this he could prove the condition the water left his premises in, and this would have been responsive to the question. The defendant could protect himself from any illegal evidence given by the answer by proper motion to exclude. *O'Grady v. Julian*, 34 Ala. 88. Answering the question the plaintiff stated: "The effect of the overflow on my property was to damage it a very great deal." The answer, we are constrained to hold, should have been excluded on the motion made by the defendant. It was not only the mere expression of an opinion by the witness, but it invaded the province of the jury. Whether or not the property was damaged was one of the questions of fact to be determined by the jury. *Hames v. Brownlee*, 63 Ala. 277; *Young v. Cureton*, 87 Ala. 727, 6 South. 352.

For the same reason the question to the plaintiff, "State if your property was damaged by the overflow," and the answer thereto, were improperly allowed. The plaintiff testified that he could not tell the extent of the damage of the rainfall of August 15, 1904, but that rainfall, together with others prior thereto, had reduced the rental value of his property \$2½ per month. Damages caused by other overflows than the one named in the complaint were not recoverable in this action; hence proof of such damages should not have been allowed. The witness should not have been allowed to take into consideration damages caused by other floods. *A. G. S. R. Co. v. Shahan*, 116 Ala. 302, 22 South. 509.

The questions: "Did the overflow necessitate any repairs? And "Did the overflow affect the property as tenant property?" would seem to fall in the same category with the question, "State if your property was damaged by the overflow." *Hames v. Brownlee* and *Young v. Cureton*, supra. By following the rule laid down in *Hames v. Brownlee* with respect to the manner of proving damages, the plaintiff may avoid error on another trial. While damages caused by overflow other than the one complained of in the complaint are not recoverable in this action, yet evidence of other overflows before the suit was commenced, but after the defendant began the maintenance of the sewer, was competent as affording the jury information of the consequences of the overflow or backing of the water under similar circumstances. *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec.

758; *Polly v. McCall*, 37 Ala. 20; *Central of Ga. Ry. Co. v. Windham*, 126 Ala. 552, 28 South. 392. This evidence was also competent as tending to show the defendant had knowledge of the condition of the sewer. *Central of Ga. Ry. Co. v. Windham*, *supra*.

In estimating actual damages in the case, diminution in rental value and market value, while they may not be the sole criterion, are elements to be taken into consideration; hence evidence of the rental value and market value of the property just prior to the overflow was competent, and the court erred in declining to allow the defendant to show the market value.

We are unable to see the relevancy of the fact, sought to be proved by the defendant, that the sewer on Main street had never clogged or overflowed. It was open to the jury on the evidence to say whether or not the defendant was guilty of gross negligence or wantonness in maintaining the sewer. If it was, and the jury should so find, punitive damages might be awarded by them. *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *S. & N. Ala. R. Co. v. McLendon*, 63 Ala. 266; *Birmingham Ry. & Elec. Co. v. Bowers*, 110 Ala. 328, 20 South. 345; *Cent. of Ga. Ry. Co. v. Windham*, 126 Ala. 552, 28 South. 392. It follows that charges 1, 2, 3, 4, 5, 6, 7, 12, and 13 were properly refused. Each of them excluded any recovery of punitive damages.

Charges 8, 9, 10, and 11 were general affirmative charges for the defendant. There was evidence tending to support plaintiff's case, and these charges were properly refused.

For the errors pointed out, the judgment appealed from is reversed, and the cause will be remanded.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL, and DENSON, JJ., concur.

PARKER et al. v. BLOUNT COUNTY.

(Supreme Court of Alabama. June 30, 1906.)

1. FIXTURES—IRON SAFE.

The commissioners' court of B. county purchased a safe and placed the same in the courthouse. Because of its great weight the commissioners had a foundation of stone and cement built from the ground to the floor level to support the safe, and when the foundation was finished the safe was rolled on and supported by the foundation, but was not attached to it in any manner. The door of the room in which the safe was placed being too small to admit it, it was necessary to take out a part of the wall of the room, and it could only be removed in a similar manner. On a sale of the courthouse the commissioners reserved the safe. *Held*, that the safe was not so attached to the realty as to be a fixture.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, § 10.]

2. SAME—AGREEMENTS.

The owner of a safe located in a building and the purchaser of the realty may agree that the safe is a chattel, subject to be removed from

the building, regardless of the manner in which it is affixed thereto.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fixtures, § 5.]

Appeal from Circuit Court, Blount County; W. W. Haralson, Judge.

"To be officially reported."

Action by Blount county against George H. Parker, as trustee, etc., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Ward & Weaver, for appellants. Emery C. Hall, for appellees.

HARALSON, J. Detinue for an iron safe. The commissioners' court of Blount county owned the old building used for the courthouse. Such building is no longer used for such purposes. They purchased the safe in 1896, and placed the same in said courthouse for the purpose of keeping in it the records of the court. It was very heavy and was moved on rollers attached to the safe. The commissioners had a foundation of stone and cement built from the ground to the level of the floor of the house, for the purpose of securing and supporting the safe; and when said foundation was finished, the safe was rolled on and supported by this foundation, but was not attached in any manner to it. The door of the room in which the safe was placed was too small to admit it, and it became necessary to take out a part of the wall of the room, large enough for the safe to enter, and be rolled on to its brick and cement foundation, and it could only be removed in some such way.

It was shown, that the courthouse lot was sold by the county to R. F. Wyatt, who testified, that when he purchased the old courthouse, the safe was not sold with it, and he did not purchase the same, nor did he sell it to W. F. Harrell, to whom he sold the lot and building, and said Harrell knew and understood it. The bill of exceptions recites that the safe was the property of Blount county. The minutes of the commissioners' court recites that Wyatt purchased from the county, "the Bangor court house lot," and they conveyed the same to Wyatt, and he sold and conveyed the property to Harrell, who conveyed the same to defendants as trustees of Columbia College. It further appears, that when Wyatt purchased the lot from the county, he did not attempt to buy the safe, nor did the commissioners attempt to sell it to him, but it was agreed between the commissioners' court and Wyatt that he should sell it for the county, if he could find a purchaser.

"The true rule is, that articles not otherwise attached to realty than by their own weight are prima facie personality, and articles affixed to land in fact, although only slightly, are prima facie realty, and the burden of proof is on the one contending that the former is realty or that the latter is per-

sonalty." 19 Cyc. 1186; *Bank v. Kiser*, 119 Ala. 201, 24 South. 11; *Powers v. Harris*, 68 Ala. 410.

"The early theory was that physical annexation was essential to constitute a fixture. * * * In the leading American cases the conclusion was [reached] that there is no one test, but that whether a chattel has become a part of the freehold, requires the united application of the following elements: 1. Actual annexation to the realty or something appurtenant thereto. 2. Appropriation to the use or purpose of that part of the realty with which it is connected. 3. The intention of the party making the annexation to make the article a permanent accession to the freehold." 19 Cyc. 1037. It is further stated, supported, it seems, by authorities in many states, that "mere weight is not sufficient to make a chattel a part of the realty, although resting on a surface prepared for it, * * * and that the weight of authority seems to be that merely inclosing a chattel in a building, through the entrance to which the chattel can be removed only in pieces, or which will have to be destroyed, or in which an opening must be made before the chattel can be removed from the premises, or inclosing an article, as an iron safe, in brick or iron, does not necessarily amount to annexation, even between vendor and purchaser or mortgagor and mortgagee." *Id.* 1041; *Tillman v. De Lacy*, 80 Ala. 106; *De Lacy v. Tillman*, 83 Ala. 155, 8 South. 294.

In this case, as has appeared, the safe was not sold by the county commissioners when they sold the courthouse, but they retained the title to and now claim to own it, and authorized the vendee of the realty, to sell the same for them, if he could find a purchaser. It further appears, that the safe was not in any manner annexed to the house, or to the brick foundation on which it rested. The fact, that it required a part of the wall of the house to be removed to admit the safe to its foundation, and that it would require an aperture in the wall of the building to be made in order to remove it, do not impart to it, the character of a fixture. The owner of the safe and purchaser of the realty agreed in the sale of the courthouse lot that it was a chattel, subject to be removed from the building. This was competent to be shown, and was recognizing it as a chattel, then, and for all purposes, ever thereafter. It was competent for the parties to so treat it. Even in cases of houses affixed to the soil, they may be treated as chattels, if the owner and vendor of the land and its purchaser, agree to so treat them. *Powers v. Harris*, 68 Ala. 411; *The Bank v. Kiser*, *supra*.

There was no conflict in the evidence, and on the undisputed proofs, the court very properly gave the general charge for the plaintiff, Blount county.

Affirmed.

WEAKLEY, O. J., and DOWDELL and DENSON, JJ., concur.

DIX v. STATE.

(Supreme Court of Alabama. June 14, 1906.
Rehearing Denied June 30, 1906.)

1. CRIMINAL LAW—INDICTMENT—NOTICE TO ACCUSED.

It is not necessary that a defendant in a criminal case shall have notice of the indictment, nor a copy of it, previous to his arraignment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1399-1408.]

2. GRAND JURY—DRAWING AND SUMMONING—WRITTEN ORDER OF COURT—NECESSITY—STATUTORY PROVISIONS—RECORD—SUFFICIENCY.

Under Act Dec. 7, 1900 (Acts 1900-01, p. 217), amendatory of the act to establish a criminal court of Jefferson county, providing in section 10 that the grand and petit juries for the criminal court of such county shall be drawn, summoned, and impaneled for each term of the court, if in the opinion of the judges it is necessary, in the manner now provided for or which may be hereafter provided for by law, etc., provided that the judges may direct for what weeks of the term jurors may be drawn, and that they shall impanel at least two grand juries each year, it is not necessary that the opinion of the judge be in the form of a written order, but it may be expressed orally; and a record reciting that the grand jurors were drawn according to law, and that the court, as shown by the record, did formally organize the grand jury at the beginning of the term from the venire turned in by the sheriff, sufficiently shows that the opinion of the judge had been duly expressed and communicated to the proper officers and that the jurors were duly drawn and summoned.

3. CRIMINAL LAW—VERDICT OF GUILTY—PERSONAL PRESENCE OF DEFENDANT.

In felony cases, a verdict of guilty cannot be returned in the absence of the defendant, whose presence must be affirmatively shown by the record.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1480; vol. 15, Cent. Dig. Criminal Law, § 2766.]

4. SAME—RECORD—SUFFICIENCY.

It is not necessary that the record should state in direct terms that defendant was present at the rendition of the verdict and during all the previous proceedings of the trial; and a record, the minute entries whereof recited defendant's personal presence at the arraignment on a certain date, that the trial was continued from day to day, and that defendant was personally present when sentence was pronounced, sufficiently showed by implication defendant's personal presence during the entire sitting of the court, from the arraignment to the rendition of the verdict.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2536-2542, 2766.]

5. SAME—QUESTIONS REVIEWABLE—BILL OF EXCEPTIONS—NECESSITY.

On appeal, grounds for a motion in arrest of judgment that the jury was not selected from the lawful venire, that the jury was not selected from the list served on defendant, that many of the names served on defendant as persons from whom he should select his jury were not in the number he did select from, that the names of all the persons on the jury to try defendant did not appear on the list served on him, nor were they all either on that list or drawn to complete the third jury for the week, that the court improperly struck special pleas in bar from the file without requiring the state to demur thereto, and that the court improperly eliminated the issues raised by defendant's special pleas in bar without evidence or demurrer on or to

said pleas, present questions properly presentable only by bill of exceptions.

6. SAME—SIGNING AND FILING BILL OF EXCEPTIONS—EXTENSION BY AGREEMENT.

Acts 1890-91, p. 915, provides for the holding of three terms of the criminal court of Jefferson county for each year, that each term may continue until the business is disposed of, but that the court shall adjourn 10 days before the beginning of the next term. Acts Gen. Assem. 1890-91, p. 227, provides that bills of exception in such criminal court must be filed within 60 days after the conviction, but that the act shall not prevent agreements in writing as to the time between the solicitor and counsel for defendant. *Held*, that while a bill of exceptions may be legally signed at any time within 60 days from the conviction, notwithstanding the time of the signing would have been after the next ensuing term of the court had begun, and while, had there been more than 60 days from the time of the conviction until the next ensuing term, the time of the signing might have been extended by agreement to any time before the beginning of the next term, yet when the 60 days given by the statute extend into the term next ensuing after the term of the conviction, the time cannot be extended by agreement of counsel, and the bill must be signed within the 60 days.

Appeal from Criminal Court, Jefferson County; D. A. Greene, Judge.

"To be officially reported."

Robert L. Dix was convicted of homicide and appeals. Affirmed.

The defendant was indicted, tried, and convicted for killing Bert Pesnell by cutting him or stabbing him with a knife. The facts in reference to the motions and demurrers sufficiently appear in the opinion, except as to the seventh, eighth, ninth, tenth, eleventh, and twelfth ground for the motion and arrest of judgment, which were as follows: "(7) That the jury trying the defendant was not selected from the lawful venire. (8) That the jury that tried this case was not selected from the list served on defendant as a list from which he could select his jury from. (9) That many of the names served on the defendant as persons from whom he should select his jury were not in the number he did select from. (10) That the names of all the persons on the jury who tried defendant do not appear on the list served on the defendant as a list from which he should select his jury, nor were they all either on that list or drawn to complete the third jury for that week. (11) That the court improperly struck the defendant's special pleas in bar from the file without requiring the state to demur to such pleas or either of them. (12) That the court improperly eliminated the issues raised by the defendant's special pleas in bar without evidence or demurrer on or to said pleas." The defendant was convicted and sentenced to be hanged.

Robert N. Bell, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The indictment was found during the September term, 1905, of the

criminal court of Jefferson county, and was presented in open court on the 7th day of November, 1905. On the day the indictment was presented, the defendant being in open court, the court proceeded to arraign the defendant, when he objected to being arraigned because he had had no previous notice that the indictment had been returned into court, and because no copy of the indictment had been served on him. He also moved to quash the indictment for the same reasons. The law neither requires that the defendant in a criminal case shall have previous notice of the indictment nor a copy of it previous to his arraignment. The objection and motion were properly overruled.

After overruling the objection and motion the court arraigned the defendant, he pleaded not guilty, and December 11, 1905, was fixed by the court as the day for the trial of the case. On the 11th of December the defendant demurred to the indictment and moved to quash it. The gist of the demurrer and the motion is that the record fails to show that there was a written order of the presiding judge, or either of the judges, of the criminal court for drawing or summoning a grand jury for the September term 1905, of said court. Section 10 of the act amendatory of the act to establish a criminal court of Jefferson county, which amendatory act was approved December 7, 1900, provides: "That the grand and petit juries for said criminal court of Jefferson county shall be drawn, summoned and impaneled for each of said terms of said court, if in the opinion of the judges it is necessary to dispose of the business thereof, in the same manner as is now provided for or which may be hereafter provided by law in reference to said court, and shall have the same powers as the circuit courts to issue special venirens and to summon tales jurors: Provided, that the judge of said court shall have the power to direct for what weeks of the term jurors may be drawn; and provided further, that they shall impanel at least two grand juries each year; and provided further, that all laws now in force as to the drawing, summoning and impaneling of juries shall in no wise be affected by the passage of this act, but same shall remain in full force and effect." Acts 1900-01, p. 217. If the question is one which can be raised by demurrer, yet we do not think the act contemplates—at least it is not made indispensable—that the opinion of the judge referred to shall take the shape of or be expressed in the form of a written order to be incorporated in the organization of the court, but such opinion may be expressed orally. In this instance the record recites that the grand jurors were drawn according to law, and the court, as shown by the record, did formally organize the grand jury at the beginning of the September term from the venire turned into

court by the sheriff. It must follow from this that the opinion of the judge had been duly expressed and communicated to the proper officials and the jurors had been duly drawn and summoned. *Sudduth's Case*, 124 Ala. 32, 27 South. 487.

It is not claimed by the appellant that the record fails to show affirmatively that he was present when the verdict was received by the court—when it was rendered. It is settled law that in felony cases a verdict of guilty cannot be returned in the absence of the defendant, and his presence must be affirmatively shown by the record. *Hayes' Case*, 107 Ala. 1, 18 South. 172; *Hughes' Case*, 2 Ala. 104, 36 Am. Dec. 411; *Young's Case*, 39 Ala. 357; *Sudduth's Case*, 124 Ala. 32, 27 South. 487. This legal right of the defendant is fortified by an unbroken line of decisions, English and American. In fact, there is no dispute as to the law. But the difficulty arises in determining whether in point of fact the record fails to affirmatively show the presence of the defendant. It is stated in *Young's Case*, *supra*, that "possibly it is enough if the record show by fair inference that the prisoner was present when the sentence was pronounced." The question there related to the prisoner's presence at the time of sentence, and we hold that if the recitals of the minute entries, reasonably construed and by fair inference, show the presence of the defendant, this would be an affirmative showing of his presence by the record.

The record here shows that the defendant was present in person on the 11th day of December, the day the case was tried; that on the call of the case for trial on that day the defendant was duly arraigned, and, after several preliminary motions made by the defendant were overruled; that issue joined on a plea in abatement was determined by the jury against the defendant; that he then filed the plea of not guilty and four special pleas; that the special pleas were, on motion of the state stricken from the file. The record then recites: "And on this the 12th day of December, 1905, issue being joined on the defendant's plea of not guilty filed in this cause, thereupon came a jury of good and lawful men, to wit, L. S. Kates and eleven others, who being duly impaneled and sworn according to law, before whom this trial was entered upon and continued from day to day and from time to time. Now on this the 16th day of December, 1905, said jurors on their oaths do say," etc. " * * * On the 19th day of December, 1905, the prisoner was present in open court in his own proper person, and, being asked by the court if he had anything to say why sentence should not be pronounced upon him, said nothing." So the record shows the personal presence of the defendant when arraigned on the indictment on the 11th, that he pleaded to it, and it also shows his personal presence at the sentence. It is not necessary that the record should

state in direct terms that he was present at the rendition of the verdict and during all the previous proceedings of the trial, although such presence was essential.

The recitals of the minute entry of his personal presence at the arraignment on the 11th, and that the trial was continued from day to day and from time to time, and of his personal presence when sentence was pronounced, and that he said nothing why sentence should not be pronounced, are sufficient to warrant the conclusion that the record by necessary and reasonable implication shows the personal presence of the prisoner during the entire sitting of the court from the arraignment to the rendition of the verdict. "The allegations of the continuance of the trial from day to day and time to time sufficiently indicate that it was with the incidents before described of which the presence of the prisoner was one." We hold, therefore, that the record by necessary and reasonable implication shows that the defendant was present at the rendition of the verdict, and thus his presence is affirmatively shown. *Young's Case*, 39 Ala. 357; *Snow's Case*, 58 Ala. 372; *Banks & Wood v. State*, 72 Ala. 522; *Lovett's Case*, 29 Fla. 357, 11 South. 172; *Irvin's Case*, 19 Fla. 872; *Palmquist's Case*, 30 Fla. 73, 11 South. 521; *Stephens' Case*, 19 N. Y. 549; *West's Case*, 22 N. J. Law 212; *Dodge's Case*, 4 Neb. 220; *Peter's Case*, 94 Fed. 127, 36 C. C. A. 105; *Jeffries' Case*, 12 Allen (Mass.) 145; *Rhodes' Case*, 23 Ind. 24; *Schirmer's Case*, 33 Ill. 276; *State v. Langford*, 44 N. C. 436; *State v. Wood*, 17 Iowa, 18.

After the verdict was rendered, but before sentence was pronounced, the defendant moved an arrest of judgment. The first four grounds of the motion presented the same question that was presented by the demurrer and motion to quash the indictment, and it is unnecessary to say more with respect of that question. The fifth and sixth grounds of the motion are fully answered by the record, which affirmatively shows service on the defendant of a copy of the venire, and the order of the court requiring that a copy of the venire be served; and an inspection of the record shows that the venires were drawn and formed in substantial conformity to the jury law applicable to Jefferson county as the same was construed in the case of *Maxwell v. State*, 89 Ala. 150, 7 South. 824. The other grounds of the motion present questions which can be properly presented only by bill of exceptions. 1 Mayfield, p. 510, § 6 et seq.

The law provides that three terms of the criminal court of Jefferson county shall be held each year, and they commence on the first Mondays in January, April, and September. It further provides that each term may continue until the business is disposed of, but expressly provides that the court shall adjourn 10 days before the beginning of the next term. Acts 1890-91, p. 915. The trial in this case was had during the September term, the verdict was rendered on the 12th

day of December, 1905, and the judgment and sentence were entered on the 19th day of December. The bill of exceptions was tendered, approved, and filed on the 31st day of March, 1906, so that it appears to have been signed and filed after the adjournment of the term of the court next succeeding the one at which the trial was had, and more than 60 days after the conviction. The law applicable to bills of exception reserved on trials of causes in the criminal court of Jefferson county is found in the Acts Gen. Assm. 1890-91, p. 227. This law provides that all bills of exception must be filed in said court within 60 days after conviction; "provided, that this act shall not be construed so as to prevent agreements in writing as to the time, between the solicitor and the counsel for defendant." On the 9th day of February, 1906, an agreement in writing was made between the solicitor and the attorneys for the defendant extending the time for filing the bill of exceptions "30 days beyond the time allowed by law for that purpose." On the 13th day of March, 1906, another agreement in writing was made between the solicitor and the attorneys for the defendant whereby the time for signing was "extended for and including the term of 60 days from the date when the same might have been signed under the former agreement."

Under the statute referred to, we think that the bill might have been legally signed at any time within 60 days from the conviction, notwithstanding the time of signing would have been after the next ensuing term of the court had begun. *Driver v. King* (Ala.) 40 South. (6) 315. And if there had been more than 60 days from the time of conviction until the next ensuing term, the time for signing might have been extended by agreement of counsel to any time before the beginning of the next term; but, when the 60 days given under the statute extend into the term next ensuing after the term of the conviction, under previous decisions of this court the time cannot be extended by agreement of counsel, and the bill must be signed within the 60 days. It follows that the bill of exceptions cannot be considered. *Adams' Case* (Ala.) 40 South. 85, and authorities there cited.

There is no error in the record, and the judgment of the lower court is affirmed.

Affirmed.

WEAKLEY, O. J., and HARALSON, TYSON, SIMPSON, and ANDERSON, JJ., concur.

REEVES v. STATE ex rel. CARLISLE.
(Supreme Court of Alabama. April 18, 1906.
Rehearing Denied June 30, 1906.)

ASSISTANCE, WRIT OF EXECUTION AFTER RETURN DAY.

Where, at the time judgment awarding mandamus against a sheriff to compel him to ex-

ecute certain writs of possession was rendered, the writs had become functus officio by lapse of time, and they were the only writs on which the application for mandamus was based, it was error to grant a peremptory writ.

Appeal from Circuit Court, Pike County; H. A. Pearce, Judge.

"To be officially reported."

Mandamus by the state, on relation of M. N. Carlisle, against S. M. Reeves. From an order directing the issuance of a peremptory writ, respondent appeals. Reversed.

Foster, Samford & Carroll and J. M. Chilton, for appellant. M. N. Carlisle, pro se.

DENSON, J. This is a mandamus proceeding commenced in the circuit court of Pike county, on the relation of M. N. Carlisle, against S. M. Reeves, sheriff of Pike county. The purpose of the proceeding is to compel the sheriff to execute a writ of possession which was issued on the 31st day of December, 1904, and placed in the sheriff's hands on the same day, by putting relator in possession of the lands described in said writ. The petition was filed January 14, 1905. The rule nisi appears to have been issued on the 14th day of January, 1905, requiring the sheriff to answer at the next term of the court, which was held on the first Monday in March, 1905. The prayer of the petition is to the effect that the defendant be required to show cause at the next term of the court why the peremptory writ of mandamus should not issue, commanding him to fully execute said writ of possession. On the 14th day of February, 1905, the relator filed a motion in which he prayed the court for an order requiring the sheriff to execute the writ of possession issued on the 31st day of December, 1904, by putting petitioner or movant in possession, or that he show cause why such writ should not be executed. No notice appears to have been taken by the court of this motion. On the 2d day of the March term, 1905, on motion of the defendant, the rule nisi or temporary writ of mandamus was quashed, and the clerk was ordered by the court "to issue a proper writ in accordance with the order made by the judge in vacation." The order of the judge referred to was the order indorsed by the judge on the application for the mandamus. On the 13th day of March, 1905, the clerk issued a notice to the defendant, in which are set out the averments of the original application for the mandamus, with the additional averments that the sheriff had on the 2d day of March, 1905, returned the writ of possession of December 31, 1904, with the indorsement thereon as follows: "Returned on this day, for that I failed to find defendant in possession of the land and failed to find any one in possession liable to be dispossessed under this writ and returned no property found as to the execution for costs." In the paper or notice is also contained the following statement: "That another writ of posse-

sion was issued on said judgment on the 13th day of March, 1905, and is now in the hands of said sheriff, which said sheriff now fails and refuses to execute, and which said Carlisle asks that the sheriff be commanded to execute, under the prayer of said petition and the order of the court in this case." Then follows the command or rule nisi as follows: "You, S. M. Reeves, sheriff of Pike county, are hereby commanded to execute forthwith the writ of possession now in your hands, issued from the circuit court of said county in the case of M. N. Carlisle v. Annie B. Hays, on the 13th day of March, 1905, by putting the said M. N. Carlisle into possession of the land described in said writ according to the mandate of said writ, unless you see fit to appear at the next term of the circuit court of Pike county and show cause why a peremptory writ of mandamus should not issue," etc. The sheriff on the 14th day of March, 1905, accepted service of the notice and waived a copy. At the September term, 1905, the defendant answered the alternative writ, and on the hearing on the evidence during that term the court rendered judgment against the defendant, awarding a peremptory mandamus, and adjudged that, upon the issuing of a pluries writ of possession in the case of M. N. Carlisle v. Annie B. Hays, the clerk of the court should issue a peremptory writ of mandamus commanding the defendant, as sheriff, to forthwith execute said writ of possession according to the mandate thereof by putting said Carlisle into the possession of all the land described in said writ of possession.

If it be conceded that mandamus is the appropriate remedy, and may be resorted to, to compel the execution of a writ of possession, which question we do not decide, yet the judgment in this case was improperly rendered. It must be noticed that at the time the judgment awarding the mandamus was rendered the return day of the writs issued December 31, 1904, and March 13, 1905,

had expired. They were *functus officio*. These writs are the only ones referred to in the application for the mandamus, and the only one of which the dereliction of the sheriff is predicated, and with respect of which relief is prayed. It is too clear for argumentation that the court was without authority at the September term, 1905, to award a peremptory writ of mandamus to the sheriff, commanding him to put the plaintiff in possession under writs that were *functus*. To render such judgment would be to command the sheriff to do an unlawful act. Mandamus will never lie to compel an officer to do an act which, without its command, it would not be lawful for him to do. *Moses on Mandamus*, p. 58; *State v. Judge*, 15 Ala. 740; *Norwood v. Clem* (June 1, 1904) 39 South. 214, and authorities there cited; *Johnson v. Lucas*, 11 Humph. (Tenn.) 306. But the court went a bowshot further than was contemplated by the petition or authorized by the evidence in the case, in its adjudication that upon the issuance of a pluries writ of possession in the case of Carlisle v. Hays the clerk of the court should issue a peremptory writ of mandamus commanding the sheriff to forthwith execute the writ of possession according to the mandate thereof by putting said Carlisle into the possession of all the land described in said writ of possession. It would seem that this was forecasting the sheriff's disinclination to execute a writ that was yet to come into his hands, and awarding peremptory mandamus with respect to derelictions on the part of the sheriff that had not occurred and might never occur. We are clear in our opinion that mandamus cannot be awarded in such state of the case. Judgment will be here rendered, reversing the judgment of the circuit court and denying the mandamus.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

DICKINSON v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

BURGLARY — INDICTMENT — SUFFICIENCY — CHARACTER OF BUILDING.

An indictment for burglary, charging that defendant broke into, etc., a railroad depot in which goods, wares, merchandise, or clothing, things of value, were kept for use, sale, or deposit, was demurrable for not showing a breaking into a building or structure of the kind mentioned in the statute.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 14-18, 51-54.]

Appeal from Circuit Court, Walker County; A. H. Alston, Judge.

"Not officially reported."

George Dickinson was convicted of burglary, and he appeals. Reversed and remanded.

The indictment in this case was in the following language: "The grand jury of said county charged, etc., that George Dickinson with intent to steal, broke into, and entered, depot of So. Ry. Co., a corporation, in which goods, wares, merchandise, or clothing, things of value were kept for use, sale, or deposit." Demurrers were interposed to the indictment (1) because the indictment does not show the felonious intent necessary to constitute the offense. (2) Because said indictment fails to sufficiently describe the building alleged to have been broken into and entered. (3) Because said indictment does not describe any offense in this, it does not show that the defendant broke into and entered the building, structure, or inclosure which would constitute burglary. (4) Because it does not sufficiently show that the depot he is alleged to have broken into and entered was such a structure, building, or inclosure in which would constitute burglary. The demurrers were overruled.

Ray & Leith, for appellant. Massey Wilson, Atty. Gen., for the State.

PER CURIAM. The demurrer to the indictment should have been sustained, since it did not show the breaking into a building or structure of the kind mentioned in the statute.

Reversed and remanded.

WEAKLEY, C. J., and TYSON, SIMPSON, and ANDERSON, JJ., concur.

POINTER v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. BURGLARY—EVIDENCE—RELEVANCY.

Where, in a prosecution for burglary, it was shown that defendant worked for prosecutrix, that flour and meat were stolen from prosecutrix's pantry to which defendant had access, the state was entitled to show that on the day following the night of the larceny defendant carried goods similar to those stolen to the house of a certain woman where the goods

were found, and to show the relations existing between defendant and the woman.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 91.]

2. SAME—ELEMENTS OF OFFENSE.

Where defendant entered prosecutrix's pantry with intent to steal after the pantry had been locked, he was guilty of burglary, though he might have had a right of access to the pantry in the performance of his duties as a servant.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 3, 9.]

3. CRIMINAL LAW—FORMER CONVICTION—EVIDENCE.

In a prosecution for burglary, it was error to allow the question as to whether "defendant worked on the streets for larceny in this case," and to permit an answer that he "worked 30 days on the streets," to stand.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 824-835.]

Appeal from Law and Equity Court, Walker County; Thomas L. Sowell, Judge.

"Not officially reported."

Tom Pointer was convicted of burglary, and he appeals. Reversed.

The charges requested by the defendant, and refused, are as follows: (1) General affirmative charge; (2) if the jury believe from the evidence that Mrs. Griffin had the defendant in her employ as a servant and gave him access to her dining room and kitchen, and that such right of access was not restricted by her, then the defendant is not guilty of burglary and you must acquit him; (3) if the property is stolen from a place where defendant has a right to enter at the time the property is stolen, he is not guilty of burglary but may be guilty of larceny.

Ray & Leith, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted on an indictment for burglary. There was evidence by the state that the defendant worked for the prosecutrix, and that flour and meat were stolen from the prosecutrix's pantry. The evidence also showed that the defendant had access to the pantry from which the flour and meat were stolen. In the light of this evidence, it was competent for the state to show that on the day following the night of the larceny the defendant carried goods of a similar character and quantity to those stolen to the house of the woman, Peggie, where the goods were found, and to this end it was also competent to show the relations between the defendant and the woman, Peggie. The prosecutrix testified that the defendant was employed by her as a servant in her hotel, and that he worked there during the day, but did not stay there at night. It was open for the jury to find from the evidence that the defendant entered the pantry with the intent to steal, after the pantry had been locked; and if this was the fact, although he may have had a right of access to the

pantry in the performance of his menial duties as a servant, he would nevertheless be guilty of burglary. *Hild v. State*, 67 Ala. 89.

Charges 2 and 3, requested by the defendant, ignored this phase of the evidence, and were therefore properly refused as being misleading. The trial court erred in overruling the defendant's objection to the question asked the witness Bud Smith: "State whether or not the defendant worked on the streets for larceny in this case," and, in refusing to exclude on the defendant's motion the answer to this question, viz.: "He did, and worked 30 days on the streets." Without deciding whether it was competent to show by parol what the record of the mayor's court showed, this said evidence did not show a trial and conviction in the mayor's court, and it was calculated to prejudice the defendant before the jury, and was inadmissible.

For this error the judgment must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

COLLINS v. GILLESPIE.

(Supreme Court of Alabama. June 30, 1906.)

INFANTS—JUDGMENT IN FAVOR OF—WHO MAY RECEIVE PAYMENT.

Only the regularly qualified guardian of an infant, and neither the next friend by whom the infant sues, nor the attorney representing him in the action, has authority to receive payment of a judgment in favor of the infant, and enter satisfaction thereof.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, §§ 244, 322.]

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

"To be officially reported."

Action by Mamie Collins, an infant, by her next friend, against John S. Gillespie, as clerk of the city court of the city of Birmingham. From a judgment sustaining demurrers to the petition, plaintiff appeals. Affirmed.

Mamie Collins, a minor, by her next friend and father, recovered judgment in the Birmingham city court against the Birmingham Railway Light & Power Co. for the sum of \$25 and the costs of the suit. This amount together with the costs, was paid to the clerk and register of the city court. The next friend and also the attorney of record for the next friend made demand upon the clerk and register for the said sum of \$25, and, upon his refusal to pay the same over to either of them, the next friend filed a petition seeking to secure an order from the judge of the court requiring the payment of said sum to the next friend. The petition alleges the above facts. The clerk and register answered said petition, admitting all the allegations therein contained, but alleged

that he was advised by counsel that as such clerk and register cannot legally pay over the money in his hand to any one except the general guardian of the minor. He also filed demurrers raising this same question. The demurrers were sustained.

Ward & Drennen, for appellant. J. S. Gillespie, pro se.

DENSON, J. "It is the general rule that no one but a regularly qualified guardian of an infant has authority to receive payment, and enter satisfaction of a judgment recovered in favor of such infant, and that a next friend has no such authority." And although there are authorities which seem to take the contrary view, this court has decided that a next friend has no such authority. *Isaacs v. Boyd*, 5 Port. 388; *Smith v. Redus*, 9 Ala. 99, 44 Am. Dec. 429; 17 Am. & Eng. Enc. of Law (2d Ed.) p. 839, and cases cited in note 10. See, also, with respect of the office of a *prochein ami*, the following cases: *Thomason v. Gray*, 84 Ala. 559, 4 South. 394; *Cook v. Adams*, 27 Ala. 294; *Cooper v. Maclin's Heirs*, 25 Ala. 299; *Riddle v. Hanna*, 25 Ala. 484; *Klaus v. State*, 54 Miss. 644; *Mitchell v. Connolly*, 1 Bailey (S. C.) 203. If the next friend has not the authority to receive payment or enter satisfaction, it follows logically that an attorney who derives the only authority he has from the next friend is not clothed with such authority.

There is no error in the record, and the judgment of the court must be affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

McGEEVER v. S. H. HARRIS & SONS.

(Supreme Court of Alabama. April 10, 1906. Rehearing Denied June 30, 1906.)

1. MECHANICS' LIENS—ACTION TO ENFORCE—COMPLAINT—SUFFICIENCY.

A complaint in an action to enforce a mechanic's lien, alleging that plaintiffs were entitled to a lien on a described house and lot by virtue of a contract for materials furnished and work done on the house and lot, and that a verified statement of the lien was filed in the office of the judge of probate on a certain day within the period prescribed by the statute, and that it was verified by the oath of one of the plaintiffs, was sufficient; it not being necessary that the facts recited in the statement filed should be alleged in detail.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 494.]

2. PRINCIPAL AND AGENT—ACTION BY PRINCIPAL—ALLEGATION OF AGENCY.

A complaint in an action to enforce a mechanic's lien, alleging that the sum claimed to be due was for materials furnished, etc., in pursuance of a contract between plaintiffs and defendant, through and by her husband, sufficiently alleged that defendant's husband was her authorized agent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 713.]

3. MECHANICS' LIENS—STATEMENT OF LIEN—VERIFICATION.

The statute in regard to mechanics' liens requires that there be filed in the office of the judge of probate a statement "in writing," verified by the oath of the person claiming the lien or some other person having knowledge of the facts. *Held*, that a verification of the statement was sufficient, where the lien was claimed by a partnership and the verification was by oath of one of the partners, though it did not contain an averment that he had knowledge of the facts.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 261-264.]

4. SAME—JUDGMENT—FORM—IN REM AND IN PERSONAM.

Under the express provisions of Code 1896, § 2739, where, in an action to establish a mechanic's lien, the evidence shows a personal liability on the part of defendant and that plaintiff is entitled to a lien, a judgment both in personam and in rem is to be rendered.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 632-635.]

5. COURTS—ALABAMA SUPREME COURT—APPEAL—DISPOSITION OF CAUSE—RENDITION OF JUDGMENT.

Under the express provisions of Acts 1888-89, p. 998, amending the act establishing the city court of Birmingham, it is the duty of the Supreme Court on appeal to review the conclusions and judgment of the court on the evidence, and, if error intervenes, to render such judgment as should have been rendered.

6. MECHANICS' LIENS—LIABILITY OF OWNER—KNOWLEDGE OF IMPROVEMENTS.

Where a woman, with knowledge of the facts that improvements were being made on her house under a contract with her husband, consented to their being made, those making them had under the express provisions of the statute a mechanic's lien therefor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, §§ 85, 103.]

7. APPEAL—REVIEW—FINDINGS OF FACT—FINDINGS BY COURT.

The findings of the trial court sitting as a jury will not be disturbed on appeal, unless plainly erroneous.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

"To be officially reported."

Action by S. H. Harris & Sons against Clara McGeever. From a judgment in favor of plaintiffs, defendant appeals. Corrected and affirmed.

John H. Miller, for appellant. W. E. Martin, for appellees.

TYSON, J. The first assignment of demurrer to the complaint before and after amendment was general, and therefore properly overruled. The second proceeds upon the theory that this action is by a subcontractor, and therefore the plaintiffs should have given the defendant, as owner, before filing their statement in the office of the judge of probate for the purpose of perfecting a lien under the statute, 10 days' notice in writing, etc. Acts 1900-01, p. 2115 et seq. This ground is clearly not well taken, since it appears from the averments of the complaint that the materials furnished, etc., were in pursuance of a contract entered into between plaintiff and defendant; thus showing that they were

original contractors. The averments of the complaint as amended are likewise sufficient with respect to the nature, character, and legal sufficiency of the statement filed in the office of the judge of probate. It is not necessary that the facts recited in that statement should be alleged in detail. The complaint alleged that plaintiffs are entitled to a lien upon a certain described house and lot by virtue of a certain alleged contract for materials furnished and work done upon the house and lot described, that a verified statement of the lien was filed in the office of the judge of probate of Jefferson county on a certain day within the period prescribed by the statute, and that it was verified by the oath of one of the plaintiffs. This is all that good pleading requires.

It is next insisted that the complaint is defective, in that it is not averred that defendant's husband was her authorized agent to bind her personally in the making of the contract with plaintiffs, and therefore a judgment in personam cannot be rendered against her upon the complaint. The averment is that the sum claimed is due "for materials furnished and work and labor done in pursuance of a contract entered into by and between plaintiffs and defendant, through and by her husband." This language, *ex vi termini*, includes the affirmation of an authorization on the part of the husband to make the contract for her. For it is not perceivable how there could be, as averred, a contract between the parties, which must be taken as true as against the demurrer, unless the husband was authorized to represent the defendant in the making of it.

The next point pressed upon our consideration is that the court erred in refusing to exclude the statement filed in the office of the judge of probate, which was offered in evidence by the plaintiffs. The legal sufficiency of the statement is assailed alone upon the ground that it is not verified as required by the statute. It is undoubtedly true that the requisites of the statute, with respect to the verification of the statement, must be strictly complied with. *McConnell v. Meridian S. & B. Factory*, 112 Ala. 582, 20 South. 929, and cases there cited. The language of this requirement, as found in the statute, is in these words: "A statement in writing, verified by the oath of the person claiming the lien or by some other person having knowledge of the facts." The statement allowed in evidence shows that the firm of S. H. Harris & Sons, a partnership composed of S. H. Harris, S. H. Harris, Jr., and T. H. Harris, who are the plaintiffs in the case, claimed a lien upon the property described in it, being the same property described in the complaint, and that it is verified by the oath of S. H. Harris, a member of the partnership, but does not contain the statement that he has a knowledge of the facts. It is on account of this omission that the objection to its legal sufficiency is predicated. S. H. Harris

being one of the persons claiming the lien, the verification is clearly sufficient. It is only when the verification is by the oath of some person not claiming the lien that it must contain the statement that the affiant has a knowledge of the facts. This is the plain import of the language of the statute. It follows, therefore, that the ruling of the court was correct.

The case was tried by the presiding judge without the intervention of a jury, and, under the act creating the court from which this appeal is prosecuted, it is made our duty to review the conclusion and judgment of the court upon the evidence, and, if error intervened, to render such judgment as the trial court should have rendered. Acts 1888-89, p. 998. The judgment appealed from is in personam and in rem. This was entirely proper, provided the evidence sustained the findings of a personal liability on the part of the defendant and that plaintiffs have a lien upon the property sought to be subjected. Section 2739 of the Code of 1896. There was no evidence whatever that defendant was personally bound by the contract which the plaintiffs made with her husband. He is not shown to have ever undertaken to make the contract declared on for her. On the contrary, the evidence establishes, without dispute and beyond all adverse inferences, that the contract was between plaintiffs and her husband, and solely on his credit. The judgment, therefore, is clearly incorrect as one in personam.

As to whether it is correct as a judgment in rem depends upon the weight of the testimony, which was clearly in conflict. That on the part of the plaintiffs tends to show that the contract with the husband was made before the material was furnished and the labor performed by them, with a knowledge and consent on the part of defendant that the materials were being furnished and the labor performed for the improvement of her house and lot; while the testimony on the part of the defendant tended to show the contrary. If it be true that defendant had knowledge of the fact that the improvements were being made by plaintiffs upon her house under a contract with her husband, and consented to their being made, the plaintiffs have a lien upon her house and lot. Such lien is expressly declared by section 11 of the act (page 998), which changes the provision of the Code in this respect. The case of *Hawkins Lumber Co. v. Brown*, 100 Ala. 217, 14 South. 110, and other like cases, arose under the Code, and therefore have no application. Whether she was chargeable with such knowledge and consent, under the testimony, was a question of fact to be determined by the trial judge sitting as a jury, and his findings in this respect will not be disturbed unless plainly erroneous. *Woodrow v. Hawking*, 105 Ala. 240, 16 South. 720; *Callahan v. Nelson*, 128 Ala. 676, 29 South. 555. We are unwilling to affirm that his findings were er-

roneous. If it be conceded that the contract alleged as being one with defendant, is different from the one proven, this is not insisted upon here.

It follows, therefore, from what we have said, that the judgment appealed from must be corrected, so as to adjudge that the plaintiffs are entitled only to subject the property of defendant to the satisfaction of their lien. Corrected and affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

MAYFIELD et al. v. COURT OF COUNTY COMRS OF TUSCALOOSA COUNTY.

(Supreme Court of Alabama. May 17, 1906. Rehearing Denied July 6, 1906.)

1. APPEAL—SECURITY FOR COSTS—APPROVAL.

Code 1896, § 431, provides that appeals may be taken to the Supreme Court from the judgment of judges of the circuit and city courts or applications for writs of certiorari, on plaintiff or defendant giving security for the costs of appeal, approved by the trial judge. Section 2827 provides that from the final judgment of any circuit court, or other court exercising the jurisdiction thereof, in any such proceeding (certiorari), an appeal shall lie to the Supreme Court as in other cases. Held that, when the appeal is from the judgment of the judge awarding or denying the rule nisi, the appeal must be under section 431, and the security for costs must be approved by the judge; but, when appeal is from final judgment of the court, it is governed by section 2827, and the security must be approved by the clerk of the court.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2061.]

2. SAME—EXECUTION OF SECURITY.

Where, on appeal, no supersedeas is asked for, but security for costs merely is given, it need not bind the appellants; but it is enough that the surety acknowledges himself as such for the costs of appeal in the case.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Certiorari, §§ 18-27.]

3. CERTIORARI—WHEN LIES.

Certiorari is the proper remedy for attacking an order of the commissioners' court establishing a stock law district under Acts 1894-95, p. 749, on the ground that the order is void on its face; such court, in the exercise of the power conferred on it by the act, being a court of limited jurisdiction, so that to uphold its proceedings thereunder its records must affirmatively show existence of the facts on which its jurisdiction or authority to act rests.

4. COURTS—OF INFERIOR JURISDICTION—CLERICAL ERROR IN ORDER.

The word "the," before "public places," in the order of the commissioners' court establishing a stock law district under Acts 1894-95, p. 749, reciting that the notice of application for establishment of the district was posted in "the public places," is a clerical error for "three," the number of public places in which the act requires the notice to be posted, and so does not render the order void as failing to show compliance with the provisions of the act necessary to give such court jurisdiction to act.

5. ANIMALS—STOCK LAWS—JUDGMENTS—DESCRIPTION OF STOCK LAW DISTRICT.

The order of the commissioners' court establishing a stock law district, by describing the district as all the territory embraced in the boundaries of beat No. 20 in Tuscaloosa county,

known as "Crossland's Beat," satisfies the requirement of Acts 1894-95, p. 749, § 3, that it shall describe the boundary lines of the district.

6. SAME—REPEAL OF LOCAL ACT.

Acts 1894-95, p. 749, authorizing the commissioners' court of T. county to establish a stock law district on petition of resident land-owners, being a local act, is not repealed by Gen. Acts 1903, p. 431, authorizing the court of county commissioners in the several counties to cause elections to be held in such counties, or parts thereof, for the establishment of separate stock law districts.

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

"To be officially reported."

Certiorari by J. W. Mayfield and others against the court of county commissioners of Tuscaloosa county. From an adverse judgment, petitioners appeal. Affirmed.

C. B. Vernon, for appellants. Robinson Brown, for appellee.

DENSON, J. This is a proceeding by common-law certiorari, commenced by the appellants, J. W. Mayfield and others, for the purpose of reviewing and having quashed an order made by the court of county commissioners of Tuscaloosa county establishing a stock law district in said county. On the first hearing in the Tuscaloosa county court, Hon. Henry B. Foster, judge presiding, it was adjudged on the 24th day of January, 1906, that the petitioners were not entitled to the relief prayed for, and the petition for certiorari was dismissed, at the costs of the petitioners. On the 6th day of February, 1906, was filed with the clerk of the Tuscaloosa county court a paper in these words and figures:

"J. W. Mayfield et al. v. Commissioners' Court et al. County Court. I hereby acknowledge myself security for costs in the appeal of the above-entitled cause to the Supreme Court. Feby. 2nd, 1906. C. N. Verner.

"Approved Feby. 6th, 1906. B. B. Cooper, Clerk.

"Filed in office 6th day of Feby., 1906. B. B. Cooper, Clerk."

No other security for costs was given. Motion is made here by the appellees to dismiss the appeal on the several grounds set out in the motion.

The principal ground in the motion is that "appeals in proceedings of this character cannot be taken by having the security for costs approved by the clerk, but security for costs must be approved by the judge trying the cause, and that within thirty days from the judgment." This ground of the motion and the argument in support of it are predicated on section 431 of the Code of 1896, which provides: "Appeals may be taken to the Supreme Court from the judgment of judges of the circuit and city courts on applications for writs of certiorari, supersedeas, quo warranto, mandamus and other remedial writs, upon plaintiff or defendant giving security for the costs of appeal, approved by

the judge trying the same, within thirty days from the day of the judgment." Section 2827 of the Code of 1896 provides: "From the final judgment of any circuit court or other court exercising the jurisdiction of such court, in any such proceeding (mandamus, prohibition, certiorari and other remedial writs of a supervisory nature), an appeal shall lie to the Supreme Court as in other cases; but such appeal must be taken within thirty days after the final judgment is rendered." In the case of *Ex parte Campbell*, 130 Ala. 171, 30 South. 385, it is held that an appeal will lie under section 431 of the Code of 1896 from an order of a judge either denying or granting a rule nisi in proceedings of the kind we have in hand. This ruling gives a field of operation for both statutes set out above. When the appeal is from the judgment of the judge awarding or denying the rule nisi, the appeal must be taken under section 431, and in that event the security for costs must be approved by the judge. But when the appeal is from the final judgment of the court, as is the case here, the appeal must be governed by section 2827 and the security for costs must be approved by the clerk of the court.

But it is insisted by appellees that the paper purporting to be security for costs is insufficient, because the names of the appellants do not appear on it and it does not purport to create any liability on them. No supersedeas was asked for, and, when security for costs merely is given, it is only necessary that the surety should acknowledge himself as such for the costs of the appeal in the particular case. *Spencer v. Thompson*, 24 Ala. 512; *Crump v. Wallace*, 27 Ala. 277; *Satterwhite's Case*, 28 Ala. 65; *Marshall v. Croom*, 50 Ala. 479. It follows that the motion to dismiss the appeal is not well made, and it is overruled.

The Legislature in 1895 passed an act authorizing the commissioners' court of Tuscaloosa county to establish districts in which stock may be prevented from running at large. Acts 1894-95, p. 749. Section 2 of the act provides that: "Whenever any ten freeholders petition said court in writing stating that they desire an order to be made establishing a district wherein stock may not be allowed to run at large, fully describing such district, and stating that petitioners reside in such district, that said petition must be filed with the probate judge of said county at least thirty days before the next term of the commissioners' court and said probate judge must cause a notice of said application to be posted at the office of said judge, and copies of said notice to be posted in three public places in the district described in the application or petition, and if a newspaper is published in said county, at least one notice of the said publication shall be given in such paper of

the day of hearing such application." It is conceded by the appellants that the petition filed with the probate judge in this instance to establish the stock law district in beat 20 conformed to the requirements of the act in its allegations.

But it is insisted that the order made by the commissioners' court is void on its face. If this insistence is well made, then certiorari is the proper remedy, no other remedy being provided for, and the order should be annulled. *Stanfill v. Court of County Revenue of Dallas County*, 80 Ala. 287. Section 3 of the act provides: "That said court of county commissioners, at the next regular term thereof after said application is filed, must, if such petition or application is filed thirty days before the term commences, and such notices are posted as above provided, hear the petitioners and any person that may be opposed thereto, and if such court is satisfied, that a majority of the land owners or freeholders who reside in and who own land situated in said proposed district, and who are over the age of twenty-one years, are in favor of said district being established, then said commissioners' court must make an order granting said petition or application, and shall describe in said order, on the minutes of said court, the boundary lines of said district so established, said order to go into effect thirty days after it is made."

It cannot be disputed that the commissioners' court, in the exercise of the power conferred on it by the act, must be esteemed a court of limited jurisdiction, and to uphold its proceedings under the act its records must affirmatively show the existence of the facts upon which its jurisdiction or authority to act rests. *Flowers v. Grant*, 129 Ala. 275, 30 South. 94; *Stanfill v. Commissioners*, 80 Ala. 287. In this respect the jurisdiction conferred by the act is akin to the power conferred on the commissioners' court to establish roads. In those cases in which the power of that court to establish roads has been invoked, it is held that the court is one of limited jurisdiction, and its proceedings, to be valid, "must show upon their face affirmatively, that the court has acquired jurisdiction of the subject-matter by taking those preliminary steps directed by the statute, in cases providing for its action." *Molett v. Keenan*, 22 Ala. 484; *Commissioners v. Hearne*, 59 Ala. 371; *Keenan v. Commissioners*, 26 Ala. 568. In *Commissioners' Court of Lowndes Co. v. Bowle*, 34 Ala. 461, a road case, the minute entry affirmed that it appeared by proof made that thirty days' notice of the application had been given, by advertisement posted up at the courthouse door and at three other public places in Lowndes county, according to law. It was objected to the record that it did not show at what places the notice was posted, by whom it was signed, or what it contained, or how long it remained posted

up. The court said: "The contents of the notice sufficiently appear in the assertion that notice of the application was given. There was no necessity for designation of the public places at which the notices were posted up. It is enough that they were posted up at public places."

It is next insisted that the record fails to show that the notice was posted at the number of places prescribed. The point of attack in this respect is that the order shows that the notice was posted at "the public places," not "three public places." In view of the fact that "three" is the number of places provided by the law, and the record does recite "that notices had been duly given of the filing and day set for hearing said petition by posting notices at office of the probate judge, the public places in said beat, * * * all for thirty days prior to this date as required by law," we think we violate no rule of construction in holding that the appearance of the word "the," instead of "three," in the order, is a self-correcting clerical misprision, and does not affect the validity of the order.

There is no merit in the contention that the order fails to mark the boundary lines of the district established by the court wherein stock may not be permitted to run at large. The district established is described as all the territory embraced within the boundaries of beat No. 20, in Tuscaloosa county, known as "Crossland's Beat." This, we think, substantially complies with the requirements of the statute.

The act of the Legislature involved in this case, being a local act, is not affected by the act approved September 29, 1903, which authorizes the court of county commissioners in the several counties of the state to cause elections to be held in such counties, or parts thereof, for the establishment of separate stock law districts. Gen. Acts 1903, p. 431; *Maxwell v. State*, 89 Ala. 150, 7 South. 824; *State ex rel. Tyson v. Houghton* (Ala.) 38 South. 761.

There is no merit in any of the other points made by the appellants against the order of the commissioners' court.

There is no error in the record, and the judgment of the trial court is affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

HARTON v. TOWN OF AVONDALE.

(Supreme Court of Alabama. July 6, 1906.)

1. EXCEPTIONS, BILL OF—SIGNING—TIME—EXTENSION—COURT RULES.

Court rule 30 (Code 1896, p. 1200), limiting extensions for the signing of bills of exceptions by agreement to a time prior to the next succeeding term of court, does not apply to extensions granted by the presiding judge.

2. SAME—EXTENSIONS BY JUDGE.

Under Code 1896, § 617, providing that the court may in term time fix a time in which the

bill of exceptions may be signed, and the judge may in vacation extend such time, the judge of the Birmingham city court could not extend the time for the signing of a bill of exceptions during the sitting of the court.

3. SAME.

Code 1896, § 620, provides that the time allowed for the signing of a bill of exceptions must not be extended beyond six months from the adjournment of the court. Acts 1888-89, p. 995, establishing the Birmingham city court, declares that there shall be but one term of the court a year, commencing on the first Monday in September, and ending on the last day of the succeeding June. The act also declares that bills of exceptions must be signed by the presiding judge of the court within 60 days after the date on which the issues were tried, unless the time is extended by agreement or by order of the presiding judge, as authorized by the law concerning bills of exceptions in the circuit court. Code 1896, § 617, authorizes the judge in vacation to extend the time for signing a bill of exceptions, and section 619 declares that the time so fixed may be extended by agreement of parties or their counsel, and the time fixed by agreement may be extended by the judge in vacation. *Held*, that where a judgment was rendered in such city court on January 31, 1905, and the judge successively extended the time for signing the bill of exceptions to December 1st, a bill was properly signed on November 13, 1905, though it was more than nine months after the date of the judgment and beyond the next succeeding term of court.

4. CONSTITUTIONAL LAW — DUE PROCESS OF LAW—SPECIAL ASSESSMENT.

It is not a violation of Const. U. S. Amend. 14, prohibiting the deprivation of property without due process of law, to assess a portion or all of the costs of a street improvement against the lands abutting or in the immediate vicinity of such improvement.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 871-875.]

5. MUNICIPAL CORPORATIONS — STREET IMPROVEMENT—SPECIAL ASSESSMENT—METHOD OF IMPOSITION.

A determination of what proportion of the burden of the cost of a street improvement shall be borne by the property and what by the public is a matter of legislative discretion, so that, if the Legislature determines that the assessment is to be made in a specified manner, as by the front foot, it will be presumed that the Legislature has determined that that is the proper measure of benefits received.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1106.]

6. SAME—ASSESSMENT OF BENEFITS.

The rule that the cost of a municipal improvement, if assessed against abutting property, must be assessed in proportion to the amount of benefits accruing to the property owners, only requires that there should be some rule of apportionment of the whole charge, having reference to the benefit received by the respective owners, and not that no owner should be charged in excess of actual benefits received.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1108, 1109.]

7. SAME—CONSTITUTIONAL PROVISION — CONSTRUCTIONS.

Const. 1901, § 223, forbidding municipal improvement assessments on abutting property in excess of the increased value of such property by reason of the special benefits derived from such improvements, merely fixes a limit beyond which any assessment should be void, and authorizes the courts to examine the matter and determine whether or not such constitutional limit has been transcended.

8. SAME—MODE OF LEVY.

Such provision has no application to the manner in which the assessment is proportioned, whether by the front foot or otherwise.

9. SAME—CHARTER PROVISIONS—VALIDITY.

The Avondale City Charter (Acts 1894-95, p. 139), providing that special assessments against abutting owners shall be made "in proportion to the amount of the benefit accruing to such abutting owners," does not violate Const. 1901, § 223, forbidding such assessments "in excess of the increased value of such property by reason of special benefits derived from such improvements."

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1108-1112.]

10. SAME—REVIEW.

The Avondale City Charter (Acts 1894-95, p. 139) provides for the levy of special assessments for street improvements and declares that the property owners assessed may appear and contest the assessment, and, if not satisfied with the action of the city council, they may remove the matter by certiorari to the city or circuit court, "where the case shall be regularly submitted and tried as in other civil cases." *Held*, that the property owner is entitled to a trial de novo after the case has been removed to the city or circuit court by certiorari.

11. SAME—APPORTIONMENT OF COST.

Under Avondale City Charter (Acts 1894-95, p. 139) § 12, declaring that not more than one-third of the cost of street improvements shall be assessed against the owners of abutting property, not including sidewalks, it was error for the city to assess the owners on each side of the street with one-third of the cost of the entire street, thus causing them to pay two-thirds of the cost of the work.

12. SAME—COST OF GUTTERING.

Under Avondale City Charter (Acts 1894-95, p. 139) § 12, declaring that not more than one-third of the cost of street improvements should be assessed against abutting property owners, "not including sidewalks," an assessment against property owners for the entire cost of "guttering" was erroneous.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1102.]

13. SAME—AUTHORITY TO IMPROVE STREETS—CHARACTER—DELEGATION.

The authority granted to a city council to grade and pave streets and sidewalks is legislative in character, so that the amount of the improvement, its kind and character, must first be ascertained by the city council and cannot be delegated to any other official or committee.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 802.]

14. SAME—RATIFICATION.

Where a city ordinance providing for the improvement of a street authorized the city street committee to have the streets "graded, guttered, curbed, and macadamized," and left the specifications and material to the judgment of the street committee, but after the levy of an assessment the work was accepted by the city council, such acceptance constituted the entire proceeding, including the assessment, the act of the city authorities, so that the assessment was not void because the specifications of the work, etc., were left in the first instance to the street committee.

15. SAME—ASSESSMENT—METHOD OF LEVY.

Since Const. 1901, § 223, forbidding municipal assessments in excess of the increased value of the property by reason of the special benefits derived from the improvements, places but one limit on such assessment, an assessment was not void solely because each lot was

assessed on the basis of the cost of the work done in front of it, instead of first ascertaining the cost of the entire improvement and apportioning the same among the abutting owners. [Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 1108-1121.]

Appeal from City Court of Birmingham; O. W. Ferguson, Judge.

"To be officially reported."

Bill by Lula B. Harton against the town of Avondale. From a decree in favor of defendant, plaintiff appeals. Reversed.

This was a bill filed by appellant against appellee, reciting that certain street improvements had been made abutting her property, and that the costs of said street improvement had been assessed against her property, without regard to the benefits accruing from said improvement to her property, and greatly in excess of the value derived from said improvement or the benefits accruing to the property therefrom, and alleging, also, the acts of the General Assembly under the authority of which the town of Avondale was making these assessments. Acts 1894-95, p. 137. The prayer of the bill is that writs of supersedeas and certiorari be issued from this court, directed to the mayor and aldermen of the town of Avondale, commanding them to "stay all further proceedings and to send forthwith a certified copy of the entire proceedings and records to this court, and that upon consideration by this court of said proceeding the said assessment shall be declared null and void and of no effect." On the final hearing of the cause the trial court found the issues in favor of the defendant, and entered a judgment for the amount of the original assessment, plus 8 per cent. interest, and also adjudged that the judgment should be a lien upon the lots of the appellant. From this judgment, she appeals. There was motion to dismiss bill of exceptions, because not signed in time, the facts concerning which sufficiently appear in the opinion.

Ledbeater & Johnson, for appellant. Bowman, Harsh & Beddow, for appellee.

SIMPSON, J. It appears from the record that the judgment appealed from in this case was rendered on January 31, 1905; that there were orders by the presiding judge successively extending the time for signing the bill of exceptions to December 1st; and that the bill was signed November 13, 1905, which was more than nine months after the date of the judgment and beyond the next term of the court. Section 620 of the Code of 1896 is imperative that "the time allowed for signing a bill of exceptions must not be extended beyond six months from the adjournment of court," and rule 30, p. 1200, of the Code of 1896, provides that the limit to which the signing may be extended by agreement is that it must be signed "before the next succeeding term of such court." Appellee claims

that as the time when the bill of exceptions was signed in this case was after the commencement of the next succeeding term, and more than nine months after the judgment was rendered, the same cannot be considered. According to the act establishing the city court of Birmingham there is but one term of court, "commencing on the first Monday in September and ending on the last day of the succeeding June." Acts 1888-89, p. 995. This court has heretofore held that the limitation as to the next term of court, under rule 30, applies only to extensions by agreement. *Cooley v. U. S. Savings & Loan Ass'n*, 132 Ala. 590, 592, 31 South. 521. The extensions in this case were all by the presiding judge, and the bill was signed within six months after the adjournment of court, as shown by the act above cited.

But another question arises: The act establishing the city court of Birmingham provides that bills of exceptions "must be signed by the presiding judge of said court within sixty days after the day on which the issue or issues of fact to which such bill of exceptions relates was tried, unless the time for signing such bill of exceptions is extended by agreement of parties, or by order of the presiding judge, as now authorized by law respecting the signing of bills of exceptions in the circuit court." Acts 1888-89, p. 1000. Section 617 of Code of 1896 provides that "the court may, in term time, fix a time in which the bill of exceptions may be signed, and the judge may, in vacation, extend such time"; and section 619 provides that "the time fixed by the court or judge may be extended by agreement of the parties or their counsel, and the time fixed by agreement may be extended by the judge in vacation." This court has heretofore held that the judge of the city court cannot extend the time of signing a bill of exceptions during the sitting of the court; but on the authority of the case of *Moss v. Mosley* (Ala.) 41 South. 1013, this bill was properly signed.

The matter of local assessments for street improvements has been so completely "threshed over," as expressed in a previous decision of this court, that we will not attempt to go over the arguments pro and con in the various cases, but will merely allude to the latest expressions from the Supreme Court of the United States and our own court. The substance of the latest decision of the Supreme Court of the United States on this subject is (*French v. Barber Asphalt Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879) that it is not a violation of the 14th amendment to the Constitution of the United States to assess a portion or all of the cost of a street improvement against the lands abutting or in the immediate vicinity of the improvement. And the gravamen of the argument of the court is that this is a part of the taxing power of the government, and that from time immemorial governments have not pursued the ordinary processes of courts in col-

lecting taxes; hence the methods of enforcing these assessments cannot be said to be "without due process of law," because there is not provision for a regular investigation by a court and jury in order to ascertain the amount of burden that shall be placed upon the property. It holds, also, that the "question of benefits and the property to which it extends is of necessity a question of fact, and, when the Legislature determines it in a case within its general power, its decision must, of course, be final." Page 338 of 181 U. S., page 630 of 21 Sup. Ct. (45 L. Ed. 879). Quoting from the case of *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, the court says: "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the Legislature of the state having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed either like other taxes upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit, and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. Page 339 of 181 U. S., page 630 of 21 Sup. Ct. (45 L. Ed. 879). After giving analysis of the numerous cases on the subject, in most of which there seems to be a presumption that at some stage of the proceeding and in some way the property owner has had an opportunity to test the matter of the amount of benefits to his land by the improvement, the general conclusion is that it is a matter of legislative discretion to determine what proportion of the burden shall be borne by the property, and what by the public, and, while it is admitted that any assessment beyond the special benefits received by the improvement is, as to the excess, taking the property without due process of law, yet when the Legislature determines that the assessment is to be made in a certain way, as by the front foot, the presumption is that the Legislature has determined that that is the proper measure of the benefits received. *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, is not opposed to the views of the court in this case, and explains that in that case the entire cost of opening the street was thrown upon the abutting property, which was "an act of confiscation," and that the legal effect of the decision was to prevent the enforcement of the particular assessment, and to let the village in its discretion make a new assessment "for so much of the expense of the opening of the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property" (pages 344, 345 of 181 U. S.) page 63 of 21 Sup. Ct. [45 L. Ed. 879]; and the court say: "It may be conceded

that courts of equity are always open to afford a remedy where there is an attempt under the guise of legal proceedings to deprive a person of his life, liberty, or property without due process of law." The court then calls attention to the fact that in the case before the court the lots along the street in question were of equal value, similarly situated with regard to the street, of equal depth and all "substantially on the grade of the street." While it is the opinion of the writer that the dissenting opinion of Justices Harlan, White, and McKenna has the advantage of the argument, yet in what shall be said in this opinion our conclusions shall be based on the opinion of the court as the law of the land.

Our own court has followed this decision, and held that it is a matter of legislative discretion to determine whether property abutting on the street will be benefited to the extent of the cost of paving the street along the front of such property, and to impose the cost upon the property, "apportioning the charges thereto according to the distance the several lots may front upon the street so paved"; the argument being, as in the *French-Barber Case*, that when the Legislature determines that the assessment shall be made by the front foot the presumption is that the Legislature has determined that that is the proper measure of the benefit received. Our court says, in referring to our case of *Mayor and Aldermen v. Klein*, 89 Ala. 461, 7 South. 386, 8 L. R. A. 369, which is held to be in harmony with our latest enunciation of the doctrine: "It is true that this cost was to be assessed on this property in proportion to the amount of the benefit accruing to the property owners; but this only meant that there should be some rule of apportionment of the whole charge, having reference to the benefit received by the respective owners, and not that no owner should be charged in excess of actual benefits received." *City Council of Montgomery v. Moore*, 140 Ala. 650, 37 South. 294. The court says that the case of *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 South. 522, was based on "what was generally supposed, and what three of the judges of the Supreme Court of the United States yet believe, was the effect of that court's decision in the case of *Norwood v. Baker*." *City Council of Montgomery v. Moore*, 140 Ala. 638, 37 South. 291.

As will be noticed, these decisions are based entirely on the construction of the fourteenth amendment of the Constitution of the United States and section 24, Bill of Rights, Const. 1875, and upon the law as it stood before the adoption of our present Constitution. It was while the *Norwood-Baker Case* in the United States Supreme Court and the *Birdsong Case* in our own court were generally supposed to be the law—the former declaring that an assessment beyond the benefits actually accruing

to the abutting owner from the improvement is as to the excess a taking of property without due process of law (which principle, as before shown, is still recognized), and that the courts have a right to inquire into that fact; and the latter, resting upon the same principle, and declaring that "the guaranties for the protection of private property would be seriously impaired if it were established, as a rule of constitutional law, that the imposition by the Legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvements, could not be questioned by him in the courts of the country," and going on to affirm the right of the citizen, when such assessment is made, to show "that the sum so fixed is in excess of the benefits received"—that our constitutional convention of 1901 added to our Constitution section 223, forbidding such assessments "in excess of the increased value of such property by reason of the special benefits derived from such improvements."

The conclusion is irresistible that, with the lights before them, the intention of our Constitution makers was to fix this limit in our organic law beyond which any assessment should be void, and to authorize the courts to examine into the matter and determine whether or not the constitutional limit had been transcended. To hold otherwise would be to suppose that the makers of the Constitution had taken the trouble to formulate and adopt an absolutely meaningless new section to the Constitution. To say that assessments shall not be made beyond the benefits received, and yet that, when an assessment is made, either directly by the legislative action or by a rule prescribed by it which has no provision for inquiring into the benefits, is to conclusively presume that the benefits were ascertained, and that the assessment was not in excess thereof would render the constitutional provision absolutely inoperative. This constitutional provision has nothing to do with the manner in which the assessment is apportioned, whether by front foot or otherwise, but only fixes a limit beyond which it cannot go. It necessarily follows that the property owner has the right in some form and at some time to contest the fact as to the benefits accruing and to bring forward such testimony as he can produce on that matter. Any guaranty of the Constitution would be but a brutum fulmen, if there were no tribunal in which the citizen could demand the enforcement of his right. It is true, as has been said, that it is often a difficult matter to ascertain accurately the extent of the benefit; but the courts have to pass upon many difficult matters, and the only result of that is that, in this, as in other matters in which absolute accuracy is unobtainable, much latitude must be allowed to the tribunals which pass upon the matter. It may be admitted, as

stated by the Supreme Court of the United States, that it belongs to that class of rights which do not necessarily demand a regular jury trial. Nevertheless it must be passed upon in some way, and if the original assessment is not done under some proceeding in which the citizen has had an opportunity to produce evidence and have a legal determination of the matter, the courts afterwards can inquire into it and enforce his right. Being difficult to ascertain, the conclusions of the tribunals as to the benefits accruing will not be weighed with delicate scales, but some tribunal must act, or the Constitution-protected citizen is as helpless as if he were the subject of a despot.

The provisions of the charter of the town of Avondale require the assessment against the abutting owners to be made "in proportion to the amount of the benefit accruing to such abutting owner." Acts 1894-95, p. 139. While this is not exactly in the words of section 223 of the Constitution, yet it does not violate that section. The assessment may be made in "proportion to the amount of the benefit accruing to such abutting owner," and at the same time not be "in excess of the increased value of such property by reason of the special benefits derived from such improvement." The act makes provision for notice to the property owner when an assessment is to be made against his property, and authorizes him to appear and contest the assessment, and it authorizes the owner, if not satisfied with the action of the council, to remove the matter by certiorari up to the city or circuit court, "where the same shall be regularly submitted and tried as in other civil cases." This last expression shows that the intention of the statute was not that the circuit or city court should merely look into the proceedings before the council, and either quash or affirm the same; but the reference is evidently to cases brought up by appeal, and the expression "regularly tried as in other civil cases" evidently means tried de novo. So the act is not unconstitutional.

The act provides that "not more than one-third of the cost of such improvement * * * shall be assessed against the owners of abutting property," not including sidewalks. Acts 1894-95, p. 139, § 12. The evidence in this case shows that each property owner was charged with one-third of the cost of the entire street, so that the owner on each side of the street was charged with one-third of the cost of the entire street, thus causing the property owners to pay two-thirds, in place of one-third, of the cost of the work. This was in plain violation of the provisions of the statute, and the court erred in sustaining the assessment thus made.

As to the resolution of the board of mayor and aldermen, the evidence also shows, that in addition each property owner was charged with the entire cost of the "sidewalks, curb-

ing and guttering." While the curbing may be so constructed as to make it a part of the sidewalks, yet it is clear that the guttering is a part of the street proper, and not of the sidewalk. *Job v. People*, 193 Ill. 609, 61 N. E. 1079; *Allman v. Dist. Columbia*, 8 App. Cas. D. C. 8, 17; *Willson v. Chilcott*, 12 Colo. 600, 602, 603, 21 Pac. 901. Consequently it was erroneous to sustain the assessment against the property owner of the entire cost of the guttering.

Section 12 of the act (Acts 1894-95, p. 139) authorizes the mayor and councilmen to cause and procure the streets and sidewalks to be graded, macadamized, etc. The ordinance under which the work was done in this case authorized the street committee to have the streets "graded, guttered, curbed, and macadamized." The ordinance did not contain any specification as to the kind of work that was to be done, the material to be used, or any other matter in regard either to the street or sidewalk. These matters seem to have been left entirely to the judgment of the street committee. It is a familiar principle of law that legislative authority cannot be delegated, and the authorities are clear to the effect that the authority granted to grade and pave streets and sidewalks is legislative, and that the amount of the improvement, its kind and character, must first be ascertained by the legislative body of the city, and not delegated to the engineer, the committee, or any one else. *McQuillan, Municipal Ordinances*, § 86; *Hedges & Goose v. Joyes*, 96 Am. Dec. 311, and notes; *Birdsall v. Clark*, 29 Am. Rep. 105, and note; *McCrowell v. Bristol* (Va.) 16 S. E. 867, 20 L. R. A. 653, and note; *City of St. Louis v. Clemens*, 43 Mo. 395; *City of St. Louis v. Clemens*, 52 Mo. 133; *Ruggles v. Collier*, 43 Mo. 353; *Foss v. City of Chicago*, 34 Ill. 489; *Moore v. City of Chicago*, 60 Ill. 243; *Bolton v. Gilleran*, 105 Cal. 244, 38 Pac. 881, 45 Am. St. Rep. 83; *Thompson v. City of Booneville*, 61 Mo. 282; 1 *Dillon on Munic. Corp.* (4th Ed.) § 96, p. 779, and note. The Supreme Court of the United States, however, in a case in which the city authorities authorized the mayor and chairman of the committee on streets to make a contract for doing the work, directing how the preparatory work should be done, and ordering the construction to be of one or the other of several materials, but giving to the owners of abutting lots the privilege of selecting which, held that, "while it is true the council could not delegate all the power conferred upon it by the Legislature, * * * it could do its ministerial work by agents," yet "there was no unlawful delegation of power. But, if there had been, the contract was ratified by the council after it was made." *Hitchcock v. Galveston*, 96 U. S. 341, 348, 349, 24 L. Ed. 659. Under

this authority we hold that the subsequent ratification constituted the entire proceeding, including the assessment, the act of the city authorities, and not a delegation of legislative power.

It is next insisted that this assessment is invalid because it is shown that each lot was assessed on the basis of the cost of the work done in front of it, and that the cost of the work on the entire street was not first ascertained and the cost apportioned among the abutting owners. The act provides that "the expense thereof shall, after the completion of same, be assessed upon the abutting owners of land or lots along and adjacent to the streets, alleys or sidewalks along which the work is done, in proportion to the amount of the benefit accruing to such abutting owner"; also that "after such work on any street, alley or sidewalk shall be completed in front of or abutting any land or lot owner, the said mayor and board of aldermen shall have the mayor to give the notice required, of the time and place when the meeting is to be held to consider and determine the amount to be assessed against the abutting owner," and the amount will then be determined. Acts 1894-96, pp. 139, 140, § 12. There is high authority for the position that any assessment of the cost separately against each lot owner, based alone on the cost of the work abutting his property, is illegal and void. *City of Independence v. Gates*, 110 Mo. 374, 19 S. W. 728; *Davis v. Litchfield*, 145 Ill. 813, 33 N. E. 888, 21 L. R. A. 563, and notes; *Cooley on Taxation* (2d Ed.) pp. 646, 647, and notes. But Judge Dillon, after referring to similar decisions, remarked: "Still it seems to the author difficult to find satisfactory and solid ground on which to discriminate the case, so as to hold that one is within the constitutional power of the Legislature and the other is not." 2 *Dillon's Municipal Corporation* (4th Ed.) p. 922, § 753. Inasmuch as our Constitution has placed the one limit which we have heretofore construed, and inasmuch as in conforming to that limitation the assessment must frequently not be uniform among the abutting owners along the street, and while we recognize that the duty rests upon the legislative department as far as possible to apply the principle of uniformity, yet we cannot say that this fact alone renders the assessment invalid.

For the errors mentioned the assessment in question was invalid, and the town of Avondale was not entitled to recover in this case. The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

HAMILTON v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. LARCENY—INDICTMENT—DESCRIPTION OF PROPERTY.

On a prosecution for larceny, a count of the indictment described the money taken as "two twenty dollar bank bills, and one one dollar bank bill"; the second count described it as "two twenty dollar national bank notes, and one one dollar national bank note"; and the third count as "two twenty dollar United States Treasury notes, and one one dollar United States Treasury note. The first count described the money as lawful money of the "United States of America," and the other two counts as lawful money of the "U. S. A." *Held*, that demurrers to the counts on the ground that the same failed to sufficiently describe the property alleged to have been stolen were properly overruled.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 71-75.]

2. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—CONFESSIONS—VOLUNTARY CHARACTER.

The confession of accused, made to the sheriff while she was in his custody, was admissible where it was shown that no threat was made or any reward or inducement offered to obtain the confession.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1163-1174, 1202-1206.]

3. LARCENY—TRIAL—INSTRUCTIONS.

On a prosecution for larceny, requested instructions that defendant could not be convicted unless the proof showed that the money stolen was a certain form of money, each instruction hypothesizing the description of the property as alleged in a count of the indictment, should have been given.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 195.]

4. CRIMINAL LAW—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

It was proper to refuse an instruction that, if the witnesses testifying to the crime were in the opinion of the jury unreliable and not worthy of belief, accused could not be convicted, as it pretermitted corroboration of the witnesses by other evidence.

5. SAME.

It was proper to refuse a requested instruction that, if any witness was shown to have sworn falsely to any material fact, his testimony might be disregarded, as a witness may unintentionally swear falsely to a material fact.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1889-1894.]

6. SAME—PLEA OF NOT GUILTY.

Under Code 1896, § 5262, providing that if a defendant when arraigned refuses or neglects to plead or stands mute the court must cause the plea of not guilty to be entered for him, a conviction after a trial on the merits will be reversed unless it appears that defendant pleaded not guilty, or that the plea was entered for him by the court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 612, 619, 620, 684.]

Appeal from Law and Equity Court, Walker County; Thomas L. Sowell, Judge.

"To be officially reported."

Lula Hamilton was convicted of larceny, and she appeals. Reversed.

The indictment in this case charged that Lula Hamilton and Letha White feloniously took and carried away certain money, the personal property of J. V. Ledbetter. In

the first count the money is described as "two twenty dollar bank bills, and one one dollar bank bill, lawful money of the United States of America"; in the second, as "two twenty dollar national bank notes, and one one dollar national bank note, lawful money of the U. S. A."; in the third, as "two twenty dollar United States Treasury notes, and one one dollar United States Treasury note, lawful money of the U. S. A." Demurrers were interposed to each of the counts because the same failed to sufficiently describe the property alleged to have been stolen, and because it fails to sufficiently describe the person from whom the property is alleged to have been stolen. The demurrers were overruled. On the trial, after proof had been made that certain money had been stolen from one Ledbetter, the person described in the indictment, the state introduced J. S. Moore, who testified as follows: "I know the defendant. She was turned out of jail about 12 o'clock on the day that Ledbetter claims he lost his money. She was put back in jail in the evening about 4 o'clock, but not on the charge of taking Ledbetter's money. I got sixteen dollars and some few cents off of her. We found two five dollar bills of money in her hair." The solicitor then asked the witness whether defendant made any statement to him or in his presence about getting the money, and witness answered she did. Solicitor then asked witness if he or any one in his presence made any threat or offered any reward or made or offered any inducement to get defendant to make this statement. Witness answered "No." The solicitor asked the witness this question: "State, Mr. Moore, if she denied getting the money off of Ledbetter." The defendant objected to this question and asked permission to cross-examine the witness before he was allowed to answer. This was granted defendant, and in answer to the cross-examination witness testified as follows: "I told her that she had to give up the money, she had it, and there was no use to deny it. I was the sheriff at that time and had her in jail in my custody." Here the solicitor repeated the question to the witness: "State whether or not defendant told you that she had taken the money." Witness answered she told me that she got the money from Mr. Ledbetter. There was objection to the question and answer and motion to exclude upon the grounds that it was a confession coming from the defendant, who was then incarcerated under the witness, who was sheriff of Walker county at that time, and the proper predicate had not been laid. The defendant requested a number of written charges which were refused, and which are as follows: "(a) The court charges the jury that, unless the money stolen be shown to have been all or part of it bank bill or bank bills, you cannot find the defendant guilty on the first count in this indictment. (b)

The court charges the jury that the defendant cannot be convicted under the second count of the indictment unless the proof shows that the money stolen was either all or a part of it national bank note. (c) The court charges the jury that the defendant cannot be convicted under the third count of this indictment unless the proof shows that the money stolen or a part of it was United States Treasury notes. (5) If the witnesses testifying to the theft are, in the opinion of the jury, unreliable and not worthy of belief, you cannot convict the defendant. (6) The court charges you, gentlemen of the jury, that, if any witness is shown to have sworn falsely to any material fact in the case, you have a right to disregard the testimony of such witness as though he had never testified."

Ray & Leith, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. Each count of the indictment is sufficiently specific in the description of the property alleged to have been stolen, and shows by the direct averment that it was lawful money of the United States. Grant's Case, 55 Ala. 201; Turner's Case, 124 Ala. 59, 27 South. 272. The demurrer to the indictment was properly overruled.

The confession of the defendant was properly admitted as evidence. Spicer's Case, 69 Ala. 159.

Charges (a), (b), and (c) hypothesize the description of the property as alleged in the first, second, and third counts of the indictment, respectively, and should have been given. Charge 5 was properly refused, if for no other reason, it pretermits corroboration of the witness of the class named by other evidence in the case. Frost's Case, 124 Ala. 71, 27 South. 550; Churchwell's Case, 117 Ala. 124, 23 South. 72; Osborn's Case, 125 Ala. 106, 27 South. 758. Charge 6 was properly refused. A witness may unintentionally swear falsely to a material fact. Prater's Case, 107 Ala. 26, 18 South. 238. It is not necessary to notice the other written charges refused to defendant.

"The record fails to show that the defendant pleaded to the indictment, or, standing mute, the court caused the plea of not guilty to be entered for him. Code 1896, § 5262. There can be no trial on the merits in a criminal case until the defendant has pleaded not guilty, or this plea has been entered for him by the court." Jackson's Case, 91 Ala. 55, 8 South. 773, 24 Am. St. Rep. 860. Powell v. Henry & Co., 96 Ala. 412, 11 South. 311.

For the errors pointed out the judgment must be reversed, and the cause remanded. Reversed and remanded.

WEAKLEY, C. J. and DOWDELL and ANDERSON, JJ., concur.

SMITH v. VARY.

(Supreme Court of Alabama. July 6, 1906.)

MORTGAGES—LAND CONVEYED—DESCRIPTION.

Where a mortgage described the land as "the mineral land described" in a certain deed and the deed did not particularly describe any lands as mineral, the mortgage would be construed to mean lands described in the deed which were mineral lands in fact.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 128, 249.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor

"To be officially reported."

Action between R. D. Smith and John Vary. From a judgment in favor of the latter, the former appeals. Affirmed.

Frank S. White & Sons, for appellant. A. Leo Oberdorfer, for appellee.

DOWDELL, J. The bill in this case is filed for the foreclosure of a mortgage on real estate. The bill was demurred to by the respondent, and the present appeal is from the decree of the chancellor overruling the demurrer.

The only question insisted on in argument by counsel for appellant is that raised by the ground of demurrer which challenges the sufficiency of the description in the bill of the land as to which the mortgage is sought to be foreclosed. The land is described with particularity in the third paragraph of the bill. The mortgage, as exhibit A, is made a part of the bill. The mortgage describes the land by reference to a certain deed as follows: "I also bargain, sell and convey to the Birmingham National Bank for the purposes aforesaid all right, title and interest that I may have in and to the mineral lands described in said deed above set forth from John K. Ewing, treasurer, to the Birmingham Furnace & Manufacturing Company, recorded in book 82, page 495, in said probate judge's office of Jefferson county, Alabama." The deed referred to is made a part of the bill as Exhibit B. By this deed different interests or estates in different lands are conveyed. In certain described lands the absolute fee is conveyed, while in other lands, only mineral rights are conveyed, and still further, in other and different lands, leasehold interests are conveyed. The lands in said deed conveyed in fee are described by government numbers and boundaries. These are the same lands which are described in paragraph 3 of the bill. The deed does not designate these lands or any portion of them as "mineral" lands. The mortgage (Exhibit A) purports to convey "the mineral lands described in said deed." The bill avers that the lands described in paragraph 3 are the lands conveyed in the mortgage. The point made by the demurrer is that the bill is defective in description in the failure to show what part of the lands described are mineral and which are not, and it is further insisted in argument

that the mortgage is void because of indefiniteness in description. The latter proposition, that the mortgage is void because of indefinite description, is untenable. The mortgage conveys "the mineral land described in said deed," and there being no lands particularly described as mineral lands, under the maxim, "ut res magis valeat quam pereat," the description in the mortgage will be taken and construed to mean the lands described in the deed that are mineral lands. The mortgage in this respect as to the lands conveyed may be aided by proof aliunde. The demurrer assumes that the Ewing deed referred to in the mortgage describes two different classes of land, mineral and nonmineral. This is an erroneous assumption. The deed calls for different quantity of estates in different tracts of land, but nothing to warrant the above assumption. It cannot be said, as matter of law, from the description in the deed of the different tracts of land, and there are a number of them conveyed in fee, which are mineral lands and which are not. This is a matter of evidence which the complainant is not required to aver in his bill. It may be, when the complainant comes to the proof, that he may be able to show that all of the lands described in the third paragraph of his bill, as to which he seeks a foreclosure, are mineral lands. In any event he would be entitled to a foreclosure as to such as are shown to be mineral lands.

From the view we have taken, it follows that the decree appealed from must be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

SPRINGFIELD et al. v. HURLEY.

(Supreme Court of Alabama. June 30, 1906.)
APPEAL—RULINGS ON PLEADINGS—HARMLESS ERROR.

Where a plea on which issue was joined was substantially the same as a plea to which a demurrer was sustained, and defendants were therefore afforded an opportunity to make any defense available under the plea demurred to, the sustaining of the demurrer was not prejudicial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4098-4105.]

Appeal from Circuit Court, Cherokee County; J. A. Bilbro, Judge.

"Not officially reported."

Action between D. C. Springfield and others and G. W. Hurley. From a judgment in favor of the latter, the former appeals. Affirmed.

This was an action upon contract payable in money upon condition that plaintiff release two piles of lumber from an attachment and make the title to the same clear to the defendant, appellants here. Defendant filed plea 3, which is as follows: Pleading

further, defendants say that the note, the basis of this action, was given for a lot of lumber which plaintiff offered to sell to defendant D. C. Springfield, but defendants say that the lumber was never delivered to the defendant, and was not the property of the plaintiff, and that plaintiff failed to deliver said lumber to the defendant Springfield, or any part thereof. Plea 5. Pleading further, defendants say that the note, the basis of this action, was given for a lot of lumber, and that the consideration of the same has wholly failed in this: That plaintiff had no lumber and delivered to defendants no lumber. Demurrers were interposed to these pleas and overruled as to plea 3, but sustained as to plea 5.

Lee, Lee & Lee, for appellant. Burnett, Hood & Murphee, for appellee.

DENSON, J. The only error assigned challenges the correctness of the judgment of the court sustaining a demurrer to plea 5. Plea 3, on which issue is joined, is substantially the same as plea 5, and afforded the defendants the opportunity to make the defense set up by plea 5. Therefore, if plea 5 is a good plea, and the court improperly sustained the demurrers to it (which we do not decide), the judgment should be affirmed on the doctrine of error without injury. *L. & N. R. R. Co. v. Hall*, 131 Ala. 161, 32 South. 608.

Affirmed.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

ELLIS et al. v. CRAWSON.

(Supreme Court of Alabama. June 30, 1906.)

1. WILLS—SUIT TO CONTEST—LIMITATIONS.

Code 1896, §§ 4296, 4299, provides that any person interested in a will may contest it in chancery within 18 months after probate, but allows further time for contest on the part of one who was an infant without legal guardian at the time of probate. *Held*, that the fact that some of the heirs at law of a testatrix were barred under the statute from proceeding in chancery to contest the will did not affect the right of a minor, who was not barred.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 600-606; vol. 33, Cent. Dig. Limitation of Actions, §§ 390-393.]

2. SAME—PLEADING—DEMURRER.

In a suit under Code 1896, §§ 4296, 4299, to contest a will in chancery after its admission to probate, wherein complainant sought, in addition to setting aside the will, to have a deed from a legatee set aside, and sought an injunction against the legatee's grantees to restrain them from disposing of the property, the question as to the extent and character of complainant's relief was determinable in the final decree, and not properly raised by demurrer to the bill.

3. APPEAL—REVIEW—FAILURE TO DEMUR—MULTIFARIOUSNESS.

In the absence of a demurrer to a bill in chancery on the ground of multifariousness, such question cannot be considered on appeal though argued by appellant.

4. EQUITY—PLEADING—BILL—INCONSISTENCY AND REPUGNANCY.

A bill in chancery may be inconsistent and repugnant in averment without being multifarious.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 338, 340.]

5. SAME—WILLS—CONTEST.

A bill in chancery contesting a probated will under Code 1896, §§ 4298, 4299, is not repugnant because the will avers that the will was not attested by two witnesses, while the copy of the alleged will attached to the bill as an exhibit discloses two subscribing witnesses.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 338, 385.]

6. WILLS — CONTEST — ALLEGATIONS OF GROUNDS.

Code 1896, § 4287, relative to will contests, provides that before probate, it may be contested * * * by filing in the court where it is offered for probate allegations in writing that the will "was not duly executed, or of unsoundness of mind of the testator, or of any other valid objections thereto," and sections 4298, 4299, authorize a contest in chancery after probate. *Held*, that on a contest, even in chancery, the party contesting is not confined to any one ground of contest, but all the grounds of objection may be alleged.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Equity, §§ 639-640.]

7. SAME—SUFFICIENCY OF BILL—ALLEGATION OF FRAUD.

A bill filed under Code 1896, §§ 4298, 4299, authorizing the contest of a probated will in chancery, and alleging that the execution of the will was procured by fraud and misrepresentation, without averring any facts constituting the same, was demurrable.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 639-640.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

"To be officially reported."

Suit by Florence Crawson against Bessie Ellis and others. From a decree overruling demurrers to the complaint, defendants appeal. Reversed and rendered.

This was a bill filed by Florence Crawson by her next friend against Bessie Ellis et al. seeking to have declared null and void and set aside a paper writing purporting to be the last will and testament of Martha Laws, and also seeking to have declared null and void all the proceedings in the probate court admitting said alleged paper writing to probate as the last will of said Martha Laws; also seeking to have declared the rights of complainant in the property mentioned therein, to wit, a one-third interest; also seeking to have a deed from William Laws to Bessie Ellis and Joe Ellis conveying said property to them declared a cloud upon complainant's title, and to set aside and annul the same; it also seeks injunction against all the respondents, their agents, and attorneys to restrain them from selling, disposing of, or otherwise interfering with the property, and for a receiver to take charge of the same. The facts made by the bill were as follows: Complainant is a minor, and the only heir at law of a sister of Martha Laws. That on the 19th day of March, 1903, Martha Laws

died, leaving no child or children, but leaving a husband, William Laws, and the following next of kin. (Here follows a list of next of kin including the mother of complainant, who is alleged to have died before Martha Laws.) That Martha Laws left at the time of her death certain real estate and personal property as described in the bill. It is further alleged that Martha Laws left no will, and made no disposition of her property, but that soon after her death her husband, William Laws, presented to the probate court of Jefferson county a paper writing purporting to be the last will and testament of said Martha Laws, which was duly admitted to probate. That by said alleged will all of the property was left to the husband, and in the said paper writing the husband was nominated as executor without bond. The bill further alleges "that said paper writing was not the will of said Martha Laws, that the same was procured by the fraud and misrepresentation of William Laws and one Joe Ellis. But notwithstanding this the said William Laws by fraud and misrepresentation procured the said paper writing to be probated by the probate court of Jefferson county, Ala., in May, 1903, as and for the last will and testament of Martha Laws. Complainant avers that the probating of said will or paper writing as the will of Martha Laws was obtained by the fraud and misrepresentation of William Laws and one Joe Ellis. * * * Complainant further avers that at the time the said paper writing is alleged to have been executed by said Martha Laws she was mentally unable to execute a will or to make any disposition of her property, besides she did not intend or attempt to do so, but that the whole paper writing purporting to be her last will and testament was prepared and her name signed thereto by a mark by one Joe Ellis without the knowledge or consent of said Martha Laws but by the fraud and procurement of William Laws and Joe Ellis, and that the paper writing was written out by Joe Ellis, and the witnesses' names attached thereto were signed by Joe Ellis." The bill also alleges that complainant was not legally represented during any of the probate proceedings admitting the will to probate. That after the will was admitted to probate, William Laws took charge of the property, and on the 8th day of June, 1904, executed a deed to the property to Bessie Ellis and Joe Ellis, Jr., minor children of Joe Ellis above referred to, reserving the use and benefit of the same to himself during his life. The bill also alleges that this deed was without consideration, and that the will was not signed by two witnesses. There was motion to dismiss the bill for want of equity which was overruled. The defendant then demurred to the bill and the averments thereof as being inconsistent and repugnant one with the other. That the allegations of fraud contained therein were mere con-

clusions and facts constituting the fraud were not set forth with sufficient definiteness and certainty. Various other grounds were assigned raising the other questions discussed in the opinion, and not necessary to be here set out. From a decree overruling these demurrers, this appeal is prosecuted.

Tillman, Grub, Bradley & Morrow, for appellants. R. H. Pearson and Sharpe & Miller, for appellee.

DOWDELL, J. The primary purpose of the bill is the contest of the will of Martha Laws, deceased, which had already been admitted to probate in the probate court of Jefferson county. The complainant was a minor at the time of the filing of the bill, and she files her bill by next friend. Under the averments of the bill, the right to come into the court of chancery for the purpose of contesting the alleged will, is given her by the statute. Code 1896, §§ 4298 and 4299. The fact that some of the heirs at law of the deceased are barred under the statute by lapse of time from proceeding in chancery to contest the will does not affect the right of the complainant, who is not barred, from maintaining her bill for that purpose. And the question of the extent and character of the complainant's relief is one determinable in the final decree, and is, therefore, not properly raised by demurrer to the bill.

There is no demurrer to the bill on the ground of multifariousness, and hence that question, although argued by counsel for appellants, is one not presented by the record for consideration. There is a ground of demurrer that the bill is inconsistent and repugnant in its averments. A bill may be inconsistent and repugnant in averment without being multifarious. The alleged repugnancy is that the bill avers that the purported will was not attested by two witnesses, whereas the copy of the alleged will which is attached as an exhibit to the bill discloses that there were two subscribing witnesses. The bill avers as a fact that the will was not subscribed by two witnesses who signed as such in the presence of the testator. The copy of the will might show on its face that two witnesses regularly sub-

scribed as such, yet it might not be true in fact.

On the contest of a will, the party contesting is not confined to any one single ground of contest. The statute (Code 1896, § 4287), in reference to the contesting of a will provides; "by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or of unsoundness of mind of the testator, or, of any other valid objections thereto." Any objection which goes to the validity of the alleged will is a ground of contest. And all of the grounds of objection to the validity of the will may be averred in the contest. And the same thing may be done where the proceeding to contest is by bill in chancery. Good pleading, however, requires that in stating the grounds of the contest facts should be averred, and not conclusions. The bill in this case, as the ground of contest, avers that the execution of the alleged will was procured by fraud and misrepresentation, without averring any facts constituting the alleged fraud and misrepresentation. This is an insufficient averment, and in this respect the bill was open to demurrer. The rule is, where fraud is charged, facts constituting the fraud should be stated. *Flewellen v. Crane*, 58 Ala. 628; *Morgan v. Morgan*, 68 Ala. 80; *Chamberlain v. Dorrance*, 69 Ala. 40; *Bell v. So. Building Loan Ass'n*, 140 Ala. 377, 37 South. 237, 103 Am. St. Rep. 41; 2 Brick. Dig. 330. The ground of demurrer assailing the bill in this respect was well taken, and should have been sustained.

The bill avers that the said Martha Laws was "mentally unable to make a will." at the time of making of the alleged will. It may be that this may be taken as averment of that "unsoundness of mind" which incapacitated her to make a will, but the bill in this respect might be improved.

For the error pointed out, the decree will be reversed, and one here rendered sustaining the demurrer to the part of the bill as indicated above.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON, and DENSON, JJ., concur.

OSSIE v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

1. CONVICTS—CONTRACTS OF HIRING—POWER TO ANNUL.

Under Code 1896, § 4525, providing that the inspectors of state convicts shall visit convicts sentenced to hard labor for the county and hired out by the county commissioners whenever they deem it necessary, and shall rigidly scrutinize and inquire into the treatment and management of them, and shall make report thereof to the judge of probate; that the contract of hiring shall contain a stipulation "that the contract shall end if the bond, in the opinion of the judge of probate, becomes insufficient, or if any convict is treated cruelly or inhumanly by the hirer or his employes"; and that whenever the inspectors shall notify the Governor that convicts who have been sentenced to hard labor for the county should be removed from the place where they are at work, or from the control of the person who has them hired, he shall order the judge of probate of the county where the convicts were convicted to remove them from such place or to annul the contract, as the case may be—the judge of probate may on his own motion, and on information however obtained, annul the contract for cruel treatment of the convicts as well as for insufficiency of the bond; and that whether the convicts are hired to work out of the county or in it.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Convicts, § 27.]

2. SAME—ANNULING CONTRACT FOR INSUFFICIENCY OF BOND.

Under Code 1896, § 4525, authorizing the judge of probate to annul the contract hiring out convicts sentenced to hard labor for the county, if the bond, in his opinion, "becomes insufficient," the annulment is not to be confined to a change in the sufficiency of the bond from what it was when originally made; but it is the present state of insecurity for the future that justifies the annulment.

3. HABEAS CORPUS—SCOPE OF INQUIRY.

In habeas corpus proceedings the inquiry is as to the unlawfulness of the detention, the status of the petitioner at the time of the decision, so that changes in conditions between the time the writ was allowed and the time of the trial are to be considered.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, §§ 82-85.]

4. SAME—EXTENT OF RELIEF.

Where the contract by which a convict has been hired out has been annulled, but the term of his sentence has not expired, the order in habeas corpus proceedings should not be an absolute discharge, but merely a discharge from the custody of the person to whom the convict was hired, and a remand to the custody of the jailer, till further disposition of him.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 93.]

Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge.

"To be officially reported."

Habeas corpus proceedings by Charles Ossie. From an order denying discharge, petitioner appeals. Reversed and remanded.

George A. Sullivan and Charles L. Bromberg, for appellant. Massey Wilson, Atty. Gen., and Tillman, Grub, Bradley & Morrow, for the State.

TYSON, J. The appellant sued out a writ of habeas corpus before Hon. Samuel L.

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Weaver, associate judge of the criminal court of Jefferson county, complaining that he was unlawfully imprisoned or restrained of his liberty by the Sloss-Sheffield Steel & Iron Company, hereafter called the "Sloss Company." On the hearing he was remanded to the custody of the Sloss Company, from which order this appeal is prosecuted.

The case-made is that appellant was convicted and sentenced in Mobile county to hard labor, and under a contract with the authorities was hired and delivered to the Sloss Company, and was in its custody under said contract working out his unexpired sentence when the writ was sued out. Premitting all consideration of the insistence that the contract was not made by the board of revenue and road commissioners because not fully and completely shown by the minutes of the board, and that the bond never went into effect because not actually approved by the judge of probate, we will consider only the construction of the statute (section 4525 of Code of 1896) in respect to the annulment of the contract of hiring, as in our opinion it is decisive of the cause. After the delivery of the petitioner to the contractor, the judge of probate of Mobile county annulled the contract on two distinct grounds: One, that the bond "is insufficient"; the other, that the convicts had been treated inhumanly; and also by general order not specifying any cause. One of the orders, however, was made after the writ was sued out, but before the trial—one on May 14th, the day of the date of the writ; the third on the 30th of April. After such annulment the board of revenue and road commissioners of Mobile county hired the convicts, including petitioner, to a third party. The trial judge, on the objection of the state and of the Sloss Company, excluded all evidence of the annulment of the contract by the judge of probate. This ruling of the court is sought to be justified on several grounds: First, that the orders were in two instances made by the judge after the institution of this proceeding; second, that the annulment on the ground of the insufficiency of the bond does not show that it proceeded on the bond having become insufficient since it was given, but on the ground that it was then insufficient; and, third, that the judge was without authority to annul contracts as to convicts worked out of the county on the ground of ill treatment except on the order of the Governor, and that no such requisition was here shown.

We shall consider the last point first. There can be no doubt of the general aversion of courts to summary proceedings, and especially where they are entirely ex parte. But necessity on principles of public policy may reasonably call for the application of such remedies, and, where they relate entirely to executory contracts, the dangers of application to property rights is minimized. When a continuous contract is en-

tered into there can be no injustice in either or both parties reserving an unqualified right to put an end to the contract in the future at pleasure. So, here, the welfare of the convicts, subjected to penal servitude, of whom the state is guardian as it were, could well dictate the policy of reserving the right to terminate the contract for the employment of state criminals. Such matters, like many others, cannot await the tedious termination of ordinary adversary legal proceedings. The question then is: First, whether this right was reserved in this instance to be exercised by the judge of probate; and, second, whether it has been duly exercised?

As to convicts not sentenced to hard labor for the county, contracts for their hire may be terminated summarily and wholly ex parte, under section 4475 and section 4509 of the Code of 1896, by the president of the board of inspectors, for cause, on the approval of the Governor or by the Governor "without assigning any reason therefor." As to convicts sentenced to hard labor for the county, the system is somewhat different from that applicable to convicts in the penitentiary. As to the latter the county authorities have no authority or responsibility, but as to the former there is a dual case. *Jefferson County v. Truss*, 85 Ala. 486, 5 South. 86. Section 4525 of the Code of 1896 prescribes that the inspectors of state convicts shall visit county convicts whenever they shall deem it necessary, and shall rigidly scrutinize and inquire into their treatment and management, and report to the judge of probate, in writing, as to their condition and treatment. Then follows the provision that the contract of hiring by the county authorities must contain a provision "that the contract shall end if the bond, in the opinion of the judge of probate, becomes insufficient, or if any convict is treated cruelly or inhumanly by the hirer or his employes." Then follows another provision that: "Whenever the board of inspectors shall notify the Governor that convicts who have been sentenced to hard labor for the county should be removed from the place where they are at work, or from the control of the person who has them hired, it shall be his duty to order the judge of probate of the county where said convicts were convicted, to remove them from such place, or to annul such contract as the case may be," etc. It thus appears that as to county convicts the president of the board of inspectors has no power to annul contracts, and that the Governor has the power only indirectly through the judge of probate. At the same time it appears that the board of inspectors must report the management to the probate judge.

The question in construing the section is whether the judge of probate must be moved to the annulment of the contract by the or-

der of the Governor, or may act voluntarily on information furnished by reports made to him, or otherwise obtained, on which to form an opinion. Does the fact that the Governor is given the right to compel the judge of probate to annul the contract of hiring, in a subsequent clause, put a construction on the previous clause so as to exclude the exercise of the power by the judge of probate without compulsion? Is there any incompatibility in such a power being in the Governor and at the same time an authority in the judge of probate to act without extraneous compulsion? We can see none. The clause of the section providing that the contract of hiring must contain a stipulation "that the contract shall end if the bond, in the opinion of the judge of probate, becomes insufficient, or if any convict is treated cruelly or inhumanly by the hirer or his employes," may be read with perfect consistency with the rules of rhetorical and grammatical expression, by making the clause "in the opinion of the judge of probate" applicable to each of the clauses—one relating to the bond, and the other to inhuman treatment. In the composition of compound sentences stipulating, as here, that the subject ("contract") shall have a certain status ("end") on the happening of one of two or more conditions or events connected by "or," the subject and predicate are usually and naturally expressed in connection with the first alternative condition, and left to be supplied with the other. The first condition here is "if the bond becomes insufficient," not, however, absolutely so, but qualifiedly; that is, "in the opinion of the judge of probate." It can make no difference where this qualification, so far as the first condition is concerned, is placed, so it precedes "or." In its relation as expressed it determines, limits, and defines the first alternative, by pointing out how the fact which is to end the contract is to be determined. The first sentence can be read thus: "The contract shall end, if in the opinion of the judge of probate the bond becomes insufficient." The question then is whether in the next alternative introduced by the word "or" the qualifying clause used with reference to the first condition is not to be supplied as to the second, just as the subject ("contract") and the predicate ("shall end") are supplied. It is just as grammatical and proper to carry forward the mode of determining the fact which is to end the contract, as it is to supply the subject and predicate in the several alternatives connected by "or." And we think such is the meaning of the statute. Why are reports on the condition of the convicts to be made to the judge of probate if he can act only on compulsion by the Governor moved by the notice given by the inspectors to him? The power to compel action, lodged in the Governor, by the judge of probate was not intended to give the

judge jurisdiction to act, but to prevent his neglect to act voluntarily. The power to force the judge of probate to act is a "cumulative precaution, designed to better insure the humane treatment of convicts. It may have been supposed that local officers would sometimes neglect this duty." *Jefferson County v. Truss*, supra. This case expressly holds that section 4525 of the Code of 1896 applies "to all convicts hired out by the court of county commissioners." Therefore no distinction can be drawn as to the power of the judge of probate in respect to convicts hired to work in or out of the county to terminate the contract of hiring. And we hold that under this section the judge had the right to annul the contract for either of the causes enumerated therein.

The point that the annulment for the insufficiency of the bond must be confined to the case of a change in the sufficiency from what it was when originally made is entirely too narrow. It is the present state of insecurity for the future that justifies the act, and not a change from the original sufficiency. The law supposing and taking it for granted that a sufficient bond has been originally taken gives the judge of probate authority to judge of the sufficiency at any future time, and finding it then insufficient calls into existence the power of annulment. In habeas corpus proceedings the inquiry is as to the lawfulness of the detention. It is the status of the petitioner at the trial which determines his rights. As said by Mr. Church in his most excellent work on Habeas Corpus: "On a habeas corpus, the decision should be made upon the actual status of the case at the time of the decision, and not according to the state of things when the writ was allowed." The detention may become lawful when originally unlawful, or unlawful when originally lawful; and in such cases the court is bound to regulate its judgment according to the status at the trial. It would be preposterous to remand a prisoner to be hanged who had been pardoned after the date of the writ. In short, it is the status at the time of the trial which the court views and therefore it must receive proofs to that point, though it may involve a change of the original status.

In this case, although the petition was sworn to on the 12th of May, the writ was not issued until two days thereafter and was not heard until the 11th day of June. On the 30th of April, preceding, the probate judge made an order annulling the contract with the Sloss Company because of inhuman treatment of the convicts. On the 14th of May he made a similar order without specifying the grounds on which it was based, and on the 21st of May a similar order was made on the ground that the bond of the hirer "is insufficient." If the judge was

authorized and empowered to make these orders, and we have shown that he was, they put an end to the contract with the Sloss Company, and the exercise of that authorization or power in the absence of fraud or collusion is final. *Jefferson County v. Truss*, supra; *Lynde v. County*, 16 Wall. (U. S.) 6, 21 L. Ed. 272; *Plock v. Cobb*, 64 Ala. 127. After the making of these orders the Sloss Company ceased to be "the person authorized by law to detain" the appellant, and therefore he is entitled to relief, but not to his discharge. On the evidence offered, but which the trial judge refused to admit, he should have been discharged from the custody of the Sloss Company and remanded to the custody of the jailer of Jefferson county until hired out or disposed of by the board of revenue and road commissioners of Mobile county. Sections 4838, 4839, Code 1896; *White v. State*, 134 Ala. 197, 32 South. 320; *State v. Roberts*, 126 Ala. 87, 28 South. 744; 15 Am. & Eng. Ency. Law (2d Ed.) p. 209.

The order appealed from is reversed and the cause remanded for further proceeding in accordance with this opinion.

Reversed and remanded.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

Ex parte OSSIE.

(Supreme Court of Alabama. July 6, 1906.)

"Not officially reported."

Original application of Charles Ossie to the Supreme Court for writ of habeas corpus. Dismissed.

George J. Sullivan and Charles L. Bromberg, for petitioner. Tillman, Grub, Bradley & Morrow, for respondent.

TYSON, J. The questions here sought to be reviewed are also presented by appeal on another record, and it is therefore unnecessary to review the questions here presented by the petition for the writ of habeas corpus.

The petition will be dismissed without prejudice.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

BARNES v. MORAGNE.

(Supreme Court of Alabama. July 6, 1906.)

1. TAXATION — MORTGAGES — STATUTES — REPEAL.

Gen. Acts 1903, p. 227, imposing a privilege tax on recorded mortgages, and providing that there shall be no other tax collected on any such instrument on which the tax prescribed by the act shall have been paid, either state, county, or municipal, operated to repeal Code 1896, § 8911, subd. 7, imposing an ad valorem

tax on all moneyed capital, to wit all money lent, solvent credits, and other credits of value.

2. SAME.

Such credits were not thereafter subject to taxation under Code 1896, § 3911, subsec. 14, providing that there should be levied for revenue purposes an ad valorem tax of 55 cents on each hundred dollars in value, on all other property, real and personal not otherwise specified, and other things of value.

Weakley, C. J., and Dowdell and Denson, JJ., dissenting.

Appeal from City Court of Gadsden; John H. Disque, Judge.

"To be officially reported."

Action by Fannie L. Moragne against Adam H. Barnes. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for money had and received, begun by appellee against appellant, as tax collector of Etowah county, seeking to recover taxes assessed against and paid by appellee under protest to appellant as such collector. The facts are that Fannie L. Moragne had upon record in the probate office a certain mortgage for the sum of \$6,000, of date June 4, 1900, and due June 4, 1905, upon which the tax assessor of Etowah county levied an ad valorem tax, which the said bonds require to be paid; at the same time executing a receipt showing that the ad valorem tax was paid under protest, and after levy, upon the personal property of the said Fannie L. Moragne, for the purpose of selling the same for the enforcement of the taxes on said mortgage—said Fannie L. Moragne insisting that said mortgage was not the subject of taxation, and giving notice at the time of the payment, and that she would bring suit against the collector for the recovery of the amount paid. It was further shown that taxes had been paid on this mortgage up to and including the year 1903. There was judgment for plaintiff, and the tax collector appealed.

Massey Wilson, Atty. Gen., for appellant. Goodhue & Blackwood, for appellee.

TYSON, J. The only question presented for consideration in this case is, whether the provision of the act of 1903, imposing a privilege tax on recorded mortgages (Gen. Acts 1903, p. 227) had the effect of exempting "all moneyed capital; that is, all money lent, solvent credits, or other credits of value," etc., from taxation for revenue purposes. Prior to the passage of this act this species of property was expressly made the subject of taxation by the imposition of an ad valorem tax levied annually of 55 cents on each hundred dollars in value. Section 3911 of the Code of 1896, and subdivision 7 thereof. The act of 1903 is entitled "An act, to better provide for the revenue of the state," and deals with a number of subjects of taxation which are covered by fourteen subdivisions of section 3911 of the Code of 1896. And indeed, it cannot be doubted that subdivisions 4, 5, and 9 are repealed by the act, since the

subject-matters contained in them are fully revised by the later act. In other words, it is entirely clear that the provisions of the later act relative to those subdivisions were intended to be a substitute for them. It is true that the act of 1903, in amending subdivision 7, does not revise the whole of the subject-matter of that subsection, nor does it in express terms repeal it. In fact, it only provides for a "privilege tax" on recorded mortgages, once for the life of the mortgage, which is in no sense an ad valorem tax. And clearly if no mention of subdivision 7 had been made or the provisions of the act had been enacted by an independent act with no express words of repeal of that subsection, that subsection would not have been repealed by it, since it could not be held to be a revision of it, in such sense as to repeal it by implication. But the language of the act of 1903 expressly amends subsection 7, and makes the "privilege tax" on recorded mortgages and other instruments a substitute, in so far as such mortgages are concerned, for the ad valorem tax imposed upon them by section 3911 and that subsection. To see that this is true, we need only quote the following language: "That subdivision 7 of section 3911 of the Code of 1896, be amended, and the same is hereby amended so as to read as follows: * * * There shall be no other tax collected upon any such instrument which shall have paid the tax prescribed in this act, either state, county, or municipal." This last clause is a plain expression of the legislative intent to exempt recorded mortgages and other instruments evidencing a debt from an ad valorem tax.

But it may be said that this language, or, indeed, the whole language of the act does not show a legislative intent to exempt from taxation "money lent, solvent credits, or other credits of value," not evidenced by recorded mortgages or other recorded instruments. We would be much inclined to this view upon the theory that the Legislature should be saved from the imputation of having established a system of taxation for revenue purposes which should, but does not embrace, every species of property that equitably should bear its proportion of the annual taxes for the support of the government; that it has by indirection exempted property and persons enjoying the protection of the government from contributing to its support and maintenance, and this, perhaps, to the extent of at least one-fourth of the taxable property of the state. But we are precluded from holding this view, because to so hold would render the provision of the act under consideration unconstitutional. For clearly to exempt solvent credits secured by recorded mortgages or other instruments from a property tax and to subject "money lent, solvent credits, and other credits of value" secured by or evidenced by unrecorded mortgages or other instruments, would violate the constitutional requirement as to uniformity. Sec-

tion 211 Const. 1901; *State Bank v. Board of Revenue*, 91 Ala. 217, 8 South. 852, and cases there cited. This conclusion is supported by what was said in *Hooper v. State*, 141 Ala. 111, 37 South. 662. Nor can this constitutional objection be avoided by eliminating the exemption feature of the provision of the act, and leaving the remaining feature of it to stand. It cannot be affirmed that the Legislature would have imposed the "privilege tax" on recorded mortgages and other instruments without exempting them from taxation. Nor can the exemption be declared to be offensive, because not expressed in the title to the act. The mandate of the Constitution requiring each law to contain one subject (section 45, Const.) has no application to general revenue bills.

It will not be doubted that the Legislature in the exercise of its authority or power to classify the subjects of taxation may exempt "all moneyed capital; that is, money lent, solvent credits, and other credits of value," from an ad valorem tax. These subjects may be well classified as one, but it would be an arbitrary and unjust classification to subject that species of solvent credits which are not secured by recorded instruments to a property tax and exempt those secured by recorded instruments. This, in our opinion, as said above, cannot be constitutionally done. So then, in order to avoid declaring the whole provision of the act unconstitutional, which we must not do if it is possible, we are forced to hold that the Legislature intended the provision as a substitute for subsection 7, and, therefore, intended to exempt all the property enumerated in it from a property tax. Nor can it be held that subsection 14 of section 3911 fills the chasm. It is undoubtedly true that that subsection was added to prevent an escape to property which should be taxed, and which was not enumerated in the 13 preceding subdivisions. But if the particular class, if properly enumerated in subsection 7 was and is exempted from an ad valorem tax by the provision of the act amending it, which we have been constrained to hold that it does, it is clear that it is not made subject to that tax by subsection 14.

Affirmed.

HARALSON, SIMPSON, and ANDERSON, JJ., concur. WEAKLEY, C. J., and DOWDELL and DENSON, JJ., dissent.

CLAY v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

"Not officially reported."

Action by the state against M. A. Clay. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Virgil Bouldin, for appellant. Massey Wilson, Atty. Gen., for the State.

TYSON, J. On the authority of *Barnes v. Moragne* (Ala.) 41 South. 947, this cause is reversed and remanded.

HARALSON, SIMPSON, and ANDERSON, JJ., concur.

HOOVER v. STATE.

(Supreme Court of Alabama. July 6, 1906.)

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

"Not officially reported."

Action by the state against J. F. Hooper. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Street & Isbell, for appellant. Massey Wilson, Atty. Gen., for the State.

SIMPSON, J. This cause was reversed and remanded on the authority of *Barnes v. Moragne* (Ala.) 41 South. 947.

HARALSON, TYSON, and ANDERSON JJ., concur. WEAKLEY, C. J., and DOWDELL and DENSON, JJ., dissent.

SOUTHERN RY. CO. v. HAYWOOD.

(Supreme Court of Alabama. Jan. 30, 1906. Rehearing Denied July 6, 1906.)

RAILROADS—ACCIDENTS AT CROSSINGS—COMPLAINT—WANTONNESS OR SIMPLE NEGLIGENCE.

Simple negligence, and not wantonness, is charged by a complaint alleging that intestate was killed while attempting to cross defendant's track near an unguarded street crossing, in a greatly frequented part of a city, by a car kicked by an engine, and left to rush along the track without warning or signal or means thereof, or any one on it to check its speed; and that the killing was the result of the wanton and reckless conduct of defendant's agents and servants in thus propelling the car backward at a speed of 15 to 25 miles an hour, in that they knew it was likely persons would be on the track, and knew that said place was used by the public in large numbers at all hours.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1100, 1110.]

Haralson and Dowdell, JJ., dissenting.

Appeal from Circuit Court, Morgan County; Osceola Kyle, Judge.

"Not officially reported."

Action by Hannibal Haywood, administrator, against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

This cause was tried upon the following counts: Count 4. Plaintiff, as administrator, aforesaid, claims of the defendant the sum of \$1,999 as damages for the wrongful killing of Frank Haywood, plaintiff's intestate, on June 2, 1899. Plaintiff avers that said Frank Haywood was killed in Decatur, Ala., at a point in said town within about 100 feet of the express office, the railway baggage room, waiting room, union ticket office, and depot for two railroads, and of the only telegraphic office in said city, and

within about 350 feet of the Bismark Hotel and barroom—all being places of frequent and constant resorts, and situated across the railway track of the defendant opposite the other buildings named—and within about 200 feet of the freight depot of defendant and various other houses; all of said places named being places which were greatly frequented by large numbers of people at all hours of the day and night, to reach which and other places many persons were accustomed to cross and recross the railway track of defendant, and to walk along, upon, and between them at or about the place where said Frank Haywood was killed. Plaintiff avers that his intestate was killed by one of defendant's cars which had been previously propelled or "kicked" by an engine which was then cut loose, and the car left to rush along the track without signal or warning or means thereof, so that it ran against and over plaintiff's intestate, killing him. And plaintiff avers that said killing occurred on defendant's track near the unguarded Vine Street Crossing in said town while said Frank Haywood was about to cross the track. And plaintiff avers that the said killing was the result of the wanton and reckless conduct of the defendant's agents and servants in propelling said car detached from the engine along said track against the plaintiff's intestate, in this: That the said servants and agents knew that it was likely that persons would be on said track at said place yet they wantonly and recklessly propelled said car backwards at the rate of 15 to 25 miles per hour, and detached it from the engine without any one on said car to check its speed or give warning of its approach, and without giving any signal of its approach or its propulsion by bell, whistle, or otherwise, in time for said Frank Haywood to make his escape. And plaintiff avers that defendant's said servants and agents knew that said place where said Frank Haywood was killed was used by the public in large numbers at all hours of the day in passing and repassing and walking along and in standing upon said track, and the territory adjacent thereto. Count 5 (same as count 4 down to and including the words "so that it ran against and over plaintiff's intestate killing him," where they first occur in said count). And plaintiff avers that said killing occurred on defendant's track at the Vine Street Crossing in said city, which was an unguarded crossing. No one was on said car to check its speed or give warning of its approach, and plaintiff avers that defendant's servants and agents propelling said car backwards and detaching it from the engine, knew that the place where said Frank Haywood was killed was frequented by large numbers of people at all hours of the day and night, and said track was crossed and recrossed by the public in that vicinity; they also knew that it was

likely and probable that some person would be exposed to danger at said point by the propulsion of said car backwards detached from the engine, yet with this knowledge they recklessly and wantonly rolled said car backward along said track then detached it from the engine, leaving it to roll by its own momentum against the plaintiff's intestate, and they failed to give any signal of its approach by bell or whistle. Said intestate was killed while about to cross defendant's track. Demurrers were interposed raising the question that the plaintiff's intestate as appeared from the complaint was a trespasser when the facts alleged show nothing but simple negligence. Also that the plaintiff's intestate, as shown by the complaint at the time he was struck and killed, was not in the exercise of his right of immediately crossing said track, but was dangerously near the track at a place other than a public crossing, and that the facts alleged show simple negligence, and various other grounds. The defendant also offered to interpose pleas setting up contributory negligence on the part of plaintiff's intestate, but demurrers were sustained to them as answers to counts 4 and 5.

Humes & Speake, for appellant. W. W. Callahan and E. W. Godbey, for appellee.

HARALSON, J. 1. The case was tried on counts 4 and 5, and each side agrees that these counts alone need be referred to on this appeal.

These counts claim damages for the personal injury of the plaintiff's intestate, on account of the willfulness and recklessness of the defendant's agents and servants.

The locus in quo of the killing is particularly described, as being at or near the crossing of Vine street in the city of Decatur, with defendant's railroad track. We will not here set out these counts, as this will be done in the report of the case. They were demurred to as being insufficient to charge willfulness and recklessness. Counts similar in substance and effect have been, too often passed on by us, to require any further discussion of these. It is sufficient to say that the complaint clearly counts on the wantonness of the defendant's servants and agents in operating the train. *A. G. S. R. Co. v. Guest*, 136 Ala. 348, 34 South. 968; *L. & N. R. R. Co. v. Orr*, 121 Ala. 490, 26 South. 35; *A. G. S. R. Co. v. Burgess*, 119 Ala. 556, 25 South. 251, 72 Am. St. Rep. 943; *M. & C. R. Co. v. Martin*, 117 Ala. 368, 23 South. 231.

The foregoing expresses the views of the writer of this opinion and of Justice Dowdell. The other Justices are of the opinion, that the counts charge no more than simple negligence, and that pleas of contributory negligence, when well pleaded, are proper.

Reversed and remanded.

TYSON, SIMPSON, ANDERSON, and DENSON, JJ., concurring.

HARALSON and DOWDELL, JJ., dissenting.

GRAYSON v. HAISLIP.

(Supreme Court of Alabama. Feb. 14, 1906.
Rehearing Denied July 6, 1906.)

COSTS—IN EQUITY—SEPARATE ISSUES.

All the costs of the appeal and the case will be adjudged against complainant where the bill was originally to have lands subjected to a mortgage in a certain order, to which he was not entitled, though afterwards he amended the bill to ask for reformation of a deed, and though entitled thereto, and this as well as the other relief was denied him; defendant not having been requested to make the reformation, it not appearing that he would not have voluntarily made it had request been made to him, and such matter not having been really litigated in the case.

Appeal from Chancery Court, Madison County; W. H. Simpson, Chancellor.

"Not officially reported."

Suit by Charles A. Grayson against John C. Haislip. From an adverse decree complainant appeals. Affirmed in part, and in part reversed and rendered.

D. A. Grayson and S. S. Pleasants, for appellant. Cooper & Foster, for appellee.

MCLELLAN, C. J. We concur with the chancellor in the conclusion of fact that the complainant, Charles A. Grayson, for and in consideration of the conveyance by Medlin of certain tracts of land to him assumed the debt which Medlin owed the British American Mortgage Company, secured by a mortgage on said tracts and upon other lands of said Medlin, and agreed to pay off the same, and, of course, in the chancellor's conclusion of law upon these facts that Grayson was not entitled to have lands embraced in said mortgage and still owned by Medlin first subjected to the payment of said mortgage debt, and next, lands embraced in the mortgage and conveyed by Medlin to third parties subsequent to the conveyances to Grayson subjected thereto in the inverse order of alienation, leaving as a charge on the lands conveyed to Grayson only such balance, if any, of the debt as should remain unpaid after such order of foreclosure had been resorted to and carried out. The chancellor did not err in denying this relief sought by the bill.

Grayson's bill, as amended, however, set forth another equity, namely, to have a deed executed by Medlin to him reformed in respect of the description of a part of the land in question. The facts in this connection were sufficiently alleged and proved. The relief prayed upon them should have been granted. The decree of the chancery court in so far as it denies this relief must be reversed and a decree will be here entered for the reformation of said deed. It does

not appear, however, but that this matter would have been voluntarily rectified by Medlin had request been made to him before bill filed. It does appear that no request was made, and that this ground for relief was not the occasion for filing the bill, was indeed brought into the case by amendment, and is not and has never been a matter really litigated in the case. On this state of facts, while the appellant prevails on this appeal on his prayer for reformation, all the costs of the appeal and of the case will nevertheless be taxed and adjudged against him.

Affirmed in part, and in part reversed and rendered.

HARALSON, TYSON, DOWDELL, and DENSON, JJ., concur.

MITCHELL v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

INTOXICATING LIQUORS—ILLEGAL SALE.

Defendant is not guilty of selling liquor without a license, where B. went into defendant's store, telephoned to V. at his saloon, and asked V. to send him a quart of whisky, saying that he was at defendant's store; and V. told him to leave the money with defendant; and the whisky was left at such store, and B. got it and left the money with defendant, and asked him to give it to V., and defendant did so.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 160, 182.]

Appeal from Circuit Court, Franklin County; E. B. Aimon, Judge.

"Not officially reported."

Sam Mitchell was convicted of selling liquor without a license, and appeals. Reversed and remanded.

The defendant was indicted for selling liquor without a license. The case made by the state is as follows: Baker came to Russellville, Ala., and went into the store of the defendant, and used defendant's 'phone to call up Vaughn's saloon and ask Vaughn to send him (Baker) a quart of whisky. The price was 50 cents. Vaughn asked Baker, where he was, and he told him at Sam Mitchell's store in Russellville. Baker asked Vaughn where to leave the money and Vaughn replied leave it at Sam Mitchell's store, and he would get it. This was before train time. Baker went away and returned two or three hours later, and after train time, and asked defendant if the whisky had come, and defendant replied that it had and it was in the back room of the store in a box. Baker went in and got the whisky, and gave defendant 50 cents, and asked him to give it to Vaughn, and he said he would do so. It was shown that it was afterwards given to Vaughn by defendant. The court gave the general affirmative charge for the state, and refused a like charge to defendant.

James & Williams, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. In the cases of *Bonds v. State*, 130 Ala. 117, 30 South. 427, and *Maples v. State*, 130 Ala. 121, 30 South. 428, are decisive of this case, and on the authority of those cases it must be held that the general charge given at the solicitor's request should have been refused, and the one in favor of defendant should have been given. Reversed and remanded.

ALABAMA MINERAL LAND CO. v. LATHROP-HATTON LUMBER CO.

(Supreme Court of Alabama. April 11, 1906.)

MASTER AND SERVANT—INJURIES TO THIRD PERSONS—TRESPASS—DAMAGES—PENALTIES—CUTTING TIMBER.

Where defendant was not shown to have authorized or consented to the cutting of plaintiff's trees by defendant's agent, he was not liable for the penalty imposed by Code 1896, § 4137, for willfully and knowingly cutting the trees of another.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1230-1232; vol. 46, Cent. Dig. Trespass, §§ 12, 147, 148.]

Appeal from Circuit Court, Shelby County; John Pelham, Judge.

"Not officially reported."

Action by the Alabama Mineral Land Company against the Lathrop-Hatton Lumber Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This was an action begun to recover the statutory penalty provided by section 4137 of the Code of Alabama for cutting down, destroying, or taking away 1,000 pine and oak trees and saplings. The pleas interposed and on which issue was joined were: The general issue, the statute of limitations of one year; ownership in the defendant of the timber cut and removed and a license from plaintiff to defendant to cut and remove such timber as was cut. It seems from the evidence that the defendant cut certain timber on lands belonging to plaintiff under a timber deed which conveyed to defendant all the timber which measured 12 inches and up in diameter at the stump. It was further shown that smaller timber than this was cut, but it was not shown that the defendant did this cutting or authorized or ratified the cutting of any timber less than the above-stated measurement. At the conclusion of the testimony the court gave the affirmative charge for the defendant. The bill of exceptions contained the following statement: There was no evidence showing or tending to show that the defendant was in any way connected with cutting of undersized trees, or that it authorized or instructed its employes or its timber boss or anyone else to cut or have cut any tree on said land that measured less than 12 inches, two feet above the ground, or that it had any knowledge that any such trees were being cut or had been cut by its employes.

Blackwell & Agee, for appellant. Smith & Smith, for appellee.

TYSON, J. The counts upon which this case was tried are for the recovery of the statutory penalty provided by section 4137 of the Code of 1896. It is not shown by the testimony inferentially or otherwise that the defendant authorized or consented to the cutting of the trees or ratified the action of the agent in doing so. And, in order for the plaintiff to recover, this was necessary to be shown. The case is clearly controlled by the principles declared in *Williams v. Hendricks*, 115 Ala. 277, 22 South. 439, 41 L. R. A. 650, 67 Am. St. Rep. 32, where the question here involved is learnedly and ably discussed.

The affirmative charge was correctly given for the defendant.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

KLINE v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. COUNTIES — ILLEGAL CHANGE OF COUNTY BOUNDARY.

Act Sept. 30, 1903 (Loc. Acts 1903, p. 462), taking territory from Cleburne territory and adding it to Calhoun county and so reducing the former to less than 600 square miles, is in contravention of Const. 1901, § 39.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, §§ 7-9.]

2. CRIMINAL LAW—VENUE.

Where an act taking territory from one county and adding it to another is unconstitutional, an indictment for a crime committed in the territory so changed should be found in the original county.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 231.]

Appeal from Circuit Court, Calhoun County; John Pelham, Judge.

"To be officially reported."

William Kline was convicted of murder, and appeals. Reversed and remanded.

Knox, Acker & Blackmon, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. It appears from the evidence, and is admitted by the state, that the offense was committed in that territory which was cut off from Cleburne and added to Calhoun county by the act of September 30, 1903 (Loc. Acts 1903, p. 462), and more than one-half mile inside of Calhoun as the line existed at the time of the killing.

The new county of Cleburne was formed by the act of the Legislature of December 6, 1866 (Acts 1866-67, p. 71), out of specified portions of Calhoun, Randolph and Talladega counties, the boundaries of which included 603 square miles.

By Act February 14, 1867 (Acts 1866-67, p. 432), 13½ sections were taken from Cleburne and added to Talladega county. This left 603 square miles in Cleburne less 13½

sections or 589½ square miles in that county.

By Act December 11, 1886 (Acts 1886-87, p. 757), two sections or square miles were taken from Cleburne and added to Calhoun, leaving 587½ square miles in Cleburne.

By Act September 30, 1903 (Acts 1903, p. 462), six sections or square miles were again taken from Cleburne and added to Calhoun, leaving 581½ square miles in Cleburne.

By section 39 of the Constitution of 1901, it is provided, that "no new county shall be formed hereafter of less extent than 600 square miles, and no existing county shall be reduced to less than six hundred square miles." The same provision is found in the Constitution of 1865, 1868 and 1875 (article 2, § 2 in each of said Constitutions.)

It would seem, therefore, that the act of February 14, 1866-67 by which 13½ square miles were taken from the 603 square miles in Cleburne, reducing it thereby to 587½ square miles was directly opposed to and forbidden by the Constitution of 1865. The invalidity of this act left in Cleburne its original 603 square miles. The act of 1886 by which two sections were taken from Cleburne and added to Calhoun, still left 601½ sections in Cleburne, and the latter act did not, therefore, violate the Constitution by reducing the square miles of the county below 600. But the act of the 30th of September, 1903, by which six sections or square miles were taken from Cleburne and added to Calhoun, thus reducing the former from 601 to 595 sections, contravened the Constitution, and was, therefore, invalid. Inasmuch as the offense for which the defendant is prosecuted, was committed in Cleburne county, the indictment was improperly found in Calhoun. It is unnecessary to consider any other questions raised.

Reversed and remanded.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concurring.

RIDDLE v. REGAN et al.

(Supreme Court of Alabama. July 6, 1906.)

EXCEPTIONS, BILL OF—TIME FOR SIGNING—EXTENSION OF TIME.

An order extending the time for the signing of a bill of exceptions, made after the expiration of the term at which the cause was tried and after the expiration of time previously properly granted, was of no effect.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, § 60.]

Appeal from Clay County Court; W. J. Pearce, Judge.

"Not officially reported."

Action by D. H. Riddle against Eola Regan and others. Judgment for defendants, and plaintiff appeals. Affirmed.

D. H. Riddle, for appellant. Lackey & Bridges, for appellees.

TYSON, J. The paper in the record purporting to be a bill of exceptions bears date the 20th of July, 1906. The cause was tried by the county court of Clay on the 14th day of June preceding, a day during the regular term of the court beginning on the second Monday in January, and ending on Saturday next preceding the beginning of the next regular term on the second Monday in July, 1905, the second Monday being the 10th day of that month. Acts 1900-01, p. 2085. In the judgment entry appears an order entered by the court allowing 30 days for the signing of a bill of exceptions from the 14th day of June. After the expiration of the 30 days allowed, on to wit, the 20th day of July, the day the paper purporting to be a bill of exceptions was signed, and the order was made by the presiding judge extending the time 20 days. This order was clearly functus, not being made within the time fixed by the former order. 5 Mayfield's Dig. 102, 345 et seq. The paper in the record purporting to be a bill of exceptions cannot, therefore, be considered, and with it eliminated, there is nothing left in the record upon which the assignments of error can be made to rest, since they are predicated solely upon exceptions taken upon the trial to rulings which must be presented in a bill of exceptions.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

KEITH v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

CRIMINAL LAW—APPEAL—EXCEPTIONS, BILL OF—TIME FOR SIGNING—EXTENSION—VALIDITY OF ORDER.

Under Acts 1894-95, p. 1227, providing that the time for signing a bill of exceptions relating to the trial of causes in the city court of Talladega may be extended by order of the presiding judge, an order made by the court and not by the presiding judge is of no effect.

Appeal from City Court of Talladega; G. K. Miller, Judge.

"Not officially reported."

Bob Keith was convicted of murder, and he appeals. Affirmed.

The defendant was tried and convicted of the murder of Anderson Cleggett, by striking him with a piece of wood. Motion was made, on appeal, to strike bill of exceptions because not signed within the time allowed by law.

Whitson & Dryer, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. The defendant was tried in the city court on the 8th of December, 1905, and the bill of exceptions was signed more than 60 days afterwards. The orders of extension relied on to validate the bill were those of the court, and not of the presiding judge, and hence are without potency

to save the bill. Acts 1894-95, p. 1227; Western Ry. of Ala. v. Arnett (Ala.) 39 South. 775; Western Ry. of Ala. v. Russell (Ala.) 39 South. 311. The bill of exceptions must therefore be stricken, and as no error otherwise appears the judgment must be affirmed. Affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

RYAN et al. v. YOUNG.

(Supreme Court of Alabama. July 6, 1906.)

1. APPEAL—HARMLESS ERROR—RULINGS ON DEMURRER.

The overruling of a demurrer to a rejoinder was harmless where defendants were allowed to make proof of the facts alleged in it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4105.]

2. TROVER AND CONVERSION—PLEADING—ISSUES.

In trover the plea of not guilty puts in issue every matter pleadable in bar except a release.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 211, 212.]

3. SHERIFFS AND CONSTABLES—LEVY OF ATTACHMENT—TRESPASS AB INITIO.

Where a sheriff attached a stock of goods which were mortgaged, if the mortgage was fraudulent as to creditors, the fact that the sheriff subsequently sold the goods at a place other than that advertised did not render him liable to the mortgagee as a trespasser ab initio.

4. SAME—LEVY OF ATTACHMENT—RETURN OF WRIT—SUFFICIENCY.

In trover against a sheriff who had sold chattels mortgaged to plaintiff under an attachment against the mortgagor it appeared that during the term of court to which the attachment was returnable the sheriff applied to the court for an order to sell the property levied on, on the ground that it would greatly depreciate in value and the application was offered in evidence, it reciting the fact that the attachment had been levied and return made thereon, and it appeared that the court acting on the application granted the order; that the sale was advertised and made under the order and the sheriff testified that after having sold the goods under the order he returned the writ of attachment into court. *Held*, that it was evident that the witness did not refer to the official return but to the paper itself, and that it sufficiently appeared that the sheriff made return of the writs to the term to which they were returnable.

5. EVIDENCE—ADMISSIBILITY—DOCUMENTARY EVIDENCE—PRELIMINARY AUTHENTICATION—WRITS OF ATTACHMENT.

Where a deputy sheriff testified without objection that certain writs of attachment were issued, and that he seized certain goods under them, there was sufficient proof of the authenticity of the writs to warrant their admission in evidence.

6. SAME—JUDICIAL NOTICE—OFFICIAL SIGNATURES.

The courts judicially know whether the officer by whom a writ of attachment offered in evidence purports to have been issued was the commissioned officer and know the genuineness of his signature, notwithstanding that between the time of the issuance of the writ and the time it was offered in evidence a successor to

the officer who issued it has been elected, and is performing the duties of the office.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 66-71.]

7. TROVER AND CONVERSION—MEASURE OF DAMAGES—IN GENERAL.

In trover ordinarily the measure of damages is the value of the property at the time of the conversion, with interest.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 260, 263.]

8. SAME—FLUCTUATING VALUE.

If the evidence shows fluctuation in value after the conversion the jury in their discretion may fix the value of the highest price at any time between the conversion and trial.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 265.]

9. SAME—MORTGAGED PROPERTY.

Where, in trover, plaintiff's title is based on a mortgage, the measure of damages is the amount of the mortgage debt and interest, not to exceed the value of the property.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, § 263.]

10. JUDGMENT—PARTIES CONCLUDED—PARTIES TO ACTION.

It was proper not to admit in evidence proceedings in another cause offered to show that a certain issue was res judicata, where one of the defendants to the action pending was not a party to the other action and the proceedings were offered in behalf of all the defendants, without any offer to limit their effect.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1230-1233.]

Appeal from Circuit Court, Morgan County; O. Kyle, Judge.

"To be officially reported."

Action by Martha L. Young against S. P. Ryan and others. From a judgment in favor of plaintiff, defendants appeal. Reversed and remanded.

D. W. Speake and W. L. Martin, for appellants. Wert & Wert and E. W. Gardiner, for appellee.

DENSON, J. Action of trover by Martha L. Young, plaintiff, against Silas P. Ryan, John L. Brock, and J. F. Lovin, defendants, for an alleged conversion of a stock of goods (drugs). The suit was commenced on the 2d day of July, 1898. The plaintiff claimed title to the goods by virtue of a mortgage which was executed to her by Thomas M. Cross on the 31st day of January, 1895. The mortgage indebtedness was evidenced by six notes given by the mortgagor to the mortgagee on the 22d day of January, 1895, each in the sum of \$100, and due one year after date.

The complaint as originally filed alleged that the conversion occurred on the 28th day of March, 1898, but after the court overruled a demurrer filed by plaintiff to defendants' special plea numbered 2 which set up justification under an attachment issued at the suit of defendant John L. Brock against Thomas M. Cross on March 28, 1898, the plaintiff, by leave of the court, amended the complaint by striking out the date of the conversion as alleged and by inserting in

lien thereof as the date of the conversion, May 25, 1898. There were some special pleadings in the case, and the record is somewhat confusing as to the course of the proceedings with reference to part of it. By special plea 2, defendants set up justification under legal process, namely, the attachment issued at the suit of the defendant Brock against Thomas M. Cross. Plaintiff's demurrer to plea 2 was overruled, and she filed a general, and two special replications, 1, 2, and 3. The defendants demurred to the special replications, assigning several grounds of demurrer, and the demurrer was sustained. The plaintiff then amended the special replications 2 and 3 which amendment appears to have been filed on the 23d day of April, 1902; the defendants then demurred to the replications as amended which demurrer contains two grounds, and was filed April 23, 1902. The court overruled the demurrer to the replications as amended. The defendants then filed a rejoinder to replications 2 and 3 as amended. Only one rejoinder to said replications is shown by the record, and it bears date of filing April 23, 1902.

The minute entry shows that the trial was had on the 24th day of April, 1902, and recites that issue was joined between the parties on the plea of not guilty, special plea 2, and the replication as amended to said plea and on the rejoinder to said amended replication. After the evidence was closed, the plaintiff was allowed by the court to file another amendment to the replication to plea 2, and the judgment entry recites that the defendants demurred to the amendment, and that the demurrer was sustained, but the record does not show what the amendment was nor the demurrer to it; they were entirely atmospheric so far as the record shows. Neither does the record show that there was any refile of previous demurrers made to the replications. Therefore, we cannot review rulings on demurrers to the special replications.

The judgment entry recites that by leave of the court the defendants filed an amendment to the rejoinder to the replication as last amended, and that the amended rejoinder is designated in the minute entry as rejoinder No. 3. We find no such rejoinder in the record and cannot know what it was, not can we review the ruling on the demurrer to it. Furthermore, if it should be contended that the rejoinder which appears in the record, is the rejoinder referred to in the minute entry as No. 3, the overruling of the demurrer to it would be error without injury, as the record affirmatively shows, that the defendants were allowed to make proof of the facts alleged in it.

With reference to the pleadings we remark that there was no necessity whatever for the special pleading which encumbers the record in this case. In trover, not guilty puts in issue every matter which might be pleaded

in bar, except a release. *Morris v. Hall*, 41 Ala. 510; *Barrett v. City of Mobile*, 129 Ala. 179, 30 South. 86. In the last case cited, the reason for the rule is explicitly stated, and we will not consume time in repeating it here. Under the rule above stated no necessity arises for consideration of the ruling of the court on the demurrers to special pleas 3, 4, and 5, if the matters alleged in those pleas were good in defense, the defendants could have availed themselves of the defense under the general issue upon which the record shows issue was joined. The record shows affirmatively that the defendants attempted to make proof of the matters alleged in said pleas. *L. & N. R. R. Co. v. Hall*, 131 Ala. 161, 32 South. 603; *N. O. & St. L. Ry. v. Bates*, 133 Ala. 447, 32 South. 589.

The circuit court tried the case upon the theory that the sheriff, in selling the property seized at a place other than the one advertised, thereby became a trespasser ab initio, and was bereft of protection under the attachment writs. And this being true, that it was immaterial as to the attitude the plaintiff as mortgagee occupied with reference to the creditors of the defendant in attachment so far as the defendants were concerned; the mortgage being valid as between the mortgagor and mortgagee.

Applying the theory as above stated to the case it was very natural that the trial terminated as it did in a verdict for the plaintiff. It has never been doubted that if an officer has legal process to execute, and voluntarily abuses and convert it to other purposes, he is not only a trespasser in that act, but becomes one ab initio, and is thus liable for all he has done under the process. This rule of the common law applies to all subordinate executive officers, and serves to confine them within the limits of their legal duties. *Bacon's Abr. Trespass. B*; *Brock v. Berry*, 132 Ala. 95, 31 South. 517, and cases there cited. *Ross v. Philbrick*, 39 Me. 29; *Allen v. Crofoot*, 5 Wend. (N. Y.) 506.

It is unnecessary to discuss the abstract proposition that a sheriff who advertises property seized under process for sale at a designated place and sells it at another and different place is guilty of a misfeasance in such sort as deprives him of the protection originally afforded by the process. The case in that respect has assumed a concrete form, this court having held on the facts of the case, that the sale was made without legal advertisement and that the sheriff in making it was guilty of a misfeasance by which he was dismantled of his protection, and made a trespasser from the beginning. *Brock v. Berry*, 132 Ala. 95, 31 South. 517.

If the sheriff was a trespasser ab initio, then it cannot be and we understand it is not disputed that the defendant in the attachment suit might have maintained trespass

or trover against the sheriff. *Wright v. Spencer*, 1 Stew. 576, 18 Am. Dec. 76. But the contention of the appellants is that a stranger to the writ, one not of a party to it, cannot claim any benefit from this rule of law. In this case the plaintiff as the grantee of the defendant claimed the benefit. "The authority bestowed by the law upon the sheriff did not authorize him to interfere with any of the rights of the plaintiff in this case, or to affect any title which the latter had as against the plaintiff in the attachment suit. The plaintiff in this case could not be injured by an abuse of the authority. If she has any cause of action against the defendants, it was complete in the instant of the levy, and the amount of her recovery could be neither increased nor lessened by any subsequent irregularity of action on the part of the defendant. The sheriff had the right to levy the attachment, if the conveyance to the plaintiff was fraudulent. The process in his hands clothed him with the right of the plaintiff therein to assert the fraud in the conveyance. His connection with the title was thus so made as to authorize him to assail the title of the defendant's grantee. The right which the process thus gave the sheriff could not be taken away by a misfeasance, which could not in any event affect the plaintiff. We cannot perceive either reason or justice in imputing to the sheriff's misfeasance the effect of converting a lawful into an unlawful act as to one who has no interest whatever in the question whether the sheriff does or does not commit a misfeasance." The quotation has been extracted from the case of *Hartshorn v. Williams*, 31 Ala. 149, which, so far as the facts of that case are concerned, presented to the court the precise question which has been presented by the case at bar. The court there held, that notwithstanding the sheriff was guilty of conduct which rendered him a trespasser from the beginning as to the defendant in the process, yet the plaintiff, grantee of the defendant in the attachment suit could not invoke the rule of law, and that the sheriff was not deprived of the privilege of showing that the plaintiff in the trover suit against him was a grantee under a conveyance that was fraudulent as against creditors of and purchasers from the defendant in the attachment suit. It is true, the decision did not have the assent of Judge Stone. He rendered a dissenting opinion. And while we have been impressed with the cogency of his reasoning in support of the conclusion he reached, which conclusion was contrary to the contention of the appellants here, yet the case has stood as authority for nearly 50 years. We can see no great hardship that the ruling there made will work, and remembering the salutary doctrine that "it is often more important that a rule of law should be fixed, even though with less of

reason in it, than subject to the uncertainty of fluctuating judicial decisions," we cannot yield to the implied solicitations to overturn the case as authority. There are other authorities in support of the proposition that if the original taking be not a trespass, as against the plaintiff, the subsequent conversion of the property will not make the defendant liable. *Davis v. Young*, 20 Ala. 155; *Henderson v. Marx*, 57 Ala. 169. But it is insisted that the sheriff did not make due return of the writs of attachment under which the goods were levied upon and that therefore the defendants do not come within the principle enunciated in the case of *Hartshorn v. Williams*, supra. The attachments were issued on the 28th of March, 1898, returnable to the next term of the court, which under the statute regulating the terms of the circuit court for Morgan county, convened on the 18th day of April, 1898, and could continue four weeks. The levy of the writs was made on the 28th day of March, the same day of their issuance.

The record affirmatively shows that on the 9th day of May, 1898, the sheriff applied to the court for an order to sell the property levied on under the writs on the ground that the property would greatly depreciate in value. The application was offered in evidence, and recites the fact that the attachments had been levied and returns made thereof. It also affirmatively appears that the court, acting on the application of the sheriff, granted the order of sale prayed for, the order of sale being set out in the record. It further affirmatively appears that the sale was advertised and made under the said order. In the face of the proof it cannot be said that the sheriff did not make return of the writs to the term of the court to which they were returnable and in due time. It is true that Turley, the deputy sheriff, testified that, "after having sold the goods under an order of the court, I returned the writ of attachment in the case, together with the money received from the sale of goods into court." But in this testimony it is quite evident that the witness was not referring to the official return but to the paper itself—the writ. This must be true because the court could not have ordered the sale without the return of the levy by the officer showing the goods levied on, and the record shows that the order was granted on proof supporting the allegations of the application. Hence, the case is withdrawn from the influence of the case of *Womack v. Bird*, 63 Ala. 500, and the insistence of the appellee in this respect cannot avail anything.

If the plaintiff's mortgage was void as to the plaintiff in the attachment suit and the doctrine of trespasser ab initio could not be invoked against defendants, the original taking under the attachment was not void. In this view of the case, the circuit court

proceeded upon an erroneous theory in the trial of the case.

The agreements between the mortgagor and the mortgagee with reference to the mortgagor being allowed to remain in possession of the goods mortgaged and the extent of such agreements, were competent evidence on the question of fraud vel non, and the court erred in not allowing proof of them to be made. If there was such an agreement between the parties to the mortgage as the defendants offered to prove, it would render the mortgage void as to creditors, existing and subsequent. *Brock v. Berry*, supra; *Christian & Craft Grocery Co. v. Michael & Lyons*, 121 Ala. 84, 25 South. 571, 77 Am. St. Rep. 30. In this aspect of the case it would make no difference whether the plaintiffs in attachment had any lien on the goods for rent or not.

The witness Turley, after testifying that he was deputy sheriff, testified that as such he took charge of the drug business of Thomas M. Cross in favor of John F. Brock and L. P. Troup as administrators. After the witness had testified in detail about removing the goods and the sale of them, the bill of exceptions recites, "the witness further testified that said writs of attachment together with indorsements thereon are in words and figures as follows," then follow the writs and returns of the sheriff made on them, all set out in *hæc verba*. After the witness had given parol evidence of the contents of the writs and returns on them, the bill of exceptions states that the defendants offered said writs of attachments and indorsements thereon in evidence. A general objection made by the plaintiff to the writs was sustained.

In the view we have taken of the case the writs were competent as evidence under the general issue, and it would seem that the Brock writ, under the issue made by plea 2, was competent. But it has been insisted in the brief and argument of counsel for the appellee, that there was no proof of the authenticity of the writs. This contention cannot prevail; first, for the reason that without objection the witness Turley testified that the writs were issued out of the circuit court of Morgan county and that he seized the goods under them; secondly, they purport to have been issued and signed by the clerk of the circuit court of Morgan county. We judicially know who are the commissioned officers of the state within its limits, the extent of their authority and the genuineness of their signatures. This rule is not varied by reason of the fact that between the time of the issuance of the writs and the time they were offered in evidence a successor to the officer who issued the writs had been elected and was performing the duties of the office. *Sandlin v. Anderson*, 76 Ala. 403, and authorities cited in that case; *Whitney v. Jasper Land Co.*,

119 Ala. 497, 24 South. 259; *McCarver v. Herzberg*, 120 Ala. 523, 25 South. 3; *Barron v. Tart*, 18 Ala. 668. We remark incidentally, that while the defendants were not allowed to offer the writs in evidence, there was no ruling of the court excluding the parol evidence of their contents from the jury.

The manifest purpose of the introduction of the chancery proceedings in evidence was to show that the validity vel non of the plaintiff's mortgage was *res adjudicata*, and therefore, that the plaintiff was precluded from maintaining the suit. "The rule of *res adjudicata*, is confined to those cases where the parties to the two suits are the same, the subject-matter the same, the identical point is directly in issue, and the judgment has been rendered in the first suit on that point." *McCall v. Jones*, 72 Ala. 368; *Gilbreath v. Jones*, 66 Ala. 129; *Fidelity & Deposit Co. v. Robertson*, 136 Ala. 879 at page 410, 34 South. 933 at page 944.

Premitting discussion of other ingredients, we note that an essential ingredient of *res adjudicata* was lacking in the proceeding offered, the defendant Lovin was not a party to the suit in chancery. The proceedings were offered in behalf of all the defendants without any offer to limit the effect of the evidence to defendants Ryan and Brock, and even if the proceeding could be held competent as to them, yet, not being competent as to Lovin, the court did not err in not allowing them in evidence. Authorities supra; *Burgin v. Raplee*, 100 Ala. 433, 14 South. 203.

In trover, ordinarily, the measure of damages is the value of the property at the time of the conversion with interest, but if the evidence shows fluctuation in value after the conversion, the jury, in their discretion, may fix the value of the higher or highest price at any time between the conversion and the time of trial. 4 *Mayfield's Dig.* p. 908, § 220. When the plaintiff's title is based on a mortgage the measure of damage is the amount of the mortgage debt and interest not to exceed the value of the property. *Selbold v. Rogers*, 110 Ala. 438, 18 South. 312.

Having reached the conclusion that the case was tried on an inaccurate theory as to the main proposition involved in the case, and as the propositions involved in the charges given for the plaintiff will hardly arise on another trial, we deem it unnecessary to criticize the charges given for the plaintiff. With the evidence which was excluded and which we have here held was admissible, admitted, it is clear the charges should not be given.

Neither is it necessary to discuss the charges refused to the defendant; what has been said in this opinion will be a sufficient guide for the court in this respect on another trial.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

WEAKLEY, O. J., and TYSON and SIMPSON, JJ., concur.

SCHUESSLER v. GOODHUE et al.

(Supreme Court of Alabama. June 30, 1906.)

EXECUTORS—POWERS—PARTITION—ACTION IN CHANCERY COURT.

Code 1896, § 3187, provides that the chancery court shall have jurisdiction to divide or partition, or to sell for division or partition any property, real or personal, held by joint owners or tenants in common, etc., and section 3185 declares that should any of the parties interested in property held by joint owners or tenants in common, die, the provisions of the article should fully apply to his executor or administrator. *Held*, that such sections conferred power on an executor to file a bill for partition in his own name in the chancery court.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1666.]

Appeal from Chancery Court, Etowah County; W. W. Whiteside, Chancellor.

"To be officially reported."

Suit by Z. Schuessler as executor, etc., against A. E. Goodhue and others. From a judgment in favor of defendants, plaintiff appeals. Reversed, rendered, and remanded.

Jas. Aiken and Dortch, Martin & Allen, for appellant. Motley & Douglass and Goodhue & Blackwood, for appellees.

DOWDELL, J. There seems to be but one question presented for our consideration in this case, and that is whether or not an executor can file a bill to sell lands for partition in the chancery court. It appears from the bill, as amended, that all parties interested in the land were before the court as respondents. The chancellor was of the opinion that the executor, not having any interest in the land, and only the right of interception, for the payment of debts, could not maintain the bill alone in his own name for partition and division, and so decreed.

Section 3262 of the Code of 1886 which conferred jurisdiction on the chancery court in the matter of the sale of land for partition and division was as follows: "The chancery court shall have concurrent jurisdiction with the probate court to divide or partition, or to sell for partition or division any property, real or personal, or mixed, held by joint owners or tenants in common." This section brought forward and adopted into the Code of 1896, as section 3187 in the latter Code now reads as follows: "The chancery court shall have jurisdiction to divide or partition or to sell for division, or partition any property, real, personal, or mixed, held by joint owners or tenants in common, whether the defendant denies the title of complainant or sets up adverse possession or not." With

the exception of the last clause in the statute as it now is in the Code, viz.: "Whether the defendant denies the title of complainant, or sets up adverse possession or not," no material alteration or change was made in the statute as it stood in the two Codes. The omission of the words "concurrent," and "with the probate court" from the present statute in no wise affected its meaning. The jurisdiction conferred on the chancery court by the statute was nothing more nor less than the jurisdiction concurrent with the probate court.

It is not denied that the executor has the power under the statute to proceed in the probate court in such a case, and this without regard to the question of his being a party interested in the estate. Moreover, section 3185 provides as follows: "Should any of the parties interested in the property, real, personal, or mixed, held by joint owners, or tenants in common, die, the provisions of this article shall fully apply to his executor or administrator." What meaning can this statute have other than to confer on the executor or administrator the same right and power to institute proceedings for partition and division of property held by joint owners that his testator or intestate had? The jurisdiction of the chancery and probate court, being concurrent in such matters, we are unable to see why the executor may not proceed in one forum as well as the other. The power of the executor is one conferred by the statute. The case of *West v. West*, 90 Ala. 458, 7 South. 830, simply decides the question of practice, and is not opposed to the views which we have herein above expressed. The rule of practice applied there, where the suit was commenced by the guardian of a lunatic, or person of unsound mind, is not necessarily applicable here where the bill is instituted by the executor. The case of *West v. West*, supra, was decided under the Code of 1886 and section 2582, the one sought to be applied to the government of the case was found in part 3 of the Code, relating to proceedings in civil cases in courts of common law. That section 2582 could not govern, was argued from its lack of consonance with chancery practice, and from the further fact that section 3417 of title 4 of the same Code, relating to chancery proceedings, made specific statutory provision for the bringing of suits by lunatics in the chancery court. No such special statutory provisions are made with reference to the institution of suits by executors, and hence the rule laid down in that case is without application here. We repeat that we are unable to see why under the statute conferring on the chancery court the same jurisdiction and powers as possessed by the probate court, the executor may not proceed in his own name in the chancery court as well as in the probate court. Our conclusion is that the chancellor erred in his decree, and the decree will be here rendered, overruling the

demurrer and motion to dismiss the bill, and the cause remanded.

Reversed, rendered, and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

RIKE et al. v. RYAN et al.

(Supreme Court of Alabama. April 4, 1906.
Rehearing Denied June 30, 1906.)

1. FRAUDULENT CONVEYANCES — ACTUAL FRAUD—BURDEN OF PROOF.

Where an alleged fraudulent mortgage was made before any of complainants' debts were created, complainants were bound to show actual fraudulent intent, participated in by both mortgagor and mortgagee, in order to set the mortgage aside.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 10-14.]

2. CHATTEL MORTGAGES — RETENTION OF POSSESSION.

The mere retention of possession by a chattel mortgagor, or a provision in the mortgage authorizing the same, is not such a reservation of a benefit to him as invalidates the instrument against his existing or subsequent creditors.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 375-377.]

3. SAME—FAILURE TO RECORD.

Unless a chattel mortgage is purposely withheld from record for the purpose of concealment, and to give the mortgagor a false credit, the only effect of it is to postpone it to after acquired liens.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 429.

4. FRAUDULENT CONVEYANCES—PREFERENCES.

A debtor may prefer his creditors, if the debt be bona fide, the payment absolute, and the property conveyed is not materially in excess of the debt.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 369-374.]

5. SAME—EVIDENCE.

Where money was loaned to a mortgagor from time to time, and was finally secured by a mortgage in good faith when the lender had no reason to believe that the mortgagor was embarrassed, and when his credit was still good, the mortgage was not fraudulent.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 518, 519.]

6. SAME—EXEMPT PROPERTY.

A transfer of property belonging to a debtor, but of less value than a thousand dollars (the statutory exemption limit) is not subject to attack by creditors.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 114.]

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

"To be officially reported."

Bill by M. Ryan and others against J. N. Rike and others. From a decree in favor of complainants, defendants appeal. Reversed and bill dismissed.

This was a bill filed by numerous creditors seeking to have set aside and annul as a fraud on creditors certain mortgages and sales made by Rike to the other parties named as respondents, and for receiver to

take charge of the property. The accounts alleged to be due were variously made between the dates of October 6, 1901, and March 24, 1902. The bill alleges the execution by Rike to Gunn of a mortgage dated May 19, 1902, for \$790 on certain property described therein, and also alleges that the indebtedness was fictitious, and that it was without consideration, and was executed to hinder, delay, and defraud creditors. That on February 28, 1902, the said Rike, being heavily embarrassed, sold and conveyed to one John Patgens a half interest in Rike's saloon business, stock, trade, and fixtures; that this sale was wholly without consideration, and that Falk claims the mortgage on an undivided half interest in a steamboat; that the date and amount of said mortgage complainants are unable to give. It is further alleged that Falk has taken no control or management of said steamer. The other facts sufficiently appear in the opinion.

Wert & Wert, C. O. Harris and John Eyster, for appellants. E. W. Godbey and A. J. Harris, for appellees.

SIMPSON, J. This was a bill filed by the appellees, who are creditors of the appellant Rike, to set aside and declare fraudulent certain sales and mortgages of personal property made by said Rike at different times to the other appellants severally.

Each transaction then necessarily stands on its own basis, and must stand or fall alone. It will be noticed that the mortgage made to Falk was made before any of the debts were created, so that, in order to set aside that mortgage as fraudulent, the burden rests upon the complainant to show an actual fraudulent intent participated in by both mortgagor and mortgagee. 3 Mayfield's Dig. p. 875, No. 36; 5 Mayfield's Dig. p. 476, No. 13. The cases of McDermott v. Eborn, 90 Ala. 258, 7 South. 751, and Christian & Craft Grocery Co. v. Michael & Lyons, 121 Ala. 84, 25 South. 571, 77 Am. St. Rep. 30, rest upon the familiar principle that a mortgage of goods which are to be retained and used up by the mortgagor, such as a stock of goods, or lumber which he is constantly selling, is fraudulent per se. On the other hand, the very essence of a mortgage of ordinary property, is that the property remains in the possession of the mortgagor until the mortgage is foreclosed by the mortgagee. In the case of Howell v. Carden, 99 Ala. 111, 10 South. 645, the court says: "The mere retention of possession by the mortgagor, or a provision in the mortgage to that effect, is not such a reservation of a benefit to him as invalidates the instrument against his existing or subsequent creditors." Upson v. Ralford, 29 Ala. 188. And while in that case the mortgage was recorded, in another case this court has held that unless the mortgage is purposely withheld for the purpose of concealment, and to give the

mortgagor a false credit, the only effect of it would be to postpone it to after acquired liens. *Lehman Durr & Co. v. Van Winkle & Co.*, 92 Ala. 443, 450, 8 South. 870. There is no proof in the record to show any such fraud as the law requires to set aside this mortgage.

"To authorize a conveyance or sale made by a debtor to be pronounced fraudulent, two things must concur. The transaction must be shown to be infected with a fraudulent intent on the part of the grantor, and this must be participated in by the grantee." *Shealy & Finn v. Edwards*, 75 Ala. 411, 416; *Howell v. Carden*, supra; 3 *Mayfield's Dig.* pp. 876-7, No. 42. A debtor may prefer his creditors if the debt be bona fide, the payment absolute, and the property not materially in excess of the debt. 3 *Mayfield's Dig.* p. 874, No. 34. "The rule is that when the payment of a valuable consideration is shown, the burden is cast upon the complaining creditor to prove the existence of a fraudulent intent, and that such intent was known to the grantee of the conveyance assailed." *Allen v. Riddle*, 141 Ala. 621, 626, 37 South. 680; *Morrow v. Campbell*, 118 Ala. 330, 339, 340, 24 South. 852.

Referring to the mortgage of Rike to Gunn (May 19, 1902) the testimony of Gunn shows that he had loaned various sums to the defendant Rike, from time to time; that Rike was running a saloon, also operating a steamboat and barges; that the debt was finally secured by the mortgage in good faith; that he did not know and had no reason to believe that Rike was embarrassed, and there is no proof to contradict this, or even to show that Rike was embarrassed at that time. On the contrary, his credit seems to have been good at that time, as the complainants were selling him goods on credit about that time. Under the authorities above cited, the court erred in declaring this mortgage fraudulent.

With regard to the saloon fixtures, the testimony of Falk is clear that he bought them and placed them in the store which he rented to Rike; that Rike agreed to pay him \$5 per month as rent for the fixtures, and did pay said rent, and that he told him that whenever he wished to buy them he could do so for \$225. The receipts are produced and identified corroborating his statement, and it is further shown that when Rike sold out his business the fixtures remained, and his successor paid the same rent. The discrepancies in Rike's testimony are not sufficient to overturn Falk's testimony. Rike testified that he was first in partnership with Patjens, then sold him the "white side" of the saloon, and these fixtures went to him. Patjens corroborates Rike about purchasing the "white side" of the saloon with the fixtures, and he was to pay Falk the \$225 and have the fixtures.

In addition to all this, we think the evidence shows that the fixtures belonged to

Falk, and all the other property did not amount to the \$1,000, which Rike had a right to claim and did claim under the exemption laws.

The decree of the court is reversed, and a decree will be here rendered dismissing the bill.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

GIBSON v. WALLACE.

(Supreme Court of Alabama. April 10, 1906. Rehearing Denied June 30, 1906.)

1. HUSBAND AND WIFE—SURETYSHIP OF WIFE—BURDEN OF PROOF.

Where a note and mortgage were signed by both husband and wife, the burden was on the wife to show that the debt was that of the husband merely, and that she executed the instruments only as his surety.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 673-676, 841.]

2. EVIDENCE—PAROL EVIDENCE—PRINCIPAL AND SURETY.

Where a note and mortgage were signed by a husband and wife, parol evidence was admissible to establish that she signed as surety only.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1964.]

3. HUSBAND AND WIFE—AGENCY OF HUSBAND.

Where a lender of money knew that a husband was the general agent of his wife, the lender's declaration that he would not make a loan to the husband, but that if he would get his wife to give a mortgage on her land the lender would let him have the money, should be construed to mean that the lender would let the husband have the money "for the wife."

4. SAME—EVIDENCE.

In a bill to foreclose a mortgage on a wife's land, evidence held to establish that the wife was a principal debtor, and not merely surety for her husband.

Appeal from Chancery Court, Lawrence County; W. H. Simpson, Chancellor.

"To be officially reported."

Bill by W. K. Wallace against E. R. Gibson. From a judgment for plaintiff, defendant appeals. Affirmed.

W. T. Lowe and Kirk, Carmichael & Rath-
er, for appellant. D. C. Almon, for appellee.

WEAKLEY, C. J. The bill was filed by W. K. Wallace against E. R. Gibson, a married woman, to foreclose a mortgage executed by her with the consent and concurrence of her husband upon her property. The mortgage recites that she was indebted to the mortgagee in a certain sum, evidenced by a described instrument of even date, and this instrument, which is exhibited with the bill, is the note of both husband and wife, her signature being first written.

The defenses are two in number: First, that she executed the mortgage under the duress of the husband, of which the mortgagee had knowledge; and second, that she had signed the note and mortgage as surety

of the husband merely. The chancellor, on the evidence, was of opinion she had failed to establish either defense, and decreed foreclosure for the amount of the note, less a small credit, and attorney's fees. While there is evidence of general mistreatment of the wife by the husband, we are not reasonably satisfied that she executed the mortgage under his coercion or duress; and if she did, there is want of sufficient evidence that the mortgagee either participated in or was cognizant of it. *Walker v. Nicrosi*, 135 Ala. 353, 83 South. 161; *Mohr v. Griffin*, 137 Ala. 456, 84 South. 378. The burden of proof rests upon the wife to show that the debt was that of the husband merely and that she executed the instruments (the note and mortgage) as his surety. *Mohr v. Griffin*, 137 Ala. 456, 84 South. 378; *Lunsford v. Harrison*, 131 Ala. 263, 81 South. 24. The note and mortgage, *prima facie*, constitute an indebtedness of her own, although parol evidence is admissible to establish her suretyship if it in reality existed. Many cases of the same general nature as this have been presented to and decided by this court. The law is settled beyond further controversy and the result usually turns upon the facts. No two cases are exactly alike, and hence, other decisions on different facts and circumstances, are of little assistance, in reaching a correct conclusion in new cases as they arise. The question at last is whether, notwithstanding the form of the transaction, the wife was attempting to secure a debt entirely her husband's, upon which she was not bound either separately or jointly. We have given the evidence careful examination. It lies within a small compass, and it has not been difficult to secure the full consideration thereof by each of the judges who participate in this decision.

The consideration of the note, secured by the mortgage of January 18, 1896, now sought to be foreclosed, was the surrender and cancellation of two other notes, and mortgages of an earlier date, in like manner duly executed by the wife to the same mortgagee, her husband joining therein, as required by the statute, to constitute a valid conveyance. Attention must, therefore, be directed to the two previous transactions. At the outset, an important fact, established by the undisputed evidence, and in the light of which the transactions, and the testimony of the two parties must be interpreted should be noted. The wife owned the farm, agricultural implements, and live stock; the husband owned nothing, and this fact was known to Wallace. In 1904 a stock of plantation supplies was purchased by the husband from the proceeds of cotton grown on the wife's land, and with this he conducted, in her name, a small store. She gave no personal attention to her business affairs, their management was confided solely to the husband. According to her evidence, he superintended the making of the crops, bought

all the supplies that were not raised at home, and superintended the gathering and selling of the crops. Furthermore, she was accustomed to sign notes and mortgages on her property, without question, when requested by the husband, and the money obtained upon them was delivered to him, and, as we may well presume, for use in employing laborers, purchasing supplies, including corn when needed, paying taxes, and otherwise meeting the demands of her mercantile and planting operations. In fact, the evidence establishes the use in this way of a portion of the money borrowed upon each of the previous mortgages. The death of the husband, before this bill was filed, prevented any evidence as to what was done with the remainder. This, however, is not important; under repeated decisions of this court, it is no concern of the lender to the wife that she gives the money to her husband or places it in his hands for disbursement.

We will now consider the evidence as to each of the previous mortgages, cancellation of which formed the consideration of the instrument directly involved in this case. In respect of the mortgage of March 2, 1894, there is little room for controversy. Although there is no doubt of the fact that the husband, in the exercise of his authorized general superintendence of the wife's affairs, arranged the preliminaries, and induced the mortgagee to bring the money to their farmhouse together with a prepared mortgage ready for execution, yet she well understood the loan was made to her, and she admits the money was placed in her hands, with the statement that it was hers. The circumstances attending the mortgage of January 18, 1889, in their general outline, are satisfactorily shown, without material conflict. The note and mortgage were prepared by the husband at their home, some miles from the residence of the mortgagee, duly executed there before a justice of the peace, and sent to the mortgagee by a farm laborer to whom the money was delivered, and who, after paying out of it the taxes of the wife and her son, carried the balance to the home of the grantors in the mortgage. The evidence conflicts upon the inquiry whether the money was handed to the husband or the wife by the messenger, but, as above stated, this is not important, if other evidence proves a loan to her.

This leaves for consideration a paragraph in the deposition of Wallace, upon which the appellant strongly relies to establish the contention that the loan of 1889 was made to the husband alone. We quote it literally: "Mrs. Gibson did not apply to me in 1888 to loan her \$270 or any other amount. In 1888 Jim Gibson was up here and wanted to borrow some money. I told him I could not loan it to him as he had nothing to secure it with. But if he would get his wife to give a mortgage on the land that I would let him have the money. He went away and

the next thing I knew about it Crow came up with the mortgage signed up and got the money. That is the mortgage dated January 18, 1889 with which Crow also brought a letter from Gibson and Mrs. Gibson and got the money." The letter which is produced, signed by both, requested that the money be sent them for the note and mortgage by the bearer Crow, and thereupon, contemporaneously with the delivery of the instruments, purporting to bind her and her land, the money was confided to their authorized agent as requested by both. *Lunsford v. Harrison*, 181 Ala. 283, 31 South. 24. In the light of the general agency of the husband, and the declaration of the mortgagee that he would not make a loan to the husband, we interpret the mortgagee's statement to mean that he would let him have the money for the wife, and as her representative, and upon the faith of a valid security; and this interpretation is supported by what followed in the preparation and delivery of the mortgage, the writing of the letter to the mortgagee and the use of the money, at least in part. Other considerations might be stated lending support to our conclusion, but they would unduly prolong the opinion.

We have considered the legal evidence only and all the legal evidence found in the record; there is no occasion to review the rulings of the chancellor, admitting or excluding parts of the testimony.

The decree was correct and will be here affirmed.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

COLBY-HINKLEY CO. v. JORDAN.

(Supreme Court of Alabama. June 12, 1906.
Rehearing Denied June 30, 1906.)

1. PARTITION—PERSONALTY—PROCEEDINGS—JURISDICTION—COURTS.

Code 1896, § 3161, providing that any real or personal property held by tenants in common may be divided among them by the probate court on the petition of one or more of them, confers on the probate court jurisdiction of a petition for the partition of personalty owned by petitioner and another as tenants in common.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 39.]

2. LOGS AND LOGGING—STANDING TIMBER—SALES—PAROL CONTRACTS—RIGHTS ACQUIRED.

An owner orally contracted for the sale of standing timber. The contract authorized the buyer to enter on the land and cut the timber and provided that the timber cut should be equally divided between the owner and the buyer. *Held*, that the contract gave to the buyer only a license to enter on the land and cut the timber, which license was revocable at the pleasure of the owner, except as to timber which had been cut.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Logs and Logging, §§ 9-13.]

3. TENANCY IN COMMON—PERSONALTY.

An owner orally contracted for the sale of standing timber. The contract provided that the timber cut by the buyer should be equally divided between him and the owner. *Held*, that the owner and the buyer were tenants in common of the timber cut.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 8-11.]

4. LOGS AND LOGGING—CONTRACTS—OBLIGATION TO PERFORM.

One entitled to enter on the land of another, and cut and haul away standing timber, pursuant to an oral contract giving him only a license to do so, revocable at the will of the owner, is not liable as for breach of contract for failing to go forward with the execution of the contract.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Logs and Logging, §§ 9-13.]

Appeal from Probate Court, Marshall County; J. H. Carter, Judge.

"To be officially reported."

Petition by the Colby-Hinkley Company against William G. Jordan, for the partition of personalty. From a decree dismissing the petition, the petitioner appeals. Reversed and rendered.

J. A. Lusk, for appellant. Street & Isbell, for appellee.

TYSON, J. The petition in this case was exhibited in the probate court for the purpose of having divided between the petitioner and the respondent certain logs owned by them in equal shares as tenants in common. The jurisdiction of the court to divide personal property is just as effectual, when properly invoked, as it is to partition real estate. Section 3161, Code 1896.

There seems to be no dispute between the parties as to their respective interest or share in the logs sought to be divided. The point of difference between them seems to be as to certain terms of the contract with respect to the size of the timber and the area from which it was to be cut, and as to which of them breached it. This contract was a verbal one. The respondent was the owner of the timber from which the logs were to be cut and hauled by the petitioner, and when cut and hauled they were to be divided equally between them. The petition seeks only a division of those that have been cut and not a partition of the standing timber which has not been converted into logs by felling. It will scarcely be doubted that, if the effect of this agreement was to invest the petitioner with an interest in the growing timber, it is void because violative of the statute of frauds, and, as to the standing timber unconverted under it into logs, is unenforceable by either party, being merely an executory one, as to the timber uncut. But the contract did not invest the petitioner with an estate in the growing timber which is a part of the land. It was nothing more than a license to him by the respondent to enter upon the land of the latter to cut and take away the timber, and was revocable at pleasure except as to the timber which had been

converted into logs under *It. Riddle v. Brown*, 20 Ala. 412, 58 Am. Dec. 202. As to the logs cut, the license had become an executed one and was irrevocable (*Giles v. Simonds*, 77 Am. Dec. 373 and note) and vested in the parties equally a title to them as tenants in common. As to the timber still standing, the license, being revocable at the pleasure of the owner of it, is unenforceable by him as against the petitioner, the licensee. For clearly the petitioner cannot be held liable for its failure to go forward with the execution of the contract when the other party to it is not legally bound to perform it, and therefore cannot be made liable for his breach of it or be made to specifically perform it. It is upon this principle that a purchaser may recover back purchase money paid for land when the contract of purchase is violative of the statute of frauds. *Nelson v. Shelby Mfg. & Imp. Co.*, 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116. This being true, the defense attempted to be invoked against the relief here sought, that petitioner violated the contract in certain respects alleged in the answer of respondent, is of no avail, and conceding that the evidence supports this attempted defense, this will not defeat the petitioner's right to the relief sought.

The decree dismissing the petition will be reversed and one will be here rendered granting the relief sought by it, with directions to the judge of probate, who tried the case, to enter an order appointing commissioners in conformity with section 3166 of the Code of 1896.

Reversed and rendered.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

ROLAND v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. CRIMINAL LAW—AFFIDAVIT—MISDEMEANORS—WRONGFUL SALE OF LIQUORS.

The clerk of the circuit court and ex officio clerk of the county court of Shelby county has authority to take the affidavit of the prosecutor in a prosecution for violation of the liquor law as provided by Acts 1896-97, p. 124, § 3, regulating the trial of misdemeanors in Shelby county.

2. SAME—LOST AFFIDAVIT—SUBSTITUTION.

Where an affidavit, on which a prosecution for the illegal sale of liquors was based, was lost, the county court had power to allow a substitution thereof.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 526, 527.]

3. SAME—TRIAL—WARRANT.

Where accused was properly before the court, it was immaterial to the court's power to try him that several terms of court had lapsed since the issuance of the warrant and that the warrant was functus officio.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 192-195.]

Appeal from Shelby County Court; A. P. Longshore, Judge.

"To be officially reported."

Will Roland was convicted of selling liquor without a license, and he appeals. Affirmed.

McMillan & Haynes, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. This prosecution was commenced in the county court of Shelby county by affidavit made by Dave Harper before J. P. Pearson, clerk of the circuit court, and ex officio clerk of the county court of Shelby county in which the defendant was charged with the offense of selling vinous, spirituous, or malt liquors without a license and contrary to law. The authority of the clerk to take the affidavit exists under the third section of the act to regulate the trial of misdemeanors in Shelby county, approved December 9, 1896, Acts 1896-97, p. 124. The case was tried before the judge without a jury, and the appeal is prosecuted from the judgment of the court convicting the defendant. Acts 1896-97, p. 123.

At the trial, and when the case was called, the solicitor made known to the court that the affidavit was lost, and motion to substitute a copy of the affidavit for the original was granted by the court. To the motion to substitute a demurrer was overruled. The demurrer proceeds upon the theory that the court was without authority to substitute a lost affidavit in a criminal case. It was held in *Ganway's Case* by a divided court that a lost indictment could not be substituted. The court there recognized the right inherent in the court to substitute any part of the record which has been lost or destroyed in civil cases, but held that the rule did not apply to indictments. The conclusion there reached was based principally upon the proposition that the statutes of jeofails and amendments, which, in general terms, authorize corrections and amendments in process and pleadings, did not apply to indictments. *Ganaway's Case*, 22 Ala. 772. That case was tried at the February term, 1852, of the city court of Mobile, and presumably before the adoption of the Code of 1852, as no notice was taken in the opinion of the court of the statute providing for the substitution of lost indictments which is section 3527 of the Code of 1852, section 4919 of the Code of 1896; *Bradford's Case*, 54 Ala. 230.

The contention of the defendant, appellant here, is that the statute with respect to the substitution of a lost indictment has no application to affidavits, and this contention may be conceded on the maxim, "*Inclusio unius est exclusio alterius*." But this court has expressly held that an affidavit upon which a criminal prosecution is based, like an information at common law, is amendable at the instance of the state, and without the consent, or even against the objection of the defendant. *Simpson's Case*, 111 Ala. 6, 20 South.

572; Gandy's Case, 81 Ala. 68, 1 South. 35. So it would seem, that the theory upon which the majority opinion in the Ganaway Case proceeded does not obtain in the case at bar. We are satisfied that it is within the inherent power of the county court to allow the substitution of a lost affidavit, and that there is no error in the action of the court in substituting the affidavit in this case. Bradford's Case, 54 Ala. 230. It can make no difference, so far as the trial is concerned, whether the warrant was *functus officio* or not, the purpose of issuing the warrant was to get the defendant before the court, he was present, and the trial could properly proceed without regard to the fact that several terms of the court had elapsed since the issuance of the warrant. The affidavit was the paper upon which the trial was had, it was that which afforded the defendant information as to the charge made against him. There is no merit in the insistence that the court erred in denying the motion to quash the warrant. Murphy's Case, 55 Ala. 252; Clayton's Case, 122 Ala. 91, 26 South. 118.

The witnesses were examined *ore tenus*, and we do not feel that we would be warranted in disturbing the conclusion reached by the court as to the defendant's guilt. Woodrow v. Hawving, 105 Ala. 240, 16 South. 720.

There is no error, and the judgment is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

SOUTHERN RY. CO. v. PATTERSON.

(Supreme Court of Alabama. June 6, 1906.
Rehearing Denied June 30, 1906.)

CARRIERS—DUTY TO PERSON AIDING PASSENGER TO BOARD TRAIN.

Where one boards a train solely for the purpose of assisting an old lady, nearly blind, at her request, to take passage on it, before doing so having approached the conductor, and told him of her condition and need of assistance, and been requested by him to render such assistance, so that the conductor is bound to know of his intention to alight before the train starts, it is the duty of the conductor to give him a reasonable time to alight before starting the train; and not having done so, and such person having in consequence been injured in alighting, without any contributory negligence, after the starting of the train, the carrier is liable therefor.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1242.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

"To be officially reported."

Action by S. J. Patterson against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. **Affirmed.**

Humes & Speake, for appellant. J. A. Bilbro, for appellee.

TYSON, J. The plaintiff received his injuries from a fall caused by stepping from one

of the defendant's passenger trains while moving. It was shown both by the averments of the complaint and his testimony that he had boarded the train for the purpose solely of assisting an old lady, who was nearly blind, at her instance and request, to take passage upon it; and before he could locate her in a seat the train began to move out of the station. According to the averments of the complaint and his testimony, he had told the conductor in charge of the train, before boarding it, of the old lady's condition and of her need of assistance to get upon the train, and to secure a seat, and was requested by that officer to perform that service. It is undoubtedly the law that "a carrier owes a duty to persons who come upon a train accompanying passengers, with the intention of getting off before the train starts or for the purpose of meeting passengers who are about to alight. And especially is there such a duty when the passenger requires assistance which the servants of the carrier do not undertake to render. But if the servants of the carrier have no notice or knowledge of the intention of one thus coming on board to get off before the starting of the train, they owe him no additional duty as to affording him an opportunity to safely alight." 6 Cyc. p. 615. But where the conductor of the train knows or should have known that the only purpose of the person assisting a passenger, needing assistance to board the train, is to assist the passenger to a seat, he is bound to give such person a reasonable opportunity to alight before starting it. And if, after the train is started, the person alights from it, and is injured, and his act of alighting is not under such circumstances as to make him guilty of contributory negligence, he is unquestionably entitled to recover the damages suffered by him. *L. & N. R. Co. v. Crunk*, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443; *Galloway v. C., R. I. & P. Ry. Co.*, 87 Iowa, 458, 54 N. W. 447; *Evansville & T. H. R. Co. v. Athol* (Ind. App.) 33 N. E. 469, 51 Am. St. Rep. 303; *Wood on Railroads*, § 305, p. 1297, and note 2; 2 *Redfield on the Law of Railways*, p. 280; 4 *Elliott on Railroads*, § 1578, p. 2458; note 29 Am. St. Rep. p. 54.

Mr. Elliott in his work cited above says: "There is some diversity of opinion as to whether one who enters a train for the purpose of assisting a passenger is to be regarded as a passenger, and there are cases which seem to hold that such a person is a passenger. We are unable to assent to this doctrine as broadly held by some of the cases, for it seems to us that the extraordinary duty of a carrier to a passenger, is not, as a general rule, owing to such a person, although we have no doubt that the railroad company owes to him the duty of exercising ordinary or measurable care. There may probably be cases where a person assists a passenger on a train, as, for instance, where the passenger is ill, feeble, too young to care for

himself or the like, where it is proper to hold that the person needing the assistance is a passenger, but where there is no reason for rendering assistance the person giving it cannot, as we believe, be regarded as a passenger." We think the distinction here pointed out by the learned author is well taken. The illustration given by him of the condition of the person taking passage rendering it necessary to have an assistant to help him safely board or get off the train, brings such an assistant, rendering the requisite service, within the category with respect to the duty owing by the carrier of a passenger, and where injury is suffered by such an assistant at the hands of the carrier in performing the service assumed by him, whether assumed at the instance of the passenger or the servant of the carrier whose duty it was to render it, in the absence of all explanation, the law presumes it was the result of the carrier's fault, and casts upon the latter the burden of overturning the presumption, or of showing that diligence and a careful observance of duty could not have prevented the injury.

We fully concur in the view that the duty of the conductor not to start the train never arose in this case unless he knew or ought to have known that the plaintiff's sole purpose in going on it was to assist the lady to a seat. But we think the circumstances shown were such as to afford the reasonable inference that he did know or ought to have known that plaintiff boarded the train solely for that purpose. It is reasonable to suppose that plaintiff would not have approached him, and made known the infirmity of the old woman if he intended to take passage himself. Had he intended to do so it is more than probable he would have assisted the woman to board the train and to a seat without making known her condition and need of assistance to that servant of the defendant. *L. & N. R. R. Co. v. Crunk*, supra; *Galloway v. O., R. I. & P. Ry. Co.*, supra.

Nor can it be affirmed, as a matter of law, that plaintiff's alighting from the train, while moving, under the circumstances shown, was an act of negligence which would defeat his recovery. Whether it was or not was a question for the jury. *Central Rail & Banking Co. v. Miles*, 88 Ala. 256, 6 South. 696; *North B'ham St. Ry. v. Calderwood*, 89 Ala. 247, 7 South. 360, 18 Am. St. Rep. 105; *Montgomery & Eufaula R. R. Co. v. Stewart*, 91 Ala. 421, 424, 8 South. 708; *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 152, 24 South. 392, 43 L. R. A. 297, and authorities there cited. There was clearly no duty on plaintiff to request the conductor to stop the train, after it started, for him to alight. *Miles' Case*, supra. He had the right to get off, and if injured in doing so he may recover if the conductor knew or ought to have known what his purpose was in boarding it, there being no dispute but that he was diligent in the service he was

rendering, and in getting off he did no more than a prudent and careful man would have done. And the breach of duty owing to him by the conductor in starting the train without giving him a reasonable opportunity to alight was clearly the proximate cause of his injury, just as much so as was the breach of duty the proximate cause of the injury recovered for in the case of *Central R. R. & Banking Co. v. Miles* and other cases cited by us of a similar nature. We need only apply these principles to the points insisted on for a reversal in brief of appellant's counsel, except as to charge 8, to see that none of them are well taken.

Charge 8 was calculated to mislead the jury to the conclusion that the conductor must have had express notice that plaintiff was not a passenger, or did not intend to remain on the train.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

WESTERN UNION TELEGRAPH CO. v. LONG.

(Supreme Court of Alabama. May 8, 1906.)

1. TELEGRAPHS AND TELEPHONES—FAILURE TO DELIVER MESSAGE — DAMAGES — MENTAL ANGUISH.

Plaintiff sent his uncle by marriage a telegram—"My baby is dead, phone Mr. G. and also L. I will be at your place tonight—Meet us with conveyance." The company failed to deliver the message, and plaintiff, on arrival, found no one to meet or assist him, and heard that no one had been apprised of the death and no arrangements made for the funeral. *Held*, that though the sendee was not within the degree of kinship, so that his absence alone furnished a right to recover for mental anguish, plaintiff was entitled to recover for the same as proximately resulting from the nondelivery in view of the circumstances.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 69, 70.]

2. SAME—EXCESSIVE DAMAGES.

A verdict for \$500 was not excessive.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 74.]

3. EVIDENCE—ADMISSIBILITY—TESTIMONY AS TO MOTIVE OF WITNESS.

In an action against a telegraph company for nondelivery of a message, a question to the sendee's brother to whom the message was delivered as to why he did not give the telegram to his brother was objectionable, as seeking to bring out the uncommunicated reason or motive of the witness.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 440.]

Appeal from Circuit Court, Dekalb County; J. A. Bilbro, Special Judge.

"To be officially reported."

Action by J. W. Long against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action for failure to transmit and deliver the telegram set out in the opinion. The assignments of error were as follows: (1) The court erred in overruling demurrers to the sixth count of the complaint. (2) In overruling demurrers to the second count of the complaint. (3) In overruling demurrers to the eighth count. (4) In overruling the objection to the question propounded to the plaintiff on direct examination: "Now how long was it after you arrived at Collinsville before you got the body removed to your uncle's house?" (5) In overruling appellant's objection to the following question asked the plaintiff on his direct examination: "Was there any delay about the burial of your child?" (11) In refusing at the request of the defendant to give written charge 5. (12) In refusing to give written charge 6. (13) In refusing to give written charge 7. (14) In refusing to give written charge 8. (15) In refusing to give written charge 9. (17) In refusing to give written charge 11. (18) In refusing to give written charge 12. The counts on which the case was tried are in the following language: "Count 6. Plaintiff claims of the defendant the sum of \$1,999.90 damages for that, at, to wit, 9 o'clock in the morning, and on, to wit, the 17th day of November, plaintiff delivered to defendant, which was engaged in the business of transmitting for hire by means of electricity from Birmingham to Collinsville, Ala., telegrams or telegraphic messages, at Birmingham, on a blank furnished by defendant a telegram addressed to Pleas Keener at Collinsville, Ala., paying for the transmission and delivery thereof, the sum of, to wit, 75 cents. Said defendant received said message and said compensation, agreeing thereby to transmit and deliver the said message to said Pleas Keener, and which said message was in words and figures, except the printed matter thereon which was placed there by defendant, as follows: [Here follows message as set out in the opinion.] And the plaintiff avers that the defendant failed to transmit and deliver said telegram as it undertook to do, and that by reason of said failure, plaintiff was compelled to receive the body of his child from the carrier which brought it from Birmingham to Collinsville, and deliver it into the hands of strangers while he went in search of in the nighttime, and through the rain the means to convey said body to the house of his relative and friend, the said Pleas Keener; that he was compelled to postpone the burial of his child for a long time, to wit, one day; that he was deprived in the hour and time of his arrival at Collinsville with the remains of his dead child of the comfort, consolation, and assistance of his near relative and friend, suffering thereby great inconvenience and also great mental pain and anguish for all of which he sues. Count 7. Plaintiff adopts all of the sixth count down to and including the telegram,

and adds thereto as follows: Plaintiff avers that defendant failed to deliver said telegram to the said Keener, whereby plaintiff was compelled to receive the body of his dead child, and deliver it into the hands of strangers, while he, in the nighttime, and through the rain, went in search of means to remove said body to the residence of his near kinsman, Pleas Keener, causing him to suffer great grief and mental pain and anguish, wherefore he sues. Count 8. Plaintiff adopts all of the sixth count down to and including the telegram, and adds thereto as follows: Plaintiff avers that one of the purposes in view in sending said telegram was to notify the said Pleas Keener, who was a near relative of his and his deceased child of the misfortune which has befallen him, and to secure at the time of his arrival in Collinsville with the body of his said child the comfort, consolation and assistance of said relative, and to secure the means of immediately removing said body to a place where it could be housed and cared for during the night; that said message advised said defendant of this purpose. Plaintiff further avers that the defendant wholly failed to deliver said telegram to said Keener, whereby his purpose was thwarted. He was caused to arrive at Collinsville in the nighttime, and was deprived contrary of his expectations of the presence, comfort, consolation and assistance which would have been rendered, and extended to him by his relative, said Keener, thereby adding greatly to the mental pain, affliction, and anguish he was already suffering, hence this suit.

The defendant demurred to the above counts. (1) For that there is a misjoinder of action in said complaint in that plaintiff has joined an action ex contractu with actions ex delicto. (2) For that the seventh and eighth counts of said complaint are actions ex delicto, which are improperly joined with action ex contractu. And to the sixth, seventh, and eighth count, the defendant assigned separately and severally the following grounds of demurrer: (1) Said count seeks to recover damages for mental pain and anguish, and fails to state facts which would authorize the recovery of damages for such mental pain and anguish. (2) The damages claimed therein and thereby are too remote and speculative. (3) For that the pain or anguish which the plaintiff suffered was caused by the failure of Pleas Keener to meet him at the depot with a conveyance, and the failure of said Keener to so meet him was not the proximate consequence of the failure to deliver the telegram. (4) For that there can be no recovery for mental pain and anguish under said count. (5) It does not appear therefrom that had said telegram been delivered to said Pleas Keener, that he, the said Keener would have met plaintiff at said train with a conveyance. (6) For that the averments of said count are

vague, indefinite, and uncertain. (7) For that it does not appear with sufficient certainty what relation the said Keener, and the said Green, and the said Long bore to plaintiff. (8) Said count avers but the conclusions of the pleader. (9) For that it does not appear therefrom that the injury complained of and the damage suffered by plaintiff was the proximate consequence of the negligence alleged. (10) For that it appears therefrom that the damages suffered by plaintiff were not the proximate consequence of the negligence complained of. These demurrers were overruled. The facts of the case are sufficiently set out in the opinion.

The defendant requested the following written charges which were refused: "(5) If you believe the evidence you cannot assess more than nominal damages in favor of plaintiff. (6) I charge you that the plaintiff in this case can recover only the amount paid by him for the transmission and delivery of the message. (7) I charge you that the plaintiff in this case is not entitled to recover damages for mental pain or anguish which may have been suffered by him. (8) If you believe the evidence you cannot assess any damages in plaintiff's favor on account of mental pain or anguish which you may believe from the evidence was suffered by him. (9) I charge you that you cannot assess in favor of plaintiff any damages for mental pain or anguish suffered by plaintiff for and on account of the failure of Pleas Keener to meet plaintiff at the depot at Collinsville upon the arrival of the train there. (10) I charge you that you cannot assess damages in favor of plaintiff for any mental distress which you may believe plaintiff suffered for and on account of any consolation that the presence of Pleas Keener at the station upon the arrival of the train there may have been to the plaintiff. (11) I charge you that the failure of the sendee of the message Pleas Keener, to meet plaintiff upon the arrival of the train at Collinsville was not the proximate result of the alleged failure to deliver the said telegram to the said Pleas Keener. (12) I charge you that you cannot assess any damages in favor of plaintiff for and on account of any mental distress he may have suffered on account of the fact—if under the evidence you believe it to be a fact—that he had to leave the body of his child in the hands of strangers while he went in search of means to remove the body of the child from the station. (13) I charge you that the delay in the burial of plaintiff's child, if you believe from the evidence that there was a delay in the burial, was not proximately caused by the alleged failure to deliver the telegram to said Keener. (14) I charge you that you cannot assess in favor of plaintiff any damages for mental pain and anguish which you believe were suffered by him for and on account of any delay in the burial of his child, even though you may

believe from the evidence that the burial of said child was delayed."

Issue was joined on the plea of the general issue, and there was verdict and judgment for plaintiff in the sum of \$500.

George H. Fearons and Campbell & Walker, for appellant. Hickman & Hamil and John T. Davis, for appellee.

ANDERSON, J. This was an action brought by the plaintiff Long, for a failure by the defendant to deliver a telegram sent by him as follows, to wit: "Mr. Pleas Keener, Collinsville, Ala.: My baby is dead, phone Mr. Green, also to H. M. Long at Dr. Shermans at Lathamville. I will be at your place tonight, meet us with conveyance. J. W. Long." The case was tried on the sixth, seventh, and eighth counts, resulting in a verdict and judgment for the plaintiff, and from which the defendant prosecutes this appeal.

This court seems to be committed to the doctrine that the sender of a telegram can recover damages for mental anguish suffered, as the proximate consequence of a failure to deliver the message. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 South. 419, 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Ayers*, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; *Western Union Tel. Co. v. Haley*, 143 Ala. 586, 39 South. 386. We think a perusal of the message in the case at bar, would likely suggest the importance of a delivery, and that mental anguish and suffering would naturally ensue from a non-delivery. In the *Ayers Case*, supra, the court held that the plaintiff was not entitled to recover damages for mental suffering because the sendee was not of the degree of kinship, whose absence deprived the plaintiff of consolation in his hour of grief. There the only mental anguish claimed to have been suffered was the absence of the brother-in-law, thus depriving the plaintiff of his presence and consolation. The message in the case at bar was sent to an uncle by marriage and who does not come within the degree of kinship whose absence furnished a right to recover for mental anguish. But as we understand the complaint and the proof, the plaintiff grounds his right to recover for mental suffering, not alone upon the fact that the sendee and others were not at the train to extend their condolence, but to aid and assist him with the corpse of his child, and in making the funeral arrangements, etc. Instead of being met at the train with a conveyance and by friends and relatives, and of having his people informed, when he expected to bury his child, he alighted from the train a dreary, cloudy night, with no one to meet or assist him, and to hear that no one had been apprised of his child's death, and that no arrangements had been made for the funeral the next day. Can it be thought for a moment that this

man did not suffer mental anguish not measurable by dollars and cents, and that said anguish and suffering were not the proximate consequence of a nondelivery of his telegram, and that the very telegram itself was not sufficient to suggest to the defendant the result of a nondelivery? We think not. We do not mean to hold that in all cases and under all conditions the sender can recover for mental suffering, growing out of a failure to meet him at the train, etc. But the telegram in this case contemplated more than the bare presence of the sendee. It called for the arrangements of preliminaries, of a most sacred character.

In the case of *Western Union Tel. Co. v. Carter* (Tex. Civ. App.) 21 S. W. 688, where a father telegraphed to a friend of the death of his son, and requested him to send a coffin which was not delivered, and the funeral was delayed until the body begun to decompose, the court said: "The doctrine that damages of this character may be considered the natural and direct consequence of a failure to transmit a telegraphic message, such as the one in question, has become so firmly fixed in our jurisprudence, that the action of appellant seems scarcely to be justified in asking us to renounce it." See, also, *Western Union Tel. Co. v. Broesche* (Tex. Sup.) 10 S. W. 734, 13 Am. St. Rep. 843. We think the case of *Western Union Tel. Co. v. Henly* (Ind. App.) 54 N. E. 775, relied upon by the appellant's counsel is unlike the case at bar. The telegram in that case did not even request that the sender be met. It could have been taken simply as a notice of her expected arrival, and reads: "Arrive Baltimore & Potomac, Monday, 1:30, p. m." There was nothing in this message to indicate that the sender would suffer mental anguish as the result of the nondelivery of the message. She was to arrive in broad daylight, and, as was said by the court: "On its face the message did not disclose the purpose of the journey, or indicate the age or condition of the sender or sendee, or the condition between them or whether the sender was travelling alone, or with an escort, or with others under her care. It did not purport to be a request for any person to meet her or provide a conveyance for her. It did not show that it was sent in response to any message, or suggest the illness of any person or a desire that the coming of the sender should be communicated to anybody but the sendee. Under well-settled principles, there was not, we think, such a consequence of the breach of the contract that the injury to the appellee could be the measure of damages, for the reason that such damages cannot reasonably and fairly be considered as arising naturally from a breach of the contract itself, or as having been in the contemplation of both parties, when they made the contract, as the probable result of a breach of it." In the case at bar the telegram was received by the

agent at Collinsville; it imparted to the company, through him, the sadness and sacredness of plaintiff's mission. The agent knew the train would arrive in the night. The sendee was but a short distance from the office, and would have had ample time to comply with plaintiff's request had he gotten the message. And the defendant must have known that the nondelivery of the message would result in disappointment and mental anguish to the plaintiff. What we have heretofore said disposes of assignments of error numbered 1, 2, 3, 4, 5, 11, 12, 13, 14, 15, 17, and 18.

There was no error in sustaining the objection to the question to John Keener: "Why did you not give the telegram to your brother?" Of course, the defendant had the right to show efforts to promptly deliver the message, but the question does not seek to bring out what was done but seeks the uncommunicated reason or motive of the witness. There was no error in refusing charge 10 requested by the defendant. The plaintiff was not only deprived of the presence of Pleas Keener, upon his arrival and his consolation as a relative, but he was deprived of his assistance which would have been of some consolation to him at the time. The facts in the *Ayers Case*, supra, are unlike the ones in the case at bar. There the plaintiff was deprived only of such consolation as could be inferred from the absence of his brother-in-law, and from whom he expected nothing except the benefit of his presence. Here, the plaintiff, not only had the right to expect the presence of Keener for the purpose of sharing his grief, but that the assistance to be rendered to him upon the arrival of the train would afford consolation to him under the circumstances. The message clearly indicated that plaintiff was taking his child to Collinsville for burial, and that the failure to deliver it would naturally result in delay, and there was evidence of a delay of the burial, and the jury could have inferred that the delay was the proximate result of the failure to deliver the telegram. Charges 13 and 14 requested by defendant were properly refused. We do not consider the damage assessed by the jury excessive, and there was no error in overruling the motion for a new trial.

The judgment of the circuit court is affirmed.

HARALSON, DOWDELL, and DENSON,
JJ., concur.

HAINEY v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. WEAPONS—CARRYING CONCEALED WEAPONS—QUESTION FOR JURY.

Whether the pistol which accused, on trial for carrying a concealed weapon, was shown to have carried, was carried in such manner as

not to be discernible by ordinary observation, is for the jury.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Weapons, § 30.]

2. SAME—EVIDENCE—ADMISSIBILITY.

On a trial for carrying a concealed weapon, the admission of evidence that accused was drunk at the time, was prejudicial error.

3. SAME.

A witness for the state, on a trial for carrying a concealed weapon, may state what he was doing at the time he saw accused with the weapon, as showing that he was or was not in a position to see accused and the weapon.

4. SAME.

On a trial for carrying a concealed weapon, evidence that accused was a brother of a person whom the officers sought to arrest for drunkenness at the time accused was alleged to have carried a concealed weapon, was inadmissible.

5. CRIMINAL LAW—INSTRUCTIONS—REPETITION.

It is not error to refuse instructions covered by those given at the request of the accused.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

"To be officially reported."

Dick Hainey was convicted of carrying a concealed weapon, and he appeals. Reversed and remanded.

The state was permitted to prove, over the objection of defendant, that at the time of the carrying, the defendant was drunk or under the influence of whisky. The state was also allowed to prove that Sam Hainey and the defendant were brothers, and that Sam Hainey was drunk also, and that the defendant stopped the marshal and his assistant while in the discharge of their duty in carrying Sam Hainey, under arrest, to town.

Lawrence E. Brown, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The defendant was convicted for carrying a pistol concealed about his person.

The defendant offered no evidence, and the point in the case on its merits was whether the pistol, which the testimony showed the defendant had, was carried in such manner as not to be discernible by ordinary observation; and this was a jury question. *Smith's Case*, 96 Ala. 66, 11 South. 71; *Ramsey's Case*, 91 Ala. 29, 8 South. 568; *Trigger's Case*, 123 Ala. 426, 26 South. 512.

Evidence that the defendant was drunk at the time the state's witness testified he saw him with the pistol, was not an issuable fact in the case, and was patently immaterial. Its only tendency was to unduly prejudice the jury against the defendant. The court erred in admitting it. *Dean's Case*, 98 Ala. 71, 18 South. 318; *Gainey's Case*, 141 Ala. 74, 37 South. 355. We cannot say that the admission of the evidence was not injurious to the defendant's case, as has been suggested by the Attorney General in his brief. What the state's witness was doing at the

time he saw the defendant with the pistol may have been competent as tending to show that he was, or was not, in a position to see the defendant and the pistol, and the court properly overruled the objection calling for such evidence. But the witness' answer was not entirely responsive to the question, and those parts of it that defendant moved to exclude should have been excluded.

Nor have we been able to discover the materiality of the evidence of the relationship between Dick and Sam Hainey. Neither was examined as a witness, and whether they were brothers or otherwise related, or not related at all, had no tendency to elucidate any issue in the case.

The defendant had the benefit of charges 1 and 4 refused to him in other charges given at his request.

For the errors pointed out, the judgment of conviction is reversed and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and SIMPSON, JJ., concur.

WESTER v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. CONSTITUTIONAL LAW—POLICE POWER—FRAUD—SALE OF DISEASED HORSES.

The purpose of Cr. Code 1896, § 4762, making it a misdemeanor for one to knowingly sell or exchange a horse having the disease known as "choking" being, as shown by its history and the mode and manner in which it was adopted into the Code, the prevention of fraud, it is a proper exercise of the police power, and therefore not violative of the Constitution as an arbitrary prohibition on the sale by one of his property, of the constitutional guaranty to every person of the right to enjoy, use, and dispose of his property.

2. INDICTMENT—FRAUD—ELEMENTS OF OFFENSE.

The purpose of Cr. Code 1896, § 4762, making it an offense to knowingly sell or exchange a horse having the disease known as "choking," being the prevention of fraud, an indictment thereunder should aver that the offense was committed with the intent to defraud.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 182, 256, 257.]

Simpson and Denson, JJ., dissenting.

Appeal from Circuit Court, Cherokee County; W. W. Haralson, Judge.

"To be officially reported."

Joe Wester appeals from a conviction. Reversed and remanded.

C. Daniel and Hugh H. White, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The indictment in this case was preferred under section 4762 of the Criminal Code of 1896. This section is as follows: "Any person, by himself or another, or as agent for another, who shall knowingly sell or exchange any horse or

mule subject to the disease or affection known as 'choking' must, on conviction, be fined not less than one hundred, nor more than five hundred dollars, and may also be sentenced to hard labor for the county for not less than three, nor more than six months; one-half of the fine shall go to the party injured. For each conviction under this section, the solicitor shall be entitled to a fee of fifty dollars. Justices of the peace shall have concurrent jurisdiction with the circuit and city court of offenses arising under this section."

The indictment in terms pursued the language employed in the statute, without averment, in charging the offense; that is to say, it merely charged that the defendant "knowingly sold to R. F. Ewing a mule subject to the disease or affection known as 'choking.'"

There are two questions presented by the record for our consideration, the first going to the constitutionality of the statute, and the second to the sufficiency of the indictment in its averments. It is insisted by counsel for appellant that the statute is violative of the constitutional guaranty that gives to every person the right to enjoy, use, and dispose of his property. If the statute were nothing more than an arbitrary prohibition on the sale by one of his property, then there would be no doubt as to its being unconstitutional, and without legislative competency. We recognize and approve what was said in *Dorman v. State*, 34 Ala. 239, cited by counsel. It is not here denied that the Legislature may, in the proper exercise of the police power of the state, regulate or prohibit the sale of personal property when the morals, health, or general welfare of the people require it. But, it is insisted that inasmuch as the undisputed evidence shows that the disease or affection known as "choking" is not a contagious disease, there is no room for the exercise of the police power of the state so as to save the statute from offending against the constitutional right of the citizen in the guaranteed enjoyment, use and disposition of his property. In this insistence, the room for the exercise of the state's police power is made too narrow and circumscribed. Certainly it is as much within the police power to prevent imposition and fraud in the sale of personal property as it is to regulate or prevent the sale of animals infected with contagious disease. If the purpose of the statute in question was the prevention of fraud, then it was clearly within legislative competency as an exercise of the state's police power, and not violative of any constitutional right of the citizen. Was this the purpose of the statute?

The statute in question, section 4762, is found in chapter 154 of the Code of 1886, the subject of which chapter is "Frauds." Article 2 of said chapter and which includes section 4762 is headed "Fraudulent conveyances and illegal disposition of property on

which another has a claim." Section 4762 was brought forward from the Criminal Code of 1886, in which latter Code it is to be found as section 3839. It appears that this section 3839 of the Code of 1886 was added by the joint committee, as shown by marginal note, and in this way became a law at the time of the adoption of the Code of 1886. In that Code the section is found in article 6 of chapter 4, which has for its subject "Fraudulent Conveyances," etc. We think from the history of the statute, the mode and manner in which it was adopted into the Code, that the manifest purpose in the enactment of the law was the prevention of fraud. This being true, from what we have above said, the statute as an exercise of the police power of the state is free from constitutional objections.

This brings us to a consideration of the second question; that is, as to the sufficiency of averments in the indictment. The general rule is that it is sufficient in making a criminal charge to follow the words of the statute which declares the offense, but this rule does not apply when the statute does not prescribe with definiteness the constituents of the offense. The defendant has the constitutional right to demand the nature and cause of his accusation, so that he may identify the particular charge and offense. *Mayfield's Dig.* § 421 et seq., pp. 445, 446. The purpose of the statute being the prevention of fraud, fraud becomes a constituent element of the offense. The indictment, therefore, was defective in failing to aver that the offense charged was committed with the intent to defraud. The demurrer to the indictment should have been sustained. For the error committed by the trial court in overruling the demurrer, the judgment appealed from must be reversed, and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON, TYSON, and ANDERSON, JJ., concur. SIMPSON and DENSON, JJ., dissent.

MEFFORD v. CITY COUNCIL OF SHEFFIELD.

(Supreme Court of Alabama. June 30, 1906.)

LICENSES—MUNICIPAL ORDINANCE—VALIDITY.

A city charter gave the council authority to levy a license tax on all persons carrying on any business, and an ordinance imposed a tax of \$200 on wholesale dealers in kerosene oil, and a tax of \$10 on all dealers in goods, wares, or merchandise, and it was provided that parties engaged in two or more businesses under the same roof should take out the license for the business requiring the greater license, and not be required to secure any other license. *Held*, that the provision as to wholesale dealers in kerosene oil was not unconstitutional as discriminative merely because kerosene oil was sold by wholesale and retail grocery merchants and druggists as a part of their regular stock

in trade, the oil not being an article necessarily belonging to the carrying on of such occupations.

Appeal from Circuit Court, Colbert County; E. B. Almon, Judge.

"To be officially reported."

W. M. Mefford was convicted of violating an ordinance of the city of Sheffield, and he appeals. Affirmed.

Charles P. Jones and W. F. Thetford, Jr., for appellant. J. L. Andrews, for appellee.

DENSON, J. Prosecution was commenced against the defendant (appellant) before the recorder of the city of Sheffield for engaging in the business of wholesale dealer in kerosene oil in the city of Sheffield, without first obtaining a license to carry on such business. From a judgment of conviction rendered by the recorder, the defendant appealed to the circuit court of Colbert county. In that court the case was tried on an agreed statement of facts, and from a judgment of conviction rendered by that court, the defendant has appealed to this court.

The city of Sheffield was incorporated by an act of the General Assembly approved February 17, 1885 (Act 1885, p. 781). Subsection 27 of section 27 (page 798) of the charter as established by that act was amended by an act of the General Assembly approved February 28, 1889 (Acts 1888-89, p. 907, § 5). And so much of the section as amended, which bears upon the question presented by this case, is in the following language: "That subsection 27 of section 27 of said act be amended so as to read as follows: said city council shall have authority to levy and collect from all persons, firms, and corporations trading or carrying on any business, trade, or profession; by agent or otherwise in said corporate limits, a license tax on said business, trade, or profession; provided, that no license tax shall exceed the sum of two hundred dollars, except license on retail, vinous, spirituous, and malt liquors, which shall not exceed one thousand dollars."

In the statement of facts on which this case was tried, is set out a license ordinance of the city which so far as it pertains to the question in hand is as follows:

"Annual License Ordinance. An ordinance entitled an ordinance to prescribe and fix license for business, occupations and vocations in the city of Sheffield, Alabama, for the year 1904.

"Section 1. Be it enacted by the city council of Sheffield, Alabama: That the following be and the same is hereby declared to be the schedule of licenses for the year 1904, for the divers businesses, professions, occupations and avocations carried on or engaged in, in the city of Sheffield, Alabama, and each and every person, firm, company or corporation engaging in any of the business, vocations, professions or occupations provided for by agents or otherwise, shall pay for and take

out such license and in such sums as are herein provided, to wit: For wholesale dealers in kerosene oil, or other illuminating oil, to wit: Oil, each wholesale dealer in kerosene oil or other illuminating oil, \$200.00. 110. All dealers in goods, wares, or merchandise, when license is not fixed by this ordinance, whether their principal business be the sale of the particular article dealt in or not, whether a person, firm, or corporation manufacturing or otherwise, selling to parties within the city each, \$10.00.

"Sec. 4. Be it further ordained when parties are engaged in two or more businesses, under the same roof and in one room they shall take out the license for the business, profession, vocation, or occupation requiring the greater license, and not be required to pay for more than one business except as above provided."

It is conceded that the defendant did not have the license required. It is further shown by the agreed statement of facts that kerosene oil is a useful commodity, in general use, and is kept and sold by wholesale and retail grocery merchants and druggists as a part of their regular stock in trade; that there were during the entire year of 1904, both wholesale and retail grocery merchants and druggists carrying on their business in Sheffield, Ala.

The contention of the appellant is that the ordinance imposing a tax of \$200 on wholesale dealers in oil violates the constitutional provision that all occupations or business enterprises or property of the same class must be taxed equally. As was said in *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 South. 627, 72 Am. St. Rep. 143: "We may concede that when a tax is imposed on avocations or privileges, or on the franchises of corporations, it must be equal and uniform. The equality and uniformity consist in the imposition of a tax upon all who engage in the avocation, or who may exercise the privilege, taxed, and, if it be a franchise tax, upon all corporations belonging to the class upon whom it is imposed." 1 *Desty on Tax*, § 36; *Cooley on Tax*, (2d Ed.) 378; *Delaware Ry. Tax Case*, 18 Wall. (U. S.) 206, 21 L. Ed. 888; *City of New Orleans v. Kaufman*, 29 La. Ann. 283, 29 Am. Rep. 328; *Durach's Appeal*, 62 Pa. 491. The Legislature in the legitimate exercise of the taxing power, may impose direct taxes on lands only, to the exclusion of every variety or species of personal property, and vice versa. And as is said by Judge Cooley: "What is true of property is true of privileges and occupations also. The state may tax all, select for taxation certain classes and leave the other untaxed." No one doubts, that the state possessing such power, may, in the absence of any constitutional inhibition transfer it to a municipal corporation. *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85. It will be observed, that the ordinance under consideration in terms, applies equally to all

persons who engage in the business of wholesaling kerosene oil; and this is so whether such person carries on a grocery store or a drug store, and wholesales oil in connection with such business. But the agreed statement of facts shows that kerosene oil is a useful commodity, in general use, and is kept and sold by wholesale and retail grocery merchants and druggists as a part of their regular stock in trade. That while defendant was selling oil and during the entire year of 1904, there were both wholesale and retail grocery merchants and druggists carrying on their business in Sheffield, Ala. It is argued from this, that inasmuch as section 110 of the license ordinance fixes the tax on all dealers in goods, wares, and merchandise at \$10 annually, this should entitle these merchants to keep and to sell every article which is properly embraced in the conduct of their business as a whole, and that the city has no right to require of these merchants an additional tax of \$200 in case they see fit to keep and sell kerosene oil.

The crux of this argument is that the ordinance divides one privilege into two, and discriminates between venders of articles necessarily belonging to the one privilege by requiring a separate license tax to sell that special article. It is a correct statement of the law to say that if the city revenue ordinance undertakes to curtail a privilege by constructing out of its constituent elements two separate taxable privileges; if it imposes one tax to cover the wholesaling and retailing of goods, wares, and merchandise, and another special and independent tax for the wholesaling of an article which necessarily belongs to the privilege of wholesaling and retailing, it has transcended its charter power and the provisions of the ordinance imposing such independent special tax upon the one element of the privilege are void. Mayor and Aldermen of Tuscaloosa v. Holcstein, 184 Ala. 636, 32 South. 1007; City of Mobile v. Craft, 94 Ala. 156, 10 South. 534; City of Mobile v. Richards, 98 Ala. 594, 12 South. 793; Gambill v. Erdrich (Ala.) 39 South. 297. While it must be conceded that the agreed statement shows that kerosene oil is a useful commodity in general use and is kept and sold by wholesale and retail grocery merchants and druggists, we think it cannot be affirmed that it is an article which necessarily belongs to the privilege of wholesaling groceries or drugs, nor does the agreed statement show that it is such. City of Mobile v. Craft, 94 Ala. 156, 10 South. 534; City of Mobile v. Richards, 98 Ala. 594, 12 South. 793. The case of City Council of Montgomery v. Kelly (Ala.) 38 South. 67, 70 L. R. A. 209, is easily distinguishable from this case. There the tax was held void, and the court expressly states in the opinion that: "It will be noticed that this license was, not for engaging in any business, but for the manner in which the party chose to conduct the business already licensed. This is such a palpable attempt, un-

der the guise of a license tax to fix a penalty on the merchant for conducting his business in a certain way, that, under the authorities heretofore cited, we hold it to be unconstitutional and void." Furthermore, two licenses are not required by the ordinance under consideration, but the ordinance provides that if a person carries on two businesses under the same roof, and in the same room two licenses need not be taken but by taking the highest license both businesses may be legitimately carried on. It is worthy of remark too, that it is not contended by the appellant that he has paid any license as a wholesale or retail dealer in goods, wares, and merchandise, or that he was engaged in business as a wholesale or retail grocer, or wholesale or retail druggist.

We are at the conclusion that the city had the power under its charter to require the license; that it is not discriminative, and is valid. Without entering into a discussion, or attempting to write the definition of a wholesale dealer, we think it is clear from the agreed statement of facts which, has been carefully considered, that the defendant was a wholesale dealer in oil.

We find no error in the record, and the judgment appealed from will be affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

HARGROVE v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. CRIMINAL LAW—EVIDENCE—TRAILING DEFENDANT WITH DOGS.

Where a witness who trailed defendant with bloodhounds testified that such was witness' business; that the two dogs were trained to trail human beings; that one of them had four years' training; that the other was two years old, "and had experience also"; and that the dogs had trailed 60 or 70 persons in the last four years, evidence as to the trailing of defendant by the dogs was admissible.

2. SAME—TRACKS.

Where accused admitted that certain shoes belonged to him and that he wore them on the day of the night of the burglary, evidence that the shoes were obtained from defendant's house after he was arrested, and that they were the same length and width as certain tracks found near the place where the burglary was committed, was admissible.

3. SAME—PEREMPTORY INSTRUCTION.

A general affirmative charge in favor of accused cannot be given when the evidence affords an inference adverse to him.

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

"To be officially reported."

Frank alias Buster Hargrove was convicted of burglary, and he appeals. Affirmed.

M. K. Clements, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted on an indictment charging him with the crime of burglary.

There are three questions presented for our consideration. The first is on the action of the trial court in overruling the motion of the defendant to exclude "all the evidence of the witness, Lee Davidson, in reference to alleged trailing of the defendant by the dogs." It was shown by this witness that he owned two bloodhounds, and "was in the business of running bloodhounds, and that the two dogs were trained to trail human beings. This witness further testified that one of the dogs had had four years' training, and that the other dog was two years old, "and had experience also," and that "these dogs had trailed 60 or 70 persons in the last four years." With this evidence as to the nature and training of the dogs, the testimony of this witness in reference to the trailing of the defendant by the dogs, was competent and admissible under the ruling in the case of *Hodge v. State*, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17. See, also, *Little v. State* (Ala.) 39 South. 674.

The second question is on the action of the court in overruling the defendant's motion "to exclude the evidence of the witness Labe Westmoreland in reference to the tracks." This witness testified "that he got a pair of shoes at the house of the defendant the night that the dogs went to the defendant's house, and after the defendant was arrested, and that some tracks that were found near Warten's store and near where the cash drawer was found, were the same length and width as the shoes found in the defendant's house." The witness further testified "that these shoes were put into the tracks found in the rear of Warten's lot, where the cash drawer was rifed, and they were the same length and width as these tracks." The defendant admitted, when being examined as a witness in his own behalf on the trial, that the shoes were his, and that he wore them on the day of the night of the burglary. The evidence as to the tracks was competent and relevant, and the court committed no error in overruling the motion to exclude. *Mayfield's Digest*, vol. 1, § 421½, p. 333.

The third question raised is based on the refusal of the court to give the general charge requested in writing to find in favor of the defendant. It has often been ruled by this court that the general affirmative charge cannot be given, when the evidence affords inference adverse to the party requesting the charge. In such a case the question becomes one for determination by the jury. The evidence in the case before us offered inference of the defendant's guilt, and the court, therefore, properly refused the charge.

We find no error in the record and the judgment will be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

HANNERS v. STATE.

(Supreme Court of Alabama. April 5, 1906.
Rehearing Denied July 6, 1906.)

1. JURY—LIST—PREPARATION.

Under Code 1896, § 4982, providing that the jury commissioners shall select from the residents of the county such persons as in their opinion are competent to serve as jurors, and shall prepare a list of names so selected and certify the same to the judge of probate, a jury list containing names selected only from certain beats of the county was fatally defective.

2. CRIMINAL LAW — CONVERSATIONS WITH CONSPIRATORS.

In a prosecution for homicide, conversations had between defendant and two others immediately before the difficulty in which the killing occurred, which showed a conspiracy between the parties to do great bodily harm or take the life of deceased, were admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1007-1013.]

3. WITNESSES—BIAS.

Where, in a prosecution for homicide, a witness for defendant denied making certain threats against deceased, and testified that he and deceased were on friendly relations, evidence that witness made such threats against deceased long before the fatal encounter was admissible to show his hostility to the prosecution and his bias for defendant.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1189, 1201.]

4. CRIMINAL LAW—TRIAL—EVIDENCE.

It is immaterial that evidence admitted over accused's objection was incompetent when offered, if it is subsequently rendered competent.

5. SAME — LIMITATION—INSTRUCTIONS—DUTY TO REQUEST.

If certain evidence was admissible for a particular purpose only, it was the duty of accused, if he desired that the jury's consideration thereof should be limited, to request an instruction to that end.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1874, 1999.]

6. SAME—TRIAL—ARGUMENT OF COUNSEL.

Where defendant's counsel in argument asked why an alleged conspirator was never indicted, and why the state had not produced him, it was not error for the state's solicitor in reply to state that if any one was expected to produce such conspirator it was defendant, as they were on friendly terms, and that if no conspiracy existed it would be easy for defendant and the alleged conspirator to prove it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1681.]

7. HOMICIDE—INSTRUCTIONS.

Defendant requested the court to charge that if deceased accused defendant of meddling with or encouraging the difficulty between deceased and another, then defendant had the right to repudiate such accusation if it was false in no uncertain terms, and that if deceased and another were having a difficulty the day deceased was killed, and he accused defendant of encouraging the same, then it was defendant's duty to emphatically deny such accusation, and that to have been accused of it and not to have denied it would have been circumstances against him. *Held*, that such instructions were properly refused as calculated to mislead the jury to believe that deceased was entitled, as a matter of law, to repudiate the accusation in such language as was calculated to provoke or encourage the difficulty which ensued between them.

8. CRIMINAL LAW—PROVINCE OF JURY.

Instructions that the evidence failed to show that there was any conspiracy between defendant and certain others to take deceased's life, and that if the jury believed the evidence, defendant could not be convicted on the theory that he had entered into such a conspiracy, were objectionable as invading the province of the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1731, 1732.]

9. SAME—INSTRUCTIONS AS TO EVIDENCE.

An instruction that the evidence of a certain witness on a preliminary trial was not the evidence the jury should consider as being his evidence on the trial in question, but that the jury should take the written showing signed by defendant as being what the witness would swear to if present and give it the same weight as if the witness had testified on the stand, was properly refused as excluding a part of the testimony from the jury's consideration.

10. HOMICIDE—INSTRUCTIONS—FREEDOM FROM FAULT.

An instruction that if deceased had a shotgun in his hand in a threatening manner, and that defendant heard a number of voices hollering, "Look out George, he is going to shoot you with a shotgun," and that defendant immediately stepped from behind the corner of the house and saw deceased with a gun pointing toward him, and acted in the honest belief that he was in danger of being shot and killed by deceased, then it was immaterial whether deceased was really aiming to shoot or not, and defendant could not be convicted, was properly refused as premitting consideration of defendant's freedom from fault in producing the necessity to take deceased's life as well as his duty to retreat.

11. SAME—EVIDENCE—CODEFENDANTS—MISLEADING INSTRUCTIONS.

Where, in a prosecution for homicide, there was some evidence showing a conspiracy between defendant and W., an instruction that defendant could not be convicted unless the evidence established his guilt independent of W. beyond all reasonable doubt was properly refused as misleading.

12. SAME—SELF-DEFENSE.

An instruction that if defendant shot deceased with a bona fide belief that he was in great danger of being shot by him, then it would make no difference whether defendant was in danger or not, was properly refused, as premitting consideration of defendant's freedom from fault and his duty to retreat.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, §§ 617, 630.]

Appeal from Circuit Court, Clay County; John Pelham, Judge.

"To be officially reported."

George Hanners was convicted of murder, and he appeals. Affirmed.

The defendant and Barney Worthey were jointly indicted for killing Tom Waldrop by shooting him with a gun or pistol. The present defendant demanded a severance, and was tried alone. When the case was called at a former term of the court motion was made to quash the special venire. The facts upon which this motion was based were that the jury commissioners, in drawing the grand jurors and petit jurors for the court, discarded six names, and discovering that there were not enough names left in the jury box from which to draw special venire, partially filled the box by putting therein the names

of the qualified male citizens in beats 10 and 11 and part of 14. The court granted the motion to quash the venire, continued the cause, and declared the jury box invalid. The commissioners then met, discarded the old jury box, and made up a new jury box by placing therein the names of all the qualified male citizens of the county. From this new box, the special venire to try this particular case was drawn. The defendant objected to the drawing of a special jury from this box and for grounds of objection set out the facts as above stated. This objection being overruled, and the special venire being drawn from the box, he made a motion to quash the special venire on the ground and facts as above set out. The motion to quash was overruled.

The state offered testimony tending to show that just previous to the difficulty Bud Orr called defendant into the store near which the difficulty took place and asked him if he was going to stick up to him as he promised to do, as he was about to have some trouble. Worthey also called defendant, and asked him if he was going to stick up to old man Bud Orr, as it was agreed they should do, and defendant replied that he was, and Worthey replied be sure and run a little before you do it. That immediately after the conversation defendant walked out of the store and commenced the difficulty by calling deceased a d—ned liar, and in which difficulty the fatal shooting occurred. The evidence in this connection tended to show that immediately after these conversations and after the lie had been passed, deceased went into the store and procured some weights and attempted to strike the defendant but was prevented from doing so. That deceased was on one side of the store building and Hanners and Worthey on the other side with a crowd around them. That Hanners pushed the crowd aside with the assistance of Worthey, and came around the corner of the store to where he could see deceased when he commenced to fire on defendant inflicting the fatal wound. Worthey then remarked: "Well, you have fixed him now, and we had better go," and defendant said, "Yes, get your horse and we will go." The other facts necessary to an understanding of the opinion sufficiently appear therein. The counsel, in arguing the case for the defendant, said: "The solicitor claims a conspiracy in this case between the defendant, Barney Worthey, and Bud Orr. Why was Bud Orr never indicted? If he was in the conspiracy, why hasn't the state got him here? Where is Bud Orr?" No objection was interposed to this argument. The solicitor, in his closing argument, said: "Defendant's counsel has asked why it is that the state did not have Bud Orr here upon the trial of this cause. It seems to me that if any one could be expected to have Orr here, it would be the defendant. From this evidence it is clearly shown that Orr and the defendant and his co-conspirator, Worthey, were friendly, and

together on that day, and if no conspiracy existed between these parties, it would be an easy matter for them to have all present in order to explain or deny this conspiracy. Defendant objected to this argument and moved to exclude it.

The defendant requested the following written charges which were refused:" (3) I charge you that if you believe from the evidence that Waldrop accused Hanners of meddling with or encouraging the difficulty between Waldrop and Orr, then it was Hanners' right to have repudiated any such accusation if it was false in no uncertain terms. (4) I charge you that the evidence in this case fails to show that there was any conspiracy between Hanners and Worthey, or Hanners, Orr and Worthey to take the life of Waldrop. (5) I charge you that if you believe the evidence in this case, the defendant could not be convicted on the theory that he had entered into a conspiracy to take the life of Waldrop. (6) I charge you that the evidence of Jim Cotney on the preliminary trial is not the evidence that you must consider as being the evidence of Cotney on the present trial, but you will take the written showing signed by Hanners as being exactly what Cotney would swear if present, and give it just such weight and consider it just as you would if Cotney had been here, and sworn to it from the stand." "(10) I charge you that if you believe from the evidence that Waldrop had a shotgun in his hand in a threatening manner and Hanners heard a number of voices hollering, 'Look out George, he is going to shoot you with a shotgun,' and that Hanners immediately stepped from behind the corner of the house and saw Waldrop with a gun pointing towards him, and acting in the honest belief that he was in danger of being shot and killed by Waldrop, then it would make no difference whether Waldrop was really aiming to shoot or not, your verdict should be not guilty. (11) I charge you that if you believe from the evidence that Bud Orr and Waldrop had been having a difficulty there the day Waldrop was killed and that Waldrop accused Hanners of encouraging said difficulty, then it was not only Hanners' right, but it was his duty, to emphatically deny any such accusation, and that to have been accused of it, and not denied it, would have been circumstances against him. (12) I charge you that you are not trying Barney Worthey, but you are trying George Hanners, and you cannot convict Hanners unless the evidence shows his guilt independent of Barney Worthey beyond all reasonable doubt." "(21) I charge you that if Hanners shot with bona fide belief that he was in great danger of being shot by Waldrop then it would make no difference whether Hanners was in danger or not, your verdict should be not guilty."

D. H. Riddle, for appellant. Massey Wilson, Atty. Gen., and Borden H. Burr, Sol., for the State.

TYSON, J. In support of the motion to quash the special venire drawn for the trial of the case, it appears, by the agreed statement of facts, that at a former term of the court, on motion of the defendant, the special venire drawn for the trial of his case was quashed because of the illegality in the preparation of the box by the jury commissioners containing the names from which juries are required to be drawn, and properly so. Section 4982, Code 1896. It is also made to appear that the jury commissioners subsequently prepared another box in all respects, as required by the statutes, and it was from this box containing the names of the qualified jurors that the special venire was drawn to which the objection here urged was taken. There is no merit in it. *West v. State*, 118 Ala. 100, 24 South. 48. The conversations had between defendant, Orr, and Worthey, which the testimony on the part of the state tends to establish, just immediately before the difficulty took place, in which the killing occurred, under the circumstances shown by the testimony, were clearly competent. If believed by the jury they tended to illustrate the subsequent conduct of defendant, and to give meaning and point to it, and also tended to show a conspiracy between those parties to do grievous bodily harm to or to take the life of the deceased. *Smith v. State*, 136 Ala. 1, 34 South. 168; *Bonner v. State*, 107 Ala. 97, 18 South. 226.

It may be conceded for the purposes of this case that the threats by Worthey against the deceased, indulged in long before the fatal encounter, if made, were not competent for any purpose other than to show his hostility to the prosecution and his bias for the defendant. And it may be further conceded that they would have been inadmissible unless Worthey had testified as a witness for defendant. But this he did. In his testimony, he not only denied making the threats, but testified that he and deceased were on friendly relations with each other. They were clearly competent for the purposes indicated above. *Haralson v. State*, 82 Ala. 47, 2 South. 765; *People v. Brooks* (N. Y.) 80 N. E. 189, and cases there cited. Nor was it of consequence that this testimony may have been incompetent at the time it was offered, if it was subsequently rendered so, as was done. *Ray v. State*, 126 Ala. 9, 28 South. 634. If the defendant perceived that this evidence should have been limited in its consideration by the jury to the purposes, for which we have said it was competent, he should have made a request of the court to that end. He had no right to have it excluded. *Williams v. State*, 81 Ala. 1, 1 South. 179, 60 Am. Rep. 133. In view of the remarks of defendant's counsel in his speech to the jury, we are unwilling to affirm that the remarks of the solicitor in reply thereto should have been excluded. It may be admitted that the prosecution had the right to have the remarks of opposing counsel excluded.

ed (*Crawford v. State*, 112 Ala. 1, 21 South. 214), but this not being done, the right to reply to them cannot be seriously doubted, upon the same principle often recognized by this court that illegal evidence may be rebutted by evidence of the same character. The court committed no error, therefore, on this point. This brings us to a consideration of the charges refused to defendant. Charges 8 and 11 requested by him are each an argument, and, besides, were calculated to mislead the jury to the conclusion that he had the right, as matter of law, to repudiate the accusation made by the deceased in such language as was calculated to provoke or encourage the difficulty which ensued between them. Furthermore, there was evidence from which the jury may have inferred that his reply was far the purpose of bringing on the difficulty which had been preconceived and planned.

Charges 4 and 5 clearly invade the province of the jury. Whether there was a conspiracy between defendant and Worthey or between defendant, Worthey, and Orr, was a question of fact, under the testimony, for the determination of the jury. Charge 6 sought to have the jury to exclude from their consideration a part of the testimony and was, therefore, bad. Charge 10 pretermits all consideration of defendant's freedom from fault in producing the necessity to take the life of the deceased as well as his duty to retreat. In view of the tendency of the evidence showing a conspiracy between defendant and Worthey, charge 12 was properly refused, as being calculated to mislead the jury. Charge 21 is subject to the same vice as charge 10. It is wholly unlike the one approved in *Kennedy v. State*, 140 Ala. 1, 37 South. 90, as will readily appear by a comparison with it, and with what was there said with respect to that charge.

There is no error shown by the record, and the judgment must be affirmed.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

FINNEY v. STEELE.

(Supreme Court of Alabama. June 13, 1906.
Rehearing Denied July 6, 1906.)

LANDLORD AND TENANT — DANGEROUS CONDITION OF PREMISES — LIABILITY OF LANDLORD.

A landlord leased premises in which a person infected with a contagious disease had been. Before doing so, the landlord employed a skilled physician and an experienced nurse to disinfect the premises. Experts gave their opinion that there were better means of disinfection than those used by the physician and the nurse. *Held*, that the landlord was not liable for injuries sustained by the tenant in consequence of his infant child becoming infected with such contagious disease.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 636.]

Appeal from Circuit Court, Madison County; Paul Speake, Judge.

"To be officially reported."

Action by Thomas L. Finney against Walter R. Steele. From a judgment for defendant, plaintiff appeals. Affirmed.

Cooper & Foster, for appellant. King & Bankhead, for appellee.

SIMPSON, J. This suit was brought by the appellant against the appellee claiming damages by reason of the fact that the defendant leased to the plaintiff a certain house, in which there had been a person infected with a contagious disease known as "scarlet fever," from which said house had become infected, and the plaintiff claims that the defendant concealed from plaintiff the fact that said house had been so infected, and that as a result the plaintiff's infant daughter became infected with such disease, had a spell of sickness therefrom, and still suffers from the results. The damages are claimed for the actual expense, the deprivation of the services, companionship, etc., of his daughter and for mental pain and anxiety resulting to plaintiff from said sickness.

In addition to the legal points made on the pleading, the general defense was that although it was proved that there had been a case of scarlet fever in said house, yet, before leasing the premises to the plaintiff, the defendant had employed a skilled physician to have said premises thoroughly fumigated and disinfected, that it was fumigated by a skilled nurse under the direction of said physician, and the report made to plaintiff that it was disinfected before he leased it to the plaintiff. There was no dispute about the fact that scarlet fever is an infectious and contagious disease, that there had been a case of it in said house, and that the plaintiff's daughter after moving into said house had said fever. It was proven that, by direction of the defendant, Dr. H. D. Westmoreland, who was a physician of 8 or 10 years' practice, had given directions to Martha M. Gullette, who was a nurse of experience and skill, to disinfect the house; that said Martha M. Gullette was instructed to disinfect with sulphur and bichloride of mercury, that she burned sulphur in the house for 24 hours, and used 1-500 bichloride of mercury; that she had had experience with this and other infectious diseases at the Charity Hospital in New Orleans, and other places, that she considered the house free from contagion when she finished the fumigation; that the bathroom was fumigated by burning sulphur, and the walls and bath tub sprayed and washed with said bichloride of mercury. Said nurse testified that she washed the floor of the room where the patient had had scarlet fever after sweeping it, but could not say whether she scoured it, and that the floor was sprayed with bichloride of mercury; that she did

not remember whether she removed the window shades or not, that she did not remove the paper from the walls, that she had never known of any contagion remaining in a room fumigated as she did this one. It was shown that the doctor and the nurse reported to the defendant that the house had been disinfected. The plaintiff himself testified that the bedroom in question was strewn with papers and other litter when he went to examine the house, and the bathroom very dirty, and that there was a tissue paper ornament hanging on the gas fixture in the middle of the room. There was a conflict between the testimony of the plaintiff and that of defendant as to whether the defendant did tell the plaintiff that there had been a case of scarlet fever in the house. Plaintiff introduced physicians as expert witnesses who testified that in order to thoroughly disinfect a house in which there had been scarlet fever, it was necessary to remove the wall paper and scrape the walls, or wash them thoroughly with a solution of bichloride of mercury formaldehyde; that all hangings, such as shades and curtains, should be burned, or thoroughly boiled, the floors thoroughly scoured with a strong solution of bichloride of mercury, and the mattress and bedding burned. That sulphur fumigation was of doubtful efficiency, and was never relied upon by the profession since the discovery of formaldehyde, that while 1-500 solution of bichloride of mercury was sometimes used, he considered 1-250 better. That sulphur and bichloride of mercury had been used for disinfection for almost a century, and formaldehyde was of more recent use and considered more efficacious.

While one who rents or leases a house to another does not thereby warrant the condition of the premises unless specially mentioned, the doctrine of caveat emptor applying, yet if there are defects known to the owner, rendering the premises unsafe, either from unseen dangers otherwise or from infection, the owner who conceals such dangers, and fails to communicate the knowledge of the same to the party to whom the premises are leased, he being ignorant thereof, is liable to the lessee for any damages resulting therefrom. The cases base the liability variously on fraudulent concealment, on the breach of the duty which the relation implies, etc., but not upon the principle of an implied warranty. Hence, great stress is laid in the cases referred to by appellant and others, on the necessity of knowledge of the defect or infection, in order to fix the liability on the lessor. *Minor v. Sharon*, 112 Mass. 477, 487, 17 Am. Rep. 122; note to same case in 17 Am. Rep. 127; *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164; *Coke v. Gutkese*, 80 Ky. 598, 44 Am. Rep. 499; *Booth v. Merriam* (Mass.) 30 N. E. 85.

In another case in the Supreme Court of Massachusetts, in which a party leased prem-

ises on which there was a vault emitting offensive and dangerous odors, and had employed his own servant to throw lime in, and nail boards over the vault, the court says that it is not enough that the landlord knows of the source of the danger unless also he knows, or common experience shows that it is dangerous. He is bound at his peril to know the teachings of common experience, but he is not bound to foresee results of which common experience would not warn him, and which only a specialist would apprehend (citing a number of cases). The court goes on to hold that if the defendant knew the vault was dangerous, and by his own servant undertook to remedy it by "means which were ineffectual for that purpose, and which he knew, or ought to have known were ineffectual, he cannot escape liability by employing a servant to do the work," because he was responsible for the act of his servant. The court also refers to a previous case in which a man, over whose hay white lead had been spilled, undertook himself to separate it, and sold some of the hay which proved injurious, and it was held that he was liable because his belief in the success of his remedy was merely conjectural and uncertain. *Martin v. Richards* (Mass.) 29 N. E. 591, 593.

The Supreme Court of Tennessee, after a thorough examination of this subject, thus summarizes the results: "We think the great weight of authority is that if a landlord lease premises which are at the time in an unsafe and dangerous condition, he will be liable to his tenant for damages that may result, if he knows the fact and conceals it, or if by reasonable care and diligence he could have known of such dangerous and unsafe condition, provided, reasonable care and diligence is exercised by the tenant on his part," (citing a number of authorities). The court proceeds to remark that "the liability does not arise upon any question of contract, but upon the obligation to the tenant not to expose him to danger of which the landlord knows, or could know by reasonable care." *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. '824, 832, 54 Am. St. Rep. 823, 830. The court reaffirmed this case on application for rehearing in which it is said that the rule imposes reasonable care, etc., page 831 of 54 Am. St. Rep. (96 Tenn. 328, 34 S. W. 420). We do not commit ourselves to going as far as this case does, but cite it as stating the doctrine in its strongest light in making the landlord liable not only for failing to make known defects that are known, but also making him responsible for those he could have discovered by reasonable care and diligence.

In the case of *Cutter v. Hamlen* (Mass.) 18 N. E. 397, 1 L. R. A. 429, the landlord was sued for damages resulting from his having rented a house infected with diphtheria, and having defective drains. There was evidence that the house had been fumigated by the

board of health, and indorsed O. K. by the inspector, and the court says: "If the case stopped there, we should be of opinion that the landlord was justified in assuming that the house had been disinfected, and that the requirements of *Minor v. Sharon*, supra, were satisfied." Page 398 of 18 N. E. (1 L. R. A. 429). But as there was the additional defect that the drains were known to be defective, and also that there were specific statements, the matter was held to properly have been submitted to the jury. Page 399 of 18 N. E. (1 L. R. A. 429).

In the case now under consideration, the only defect suggested was that there had been a case of scarlet fever in the house. It was shown without contradiction, that the disinfecting of the house was intrusted by the owner to an experienced physician and a trained, experienced, and competent nurse. While there is testimony by other experts giving their opinion that there were better means of disinfection than were used, yet there is not a word of testimony questioning the experience or competency of the physician and nurse to whom the work of disinfecting the house was committed. Dr. Wheeler, the health officer, testified that when infectious diseases were in any house, it was the duty of "the attending physician and the head of the family, or the owner of the premises" to report the matter to him, which was not done when the first-named case occurred in this house. But he further testified that the health officer never disinfected premises where the attending physician attended to this. Dr. Westmoreland was the attending physician in this case. Under this state of facts, and the authorities above cited, we think the defendant would have been entitled to the general charge in his favor on this case. Hence, it is not necessary to go into an examination of the questions raised on pleading and evidence.

The judgment of the court is affirmed.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

PENNEY v. COREY.

(Supreme Court of Alabama, April 3, 1906.
On Rehearing, June 30, 1906.)

JUDGMENT—RES JUDICATA.

A buyer executed notes, payable at different times, for a stock of goods. The seller sued on some of the notes, and for interest due on the others. The buyer pleaded failure of consideration. A judgment for plaintiff for less than the amount of the notes sued on and the interest on the other notes was rendered. *Held*, that the judgment did not operate either as a bar to the seller's right to sue on the other notes, or to the buyer's right to set up failure of consideration.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1111, 1122, 1133, 1134, 1240.]

Appeal from Circuit Court, Morgan County; John C. Hyster, Special Judge.

"To be officially reported."

Action by Lorenzo Corey against James E. Penney. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

In this action plaintiff sued defendant upon 36 promissory notes each for \$25, bearing interest from date, payable annually. He had formerly brought suit against Penney on 26 similar notes each for \$25, and in separate counts suing for the annual interest due on the said 36 notes now sued on. In that former suit Penney pleaded that the notes sued on were given in consideration of the sale by Corey to Penney of a certain stock of goods or plumbing supplies, and that said stock of goods was worth greatly less than what he agreed to pay for it and was not in fact worth exceeding \$500; that said sale was made and said notes executed upon the faith of certain false representations made by Corey to Penney, and these facts were pleaded in bar of the suit. Issue was joined on this plea and upon certain special replications thereto. The amount sued for in that suit, including the annual interest due on the 36 notes now in suit, was \$1,022. The jury rendered a verdict in favor of plaintiff for \$399, and judgment followed accordingly, which Penney paid. In this suit Penney by his third plea set up the alleged false representations in substantially the same plea as was filed in the former suit. Demurrers to this plea were overruled. Plaintiff replied, in substance, that Penney had pleaded this in the former suit, and that the plea or issue was decided against him by reason of the fact that the verdict and judgment were for plaintiff, although for greatly less than was sued for in that action; and that the defense was entire and indivisible, and that Penney by pleading it in that suit had exhausted his remedy and could not set up the same facts in bar of this suit upon other notes growing out of the same transaction, and upon notes the interest upon which was sued for in that former action; and that the judgment upon this issue in the former suit cut off Penney from pleading said false representations in this case. Defendant's demurrers to this replication were overruled. Defendant Penney, by his fourth, fifth, sixth, and seventh pleas, himself set up the former action and the judgment therein, as res judicata of this action and as conclusive of the issue that the stock of goods was not worth what they were sold for, and that the notes were without consideration, and that Corey had fraudulently represented to Penney certain facts as to their value and as to certain offers which Corey claimed had been made to him for the stock of goods by other parties. To these pleas plaintiff's demurrers were sustained, and upon issue

joined on the fourth replication to the third plea a judgment was rendered in favor of the plaintiff; the parties agreeing in open court that the complaint, the third plea, and the fourth replication thereto stated the facts truly. From this judgment defendant appeals, assigning as error the rulings upon the demurrers to the fourth, fifth, sixth, and seventh pleas and to the fourth replication to the third plea.

Humes & Speake and Callahan & Harris, for appellant. E. W. Godbey, for appellee.

ANDERSON, J. By the pleading in the former case defendant sought a recoupment of damages for the breach of the contract of sale, and was awarded the difference between the amount claimed in the notes sued on in the first suit and the amount of the judgment recovered, which was \$623, and which said sum is all that is available to the defendant for the breach of the contract of sale. And the defendant having exhausted his counterclaim growing out of said breach of sale, as represented by all of the notes, upon the suit for the collection of the matured series of notes, cannot now use the same breach for the purpose of reducing the amount due on the second series of notes. While two separate suits were brought on the notes, they maturing at different times, they all evidenced and represented the consideration of but one contract of sale, and under the pleading and judgment in the former case the defendant got the benefit of all damage by way of recoupment, to which he was entitled, and which was conclusive. And as the damage then awarded was less than the amount claimed in the former suit, the defendant thereby became precluded from setting up the same breach as a defense to the other notes, which had in no way entered into the amount awarded the plaintiff on the first payment. This court in discussing the conclusiveness of a plea of recoupment, while admitting that this is an unsettled question by some authorities, has set the lead which we will follow, and we quote Judge Stone, in the case of South & North Alabama R. R. Co. v. Henlein & Barr, 56 Ala. 374: "Such plea is in its very nature defensive, and the party making it seeks only to cut out, or keep back, a part or the whole of plaintiff's demand. Whether such defense is a waiver or abandonment of all claim by reason thereof, save that which abates or defeats plaintiff's recovery, is not fully settled. This court, in *McLane v. Miller*, 12 Ala. 643, asserted the affirmative of the proposition, and declared that no action will lie for the recovery of a balance of a claim, a part of which has been used as recoupment of damages in a former suit. *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713, decides the same thing. In *Waterman on Set-Off*, this question is treated as unsettled, referring to

Mandel v. Steel, 8 Mees. & W. 858. See *Waterman on Set-Off*, § 631; *Mason v. Heyward*, 8 Minn. 182 (Gil. 116). We prefer to follow the lead of *McLane v. Miller*, supra, and hold that, in such case, no action can be brought for the residuum of a claim, a part of which has been utilized by way of recoupment in a former suit." In the case of *McLane v. Miller*, supra, it was said: "That the plaintiff having in a former action, where he was defendant, insisted on a rebatement of the hire which he was to pay for the slaves, and having obtained it, for the reason that his possession was determined by the defendant's act, he is concluded, so far as that extends, from again obtaining satisfaction for the same injury. It will be seen by this extract that the prohibition to recover extends only to the rebatement of the hire of the slaves, which the plaintiff had recouped in the former action, and therefore was not permitted again to insist on." It will be seen, by an application of the foregoing authorities to the case at bar, that the plea of recoupment in the former suit having fixed the defendant's damage for the breach of the contract, he is concluded from again obtaining satisfaction for the same injury. In the case of *Taylor v. Chambers*, 1 Iowa, 124, notes for part of the purchase price of logs were resisted by the maker, because the logs were bought by him as good merchantable logs, whereas they were really "rotten and hollow," and damaged 20 per cent.; but it was shown that on one of the hundred dollar notes, a prior suit had been brought, and defended on the same ground, resulting in a judgment against the defendant, the maker, for \$78. The court said: "The defendants set up and caused their demand for damages—their whole demand—to be adjudicated; and now to afterwards talk of their right to sever it is idle. When once adjudicated, and the amount deducted from the note in that suit, it no longer existed." See, also, *Gilmore v. Whitman* (Neb.) 70 N. W. 365; *Hoover v. Kilander* (Ind. Sup.) 34 N. E. 697; *Clement v. Field*, 147 U. S. 467, 13 Sup. Ct. 358, 87 L. Ed. 244; *O'Conner v. Varney*, 10 Gray (Mass.) 231; *Britton v. Turner*, 26 Am. Dec. 713; *Sutherland on Damages*, § 189. We consider the case of *Brown v. First National Bank*, 132 Fed. 450, 66 C. O. A. 293, relied upon by appellant, rather in favor of, instead of opposed to, the above doctrine.

The judgment of the circuit court is affirmed.

MCCLELLAN, C. J., and TYSON and SIMPSON, JJ., concur.

On Rehearing.

ANDERSON, J. The foregoing opinion was adopted upon a misconception of the plea interposed in the former suit, which we find upon reconsideration to be one of "failure of consideration" instead of recoupment.

This question has been fully discussed in a learned opinion rendered by Elliott, J., of the Supreme Court of Indiana, in the case of *Felton v. Smith*, 88 Ind. 149, 45 Am. Rep. 454, and as it is so very applicable to the case at bar we quote approvingly therefrom:

"The four assignments were as many separate and distinct causes of action, upon each of which an action might be maintained. The cause of action sued on in this case was independent of the others, and the recovery of the appellant was on that one cause of action alone. The amount awarded him was not upon three contracts not sued on, and which constituted independent causes of action, but upon the one contract sued on. The verdict and judgment settled nothing more than the right of the appellant to recover on the cause of action stated in the complaint. In *Campbell v. Board, etc.*, 71 Ind. 185, it is said: 'A recovery on a part of a cause of action which is divisible is not a bar to an action brought upon the other part; but a recovery on the whole cause of action, of only a part of the amount, is a bar to a suit brought on the same cause of action for the balance of the amount.' Where a judgment settles the entire defense to a series of notes, although rendered upon one only of the series, it conclusively adjudicates the controversy as to all of the series. This is, however, only where the entire subject-matter of the defense is litigated in the one action, and is determined by the judgment. It is not so where the litigation is as to the one note declared on, and the judgment does not extend to the whole subject-matter of the entire series of notes. *French v. Howard*, 14 Ind. 455; *Hereth v. Yandes*, 34 Ind. 102; *Turner v. Allen*, 66 Ind. 252; *Gardner v. Buckabee*, 8 Cow. (N. Y.) 120, 15 Am. Dec. 256; *Edgell v. Siger-son*, 26 Mo. 583; *Hazen v. Reed*, 30 Mich. 331. In this case it cannot be said that the judgment determined the entire controversy, for the appellee did not succeed upon the issues tendered by him; nor, on the other hand, did the appellant obtain judgment for all he claimed. If the latter had recovered judgment for the full amount claimed, he could not successfully claim that it settled his right to recover on all the other notes. Nor can it be justly said in the case before us that the whole subject-matter of the controversy was litigated, for the defenses pleaded were different, and those professing to go to the entire subject-matter did not necessarily involve an investigation to an extent beyond what was necessary to ascertain the appellant's measure of damages. This we say for the reason that under a plea of want of consideration partial failure may be shown. If the verdict and judgment had sustained the plea of want of consideration, then it might, with some plausibility, have been maintained that the whole controversy was determined; but this they did not do, for they merely cut

down the appellant's damages, and did not find that he had no cause of action. The appellant established his cause of action, but did not recover all the damages his prima facie case entitled him to, and his adversary did not succeed in establishing any defenses except such as went to the amount of recovery, and it cannot be said that this extended beyond the cause of action declared on. The issue decided was really as to the amount to be recovered on that single cause of action, and not as to the amount to be recovered upon some other cause of action. If the appellee had filed a counterclaim showing cause for the cancellation of the other notes, a different case would have been presented. But, whatever may be the rule in such a case, the judgment in the one at bar settles nothing more than the measure of recovery in the cause of action declared on. It does not conclude the appellant from maintaining an action on his other notes; nor, on the other hand, does it preclude the appellee from defending against them. The former cannot claim that, as he recovered \$300 on the note sued on in the former action, he is, by force of the judgment, entitled to recover a like sum on each of the other three notes; nor can the latter justly claim that, as he succeeded in cutting down the amount of the recovery, he is entitled to have the judgment regarded as conclusively settling the question that the consideration for the indorsement of the four notes was no more than the sum recovered in that action. If the sum recovered in the former action was the entire consideration paid for the indorsement of the four notes, then there can be no recovery on the other three contracts of indorsement; but this is a defense altogether different from that of *res adjudicata*, as here relied on. It is a defense not to be made out by the mere production of the record of the former action, but to be made out by supplementing evidence of the former action and judgment with proof of the fact that all of the consideration was exhausted in the former recovery. The record of that recovery does not show that the sum allowed as damages exhausted the consideration for all the notes. Nothing more can be justly claimed for that record than that it shows that the defense prevailed to the extent of \$250, and that, although the plaintiff established a cause of action, he showed himself entitled to only the amount of damages awarded by the jury. The fact that the appellant recovered less than the sum his prima facie case gave him the right to does not settle his right of recovery upon distinct and independent causes of action not sued on in the former action. The appellee cannot affirm that the mere fact that the recovery was cut down entitles him to a presumption that his defense failed. It may well be that the jury found less than the appellant was entitled to recover, but

this would give the appellee no cause of complaint, nor render the verdict ill, nor yet make it conclusive as to the other causes of action. *Wolf v. Goodhue F. Ins. Co.*, 43 Barb. (N. Y.) 400, affirmed 41 N. Y. 620. In *Hargus v. Goodman*, 12 Ind. 629, it is shown that a judgment is not conclusive unless the point claimed to have been litigated was essential to the support of the judgment, and this principle must apply to a case like this, if to any, for the amount of recovery upon the note sued on might well be cut down without looking beyond to other and different notes. The case of *Clark v. Sammons*, 12 Iowa, 368, is in point, and illustrates the distinction we have endeavored to make between a total and partial defense. In that case two notes were given for personal property. To the complaint on the first note the defendant pleaded a breach of warranty and a failure of consideration; and in the action upon the second note it was held that the defense of failure of consideration might be pleaded. The court there said: 'The plea of failure of consideration in the first suit applied solely to the matters then in issue, to the claim of plaintiff, as then pleaded.' So it is here, for so far as concerned the amount of recovery the question in the former action was, how much is the appellant entitled to recover on the note in suit? All the jury determined was that he was entitled to recover the amount assessed in his favor. They did not and could not go outside of the issue to settle the amount of recovery on other independent causes of action.

"Suppose that the appellant had recovered the full amount claimed to be due on the note sued on, would the appellee have been precluded from pleading failure of consideration as to the notes not declared on in that action? Is it not perfectly plain that the judgment would have settled the measure of recovery as to that one note, and have left the question of the amount to be recovered upon the other notes to be disposed of in another action, or in other actions? If it be true that judgment for the full amount would have settled the question only as to the one note, then it must also be true that the plaintiff might maintain an action on the other notes, and the defendant rightfully plead failure of consideration. If this be not correct, then the recovery by the plaintiff on one note must be held to conclusively settle his right to a recovery on all the other notes, and this conclusion is manifestly wrong, for it might well be that the consideration recovered included the entire consideration for all of other notes. If it be granted that a recovery by the plaintiff settles not only the question as to the particular note, but also as to all the other notes, then the judgment in the former action, instead of barring the appellant, barred the appellee to the extent at least of the amount recovered, and this is, plainly enough, an erroneous conclusion. On the other hand, if the consideration recovered

on the first note was only the proportion which the amount of the note bore to the entire consideration, the appellant would be unjustly deprived of his right if the former recovery should be held a bar. The only solution of the difficulty is to hold that where the defense prevails so far as to cut down damages, and does not overthrow the cause of action, there is no adjudication of the entire controversy, and the judgment is to be confined to the cause of action declared on in the suit wherein the judgment was rendered. The judgment is, of course, evidence, and, if it be shown by other evidence that it took up the consideration of all the notes, then the defendant must prevail. It is apparent that the judgment in this case does not estop both parties, except as to the one note sued on in the former action. It is evident, as we have seen, that it cannot be an estoppel against the appellee except as to the one note sued on, for, if it is, then it binds him to pay, upon all the other notes the sum recovered on the one in suit. It is, we repeat, a mutual estoppel only as to the one note, and when its mutuality ends so does its effect as an estoppel. The parties are bound so far as the first note is concerned, but they are not concluded as to the other notes. The authorities recognize a difference between the effect of a judgment when pleaded as a bar to an action upon the instrument sued on in the first action, and another of the same series and founded upon the same transaction. In *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204, the court, in speaking of the position taken by counsel, said: 'In taking this position, counsel have confounded the operation of a judgment upon the demand involved in the action, in which the judgment was rendered, with its operation as an estoppel in another action between the parties upon a different demand. So far as the demand involved in the action is concerned, the judgment has closed all controversy. Its validity is no longer open to contestation, whatever might have been said or proved at the trial for or against it. The judgment is not only conclusive as to what was actually determined respecting such demand, but as to every matter which might have been brought forward and determined respecting it; and that is all that the language means which is quoted by counsel from opinions in adjudged cases, in seeming consonance with his position.' *Cromwell v. County, etc.*, 94 U. S. 351, 24 L. Ed. 195; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214. This doctrine is carried very far, quite as far, perhaps, as it is possible to do without encroaching upon settled principles, in *Roberts v. Robeson*, 27 Ind. 454, wherein it was held that a judgment declaring an assignment void was only conclusive as to the particular property involved in that action. There is reason for the general rule, and it ought surely to apply to a case like this, where the only thing really settled in the former action was the plain-

plaintiff's right to recover a specified sum on the demand there sued on, and where, except as to the mere question of amount, all issues were decided in favor of the plaintiff. It is clear that in that case there was only a partial recovery, and therefore only a partial adjudication upon the entire transaction out of which the demand arose, and it would be a violation of settled principles to stretch that judgment so as to make it include claims not in litigation in that action. Estoppels are not to be inferred, and we are not at liberty to infer that the judgment in the former action settled the controversy so as to include notes not sued on. 'It is allowable,' says the Supreme Court of Massachusetts, 'to reason back from a judgment to the basis on which it stands, upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion. But such an inference must be inevitable; or it cannot be drawn.' *Burlen v. Shannon*, 91 Mass. 200, 96 Am. Dec. 733; *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772. The conclusion that the whole subject of consideration was settled in the former action, so far from being an inevitable one from the judgment, is in truth an improbable one. The strong probability, if not the moral certainty, is that, with the single cause of action before them, the jury looked to nothing else, and the measure of damages adopted by them was adopted with exclusive reference to that one cause of action; in other words, that they regarded the proportion of the whole consideration due upon the note in suit to be the just measure of recovery on that one demand. In *Packet Company v. Sickles*, 5 Wall. (U. S.) 580, 18 L. Ed. 550, it was said, speaking of an estoppel by judgment, that it was conclusive if it appeared 'that the verdict could not have been rendered without deciding the particular matter.' In this case it is very plain that the damages awarded the appellant in the former action might have been awarded without deciding anything at all as to the other notes. We think a partial success upon a partial defense cannot be fairly regarded as making an estoppel as to demands not embraced in the action in which the judgment was rendered. The conclusion to which we are carried is that the judgment is conclusive as to the first note, but not as to the assignments not sued on in that action. It can no more be said that the judgment took up the whole consideration for the four contracts than that it applied the whole deduction on account of the failure of consideration to the one contract, leaving the consideration for the other three notes intact. It is impossible to say whether the whole consideration for the four assignments was included in the amount assessed by the jury in favor of the appellee, or whether the entire amount of the failure was deducted from the one sued on, thus leaving a full con-

sideration for each of the other contracts. The only manner in which justice can be done these parties, and a safe precedent established, is to hold that the judgment settled the controversy upon the issue joined on the single cause of action declared on in the former action, and this is clearly the rule declared in the cases cited."

It would thus appear that the judgment in the former suit did not operate as a bar to the plaintiff's right to recover in the case at bar upon the last series of notes, and the demurrers to the special pleas were properly sustained. On the other hand, the judgment rendered in the former case for a portion of the consideration of the first series of notes did not estop the defendant from invoking the defense of "failure of consideration" as against the second series of notes, and the trial court erred in not sustaining defendant's demurrer to plaintiff's replication proceeding upon such a theory.

The rehearing is granted, and the judgment of the circuit court is reversed and the cause remanded.

HARALSON, TYSON, DOWDELL, SIMPSON, and DENSON, JJ., concur.

SAUNDERS v. TUSCUMBIA ROOFING & PLUMBING CO.

(Supreme Court of Alabama. July 6, 1906.)

1. EVIDENCE—SECONDARY EVIDENCE—PROOF OF LOSS OF PRIMARY EVIDENCE—SUFFICIENCY.

To render secondary evidence of the contents of an instrument admissible, it is necessary to show that search has been made in the place where the instrument was last seen, or in the place where it would be likely to be found, if in existence, and that it was not found; but it is not necessary to prove that search has been made in every possible place.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 612.]

2. SAME.

Where a party testified that he could not find an instrument, that he had hunted for it in the place last seen by him, but had been unable to find it, a sufficient predicate was laid for the admission of secondary evidence.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 612.]

3. APPEAL—RECORD—SUFFICIENCY.

Where the lien sought to be enforced is not set out in the bill of exceptions, assignments of error relating to discrepancies between the lien filed in the office of the probate judge and the status of the suit as to the parties cannot be considered on appeal.

4. MECHANICS' LIENS—CONSENT OF OWNER—AUTHORITY TO CONTRACT—HUSBAND AND WIFE.

The property of a married woman is subject to a lien for labor and materials furnished in repairing a building owned by her, contracted for by her husband as her agent, without reference to whether she consented to the repairs or not.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 85.]

5. SAME—EVIDENCE—ADMISSIBILITY.

Where, in a suit to enforce a lien for labor and materials in repairing a building own-

ed by a married woman, there was no direct proof that her husband, who contracted for the repairs, was acting as her agent in so doing, it was competent to ask him whether he sold the property for his wife and as to what he did with the purchase money, and as to who employed men to do certain work on her property.

6. APPEAL—HARMLESS ERROR.

The admission of irrelevant evidence, which could not have affected the verdict, is not reversible error.

7. TRIAL—INSTRUCTIONS—CHARGES EMBODIED IN THOSE GIVEN.

It is not error to refuse instructions embodied in those given.

Appeal from Circuit Court, Colbert County; E. B. Almon, Judge.

"To be officially reported."

Action by the Tuscumbia Roofing & Plumbing Company against Olivia Saunders. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action to enforce a lien for work and labor done and material furnished in repairing certain machinery and building alleged to belong to defendant and her husband, T. C. Saunders. The defense relied on is set up in special plea as follows: "That she never made any contract with plaintiff for the material or work and labor mentioned in said cause of action, nor authorized her husband to do so, and had no knowledge or notice that the material had been furnished and the work and labor done until long after its performance, and it was all done by her husband without her knowledge and consent, and that the plaintiff gave credit to her husband alone for said material and said work and labor." The defendant requested the following written charges: "(1) That if T. C. Saunders, the husband of the defendant made the contract with Bernhardt in his own name, and not as agent for his wife, and that credit was given sold it to the husband, T. C. Saunders, the jury must find for the defendant. (2) That in order for plaintiff to recover in this case he must show that there was a contract either with the defendant or with T. C. Saunders as her authorized agent, and if the contract was not made with defendant or with T. C. Saunders as her agent, but with T. C. Saunders individually, then the jury must find for the defendant. (3) That unless the evidence in this case shows that the contract was made with Olivia Saunders the jury must find for the defendant. (4) The proof in this case shows that Mrs. Saunders never authorized Mr. Saunders to have the work done that is sued for in this case. (5) Affirmative charge. (6) If the plaintiff in this case gave the credit to T. C. Saunders for the work he did, you should find for the defendant. (7) There is no proof that Mrs. Saunders ever ratified any contract for the work in this case."

W. P. and W. L. Chitwood, for appellant. James H. Branch, for appellee.

SIMPSON, J. This was a suit by the appellee (plaintiff) to enforce a mechanic's and materialman's lien on certain property.

The first assignment of error is that the court erred in admitting the record of the mechanic's lien, because no sufficient predicate was laid for the introduction of secondary evidence. The testimony on this point was by the plaintiff, who testified that he could not find the original, and that he had hunted for the same at his shop and been unable to find it; that he had not examined at his residence, but the last time he had seen it it was at his shop. Mr. Wigmore, in his work on Evidence, in referring to this question about the sufficiency of the search, says: "The discovery of the Island of Atlantis has occasioned no less arduous and no less vain efforts than the attempt to frame a fixed and just rule for the conduct of this inquiry." And the learned author proceeds to state that there is no fixed rule, and that the inquiry must depend entirely upon the circumstances of the case. He goes on to express the opinion, based upon that of Lord Denman, that this is a matter which "should be left entirely to the trial court's discretion, and that it is an ill judged expenditure of effort, and a waste of time for a Supreme Court to renew the action of the lower court on this subject." 2 Wigmore on Evidence, §§ 1194, 1195, pp. 1407, 1412. Our own court has, nevertheless, expended some effort in passing upon this question.

From a general review of our cases, we may gather that it is not sufficient for the witness to state that he has not seen the paper and is satisfied that it is lost; also that it is not necessary to prove that search has been made in every possible place, but it is necessary to prove that search has been made in the place where the instrument was last seen, or kept, or in the place where it is likely it would be found, if in existence. *Green v. State*, 41 Ala. 419, 422; *Preslar v. Stallworth*, 37 Ala. 402, 406; *Jernigan v. State*, 81 Ala. 58, 60, 1 South. 72; *Bogan v. McCutchen*, 48 Ala. 493; *Foster v. State*, 88 Ala. 182, 187, 7 South. 185; *O'Neal v. McKinna*, 116 Ala. 606, 616, 22 South. 905; *Burks v. Bragg*, 89 Ala. 204, 206, 7 South. 156; *Laster v. Blackwell*, 128 Ala. 143, 147, 30 South. 663; *Stuart v. Mitchum*, 135 Ala. 546, 550, 33 South. 670. It is recognized in several of the cases cited that much depends upon the particular circumstances of each case. The *Foster Case*, supra. In the *Jernigan Case*, supra, *Stone, C. J.*, says that "a material inquiry is whether or not there was a probable motive for withholding this highest and best evidence. Whenever the court is able to answer this inquiry in the negative, less evidence will satisfy its conscience." In the *Bogan v. McCutchen Case*, supra, stress is laid upon the infirmities of verbal declarations in proving lost papers. In another case where it was sought to prove (by parol testimony) dying declarations (which had been reduced to writ-

ing), the court gives as the reason of the rule requiring proof of the loss of the writing "the possibly uncertain and inaccurate memories of witnesses." *Boulden v. State*, 102 Ala. 78, 85, 15 South. 341. And in a case in the Supreme Court of Texas it is held that less evidence is required to let in secondary evidence where it consists of an authenticated copy of the original, than where it is a matter to be proved by parol; the court saying: "The reason for the distinction in the construction of the affidavit in such case, and one made to allow parol proof of the contents of an unrecorded deed, is obvious." *Foot v. Silliman*, 77 Tex. 268, 271, 13 S. W. 1032. The proof in the present case was sufficient, and the court properly permitted the introduction of the record of the mechanic's lien.

Assignments 2, 3, 4, and 5 relate to supposed discrepancies between the lien, filed in the office of the probate judge, and the status of the suit as to parties. These cannot be considered because the said lien is not set out in the bill of exceptions. It is true that, with or without her knowledge and consent to the doing of the work and furnishing material, her property might be made subject to the lien, if it could be proved that her husband was her agent, clothed by her with the power and authority to make said contracts, and that the contract in question was made by him as agent for her. As there was no direct proof of the fact that the husband was acting as agent of the wife in making repairs upon her property, the jury was entitled to all the evidence which could shed any light on that question; and the questions to the witness Saunders, and answers thereto, whether he had sold the property for his wife, and as to who employed the men to build the laundry, and as to what he did with the purchase money, were properly admitted for that purpose. Agency may be proved by the acts and conduct of the parties. *Tenn. River Trans. Co. v. Kavanaugh Bros.*, 101 Ala. 1, 11, 13 South. 283.

The question as to whether the husband conveyed the property to his wife was proper, for the purpose of showing that the property belonged to the wife. The question to the witness Saunders as to who wrote the deed had no bearing whatever on any issue submitted to the jury, and while it was irrelevant yet it is clear that it could not in any way have affected the verdict on the issues submitted to the jury. Consequently its admission was not reversible error. *Borland v. Mayo*, 8 Ala. 104, 111, 112; *Parsons v. Boyd*, 20 Ala. 112, 121; *Frieron v. Frieron*, 21 Ala. 549, 555; *Seabury v. Stewart & Easton*, 22 Ala. 207, 220, 58 Am. Dec. 254; *Mayer v. Clark*, 40 Ala. 259, 267.

The charges refused were based entirely on the necessity of the agency of Saunders in making the contract for repairs; and from an examination of the charges given by the court, on request of defendant, we find that they contained the substance of the charges

refused (with the exception of two to the effect that there was no proof of certain things, which was a matter for the jury) and the general charge. Consequently there was no error in refusing them.

There was no error in the refusal of the court to give the general charge requested by defendant, as it was a question for the jury to determine, from all of the evidence, whether or not Saunders was acting as the agent of the defendant in contracting for the work and material.

The judgment of the court is affirmed.
Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

NASHVILLE, C. & ST. L. RY. v. MOORE.
(Supreme Court of Alabama. May 17, 1906.
Rehearing Denied June 30, 1906.)

1. APPEAL—SCOPE OF REVIEW—ASSIGNMENTS OF ERROR.

In the absence of an assignment of error complaining of the denial of a new trial, the sufficiency of the evidence on controverted questions of fact to sustain the verdict cannot be reviewed on appeal.

2. WITNESSES—EXAMINATION—REPETITION—PREJUDICE.

Where, in an action for ejection of a passenger, a witness had testified that lady passengers were much annoyed by plaintiff, defendant was not prejudiced by the refusal of the court to allow a repetition of the statement.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 827, 828.]

3. CARRIERS — PASSENGERS — EJECTION—MISCONDUCT.

Under Code 1896, § 3457, providing that conductors of trains may eject passengers when disorderly, or when using profane, vulgar, or obscene language, it was immaterial to the right of a conductor to eject a passenger for using obscene language that his conduct was in fact offensive to other passengers.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1443, 1444.]

4. EVIDENCE—DECLARATIONS OF THIRD PERSONS—RES GESTÆ.

Where the conductor of a railroad train was present, and witnessed plaintiff's conduct at the time he was ejected, evidence that passengers called on the conductor to remove plaintiff from the train, and their opinions, etc., was inadmissible as res gestæ.

5. APPEAL—EXCLUSION OF EVIDENCE—PREJUDICE.

In an action for ejection of a passenger, the exclusion of evidence that plaintiff became more abusive than ever but not giving the language used was not reversible error.

6. CARRIERS—PASSENGERS — EJECTION — ACTION—INSTRUCTIONS.

In an action for ejection of a passenger, a request to charge that the conductor of a railroad train is a police officer, whose duty it is to keep order on the train and to eject all persons who use obscene or abusive language in the presence and hearing of passengers, was misleading because of its omission of the qualification that the conductor may use only such force as may be necessary to accomplish the removal, as provided by Code 1896, § 3457.

7. SAME—ABUSIVENESS—STATUTES.

Cr. Code 1896, § 4345, providing that on the trial of any person for an assault, an assault and battery, or an affray, he may give in evidence any opprobrious words or abusive language used by the person assaulted at or near the time of the assault in extenuation or justification, has no application to an action for ejection of a passenger because of his alleged misconduct.

8. SAME—INSTRUCTIONS.

An instruction that if, at the time of plaintiff's alleged injury, he was a passenger on defendant's train on which M. was conductor; that plaintiff was disorderly in that he used profane and vulgar language, which made it necessary for the conductor to eject him, and plaintiff was injured because of his resistance, he could not recover—was properly refused as premitting all injury as to the degree of force employed to overcome the resistance, and as asserting as a fact that plaintiff's act rendered it necessary for the conductor to eject him, and that his resistance was the cause of the injury.

Appeal from Circuit Court, Marshall County; J. A. Bilbro, Judge.

"To be officially reported."

Action by Charles H. Moore against the Nashville, Chattanooga & St. Louis Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action brought by appellee against appellant for damages for being put off the train. The complaint contained but one count which alleges a wrongful ejection of the plaintiff by the conductor from one of defendant's cars onto the platform of said car, and from there to the ground resulting in injuries to his person. The defendant filed several pleas, all of which averred the disorderly conduct of the plaintiff, boisterous behavior and obscene language, and that in putting him off the conductor used no more force than was necessary. The case made by the evidence for the plaintiff was that he bought a ticket which entitled him to ride as a passenger on defendant's train; that he boarded said train, and that as he was trying to find a seat in the coach which he had entered the conductor took hold of him forcibly, knocked him to his knees, shoved him on down the aisle to the platform of the car, caught hold of him by the collar with one hand, and by the leg with the other, and threw him off into a ditch on the side of the road. The evidence for the defendant tended to show that there were several ladies in the coach; that the defendant was very boisterous in his conduct, and used a lot of obscene and vulgar language; that the conductor remonstrated with him, and on his refusal to cease his boisterous conduct and the use of the obscene language the conductor took him out of the coach onto the platform, and on account of his drunken condition, he fell off the moving train.

The defendant requested several written charges which were refused. Charge 1. Under the law of this state, the conductor of a railroad train is a police officer, and not

only has the right, but it is his duty, to keep order on the train on which he is conductor, and to eject all persons who use obscene or abusive language in the presence and hearing of the passengers. (2) Under the law in this state, a person charged with assault and battery may give in evidence any opprobrious words or abusive language used by the person assaulted or beaten at the time or near the time of the assault or affray, and such evidence shall be good in extenuation or justification, as the jury may determine, and such facts, if proven, may be considered in mitigation of damages in this case. (5) The court charges the jury that if they find from the evidence that at the time of the alleged injury plaintiff was a passenger on the defendant's train, that Bright Martin was a conductor on said train, that plaintiff was disorderly in that he used profane or vulgar language, which act on the part of the plaintiff rendered it necessary for said Bright Martin to eject plaintiff from the train, and that while Martin was trying to eject plaintiff from the train plaintiff resisted the efforts of Martin to eject him, which resistance on the part of plaintiff was the cause of plaintiff being injured, then the jury should find a verdict for defendant.

Oscar R. Hundley, for appellant. McCord & McCord, for appellee.

WEAKLEY, C. J. This is the second time this case has been before the court. The report of the decision on the former appeal, which was taken by the plaintiff, Moore, contains an extensive statement of the evidence on each side; and the tendencies of the evidence, as shown by this record, are not variant from what they were on the first trial. Moore v. N. C. & St. L. Ry., 137 Ala. 495, 34 South. 617. The ejection of the plaintiff from the car was not denied; it was sought to be justified upon the ground that plaintiff was intoxicated, and while in that condition used obscene, abusive, or profane language, in the presence of the passengers, the pleas further averring the use only of such force as was necessary to accomplish the ejection. The assignments of error, upon which appellant insists, are predicated upon several rulings on evidence, and the refusal to give three separate charges requested in writing. There was a motion for a new trial, which was overruled, although the trial judge required a reduction of the damages awarded by the jury. No assignment of error complains of the denial of a new trial, and hence no inquiry arises upon the action of the jury in deciding the controverted questions of fact for the plaintiff.

The assignments of error directed to the refusal of the court to allow the witness, Stewart, to answer questions, which sought to elicit from him the statement that the passengers or lady passengers were very

much annoyed by the plaintiff, are not available to appellant, for the reason, if, for no other, that the witness had already testified that the lady passengers were very much annoyed by the plaintiff, and that testimony was not withdrawn from the jury. The question: "Did Moore's conduct on that occasion annoy the ladies and passengers in that car?" was, however, propounded to the witness, Noel, and disallowed upon objection by the plaintiff, and this ruling is made the basis of an assignment of error which must be noticed. The argument of counsel pretermits consideration of the inquiry, whether the question called for an opinion or conclusion merely, rather than for a fact, and rests his contention as to the propriety of the question alone upon the assertion that the annoyance vel non of passengers is a material issue in the case. We do not discover, however, that it was a material issue. The important inquiry, under the pleas and the statute, in this connection, was whether the plaintiff used the language of the character attributed to him. It was of no consequence whether it actually annoyed the passengers or not; the statute (Code of 1896, section 3457) makes no requirement that the language of the defined character shall be offensive to passengers; and the pleas are merely that the removal of the plaintiff was necessary to prevent their annoyance. All the facts constituting the *res gestæ* might have been and we think were given in evidence, and this was sufficient. Under the statute, proof of the conduct or language it condemns raises up a conclusive presumption of such disturbance of the peace and quiet, to which passengers upon the vehicle of transportation are entitled, as justifies the ejection of the disturbing passenger by the use of the requisite degree of force. The court, therefore, committed no error in its ruling upon the objection to the question above quoted, and in similar rulings in reference to attempts to have other witnesses testify in general terms, without details, that passengers were annoyed.

Evidence that passengers called upon the conductor to remove plaintiff did not tend to disprove the averment of the complaint that the removal was willful as appellant contends; and no other suggestion in support of such evidence is made. The passengers had no control over the conductor, nor was he bound to accede to their requests. The existence of the facts essential under the plea and under the statute constituted his sole justification, and the minds of the jury should not be distracted from the true inquiry by evidence of what passengers requested. The conductor was present and witnessed all that occurred; he was informed of all that the passengers knew; and the most that could be affirmed of a request from them is that they were of opinion on the facts the plaintiff should be removed. Their opinion thus expressed could not be thrown into the

balance. It is and cannot be successfully contended that the request was a part of the *res gestæ*. There are authorities which hold that under some circumstances exclamations of bystanders are admissible, but this case is not within the rule they declare. The question calling for similar testimony from the witness, Noel, was objectionable for the same reason, besides being open to the criticism that it assumed plaintiff was guilty of misconduct, and of the use of improper language. The testimony of the witness, Martin, and other witnesses was very full, in respect of the plaintiff's alleged conduct and language, and the record shows the defendant had the fullest opportunity to present all the details of the occurrence to the jury. The difficulty under which appellant is laboring is that the jury believed the plaintiff's witnesses, or did not believe the pleas had been proven; and further inquiry in that behalf is upon this record foreclosed. Under these circumstances, the exclusion of the mere comparative statement from the showing for the witness, Martin, that plaintiff "became more abusive than ever," not giving the language employed, could not operate to inflict any substantial injury upon the defendant; and while it might not have been improper to permit the statement to go to the jury, its exclusion was not reversible error.

Charge 1, refused to defendant, is identical with charge 3 which was given on the first trial. Upon the former appeal it was held the giving of the charge did not constitute reversible error, because the criticism directed against it was that the charge had a tendency to mislead. Per contra, it may also be said that it is not an error to refuse a misleading charge or one having a misleading tendency. The charge had such tendency in that it omitted any statement of the qualification that, in ejecting a passenger for the causes mentioned in section 3457 of the Code of 1896, the conductor may use "only such force as may be necessary to accomplish the removal"; and the jury might have been led to believe by the charge requested that the conductor was justified in his action, without reference to the degree of force employed.

There was no error in refusing charge 2. Section 4845, Cr. Code of 1896, has no application to the case. We have held that it does not apply to a civil action even for assault and battery against the party committing the assault. *Mitchell v. Gambill*, 140 Ala. 316, 37 South. 290.

Charge 5 was properly refused. It pretermitted inquiry into the degree of force employed to overcome resistance; and besides, asserted as a fact, that the act of the plaintiff rendered it necessary for the conductor to eject him, and that plaintiff's resistance was the cause of the injury. Charges which assume the existence of facts as

to which the evidence is conflicting or which draw inferences for the jury are erroneous, and should always be refused. *Conrad v. Gray*, 109 Ala. 180, 19 South. 398. This disposes of all the assignments of error that are insisted on in brief of appellant's counsel. The case was fairly and fully tried. We may assume from want of any complaint in that regard that the law was satisfactorily presented to the jury in the court's oral charge; the controversy was entirely one of fact which the jury has settled, and we are unable to discover any error in any matter of substance.

Let the judgment be affirmed.

HARALSON, DOWDELL, and DENSON, JJ., concur.

BURROW v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. BURGLARY—INDICTMENT—PLEA—CORPORATE CAPACITY—PROOF.

Where accused was charged with burglarizing a railroad car, the property of the Southern Railway Company, a corporation, etc., no proof of the incorporation of such company was required, as provided by Acts 1900-01, p. 2285, in the absence of a plea denying the existence of the corporation.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 75, 102.]

2. INDICTMENT—DESIGNATION OF PERSON INCURRED.

Where a count in an indictment attempted to charge grand larceny, and laid the ownership of the property in the Southern Railway Company, but failed to charge that it was a corporation, partnership, or natural person, such count was fatally defective.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 277; vol. 32, Cent. Dig. Larceny, § 86.]

3. CRIMINAL LAW—INDICTMENT—COUNTS—VERDICT.

An indictment contained a count for burglary of a railroad car and a second count for grand larceny. The second count was insufficient. The verdict found defendant guilty on both counts, but he was sentenced only for burglary. *Held*, that accused was not prejudiced by the defect in the second count.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3101.]

4. BURGLARY—RAILROAD CARS—OWNERSHIP.

Where a foreign railroad car was in use by the Southern Railway Company for the transportation of freight at the time it was broken open and goods stolen therefrom, the ownership of the car was properly laid in such railway company.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 66.]

Appeal from Cleburne County Court; T. A. Johnson, Judge.

"To be officially reported."

Christopher Burrow was convicted of burglary, and he appeals. Affirmed.

Burton & McMahan, for appellant. Massey Wilson, Atty. Gen., for the State.

DENSON, J. The indictment as returned by the grand jury contained three counts. On motion of the defendant the third count was stricken. The first count charges burglary of a railroad car, the property of the Southern Railway Company, a corporation under the law of the state of Virginia, and in all essential particulars the count is sufficient. Code 1896, § 4418. No plea denying the existence of the corporation was filed. Hence there was no necessity for proving the incorporation as alleged. Acts of 1900-01, p. 2285. The second count attempts to charge grand larceny. The ownership of the property is laid in the Southern Railway Company, but there is no averment in this count that it is a corporation, a partnership, or a natural person. On the reasoning employed in the case of *Emmonds v. State*, 67 Ala. 12, 6 South. 54, and on the authority of that case, it must be held that the count is insufficient with respect of the allegation of ownership of the property alleged to have been stolen. But this will not work a reversal of the judgment; for, while the verdict of the jury finds the defendant guilty on the first and second counts, and the judgment of the conviction follows the verdict, yet the record affirmatively shows that the defendant was sentenced only for the offense of burglary. We are therefore able to say that we are satisfied that no injury resulted to the defendant on account of this defective count and the finding of the jury on it. Code 1896, § 4333.

The evidence showed without conflict that, while the car burglarized was "an Illinois Central Railroad car," it was in use by the Southern Railway Company for the transportation of freight. The goods that were in the car at the time had been brought in the car by the Southern Railway Company over its line to Heflin, the point where the burglary was committed, and the car was in that company's undisputed possession, on its tracks at the time. Under these facts the ownership was properly laid in the Southern Railway Company. *Matthews' Case*, 55 Ala. 65, 28 Am. Rep. 698; *Allen's Case*, 134 Ala. 159, 32 South. 318. The case of *Johnson v. State*, 111 Ala. 66, 20 South. 590, is not in conflict with the views expressed above, but the opinion in that case sustains the conclusion here reached. In that case the ownership was averred as being in the Alabama Mineral Railroad Company, a corporation, and the evidence upon which the opinion was based showed neither property, general or special, in, nor possession of, the car in the Alabama Mineral Railroad Company.

All other questions presented by this record are settled adversely to the defendant in the cases of *Ex parte Bud Owens*, 42 South. —, and *Burgess v. State* (at present term) 42 South. —.

No error has been found in the record, and the judgment appealed from is affirmed. Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

DALLAS MFG. CO. v. TOWNES.

(Supreme Court of Alabama. June 12, 1906.
Rehearing Denied June 30, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—RELATION OF PARTIES—SERVANT UNDER CONTROL OF CONTRACTOR.

Where defendant hired plaintiff and then put him to work under the control of a contractor engaged in placing machinery in defendant's mill, defendant paying plaintiff and charging his wages to the contractor, whose contract bound him to pay all expenses of putting in the machinery, plaintiff could not recover of defendant, as his servant, for injuries received owing to insufficient lighting of the mill.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 144-148.]

2. NEGLIGENCE—CONDITION OF BUILDINGS—CARE AS TO LICENSEES.

The proprietor of a mill in which an independent contractor is placing machinery owes it to the contractor's servants to keep the premises in a reasonably safe condition.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 42-44.]

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

"To be officially reported."

Action by Charles L. Townes against the Dallas Manufacturing Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Cooper & Foster, for appellant. R. O. Brickell, S. S. Pleasants, and Erle Pettus, for appellee.

SIMPSON, J. This action was brought by the appellee (plaintiff) against the appellant (defendant) to recover damages for an injury received by the plaintiff as an employé of defendant, while said plaintiff was engaged in the duties of his employment, working in the cotton mill of defendant. The complaint originally contained four counts, but the second count was eliminated by demurrer, and the court gave the general charge in favor of the defendant as to the first count. The third count, which is copied in the statement of the case, alleges that injury, which resulted from plaintiff's hand being "caught between the clothing of the cylinders and the clothing of the slats of the carding machines," was caused by a defect in the condition of the ways, works, etc., in the cardroom, in which plaintiff was working, "was lighted by electric lights, the electricity being generated upon the premises, and said electric appliances had become defective in some way unknown to this plaintiff, that they were totally insufficient to give proper light for the servants of defendant to discharge their duties after dark, and at the time of

the injury of, it was dark and said lights had gone out"—and then makes the statutory averments in regard to the person intrusted, etc. This count alleges that plaintiff was employed by defendant as a helper to aid in placing new carding machines. The fourth count alleges that he was employed "as a helper or assistant to those in charge of the setting up and preparing said carding machines," and that, while so engaged, he "attempted to pass between or around said carding machines, but stumbled over an obstacle which had been placed in the way between said machines by some person other than plaintiff," and thus caught his hand, and that he could not see the obstacle because of the failure of the defendant to furnish proper and sufficient lights in said cardroom, and that said lights had been out of order and in bad condition for some time, which fact had been made known to defendant or to its agents, and trusted with the supervision of its light machinery, and, although the defective condition of said lights was known to plaintiff, the defendant, through its agents, had been engaged in attempting to remedy said defect, and representing to plaintiff and its employes that said defects had been remedied.

It is shown, and not controverted: That an independent company, called the "Saco-Pattee Company," had entered into a contract selling certain machinery to defendants and agreeing "to furnish men to erect, clothe, and start" the machinery, and were engaged in that work, and plaintiff was employed by defendant as a helper to aid them, and placed under the orders of one Jackson, who was foreman in charge of the work under said Saco-Pattee Company. Defendant paid the wages of plaintiff, but charged it against said Pattee Company. That the obstacle over which plaintiff stumbled and fell was a door of a carding machine, which was lying on the floor. That just as plaintiff's foot came in contact with this door the lights went out and that whirled him around. That he grabbed at one of the standards on the side of the machine to break his fall, but missed it, and thus fell against one of the machines which had been put in motion by the Pattee Company people in setting up and testing the machinery. Plaintiff had not noticed this door there before. A little before this time the lights had "died down and then flared up." The plaintiff (who was the only witness to the accident) testified, also, that there had been trouble with the lights for some time prior to the injury; sometimes they would have trouble each day, and sometimes they would be all right for a week; that he had heard orders given to the electrician about the lights, and there had been numerous efforts made by Mr. Wise, the electrician, to remedy the lights; that he had seen them working on them some 10 or 15 times during the five months he worked there; that after said work said lights seemed to be all right; that the repairs were made on Friday

or Saturday, and Mr. Wise assured them the lights were all right, and the accident occurred on the following Monday or Tuesday. It was in proof, also, that Mr. Vaughn, the card-room boss, had been heard to complain to Mr. Massy, the superintendent of the electric plant, and that shortly thereafter the witness would see Wise and his assistants at work on them.

The witness Anglin testified that in his opinion the dying down and flaring up of the lights was owing to defective globes; that they had done so twice that day, and that he had seen Wise putting new globes on and putting new lights in that morning; also that White, boss of spinning room, had complained of the lights to Mr. Massy, superintendent; that at one time witness was sent by White to Massy to ask him to turn on the lights, and he replied that he would, and that there would be good lights before witness got back there.

The witness Massy, who was superintendent of defendant's company, testified that Wise, the electrician, was a competent electrician of seven or eight years experience; that the electric lighting apparatus was new and in perfect condition; that, when witness went into carding room a few minutes after the accident, the electric light was burning brightly, and he had no knowledge of the light having gone out; that several weeks before that there had been a request for more lights, and he had had them put in before the accident; that the only two causes which could make all the lights go out were, first, the burning out of the generator, which it would require four or five minutes to repair, or by cutting a wire or pulling out a switch, and, if all of them did go out and flash up, it must have been from throwing out a switch and immediately throwing it back on the main line. Witness explained the working of the lighting system, and stated that he had seen the lights go out probably 3 or 4 times in 57 years from the burning out of a fuse, or a globe becoming defective, and could not tell how long a fuse would last, as they varied, sometimes lasting much longer than at others. Several witnesses who were working in the same room at the time the accident occurred stated that the lights did not go out at that time.

Wise, the electrician, testified that he had been in that business for 10 or 11 years, was in the employ of the defendant, remembered the time of the accident; that he was in the dynamo room at that time; that at that time the lighting plant was in good condition, and no defects whatever in any part of the machine, and that the wires were in good condition; that he had never known all the lights to go out except when a fuse would blow out; that nothing but that, or shutting down the machine, would cause all the lights to go out, and neither occurred that evening; that the only way to cause the lights of one room to go out without affecting the others would be by pulling out the switch which

connected that room with the dynamo; that while it was impossible to say that every globe was in perfect condition (as if air should get in one it would destroy the carbon), yet the entire plant wires, globes, etc., were in first class condition; that the mill was so constructed that there were eight lights on a circuit, and if the fuse of one circuit should blow out the eight lights would be extinguished, and if only one light went out it would indicate that the globe had become defective. Witness also testified on cross-examination that there were two generators connected together; that if one had gotten out of order all the lights would have been extinguished; that generators generally are subject to various defects which affect the lights; that, if a piece of metal should come in contact with the wire, it would burn that wire in two and all lights supplied by that wire would go out; that some time prior to the accident the system of wires in the card-room had been changed, but this change did not cause any trouble; also that he had never received any complaints in regard to the lights in that room except some days they would need lights earlier than others, and he put some new lights in this room three or four weeks before the accident; also that if a metal had come in contact with the wires, so as to cause the lights in that room to go out, they would have stayed out until the wire was repaired; also that if the engine was improperly regulated that would cause the lights to flash up and down.

There was also testimony by several witnesses contradicting plaintiff about the lights going out, also relating contradictory accounts of the accident given by plaintiff as to how the accident occurred, and also explaining that it was impossible for the accident to have occurred in the manner related by plaintiff. A practical electrician of the Bell Telephone Company gave about the same explanation of the working of an electric plant as that given by Wise.

The third count is based on subdivision 1 of section 1749 of the Code of Alabama 1896.

The fourth count alleges that plaintiff was an employé of the defendant, but does not make the proper allegations to bring the case within either of the subdivisions of said section 1749; but, on the contrary, alleges that plaintiff stumbled and fell "because of the failure of the defendant to furnish proper and sufficient light in said cardroom." The subsequent part of this count, besides being elliptical, in place of charging that the supposed defects "arose from or had not been discovered or remedied owing to the neglect of the master," etc., according to the statute, alleges that the defendant, through its agents, had been engaged in attempting to remedy said defects.

The first matter which it seems necessary to ascertain, in order to arrive at a solution of this case, is what was the relation, if any, between the plaintiff and the defendant? Was the plaintiff an employé of the defend-

ant? The evidence shows that the plaintiff was not a regular employé of defendant, but had been several times employed for the same kind of work as in this, and that in this case he was working under an independent contractor, subject to his orders or to the orders of his superintendent only, who was not in any way subject to the orders or direction of the defendant. While it is true the evidence shows that the defendant employed the plaintiff, yet he immediately turned him over to Jackson, the superintendent of the independent contractor, and, although defendant paid the wages of plaintiff, he charged the same up to said independent contractor, whose contract bound him to pay all the expenses of setting up the machinery. Where certain work is let to an independent contractor, who works according to his own methods and not under the direction of the master, those who work under said independent contractor are his servants, and not the servants or employés of the master. And this principle applies even to one who is the general servant of the master, but for that particular work becomes the servant of the contractor. *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925, 929-931; *Dresser's Employer's Liability*, § 9, p. 59; 2 *Labatt's Master and Servant*, § 623, p. 1822, 1823, §§ 720, 7219, pp. 2054-2055; 2 *Bailey on Personal Injuries to Master and Servant*, §§ 2583, 2586, p. 861; *Rome & Decatur R. R. v. Chasteen*, 88 Ala. 591, 593, 594, 7 South. 94; *Scarborough v. Ala. Mid. R. R.*, 94 Ala. 497, 500, 10 South. 316; *Dean v. E. T. Va. & Ga. & L. & N. R. R.*, 98 Ala. 586, 589, 13 South. 489. In such case there would be a liability on the part of the contractor, outside the contract, to have his premises in reasonably safe condition, but these counts are not based on that liability. *Wood's Master and Servant* (2d Ed.) § 337, pp. 699-70; 2 *Bailey's Personal Injuries, relating to master and servant*, § 2594, p. 865; *Dresser's Employer's Liability*, § 9, p. 59. Both of the counts rested upon allegations charging that the plaintiff was an employé of defendant, and from what has been said it results that the plaintiff could not recover under those counts. Consequently the court erred in giving charge (C) requested by the plaintiff, and in refusing the general charge requested by the defendant.

The judgment of the court is reversed, and the cause remanded.

WEAKLEY, C. J., and TYSON and ANDERSON, JJ., concur.

STATE v. FULLER.

(Supreme Court of Alabama. June 30, 1906.)

1. HABEAS CORPUS—JURISDICTION—JUDGE TO WHOM APPLICATION MUST BE MADE.

Under Code 1896, § 4817, providing that a petition for habeas corpus, when petitioner is confined in the penitentiary, must be addressed

to the judge of the city court, or to the nearest circuit judge or chancellor, where petitioner was confined in the penitentiary in Elmore county the petition was properly addressed to the chancellor of the northeastern chancery division, embracing the county of Elmore.

2. SAME—RETURN OF WRIT—WHERE RETURNABLE.

Code 1896, § 4819, provides that if petitioner for habeas corpus is confined in the penitentiary, and the writ is granted more than 10 days before the time fixed by law for the holding of the circuit court or the city court of the county in which the convict is confined, it must be made returnable before the nearest circuit or city judge or chancellor, and made returnable before the officer by whom it is granted. *Held*, that where a writ was granted by the chancellor of the northeastern chancery division embracing the county of Elmore, the writ was properly returned before the chancellor, and he had the power to make it returnable before him at Anniston.

3. SAME—APPEAL—CERTIFICATION OF TRANSCRIPT.

Code 1896, § 4314, provides that when an appeal is taken in a habeas corpus case the clerk of the court in which the record of the judgment appealed from may be, must transmit a copy of the record and certificate of appeal to the Supreme Court. *Held*, that where a writ of habeas corpus was returnable before the chancellor of the northeastern chancery division at Anniston, if the cause was pending in any court it was the chancery court of Calhoun county, and the record being certified on appeal by the register in chancery of that court and by the chancellor, it was sufficient.

4. COURTS—COUNTY COURT—ESTABLISHMENT—VALIDITY OF STATUTE.

Acts 1896-97, p. 802, creating the county court of Cleburne county, are not unconstitutional for conferring on the county court the same jurisdiction and powers as the circuit court.

5. HABEAS CORPUS—QUESTIONS DETERMINABLE.

Const. 1901, § 143, provides that the circuit court shall have original jurisdiction in all matters civil and criminal. Acts 1896-97, p. 802, creating the county court of Cleburne county, provides in section 31 (page 814) that when any person is confined in the county jail on a charge of felony in the circuit court, and is not entitled to bail or unable to give it, the cause shall be transferred to the county court, and that the clerk of the circuit court shall transfer the cause and it be tried there as if the indictment had been returned into the county court. *Held*, that where no order of transfer was made in the circuit court, but the cause was placed on the docket of the county court by the clerk, and in the county court the prosecuting attorney and defendant agreed upon an attorney as special judge, and defendant pleaded to the indictment and was convicted, and appealed to the Supreme Court, where the judgment was affirmed, he could not thereafter, in habeas corpus proceedings, object that section 31 was violative of the constitutional provision, and that the prosecution against him was not properly before the county court.

Appeal from Chancery Court, Calhoun County; W. W. Whiteside, Chancellor.

"To be officially reported."

Habeas corpus by Levi J. Fuller to obtain his release from the penitentiary. From an order discharging petitioner from custody, the state appeals. Reversed and rendered.

Massey Wilson, Atty. Gen., for the State.
H. D. McCarty and H. D. Merrill, for appel-
lee.

DENSON, J. Section 4817 of the Code of 1896 provides that a petition for habeas corpus when the person making it is confined in the penitentiary, must be addressed to the judge of the city court, or to the nearest circuit judge or chancellor. The petition in this case shows that the petitioner was confined in the penitentiary at Spigeners in Elmore county. We have no trouble in reaching the conclusion that the petition was properly addressed to the chancellor of the North eastern chancery division which embraces the county of Elmore. And, as the writ was granted more than 10 days before the time fixed by law for the holding of the next term of the circuit court to be held for Elmore county, it was properly made returnable before the chancellor of that chancery division, and he had the power to make it returnable before him at Anniston. Code 1896, § 4819.

There is no merit in the motion to dismiss the appeal. The writ was made returnable before the chancellor at Anniston; if it can be said of the cause that it was pending in any court, it was the chancery court of Calhoun county, and the register in chancery of that court was *pro hac vice*, the clerk for the purpose of making, certifying, and transmitting the transcript of the record. The record is here certified by the register and also by the chancellor. Code 1896, § 4314. The case presented by the record is rather a novel one and one not entirely free from difficulty. The defendant was indicted at the spring term, 1896, of the circuit court held for Cleburne county, for the crime of murder. He was twice convicted in that court, but the judgment of conviction was reversed each time and the cause remanded. After the second reversal the cause was transferred to the county court of Cleburne county and was there tried in January, 1898; the defendant was convicted the third time and sentenced to imprisonment in the penitentiary for 30 years. On appeal, the judgment of the county court was affirmed by this court. Fuller's Case, 117 Ala. 36, 23 South. 688.

The county court of Cleburne county was created by an act of the General Assembly approved February 16, 1897. Acts 1896-97, p. 802. The first section of the act confers on the court the same jurisdiction and powers of the circuit court. It is provided in the thirty-first section (page 814), of the act that at any time after the spring term, 1897, of the circuit court of Cleburne county, when any person is confined in the jail of said county on a charge of felony in the circuit court, and is not entitled to bail, or is unable to give bail, said cause shall be transferred to the said county court, and the clerk of the circuit court shall transfer said cause and the same shall be tried in the county court as

if the indictment therein had been returned into the county court in the first instance.

The petitioner was confined in the jail of Cleburne county and was unable to give bail. The cause against him was docketed by the clerk of the circuit court, who was *ex officio* clerk of the county court, on the county court docket after the spring term, 1897, of the circuit court had been held, and not within 30 days before the succeeding term of the circuit court. Under the statute the duty of the clerk to so docket the case is made mandatory. The cause was tried in the county court without any question being raised by the petitioner (defendant there) as to the jurisdiction of the county court to hear and determine the cause.

It is now insisted by the petitioner (appellee) that the party of the thirty-first section of the county court act heretofore referred to, is in conflict with section 5, of article 6, of the Constitution of 1875 (section 143 Const. 1901), and, therefore, that its enactment was not within legislative competency. The case of *Adcock v. State*, 142 Ala. 80, 37 South. 919, is relied upon as supporting the contention. The act construed in the case of *Adcock*, is one entitled: "An act to further regulate the practice and procedure of the circuit court of Clay county, Alabama," and was approved December 13, 1898. Acts 1898-99, p. 196. The first section provides: "That from and after the 1st day of March, 1899, no grand jury shall be drawn, impaneled and summoned for the circuit court of Clay county, except upon the order of the circuit judge of said court, such order must be forwarded to the clerk thereof, and filed by him at least twenty days before the first day of the term of said court, for which said grand jury shall be called. All indictments returned by such grand jury shall be immediately transferred by the clerk of said court to the county court of Clay county, for trial, and it shall take no order of the court to carry this provision into effect." A grand jury was organized in the circuit court without the judge first making the order provided for by the act, and the indictment against *Adcock* was returned by such grand jury. *Adcock* moved that the cause be transferred to the county court, and pleaded in abatement of the indictment, and upon the ground that the grand jury was illegally organized. The circuit court overruled the motion and plea and tried the defendant. This court, on appeal from the judgment of conviction, held that the provisions of the act of December 13, 1898, "whereby it was intended to deprive the circuit court of jurisdiction to try indictments thereafter returned into that court, and to deprive that court of a grand jury except when the same should be ordered by the judge of the court prior to the convention of the court, were violative of section 5, of article 6, of the Constitution of 1875 (Constitution of 1901, § 143)." In the *Adcock* Case the transfer had

not been made, and the state resisted the transfer and insisted on the trial going on in the circuit court. And it might be conceded that, if the defendant in the case at bar had raised the question in the county court and had there insisted that his case should remain in the circuit court, the county court would have been without authority to try the cause. It is not necessary, however, to determine that question here; nor is it necessary to determine whether the act in question infringes on the constitutional jurisdiction of right of the circuit court to try the cause if the question had been raised by the state as was done in the Adcock Case. *Ex parte Hickey*, 52 Ala. 228. It was entirely within legislative competency to create the county court and give it jurisdiction concurrent with the circuit court, and we do not doubt that it was also within legislative competency to provide, with the consent of parties, for the removal of causes pending in the circuit court to the county court, and vice versa. *Hickey's Case*, supra; *Adcock's Case*, supra; *Ex parte Rice*, 102 Ala. 671, 15 South. 450. The county and circuit courts are of concurrent, coequal jurisdiction of the crimes of the kind charged in the indictment against the petitioner, and sit within the same territorial jurisdiction. The record here, it is true, shows that there was no order of transfer made in the circuit court, and it must be conceded that the cause was placed on the docket of the county court by the clerk in pursuance of the terms of the act creating the county court. But the record affirmatively shows that when the cause was called for trial in the county court, it appeared that the presiding judge was incompetent on account of having been of counsel in the prosecution, and the prosecuting attorney and the defendant in person and by counsel in open court, agreed upon an attorney to act as special judge in the trial of the cause; that the defendant was arraigned in open court and pleaded a former acquittal of murder in the first degree, which plea was sustained by the record of the former trial of the circuit court, and was thereupon confessed by the solicitor; that the defendant was then put on trial on the indictment for murder in the second degree and pleaded not guilty. He was convicted, appealed to this court, and the judgment of the county court was affirmed. No question of the jurisdiction was raised until this petition was filed.

We have seen that the county court is a court having jurisdiction of the crime—the subject-matter—and by the course of conduct on the part of the defendant, and of the representative of the state, “the existence of all facts essential to the jurisdiction of the county court was affirmed, and upon the affirmation, the court could not but act judicially.” *Ex parte Rice*, 102 Ala. 671, 15 South. 450; *Railway Co. v. Ramsey*, 22 Wall. (U. S.) 822, 22 L. Ed. 823. As was said by Brickell,

C. J., speaking for the court in *Ex parte Rice*, supra: “Consent cannot confer jurisdiction, it is true, but it is jurisdiction of the subject-matter which is derived from the law, which parties may not by consent confer. When jurisdiction of the subject-matter is conferred by law, jurisdiction of the person may be acquired by the acts of consent of the parties.” On the authority of that case we hold, that by the course of conduct which the record shows the petitioner pursued in the county court, that court acquired jurisdiction of his person and he cannot now be heard to urge its lack of jurisdiction, or that the cause was not properly in that court.

We are at the conclusion that the chancellor should have denied the prayer of the petition, and a judgment will be here rendered setting aside the order made by the chancellor, and dismissing the petition.

Reversed and rendered.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

WILLIAMS v. STATE

(Supreme Court of Alabama. June 7, 1906.)

1. CRIMINAL LAW—APPEAL—PRESUMPTIONS.

Where, by statute, a regular term of court was required to be held in a certain county of the circuit on May 15, 1905, and a special term for the trial of a person charged with murder was ordered to be held in another county of the circuit on May 22d, it would be presumed on appeal from a conviction on a trial at such special term, in the absence of evidence to the contrary, that the regular term was adjourned at the end of the first week of its session preceding the commencement of the special term.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3022.]

2. CRIMINAL LAW — APPEAL — RECORD — REVIEW.

Where pleas in a criminal case and a demurrer thereto which was sustained are brought before the Supreme Court only in the bill of exceptions, the ruling is not reviewable.

3. COURTS—SIMULTANEOUS TERMS.

Under Code 1896, §§ 928, 930, authorizing the holding of regular terms of court by the supernumerary judge and by special judges appointed by the Governor, the regular circuit judge may hold special terms during the session of a regular term of the court.

4. CRIMINAL LAW—VENUE—CHANGE—PREJUDICE OF INHABITANTS.

The ex parte order of a judge commanding a sheriff of another county to retain custody of accused did not constitute a judicial ascertainment of the fact that there was danger of violence to him if placed in jail in the county where the crime was committed, as against the state on the issue of fact presented by an application for a change of venue because of alleged prejudice of the inhabitants of the county.

5. JURY—SERVICE—EXCUSES.

The court, in a criminal case, was authorized to excuse a juror because of his wife's condition which demanded his personal attention.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 384-388.]

6. CRIMINAL LAW — EVIDENCE — NONEXPERT TESTIMONY.

A witness who was not an expert on gunshot wounds was competent to testify that a wound examined by him, made by a bullet, was a penetrating one.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1044, 1048-1052.]

7. HOMICIDE — EVIDENCE — WRIT OF POSSESSION.

Where a homicide occurred while deceased and an officer were attempting to execute a writ of possession against defendant, the writ was admissible without direct evidence that the lands described in the writ were the same as those on which defendant resided and from which he was sought to be ejected.

8. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

Declarations of accused while at the scene of the killing with his pistol in his hand and in the presence of deceased were admissible as *res gestæ* without preliminary proof that they were voluntary.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 810, 816, 817.]

9. SAME—EXPERT TESTIMONY.

In a prosecution for homicide, an expert was entitled to express his opinion as to the place where the bullet which produced deceased's death entered his head.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1059, 1060.]

10. SAME—RES GESTÆ — CONTINUOUS TRANSACTION.

In a prosecution for homicide, evidence describing the details of what occurred at the time of the homicide constituting one continuous transaction is admissible as *res gestæ*.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 804-809.]

11. HOMICIDE—EVIDENCE—THREATS.

In a prosecution for homicide committed during an attempted ejection of defendant from certain premises, evidence that a year before defendant told witness he had decided not to give up possession of the property, and if they came to put him out he or they would die before they would get it, was admissible.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 293-296.]

12. WITNESSES—IMPEACHMENT—PREDICATE.

An impeaching question, which was outside of and foreign to the matter laid in the predicate, was properly disallowed.

13. CRIMINAL LAW — INSTRUCTIONS—FAILURE TO CHARGE—APPEAL—REVIEW.

An exception reserved to the mere failure or refusal of the court to instruct the jury orally on the law of self-defense was unavailable to present any question for review on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2671.]

14. SAME—INSTRUCTIONS—MODIFICATION.

The court charged at the defendant's request that unless each and every member of the jury was convinced beyond all reasonable doubt of defendant's guilt from the evidence in the case they should not convict him, and that unless every jury was convinced beyond all reasonable doubt that defendant killed deceased by shooting him with a pistol within the county before the finding of the indictment, and such killing was willful and deliberate and malicious and premeditated, the defendant could not be found guilty of murder in the first degree. To the first instruction, the court added that it simply meant that the jury must all agree on the verdict, and to the second that all 12 must agree before they could return any verdict, and that the second instruction simply meant that all the jurors must agree on the elements of

murder in the first degree before they could find defendant guilty of that offense. *Held*, that the explanations of the charges were proper.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2013.]

15. HOMICIDE—INSTRUCTIONS—REFUSAL.

In a prosecution for homicide, a request to charge that the necessity that would justify the taking of life need not be actual, but the circumstances must be such as to impress on the mind of the slayer a reasonable belief that such necessity was pending, was objectionable for failure to postulate that the circumstances were such as to reasonably impress, and did impress, defendant with the belief that he was in great and imminent peril.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 616, 617.]

16. SAME—DEFENSE OF HABITATION.

The rule that a person is entitled to defend his habitation even to the taking of the life of the person attempting to invade the same has no application as against persons attempting to eject defendant under a writ of possession.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 182, 183.]

17. CRIMINAL LAW—INSTRUCTIONS—REFUSAL.

It is not error for the court to refuse an instruction covered by an instruction given.

18. HOMICIDE — SELF-DEFENSE — MISLEADING INSTRUCTIONS.

Where there was evidence from which the jury might have found that defendant deliberately shot deceased after D. had begun to run, instructions that if D. presented his pistol at defendant in a threatening manner, and defendant was free from fault in bringing on the difficulty, defendant had a right under the law to shoot at D. in self-defense, which right was not limited to cases of necessity, real or apparent, on account of danger to life or limb, but extended equally to the danger of great bodily harm, were properly refused as misleading.

19. CRIMINAL LAW — ARGUMENTATIVE INSTRUCTIONS.

An instruction that, in weighing the testimony of a witness, the jury should consider the fact that he was shot by defendant at the time of the alleged killing, was properly refused as argumentative.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1959, 1960.]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

"To be officially reported."

John Williams was convicted of murder, and he appeals. Affirmed.

The defendant was indicted, tried, and convicted for the murder of R. L. Hipp. The indictment was preferred and the trial had at a special term of the Cullman circuit court held by order of the presiding judge of the Eighth judicial circuit. The killing is alleged to have occurred on the 11th day of April, and the order for the special term was made the 18th day of April, 1905, calling the special term to convene on May 22, 1905. The defendant moved for a change of venue upon the grounds that on account of public sentiment and the fact that the defendant was a poor, obscure, and unknown man, and the deceased a prominent and influential man, the defendant could not

get a fair and impartial trial. Numerous affidavits were offered for and against the motion. The order of the court calling the special term was attempted to be offered in support of the motion, as was also the order of the court removing the prisoner from the Cullman jail to the Madison county jail. The newspaper account of the killing and of the history of the parties connected therewith, together with their account of the state of public feeling, was also offered. The court overruled the motion and put the defendant upon the trial. In selecting the jury, one Wright was called and examined under oath, pronounced competent by the court, and accepted by both state and defendant as a juror; but, before he was sworn in, he stated on oath that his wife's condition was such as absolutely to demand his presence and attention, whereupon the court excused him, and the defendant excepted. Dr. R. H. Beard testified that he saw the body of Hipp the night of the day he was killed, and that there were wounds upon it, one under the eye and one in the back of the head; the last-named one being a penetrating wound, entering from the back of the head just above the right ear and a little back of it. The defendant objected to the statement on the ground that the witness was not shown to be an expert. The evidence tended to show that Deputy Sheriff Dunlap, together with Hipp and others, had gone out to the house of Williams; the deputy sheriff having in his possession a writ of possession issued from the circuit court against Williams to remove him from the possession of the house and lands he was then occupying. That Hipp was the attorney of the plaintiff in the writ and was there to receive the possession of the house and land from the deputy sheriff. The state offered to introduce this writ of possession in evidence, but the defendant objected, and the court overruled the objection.

The assignments of error referred to in the opinion are as follows: "(12) In overruling appellant's objection to solicitor's question to witness Woodruff, 'You asked Williams where the others were,' and in holding 'The predicate is sufficient.' (13) In overruling appellant's motion to exclude statement of witness Woodruff that 'they all got away but him, and he was not able'; said expression being attributed to defendant. (14) In overruling the defendant's objection to the solicitor's question to the witness Woodruff: 'Was there anything said about where he was hit or anything of that sort—about where the ball hit him? * * * (16) In overruling defendant's objection to solicitor's question to witness Ascue, 'what did you hear Williams say?'"

The witness Woodruff testified as follows: "I was at Williams' house after the tragedy. When I got there, I saw Hipp lying with his feet upon the veranda and his face toward the ground. He was shot. Williams

was walking in the back yard about ten steps from the porch and near the well with a pistol in his hand. Mr. Hall came up and asked Williams where were the rest of them, and Williams said they all got away but 'that one, and he is hardly able to get away.' Williams was about ten steps from Hipp's body when I saw him." Witness then testified that he did not threaten Williams; that he had no gun, stick, or pistol, and did not promise Williams anything, nor offer him anything, to tell what had occurred, nor tell him that it would be better to tell something about the matter. "No one took hold of Williams. Gober did not threaten him or promise him anything or make any demonstration against him." The solicitor asked the witness: "You asked him where the others were?" There was objection to this question, but the court held the predicate sufficient, and overruled the defendant's objection. The defendant also moved the court to exclude the statement that Williams said that all got away but deceased, and he was not able, on the grounds that it was not a part of the res gestae, and that a proper predicate for its admission had not been laid. Witness, testifying further, said: "I washed Mr. Hipp's face." The solicitor then asked: "Was anything said there about where he was hit, or anything of that sort—about where the ball hit him?" Defendant objected to the question as leading and irrelevant, and the court overruled the objection. Witness Noah Holmes testified that he was present at the time of the shooting; that he went to the house with Dunlap, Hipp, and others. He further testified that while there he heard a report of a gun in the house; that he heard another report, and then saw Dunlap come out the door and turn to the left as he came out and run to the end of the porch, and then "Williams came to the door just as Dunlap went to jump off the porch, and Williams shot at him. Dunlap kept on around the house and Williams turned to the right and ran out in the yard and shot at Ryan." The solicitor asked, "Where was Ryan?" and the witness replied: "He was at the buggy where I was, and was running. Williams shot at Ryan, and, as well as I remember, turned to the right and ran to the gate that goes to the lot at the back end of the house and went around the house again." The defendant objected to all this testimony separately, but the objection was overruled. Ryan's testimony was of similar import. Newman testified that he knew Williams and had a conversation with him about a year before the date of his testimony, in which Williams said to him that he had decided not to give possession of his place, and that if they came out there to put him out, "he or they would die before he would get out." Ogletree was asked the following questions by the defendant: "I want to ask you whether or not W.

T. Giles stated to you on Saturday following the shooting on Tuesday that he was there on the porch when the shooting occurred and saw the hand of the man from the door of the west room, and he never saw the man and never saw the man come in the room?" The state objected because no predicate had been laid. Giles in his previous testimony had stated that he was in the hall and saw only the hand and pistol of the man who did the shooting; that he could not see the man himself on account of the door facing.

At the conclusion of the testimony, the defendant requested a number of written charges, some of which were given, and some of which were refused. Charge B was given as follows: "Unless each and every member of the jury is convinced beyond all reasonable doubt of the guilt of the defendant from the evidence in the case, then you should not convict him." At the time he gave this charge, the court said: "That simply means, gentlemen of the jury, that you must all agree upon your verdict." Charge E: "Unless each and every juror is convinced beyond all reasonable doubt from the evidence in the case that the defendant killed Robert L. Hipp by shooting him with a pistol in this county, before the finding of this indictment, and that such killing was willful and deliberate and malicious and premeditated, you cannot find the defendant guilty of murder in the first degree." In giving this charge, the court said: "As I said before, all 12 of you must agree before you can return any verdict. This charge is to be taken and construed with the charge I have already given you, and it simply means that all of you must agree upon the elements of murder in the first degree before you can find the defendant guilty of murder in the first degree." Charge C: "The necessity that will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with a reasonable belief that such necessity is impending." Charge D: "A man is not required to retreat from his own house before he strikes himself." Charge F: "The law regards with great jealousy and vigilance the peace and security of the dwelling house. A trespass upon it is more than a trespass upon property. It is a trespass upon the person." Charge G: "A man's house is his castle, and he may defend it, or himself in it, without retreating." Charge H: "The court charges the jury that, if the killing was the consequence of passion suddenly aroused by sufficient provocation, the jury cannot convict the defendant of murder in the first degree." Charge I: "If the jury believe from the evidence that Dunlap presented his pistol at the defendant in a threatening manner, and the defendant was free from fault in bringing on the difficulty, then the defendant had a right under the law to shoot at Dunlap in self-defense." Charge J:

"In weighing the testimony of the witness Dunlap, the jury will consider the fact that he was shot by the defendant at the time of the alleged killing." Charge K: "The right of one in self-defense is not limited to cases of necessity, real or apparent, on account of danger to life or limb, but extends equally to the danger of great bodily harm." Charge L: "Unless the evidence against the defendant is such as to exclude to a moral certainty every supposition or hypothesis but that of his guilt, you will find the defendant not guilty."

Erle Pettus, for appellant. Massey Wilson, George H. Parker, and John A. Lusk, for the State.

TYSON, J. The indictment upon which this defendant was tried and convicted was preferred by a grand jury organized at a special term of the court after notice that the court would be held had been given in conformity to the statutes. Sections 914 and 915 of the Code of 1896. The trial was also had at that special term.

The regularity of the order convening the court is assailed in only one particular. It is upon the point that the judge of the Eighth judicial circuit, who ordered the special term, and who presided over it, was without authority to hold it because he was at that date bound to be in attendance upon a regular session of the circuit court, in and for Madison county, which was in the same circuit with Cullman county, where this special term was being held. It is true the statute fixing the time for holding the regular term of the Madison circuit court requires that court to convene on the third Monday in May (and may continue four weeks) which, in the year 1905, was the 15th day of that month, and it is also true that the record shows this special term to have been convened on the 22d day of that month; but it was not shown by evidence introduced in support of the motion to quash the indictment that the Madison court did not adjourn on the Saturday, the end of the first week of its session, preceding the commencing of the special term. It will not be seriously doubted that the judge may have properly exercised the authority that he had to adjourn the Madison court, and, in the absence of a showing to the contrary, it must be presumed that he exercised that authority properly, since error must be affirmatively shown. *Smurr v. State*, 105 Ind. 125, 4 N. E. 445. The same question was also attempted to be raised by pleas to which a demurrer was sustained. But these pleas and the demurrer to them are made to appear here only in the bill of exceptions. This ruling of the court is therefore not revisable. *Beck v. West*, 91 Ala. 312, 9 South. 199; *Brooks v. Rogers*, 101 Ala. 125, 13 South. 386; 3 *Brickell's Dig.* p. 465, § 13. But, aside from these considerations, the judge had ample authority to order the special term and hold it at the time it was

held, although the Madison court may have been in session. We do not controvert the general doctrine that a court cannot be held at a time when there is clearly no authority to hold it; nor do we impugn the general rule that it is error to hold two courts in the same circuit at the same time where there is no statutory authorization for it. To see that such authority is conferred by our statutes we need only cite them. Sections 928 and 930 of the Code of 1896; Gen. Acts 1898-99, p. 236. The legislative provisions made in these statutes for the holding of regular terms by the supernumerary judge and special judges appointed by the Governor clearly recognize the authority, and, indeed, impliedly, if not expressly, confer such authority on the circuit judge to hold special terms during the session of a regular term of the court.

After a careful examination of the evidence offered in support of and against the motion for a change of venue, we feel constrained to hold that it cannot be affirmed that the trial judge erred in denying the motion. It seems to us that the testimony in support of the application is much less convincing than was that in the Hawes Case, where the application was held to have been properly denied (*Hawes v. State*, 88 Ala. 39, 7 South. 302), and does not measure up to that in the Thompson Case, 117 Ala. 67, 23 South. 676, where it was held that the application should have been granted. *Terry v. State*, 120 Ala. 286, 25 South. 176; *Thompson v. State*, 122 Ala. 12, 26 South. 141; *Daughdrill v. State*, 118 Ala. 7, 21 South. 378. The order of the presiding judge of date April 15, 1905, commanding the sheriff of Madison county to retain the custody of the defendant as a prisoner, was not a judicial ascertainment of the fact that there was danger of lawless violence to him if removed to or placed in the jail of Cullman county as against the state on the issue of fact presented by the application for a change of venue. It was purely an *ex parte* order, made without a hearing on the part of the state, and therefore was not binding as a judgment. To hold that it was a judicial determination of that fact or any other fact recited in it would vitiate the cardinal principle above referred to necessary to the efficacy of every decree or judgment. And, clearly, it is no more a judicial determination of that fact than it is of the further fact also recited in it that the jail of Cullman county was insufficient for the keeping of the prisoner. Section 4961 of the Code of 1896. The purpose of such orders is to protect the sheriff as an authorization to hold the prisoner and to prevent the latter's escape or to guard him against violence to his person. The order under consideration is clearly entitled to no more weight as evidence than an affidavit containing the same statements would be. The overruling of the motion to quash the venire is not insisted on

as erroneous. But, if it was, it would clearly be without merit. *Fields v. State*, 52 Ala. 348.

The trial court was authorized to excuse the juror Wright on account of his wife's condition which demanded his personal attention. *Parsons v. State*, 22 Ala. 50; *Hawes Case*, supra; *Yarbrough v. State*, 105 Ala. 43, 16 South. 758; *Sanford v. State* (Ala.) 39 South. 370.

It does not require that a witness should be an expert on gunshot wounds in order to testify that a wound examined by him, made by a bullet, is a penetrating one. Nor is there any merit in the other objection interposed to the question propounded by the solicitor to Dr. Beard; or in the exception reserved to the ruling on the motion to exclude this witness' statement as to the range of the wound found by him in the head of Hipp, the deceased. 3 *Mayfield's Dig.* p. 965, § 235.

The only objection urged against the introduction of the writ of possession which Hipp, the deceased, and the deputy sheriff was attempting to execute, at the time of the homicide, is that there is no evidence in the record tending to show that the lands described in the writ are the same as those upon which the defendant resided and from which they were attempting to eject him. It is true there was no positive or direct proof of this fact offered, but the evidence affords an inference from which the jury may have inferred it. The writ was clearly relevant and competent. 1 *Elliott on Ev.* § 212; *Wharton on Homicides*, § 235, p. 205; 21 *Am. & Eng. Ency. Law* (2d Ed.) pp. 141-144.

The matters made the basis of the twelfth, thirteenth, fourteenth, and sixteenth assignments of error, relating as they do to the conduct and declarations of defendant while at the scene of the killing with his pistol in his hand and in the presence of the deceased, being attendant circumstances, were a part of the *res gestæ* of the occurrence or transaction that took place on that occasion, and were therefore competent without preliminary proof being made showing his declarations on that occasion to have been voluntary. 4 *Elliott on Evidence*, § 3029, and cases cited in notes. But, aside from this consideration, the circumstances under which they were made repel all presumption that they were not voluntarily made. *Gilmore v. State*, 126 Ala. 20, 36, 37, 28 South. 595, and cases there cited. This also disposes of the fifteenth, twenty-sixth, twenty-seventh, and twenty-eighth assignments of error adversely to appellant.

Dr. Stone was shown to be an expert. He was therefore competent to express his opinion as to the place of entrance on Hipp's head of the bullet that produced his death.

The testimony of witnesses Holmes and Ryan admitted by the trial court against defendant's objection was clearly competent. All of it related clearly to matters which

were a part of the *res gestæ* of the occurrence on the occasion of the homicide. Indeed, all the details of what occurred on that occasion were entirely competent as constituting one continuance transaction. *Collins v. State*, 138 Ala. 57, 34 South. 993; *Churchwell v. State*, 117 Ala. 124, 23 South. 72; *Smith v. State*, 88 Ala. 73, 7 South. 52; *Seams v. State*, 84 Ala. 410, 4 South. 521.

The threats by defendant testified to by the witness Newman were clearly competent. *Jordan v. State*, 79 Ala. 9; *Ford v. State*, 71 Ala. 385; 4 Elliott on Ev. § 3035.

The question propounded to the witness Ogletree, to which an objection was sustained, was not competent. If answered, it would not have tended to impeach Giles upon the matter laid in the predicate for his impeachment. In short, it was outside and foreign to the matter laid in the predicate. But, aside from this, the question was clearly otherwise objectionable.

There are a number of other assignments of error, but they are so obviously without merit that we have not deemed it necessary to discuss them.

After the testimony had closed, and before the trial judge delivered his oral charge to the jury, the defendant in writing requested that he charge fully on the law of self-defense. It is also stated in the record that the judge failed in his oral charge to instruct the jury upon the law of self-defense. The exception reserved was to his failure or refusal to do so. Premitting all discussion of the question whether, under any phase of the testimony, the defendant was entitled to have the jury determine that he was justified in shooting at Dunlap, whom Hipp accompanied for the purpose of having the possession of the premises delivered to him as the agent of the plaintiff named in the writ, and conceding that defendant was so entitled, the exception reserved is unavailable to raise the question. Had the judge instructed the jury in his oral charge or a written charge had been given at the request of the solicitor asserting that defendant was not justified or excused, and an exception had been reserved to the oral charge, or if special charges had been requested by defendant raising the question of his justification or excuse and refused, then undoubtedly the ruling could be reviewed. But here we have a mere nondirection by the judge—a mere failure or refusal to instruct the jury orally upon a certain conceived phase of the testimony. This is wholly ineffectual to present for revision the question sought to be reviewed. Sections 3326 and 3328 of the Code of 1896; *Herbert v. Hule*, 1 Ala. 18, 34 Am. Dec. 755; *Green v. State*, 98 Ala. 14, 13 South. 482; 2 Thompson on Trials, § 2341. Mr. Thompson, in the section above cited, speaking to this point, says: "It is, then, a general rule of procedure, subject in this country to a few statutory innovations, that mere nondirection, partial or total, is not a ground of new trial,

unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused."

The court's explanations of charges B and E were not improper. *Holmes v. State*, 136 Ala. 80, 84, 34 South. 180; *Jackson v. State*, 136 Ala. 22, 34 South. 188; *Nevill v. State*, 133 Ala. 99, 32 South. 596.

Suffice it to say of charge C, refused to defendant, that it was faulty in not postulating that the circumstances were such as to reasonably impress him, and did so impress him, that he was in great and imminent peril. *McClellan v. State*, 140 Ala. 99, 103, 37 South. 239.

Charges D, F, and G were calculated to mislead the jury, if not otherwise bad. The rule of habitation does not apply when the person killed has the lawful right to be in the dwelling of his slayer for the purpose of executing a writ of possession. The writ in this case armed those executing it with the right to the possession of the dwelling to eject the defendant and his household goods from it. They were in no sense trespassers, nor were they committing an unlawful act in their attempt to dispossess him and to place the owner of it in possession. *Harrigan & Thompson's Cases on Self-Defense*, pp. 713-720, 900-904; 25 Am. & Eng. Ency. Law (2d Ed.) p. 278.

Charge H was a duplicate of charge 4 that was given for defendant.

Charges I and K were each calculated to mislead the jury. There was testimony from which they were authorized to find that defendant deliberately shot Hipp after Dunlap had begun to run.

Charge J was a mere argument. Charge L was correctly refused. *Bowen v. State*, 140 Ala. 65, 67, 37 South. 233.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

GRISHAM v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. CRIMINAL LAW—APPEAL—INSTRUCTIONS—EXCEPTION IN GROSS.

Where the court's oral charge consisted of several paragraphs, an exception by accused thereto as a whole could not be sustained where all the paragraphs were not bad.

2. SAME—INSTRUCTIONS—DUTY TO REQUEST.

An exception to the charge that the court had failed to charge on all the offenses embraced in the indictment was unsustainable where accused failed to request specific instructions presenting such matter.

3. SAME—INSTRUCTION AS A WHOLE.

A charge in a criminal case must be construed as a whole, though it consists of separate paragraphs.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1990.]

4. HOMICIDE—INSTRUCTIONS.

In a prosecution for assault with intent to commit murder, accused requested a charge

that intent to take the life of the person assaulted was an essential element of the offense, and that unless, if the intent had been consummated, the offense would have been murder, there could be no conviction of a felony; that, where there is an assault, the guilt or innocence of the felony necessitates the inquiry if death had ensued whether the offense would have been murder, and hence if there was no intent to murder deceased, but defendant shot to defend himself against assault endangering his life or which put him in danger of great bodily harm, defendant was not guilty. *Held*, that such instruction was bad in form and misleading in failing to state the conditions authorizing the conclusion that defendant acted in self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 657-661.]

Appeal from Circuit Court, Lauderdale County; J. H. Nathan, Judge.

"To be officially reported."

Nolan Grisham was convicted of assault with intent to murder, and he appeals. Affirmed.

The defendant was indicted, tried, and convicted of assault with intent to murder Oscar Thornton. The evidence tended to show that defendant shot Thornton with a pistol in a difficulty growing up out of the fact that defendant had run away with Thornton's sister and married her. The evidence for the defendant tended to show that Thornton commenced the difficulty, and that while both were on the ground scuffling defendant's pistol fell out of his pocket. That when this happened Thornton jumped up and made as if to draw something from his pocket, when defendant grabbed up his pistol and fired. Also tended to show that threats had been made by Thornton against the defendant. The oral charge of the court is set out in full in the transcript and relates only to the offense charged in the indictment. The exception to the charge seems to be that the court either failed or refused to charge as to assault and battery and simple assault. Several paragraphs of the written charge are not necessary here to be set out because not treated of in the opinion. The defendant requested the following written charge which was refused: "(1) The essential element of the statutory offense of an assault with intent to murder—that which converts it into a felony—is the intent to take the life of the person assaulted. Unless, if the intent had been consummated, the offense would have been murder in one or the other of its degrees, there can be no conviction of the felony. Where there is evidence of the assault, as in this case, the determination of guilt or innocence of the felony necessitates the inquiry if death had ensued would the offense have been murder. If, therefore, the jury find from the evidence that there was no intent to murder Thornton on the part of the defendant, but that he shot to defend himself against assault endangering his life, or which put him in danger of great bodily harm, you will render a verdict of not guilty

of the charge of an assault with intent to murder."

Emmett O'Neal, for appellant. Massey Wilson, Atty. Gen., for the State.

HARALSON, J. The defendant excepted to the oral charge of the court as a whole. It consisted of several paragraphs, each of which was not bad, which must be the case, to condemn the whole charge. Postal Tel. Co. v. Hulsey, 132 Ala. 461, 31 South. 527.

The exception to the charge as a whole was, "that the court had failed to charge on all the offenses embraced in the indictment." The court cannot be put in error for a mere failure or refusal to instruct orally upon a certain conceived phase of the testimony. The defendant should have requested specific instructions good in point of law and appropriate to the evidence. Williams v. State (at the present term) 41 South. 992.

It is familiar, that in a charge of the court consisting of several paragraphs, they must all be construed together, and where thus construed, they are a proper declaration of the law applicable to the whole testimony. Such charge is not erroneous, though parts of it standing alone might be subject to criticism. R. & D. R. Co. v. Weemes, 97 Ala. 270, 12 South. 186; 2 Mayfield's Dig. 561, § 15.

The defendant, after the delivery of this charge, excepted to several designated portions of it, disconnected from the entire charge, as though such designated portions were separate and independent charges. They could not be thus wrested from the entire charge unexplained by the other portion of it. Without the context and the light shed upon these portions of the charge, to which exceptions were reserved, and taken separately as defendant's counsel propose to do, some of them would be erroneous statements of law; but when the whole charge is read and construed together, we have been unable to agree to the criticisms made on its several parts.

Charge 1, requested by the defendant, and refused was bad in form. If the jury should have desired to acquit as to the highest grade of felony charged and to convict of a lower grade, the proper verdict would not have been that which the charge required. It was also misleading in dealing with self-defense, without properly stating the conditions authorizing the conclusion that defendant acted in self-defense.

Affirmed.

WEAKLEY, C. J., and SIMPSON and DENSON, JJ., concur.

HUGHES v. CLIFTON et al.

(Supreme Court of Alabama. April 11, 1906.)

INTEREST—TIME AND COMPUTATION—SUFFICIENCY OF TENDER.

A mortgagor, desiring to pay the mortgage, went to a person who had previously been the

mortgagee's agent, and was informed that the agent did not have the securities. The agent agreed to try and get them from the mortgagee's administrator, whereupon the money was paid to a third person, to be paid over to the administrator or his agent on a surrender or delivery of the securities. Held not to constitute a payment or tender of the amount due sufficient to discharge the debt or stop the running of interest.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Interest, § 114; vol. 45, Cent. Dig. Tender, §§ 29-32.]

Appeal from Chancery Court, Madison County; W. H. Simpson, Chancellor.

"To be officially reported."

Bill by James Hughes as administrator of the estate of John Hughes, deceased, against Wesley Clifton, and others. From a judgment for defendants, plaintiff appeals. Affirmed in part, and reversed in part and rendered.

This was a bill filed by the appellant as the administrator of the estate of John Hughes, deceased, seeking the foreclosure of a mortgage on land executed by Wesley Clifton and wife to said Hughes. The defendants interposed demurrers and pleas to bill, but the demurrers were overruled and the pleas held insufficient. All the defendants except Wesley Clifton failed to answer the bill and a decree pro confesso was entered against them. Wesley Clifton filed an answer setting up a payment of a certain installment of the interest to one A. R. Campbell alleged to be the agent of the mortgagee; also setting up that he went to said Campbell and informed him that he desired to pay the mortgage debt together with interest due on the mortgage and was informed by Campbell that the mortgage was in the possession of said administrator. It was agreed between respondent and Campbell that the amount of the mortgage debt and the interest due on it should be paid to one McCorley who should hold the said money until the mortgage was obtained from said Hughes. It is contended that Campbell never obtained the mortgage. The chancellor decreed a foreclosure of the mortgage but denied to complainant interest on the same after the payment of the money to McCorley, and decreed costs against complainant. From this ruling, this appeal is prosecuted.

Walker & Spraggins, for appellant. Cooper and Foster, for appellees.

ANDERSON, J. "As a general rule, a mortgage debtor is authorized to infer that an attorney or agent, who has been employed to make a loan and retains possession of the bond and mortgage, is empowered to receive payment of both the interest and of principal. But this inference is founded on his custody of the securities, and it ceases when these are withdrawn by the creditor; and it is incumbent on the debtor, who relies upon a payment so made to an attorney or agent, to show that the securities were in his posses-

sion when he made the payment, unless the action of the creditor be such as to estop him from denying the agency. * * * In making payments to an agent, the mortgage debtor should be assured of his continued authority to act for the owner of the mortgage; and such assurance of this as may be derived from his possession of the mortgage note or bond, and indorsement thereon of the payment, would be omitted only through great negligence. Authority of an agent to receive interest or principal on a mortgage cannot be inferred from the fact that the agent collected and paid over to the mortgagee interest on other mortgages. Even authority to collect the interest upon a mortgage does not afford ground for inferring authority to collect the principal, where the agent is not intrusted with the possession of the securities. The rule has been strictly adhered to in all the adjudged cases that the possession of the securities by the agent is the indispensable evidence of his authority to collect the principal." Jones on Mortgages, vol. 2, § 964. In the case of Smith v. Kidd, 68 N. Y. 130, 23 Am. Rep. 157, the court said: "If money be due on a written security, it is the duty of the debtor, if he pay to an agent, to see that the person to whom he pays it is in possession of the security. For though the money may have been advanced through the medium of the agent, yet, if the securities do not remain in his possession, a payment to him will not discharge the debtor." In the case of Haines v. Pohlmann, 25 N. J. Eq. 183, the court in discussing the question, said: "But the inference in such case is founded on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent upon the debtor who makes payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made."

The payment in this case was made to a person other than the alleged agent of complainant, but, conceding that it was equivalent to making it to Campbell, who sanctioned it, the undisputed evidence shows that Campbell did not have the securities, and so informed respondents' agent, and agreed to try and get the note and mortgage, and the deposit was made with McCorley to be paid over to complainant or his agent upon a surrender or delivery of the securities. This was in no sense such a payment or tender, as would operate as a discharge of the debt and thereby stop the interest. The case of Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818, relied upon by the learned chancellor, has no application to the case at bar; there the place of payment was designated in the bonds and the court properly held "that the designation of the place of payment of the bonds imparted a stipulation that the holder should have them at the bank when due, to receive payment and that the obligors

would produce there the funds to pay them." Here we have no designated place of payment either in the note or mortgage. We do not wish to be understood as holding that there is not an exception to the foregoing rule, when the creditor absents or obscures himself, so that the debtor cannot, by ordinary diligence, locate him, but in the case at bar there is no legal evidence to show that the respondent was sufficiently vigilant to bring himself within the exception.

The chancellor properly rendered the decree of foreclosure, but erred in disallowing the complainant interest and in taxing him with the costs; and the decree in this respect will be reversed, and the register is ordered to include the interest and costs in ascertaining the amount to be paid by the respondents, and is ordered to sell the land under the terms of the decree, if said sum including principal, interest, and costs is not paid within 30 days from the rendition of the decree of this court.

Affirmed in part, and in part reversed and rendered.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

GILBREATH et al. v. FARROW.

(Supreme Court of Alabama. July 6, 1906.)

1. TRUSTS—RESULTING TRUST—BILL TO ESTABLISH.

A bill by a wife to establish a resulting trust in land conveyed to her husband and paid for by herself, which alleges that the husband holds a deed to the premises as a bare trustee for the wife, and that she paid the entire purchase money, and has been in peaceable possession since the making of the deed, and that both she and her husband have treated the land as hers, is insufficient for failing to aver the facts out of which the alleged trust originated.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 588-592.]

2. APPEAL—DECISIONS REVIEWABLE—ORDERS ENTERED AFTER FINAL DECREE.

The court on appeal from a decree cannot review an order denying a petition by the defeated party, made at a term subsequent to the one at which the decree was rendered.

Appeal from Chancery Court, Marshall County; W. H. Simpson, Chancellor.

"To be officially reported."

Suit by Thomas L. Farrow against Sam Gilbreath and others. From a decree for plaintiff, defendants appeal. Affirmed.

This was a bill filed by Thomas L. Farrow against Sam Gilbreath, Sallie Gilbreath, wife of Sam Gilbreath, and G. H. Pounds, seeking to foreclose certain mortgages executed by Gilbreath and wife to complainant and others and by such others transferred to complainant. Pounds answered admitting the allegations of the bill. Sallie Gilbreath filed an answer and cross-bill setting up that she is a married woman, the wife of Sam Gilbreath, and that she was such at the

time each of the notes and mortgages was given, that each note and mortgage set out and described was given for debts of Sam Gilbreath and husband of complainant in the cross-bill, and the complainant here merely signed said notes and mortgages as the surety of her husband, Sam Gilbreath. That Sallie Gilbreath owns in her own right an undivided one-half interest in and to a part of the lands described in the original bill, a description of which is set out in the cross-bill, and that she is in the peaceable quiet possession of the entire interest in said lands claiming them as her own and said lands constitute her homestead. That Sam Gilbreath the husband of complainant in the cross-bill holds a deed to one-half interest as is shown by copy of the deed made an exhibit to the cross-bill, but that he holds the same as a bare trustee for Sallie Gilbreath, his wife; that she paid the entire purchase money for the same and has been in peaceable possession of the land since the making of the deed, and that both she and Sam Gilbreath have treated the lands as hers. Demurrers were interposed and sustained to the cross-bill.

Street & Isbell, for appellants. John A. Lusk, for appellee.

TYSON, J. The bill in this cause was filed to foreclose certain mortgages made an exhibit to it executed by the respondent Gilbreath conveying certain lands described in them. On final hearing the chancellor decreed a foreclosure of one of the mortgages, the last executed, which secured a note bearing date February 10, 1902. The respondent, Mrs. Gilbreath, here contends that a portion of the land conveyed by the mortgage in equity belonged to her, notwithstanding the legal title to it was in her husband, her co-respondent, the mortgagor. This contention is based upon the theory that her husband used her money to pay for the land claimed by her and that the complainant is chargeable with notice of her equity growing out of that fact. In other words, she, by her cross-bill, seeks to establish a resulting trust in a certain part of the land conveyed by her husband's mortgage to the complainant. In order to accomplish this, it was incumbent upon her not only to aver the facts out of which the trust originated with distinctness and precision, but to prove the averment by "clear, full and convincing evidence". *McCall v. Rogers*, 77 Ala. 349; *Shelton v. Aultman*, 82 Ala. 315, 318, 8 South. 232. We have only to direct attention to the averment of the cross-bill to see that they are wholly insufficient, when tested by the rule declared in the cases above cited, to afford the relief sought. Furthermore, if by any sort of construction its averments could be held to be sufficient (which they are not), they are not established by that degree of proof required.

We are next asked to review the order

of the chancellor denying the petition of the respondent, Sam Gilbreath, made at a term of the court held subsequent to the one at which the final decree was rendered foreclosing the mortgage. The matters involved in that petition, occurring as they did, after the final decree was rendered, as did the ruling on it, are clearly not reversible upon appeal from that decree. And as an examination of the record does not disclose that this appeal was prosecuted from that order, but that it is prosecuted from the decree foreclosing the mortgage, the order is not before us for revision. *Chicago Portrait Co. v. Robbins*, 42 South. —¹ It is not insisted on the part of appellant, Sam Gilbreath, that an error was committed in the rendition of the final decree as to him. Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

NASHVILLE, C. & ST. L. RY. v. REYNOLDS.

(Supreme Court of Alabama. April 28, 1906.
Rehearing Denied June 30, 1906.)

1. NEGLIGENCE—PLEADING—COMPLAINT.

In an action to recover damages for alleged negligence, the complaint is sufficient if it alleges a duty owing to plaintiff by defendant.

[Ed. Note.—For cases in point, see vol. 87, Cent. Dig. Negligence, §§ 177, 178.]

2. RAILROADS — CROSSING ACCIDENT — COMPLAINT.

Plaintiff alleged that defendant's servants ran its locomotive and cars over a public highway-crossing on a certain day at a rapid rate of speed, and thereby caused plaintiff's mules to be frightened, plunge, and run, so that plaintiff was thrown from his wagon as he was approaching the crossing within a few feet of the track, whereby plaintiff was seriously injured, to his damage, etc. Another count alleged that plaintiff was riding on a wagon drawn by two mules on a highway, and as he approached the crossing he looked and listened to discover any danger, but discovered none until his team was very near the track, when defendant negligently ran an engine and train at a rapid rate of speed over the crossing, which caused plaintiff's mules to become frightened, and to run and plunge, by which plaintiff was thrown to the ground, and seriously injured, etc. *Held*, that such counts were not demurrable for indefiniteness of the negligence averred, for failure to show how or in what manner the running of the train across the public road at a high rate of speed caused plaintiff's mules to become frightened and plunge, or for failure to aver that plaintiff stopped as well as looked and listened.

3. SAME—PLEAS.

In an action for injuries to plaintiff by his mules becoming frightened by defendant's train as they approached a crossing, defendant pleaded that plaintiff was guilty of contributory negligence in approaching the crossing with the train in full view, which caused the team to become frightened and run away; that the failure of defendant's servants to blow the whistle or ring the bell was not the proximate cause of the injury because plaintiff could see or hear the train approaching the crossing at such a distance

therefrom that he could have stopped the team in a place of safety, and that defendant's servants were operating the train in the usual and customary manner among well-regulated and well-equipped railroads, and that plaintiff was approaching the crossing with no intention of crossing over the track, and that the blowing of the whistle or ringing of the bell was therefore unnecessary, and not required by law. *Held*, that such pleas were demurrable for failure to state facts showing that plaintiff was bound to stop, look, and listen when the mules were frightened; that plaintiff was approaching the track, or that he failed to use his senses, and also because they did not confess and avoid the allegations of the complaint, nor show that plaintiff could have discovered the approach of the train by a reasonable use of his senses before his team was frightened, nor that plaintiff could have stopped his team after he could have discovered the approach of the train by a reasonable use of his senses, nor allege a state of facts casting on plaintiff any duty to stop before his team was frightened by the approach of the train.

4. EXCEPTIONS, BILL OF—ALLOWANCE—REFUSAL TO SIGN—APPLICATION TO SUPREME COURT—STATUTES.

Gen. Laws 1903, p. 396, provides that if a judge fail or refuse to sign a bill of exceptions, he is guilty of a high misdemeanor, and that the Supreme Court must receive such evidence of the facts as may be deemed by it satisfactory and proceed to hear the cause as if the bill had been signed by the judge, but that application must be filed in the Supreme Court to establish such a bill within 30 days after the refusal or failure of the judge to sign the bill. Gen. Laws 1903, p. 398, declares that if the judge dies, resigns, is impeached, or his term of office expires, or if for other good cause he does not sign a bill of exceptions within the proper time, the bill may be established in the Supreme Court, but that the application must be filed on or before the next call of the division of said court of the causes of the county in which the case was tried after the death, etc., and in no case can such application be filed after a year from the rendition of the judgment or decree. *Held*, that where a judgment was rendered February 9, 1904, and on March 4th, defendant was given 60 days in which to prepare and tender a bill of exceptions, and an additional 10 days was allowed on April 30th, and the bill was signed May 2d, after which the act creating the court was declared unconstitutional, the establishment of the bill by the Supreme Court was within the first act, and could not therefore be performed after the time specified therein.

Appeal from Circuit Court, Madison County; Paul Speake, Judge.

"Not officially reported."

Action by Robert F. Reynolds against the Nashville, Chattanooga & St. Louis Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of damages by appellee against appellant. Count 1 of the complaint is as follows: Plaintiff claims of the defendant \$1,999 as damages for that on and prior to the 20th day of November, 1901, the defendant was operating a railroad extending from the city of Huntsville, in a northerly direction through said Madison county into the state of Tennessee, and by its agents or servants ran locomotive engines and cars by steam power over and along said road: that the track of said railroad crossed a public road in Madison county known as the "Me-

¹Rehearing pending.

Meridianville Pike" at a place near a store known as "Kelly's Store"; that on said 28th day of November, 1901, plaintiff was riding in his wagon drawn by two mules on said public road going in a northerly direction, and when he had driven said wagon on said road within a few feet of said railroad track on said public road, the defendant, by its agents or servants, negligently ran a train of cars at a rapid rate of speed on its said track across said public road, and thereby caused said mules to be frightened, and plunge, or run so that plaintiff was thrown from said wagon to the ground, whereby he was caused serious bodily injury and pain, and plaintiff's said wagon was broken and injured, and the harness attached to said mules was injured and broken, all to plaintiff's damage in the sum of \$1,990. Count 4. The plaintiff claims of the defendant the further sum of \$1,999 as damages, for that on and prior to the 28th day of November, 1901, defendant was operating a railroad as aforesaid, and propelled engines and cars by steam power over and along said railroad, the track of which railroad crossed said public road at the place aforesaid, that on the 20th day of November, 1901, plaintiff was riding on his wagon drawn by two mules on said Meridianville Pike, going in a northerly direction, and as he approached the place on said public road where said railroad track crosses he duly looked and listened to discover any danger, but discovered no danger in making the crossing until his team was very near to the railroad track, when said defendant negligently ran an engine and train of cars at a rapid rate of speed across said public road, and thereby caused said mules to become frightened and to run or plunge so that plaintiff was thrown from said wagon to the ground. He was caused serious bodily injury and pain and mental distress, and plaintiff's said wagon was broken and injured to his loss in the sum of \$50, and his harness was broken and injured to his loss in the sum of \$30, and plaintiff was put to divers expenses and trouble, all to plaintiff's damage in the sum of \$1,990.

The defendant interposed demurrers to these counts as follows: (1) Said counts are vague and indefinite as to the negligence averred therein, in that they fail to set out in what the negligence consists. (2) Because said counts fail to state the cause of action against this defendant in this, that said count fails to show how or in what manner the running of the train of cars across the public road at a rapid rate of speed caused the plaintiff's mules to frighten and plunge. (3) The defendant demurs to the fourth count of the complaint because said count fails to aver that the plaintiff stopped as well as looked and listened. These demurrers being overruled, the defendant filed the plea of the general issue, and the following special pleas. (4) That the plaintiff was himself guilty of

negligence which proximately contributed to his injury, in this; that the plaintiff at the time of the injury was approaching the railroad crossing for the purpose of crossing, which crossing was well known to him; that the train was in full view; that if he had used his senses, he could not have failed to see it; and notwithstanding this, he drove his team near to the crossing, and the approaching train which caused his team to frighten and run away, which was the cause of the alleged injury to the plaintiff. * * *

(12) That the failure to blow the whistle or ring the bell by the defendant's employes as averred in the complaint was not the proximate cause of the injury to the plaintiff, because as the plaintiff approached the crossing, he could see or hear the train approaching at such distance therefrom where he could have stopped his team in a place of safety, and he was thereby thoroughly warned of the approach of the train as if the bell were rung or the whistle sounded. But the plaintiff failed to stop his team, and drove within such close proximity to the railroad crossing as to cause his team to become frightened. * * * (14) That the defendant's servants were operating the train at the time of the alleged injury in the usual and customary manner among well-regulated and well-equipped railways, and that the plaintiff was approaching or coming in the direction of the crossing of the public road and the railway track with no intention of crossing over said track, and the blowing of the whistle or ringing of the bell was unnecessary, and not required by law.

The plaintiff interposed the following demurrers to plea 4: It does not allege a state of facts casting upon plaintiff the duties to stop, look, and listen. It does not allege that plaintiff went upon the track of defendant's railway. It fails to allege that plaintiff was at a point in the road where he was required to stop, look, or listen when the mules were frightened. It does not show that plaintiff was approaching the track. It does not show that plaintiff failed to use his senses. To pleas 12 and 14, said pleas do not confess and avoid the allegations of the complaint. They put in issue no allegation of the complaint. They contain matter embraced by the plea of the general issue. They do not show that plaintiff could have discovered the approach of the train by a reasonable use of his senses before his team was frightened by the approaching train. They do not allege or show that plaintiff was attempting to cross the track, or was approaching it for the purpose of crossing it. It does not show that plaintiff could have stopped his team after he could have discovered the approach of the train by a reasonable use of his senses. They do not allege a state of facts casting upon plaintiff any duty to stop before his team was frightened by the approach of the train. The judgment appears to have been render-

ed on the 9th day of February, 1904. On March 4, 1904, as shown by the judgment, the defendant was given 60 days in which to prepare and tender a bill of exceptions. On April 30th, 10 additional days were allowed. The bill of exceptions was signed on the 2d day of May, 1904. After the signing of the bill, the act creating the Sixteenth Circuit of which Judge Paul Speake was judge was declared unconstitutional, and application is made to this court to establish the bill of exceptions.

Oscar R. Hundley, for appellant. Walker & Spraggins, for appellee.

ANDERSON, J. "In an action to recover damages for alleged negligence, the complaint is sufficient if it alleges a duty owing the plaintiff by defendant." *L. & N. R. R. v. Maybury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620. Without determining the sufficiency of counts 1 and 4, they were not subject to the grounds of demurrers assigned. Plea 4 as amended and 12 and 14, were subject to the demurrer interposed, and the ruling of the trial court thereon was free from error. The act of 1903 (Gen. Laws 1903, page 396) as to the establishment of bills of exceptions, applies to this case and the facts do not bring it within the influence of the Act on page 398. The motion to establish the bill of exceptions was, therefore, not made in time.

The judgment of the circuit court is affirmed.

All the Justices concur.

HOBBS v. LONG DISTANCE TELEPHONE & TELEGRAPH CO.

(Supreme Court of Alabama. June 5, 1906. Rehearing Denied July 6, 1906.)

1. EMINENT DOMAIN—USE OF HIGHWAY FOR TELEPHONE LINE.

A telephone line along the margin of a highway is not an additional burden, entitling the abutting owner to compensation.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 312.]

2. INJUNCTION — JURISDICTION — REMEDY AT LAW.

Even if the abutting owner on a highway is entitled to compensation for the cutting of trees thereon in the construction of a telephone line, his remedy at law is adequate, and he is not entitled to injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 16.]

Tyson and Denson, JJ., dissenting.

Appeal from Chancery Court, Limestone County; W. H. Simpson, Chancellor.

"To be officially reported."

Suit by T. M. Hobbs against the Long Distance Telephone & Telegraph Company. From an adverse decree, complainant appeals. Affirmed.

W. R. Walker, James E. Horton, Jr., and H. C. Thach, for appellant. Erle Pettus, M. K. Clements, and E. W. Godbey, for appellee.

SIMPSON, J. This was a bill filed in the chancery court by appellant (complainant) against appellee (defendant) alleging that defendant was engaged in the construction of a telephone line across certain lands owned by complainant, and seeking to enjoin further work on the same until payment should be made to the complainant, as compensation for damages to said lands. The defendant filed an answer denying the allegations of the bill, but alleging that it was engaged in constructing said line along the margin of a public road which runs through complainant's land, making as an exhibit, a map which shows the location of said line, showing that six trees on the line and a little underbrush will be cut, which, it is alleged, are practically of no value, and alleging that when cut, the same will be left on the land for complainant. Demurrers were also filed to the bill and a motion to dismiss for want of equity. A preliminary injunction was granted, and subsequently the chancellor overruled the demurrers, and motion to dismiss the bill, and dissolved the injunction, and it is from this decree that the appeal is taken by the complainant. A cross-appeal is taken by the defendant, but subsequently dismissed by the cross-appellant, so that the only question raised is the correctness of the chancellor's decree in dissolving the injunction.

While, in the formative period of our system of laws, the courts were partly judicial and partly quasi legislative, meeting each case on its own merits, and thus building up the customs which became the law; yet the principles of the law came to us in their entirety, and, under our written constitutions, it is a cardinal principle that the judicial and legislative departments shall be entirely separate. Nevertheless, it has been true that, in this wonderful age of inventions, the burden rests upon the courts continually of applying the principles of the law to situations and complications of human affairs hitherto undreamed of, and it sometimes becomes a matter of great difficulty to determine just how to preserve those principles and yet meet the demands of justice. Since the days of the Cæsars, public highways have received the careful attention of all governments, not only for the purpose of providing ways by which armies could be moved and the people travel, but for the purpose of opening up avenues of communication by which reports could be speedily brought to the capital, and the interchange of commerce promoted. The laws of Congress have provided for post roads, etc., before the telephone was known, provided for the same privileges for telegraph companies, as were given to railways in using the public lands, and, in later days, it has developed the exceedingly valuable system of "post routes" and free mail delivery along the public roads of the country, so that not the least important function of the public roads of the country is the transmission of messages from place to

place. The rights of the abutting owners, and the question as to what is or is not an additional servitude, have furnished material for a vast number of conflicting decisions, so numerous and so conflicting that it would extend an opinion beyond all reasonable limits, to attempt an analysis of them, yet a careful examination of them will show a gradual development of the principles of the law, in order to accommodate them to the progress of events and the onward march of civilization.

Thus, even in as late and excellent a work as that of Judge Dillon on Municipal Corporation, the rights of surface railways on the streets, and the question as to whether they constitute an additional burden, are spoken of as unsolved problems. And in a note the wise words of Chief Justice Hale are quoted, in which he advises patience in solving these questions, and says: "Time is the wisest thing under heaven. * * * It discovers such varieties of emergencies and cases, and such inconveniences in things that no man would otherwise have imagined," and the author of the note goes on to remark, among other things, that "good fruit in the law, as in the natural world, is the product alone of patient cultivation." In a second note the then recent case of *Taggart v. Newport St. Ry. Co.* (R. I.) 19 Atl. 326, 78 L. R. A. 205, is quoted, to the effect that an electric street railway, with its poles and wires, was not an additional servitude. 2 Dillon on Munic. Corp. § 734c, and notes.

On this subject, a recent writer states that the judgment of "substantially all of the courts of last resort in the United States," except New York, is that the "ordinary electric street railway with trolley wire," etc., is not an additional burden on a street. *Nellis on Surface Railroads*, pp. 134, 135; *Elliott on Roads & Streets* (2d Ed.) pp. 754, 757, §§ 698, 699.

The progress of thought on this subject is succinctly stated in *Joyce on Electric Law*, § 341; *Keasly on Electric Wires*, §§ 124, 145, conclusion on p. 178.

So, on the subject of erection of poles for electric lighting, on streets, after some contrary decisions, the evident necessity is so great that it has come to be generally understood that it is not an additional burden, though there still remains, in the decisions and text-writers, the impression that it is saved by the fact that the light companies generally light the streets as well as private dwellings, and, now, a recent text-writer says: "The distinction, however, is not made with respect to pipes for lighting by gas. It seems to be now conceded that city streets may be used for gas pipes, without compensation to abutting owners, whether it be for the purpose of supplying private houses, or for the purpose of lighting the streets and public places. The pipes used for both purposes are generally the same; the purpose is,

in a sense, necessary and general, and the streets are the most convenient, if not the only means of access. * * * The same conditions apply to the electric light. * * * If the purpose is a public purpose for which the streets may be used, it would seem that compensation could not be properly required for the mere occupation of the soil by a pole any more than by a gas pipe." *Keasly on Electric Wires*, § 112, p. 139. Other writers have also called attention to the fact that the streets are constantly used for fire plugs, fire alarm stations, and other things necessary for the protection and good order of the city; yet no court would, for a moment entertain the idea that they are an additional burden, for which the abutter could claim compensation. The last-named writer, we think, suggests the practical solution of these matters, when he says: "It does not follow that the landowner is without redress, if poles be put up so as to interfere with his access, or even as to be inconvenient or unsightly, or if wires be hung so as to be dangerous, or so as to prevent ready access in case of fire." *Keasly on Elec. Wires*, p. 139, § 113. "It might tend to a reconciliation of the cases and the adoption of a uniform rule, if the question of new burden were left on one side, and the attention were directed to the practical question whether or not the rights and privileges of the abutting owner * * * were affected." *Id.* p. 177, § 145. "When the property is taken for a public road or street, although technically the fee remains in the abutting owner, yet he cannot interfere with the surface, and it would seem that, practically an additional burden, such as would justify an action on his part, should be something which either interfered with or made inconvenient his enjoyment of what remained to him in the land. As to obstructing the road, that would be a matter in which he had no greater right than the public generally, but if the new use impaired his proper use of his own property, in any manner, then, if it could be said to be a use not included within the original grant, it would be a matter for which he would be entitled to compensation." *Id.* p. 153, § 124.

Judge Elliott says that "the owner who dedicates ground for a street creates an easement extensive enough to permit the city to make any legitimate public use of it which does not impair the right of passage or the right of ingress and egress to and from the adjoining property." *Elliott on Roads & Streets* (2d Ed.) p. 417, § 407.

The New Jersey court of chancery declares that "his right [the abutter on a public highway who holds the fee therein] is subordinate to that of the public and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest;" also (quoting from Justice Depue of New York Court of

Errors and Appeals) "with respect to lands over which streets have been laid, the ownership, for all substantial purposes is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest." *Halsey v. Railway Co.*, 20 Atl. 860.

Courts are not organized to decide academic questions, but to decide upon practical rights of the people, and remedy their real wrongs. It is in accordance with these principles that the courts have held that a steam railroad is an additional burden, because it renders the property of the abutting owner less habitable; while, as shown, the evident trend is to hold that electric lines are not. As said by the Supreme Court of Michigan: "When they do not interfere with the owner's access to and use of his land, we see no reason why they should be held to constitute an additional servitude." *Joyce on Elec. Law*, § 336; *Detroit City Ry. Co. v. Mills*, 85 Mich. 634, 48 N. W. 1007.

We have indulged in these general remarks, because, as Mr. Cook says, on the subject of telegraph and telephone companies: "The decisions are in irreconcilable conflict." 3 *Cook on Corp.* (4th Ed.) § 933. And Mr. Keasly says: "It is not yet safe to predict which of the two views will finally prevail." *Joyce on Elec. Law*, § 306.

Without referring to the cases, which will be found collated on both sides in the Tennessee case, to which we shall hereafter refer, our conclusion is that the public roads, when dedicated, were dedicated, not merely for travel on foot or on animals or in vehicles, but for locomotion by any means that should be afterwards discovered, and for communication between the citizens of the country, by carriers, on foot, or riding, or by any other means that might be found suitable and best. The mails could be sent over them in any way that was found most expeditious. If it had been found advisable to send the mails in metal boxes swung on wires far above the heads of the people, in place of in stages and by carriers, no one would have supposed it was an additional burden upon the abutting owner. So, if it is found better to string wires high above the roads and convey messages by that mysterious something which is in the atmosphere and which seems to be as exhaustless as the bounties of Providence, it is accomplishing one of the great purposes for which public roads are dedicated. Some of the cases have drawn a distinction between urban and suburban roads, but in regard to wires and posts there would be more reason for declaring them burdensome in a city (where they accumulate in such numbers as to interfere with the operation of engines in extinguishing fires) than in the country where there are but few and far away from houses. It has been said that "It is hard to distinguish between a rural and an urban street, and that the nature of a street changes insensibly from the former

to the latter, and a rule of property which depends on such a shifting and indefinite distinction is not likely to prove satisfactory." *Keasly on Elec. Wires*, § 108.

We may add that the uses of the telephone are as important in the country as in the city, and it does not take a prophet's ken to see that in the near future they are to perform an important part in bringing the rural districts within the beneficial enjoyment of city improvements. The argument of Justice Devens of the Massachusetts Supreme Court is satisfactory to us on this general subject, and we think that the qualification which we make, that if the abutting owner shows that there will be actual and substantial injury to his property, he is entitled to compensation, meets the objections made in the dissenting opinion. *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7.

This matter of the rights of abutting owners has been recently considered by the Supreme Court of Tennessee in an opinion, a certified transcript of which is furnished us, and that court, after giving long lists of the cases on each side of the controversy, takes the ground that one important function of the streets and roads of the country is to furnish means of communication, and that the telephone is only a new and very important invention for accomplishing that end, and does not constitute an additional burden. *S. J. A. Frazier and Wife v. East Tenn. Telephone Co.* (Supreme Court of Tenn. September Term, 1905) 90 S. W. 620.

Coming to the question of injunctive relief: It will be borne in mind that the right is granted by statute to telegraph and telephone companies to construct their lines "along the margin of the public highways." Code 1896, § 2490.

This right is said to "depend either on whether such line constitutes an additional servitude entitling him to compensation (which we have held it does not) or whether his right of ingress or egress have been impaired, or whether, in some other way, he has been injured in his property or rights. * * * Nor will an injunction be granted where the injuries are merely consequential, since a court of law is the proper tribunal in such a case." *Joyce on Elec. Law*, § 1022.

The Court of Errors & Appeals of New Jersey says: "It is impossible to emphasize too strongly the rule so often enforced in this court, that a preliminary injunction will not be allowed where either the complainant's right, which he seeks to have protected, in limine by an interlocutory injunction, is in doubt, or where the injury which may result from the invasion of that right is not irreparable." *Halsey v. Ry. Co.* (N. J. Ch.) 20 Atl. 861; *Hagerty v. Lee*, 45 N. J. Eq. 255-256, 17 Atl. 826.

Our own court has expressed itself very strongly as to the absolute right of the state to control and use the public thoroughfares for all public purposes, and against the right to enjoin a public improvement authorized

thereon. *Perry v. N. O. M. & C. RR.*, 55 Ala. 413, 28 Am. Rep. 740; *Western Ry. of Ala. v. A. G. S. Ry.*, 96 Ala. 272, 281, 11 South. 483, 17 L. R. A. 474.

In a more recent case, it has declared the absolute right of a municipal corporation to authorize a telephone company, in stringing its wires, to cut trees on the sidewalk, without liability to the abutting owner. *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 81 L. R. A. 193, 55 Am. St. Rep. 930.

In this case it is the right of the public authorities to cut all the trees on the public roads or to authorize them to be cut, the abutting owner being merely entitled to the wood when felled. And, at any rate, even if the complainant has a right to compensation for the trees, his remedy at law is adequate and complete.

The decree of the chancery court is affirmed.

WEAKLEY, C. J., and HARALSON, DOWDELL, and ANDERSON, JJ., concur.

TYSON, J. I cannot concur in the view expressed by my brothers. I prefer to follow the lead of the great weight of authority holding that poles and wires of a telephone company erected along a public country highway is an additional servitude upon the fee for which the owner must be compensated. I do not regard it as necessary to repeat the reasons for this holding, since they are able, and in my opinion, unanswerably stated in the cases upon which I rely. These cases may be found collated in note on pages 721, and 722 of 24 L. R. A.; note on pages 261-263 of 106 Am. St. Rep. See, also, Elliott on Streets, §§ 397, 400, et seq.; 2 Dillon on Muni. Corp. § 698a. We need not have any apprehension of depriving people of the use of this quasi public utility by this holding. Indeed, in those states where the cases cited above maintained this principle, the telephone systems, urban and suburban, are far more extensive than in this. The requirement of telephone companies to pay just compensation to the owners of land adjoining the public country roads does not seem to have been an impediment in the way of their extensive construction and operation; but even if that requirement is an impediment, this could be no possible justification for depriving the owner of his constitutional guaranty.

DENSON, J., concurs in these views.

HORTON v. LONG DISTANCE TELEPHONE & TELEGRAPH CO.

(Supreme Court of Alabama. June 7, 1906. Rehearing Denied July 6, 1906.)

Appeal from Chancery Court, Limestone County; W. H. Simpson, Chancellor.

"Not officially reported."

Suit by James E. Horton, Sr., against the

Long Distance Telephone & Telegraph Company; From an adverse decree, complainant appeals. Affirmed.

W. R. Walker, James E. Horton, Jr., and H. C. Thach, for appellant. Erle Pettus, M. K. Clements, and E. W. Godbey, for appellee.

SIMPSON, J. Affirmed on the authority of *Hobbs v. Long Distance Telephone & Telegraph Co.* (Ala.) 41 South. 1003.

TYSON and DENSON, JJ., dissent.

RICHARDSON v. LONG DISTANCE TELEPHONE & TELEGRAPH CO.

(Supreme Court of Alabama. June 7, 1906. Rehearing Denied July 6, 1906.)

Appeal from Chancery Court, Limestone County; W. H. Simpson, Chancellor.

"Not officially reported."

Suit by Minnie H. Richardson against the Long Distance Telephone & Telegraph Company. From an adverse decree, complainant appeals. Affirmed.

W. R. Walker, James E. Horton, Jr., and H. C. Thach, for appellant. Erle Pettus, M. K. Clements, and E. W. Godbey, for appellee.

ANDERSON, J. Affirmed on the authority of *Hobbs v. Long Distance Telephone & Telegraph Co.* (Ala.) 41 South. 1003.

TYSON and DENSON, JJ., dissent.

PRYOR v. LONG DISTANCE TELEPHONE & TELEGRAPH CO.

(Supreme Court of Alabama. June 7, 1906. Rehearing Denied July 6, 1906.)

Appeal from Chancery Court, Limestone County; W. H. Simpson, Chancellor.

"Not officially reported."

Suit by Ida H. Pryor against the Long Distance Telephone & Telegraph Company. From an adverse decree, complainant appeals. Affirmed.

Thomas C. McClellan, for appellant. Erle Pettus, M. K. Clements, and E. W. Godbey, for appellee.

SIMPSON, J. Affirmed on the authority of *Hobbs v. Long Distance Telephone & Telegraph Co.* (Ala.) 41 South. 1003.

TYSON and DENSON, JJ., dissent.

SOUTHERN RY. CO. v. NELSON.

(Supreme Court of Alabama. April 3, 1906. On Rehearing, June 30, 1906.)

APPEAL—JUDGMENT—ORDER DENYING NEW TRIAL.

Where an appeal is taken from the judgment on a verdict of the jury and the bill of exceptions shows a motion for a new trial, the overruling of such motion, and an exception re-

served, the denial of the motion for a new trial may be reviewed on appeal from the judgment without any formal order or judgment overruling such motion in the bill of exceptions or elsewhere.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2944-2947.]

Appeal from Circuit Court, Limestone County; W. R. Walker, Special Judge.

"To be officially reported."

Action by William W. Nelson against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed on rehearing.

Humes & Speake and Cooper & Foster, for appellant. Callahan & Harris, for appellee.

DOWDELL, J. The complaint as originally filed contained five counts, and was subsequently amended by the addition of two other counts. The cause was submitted to the jury on the first count; the remaining counts having been eliminated or withdrawn. The first count proceeded upon the theory of a breach of duty by the defendant as a common carrier to the plaintiff while the latter was being transported as a passenger on one of its trains. This count sufficiently avers the relationship of passenger and carrier, as also the duty owing to the plaintiff for the alleged breach of which damages are claimed. In such case the relationship of carrier and passenger being averred, it is not necessary to allege that the servant or agent who violated the duty imposed by law on the defendant to its passenger was acting within the scope of his authority at the time of the alleged breach of duty. *Birmingham Railway & Electric Co. v. Baird*, 130 Ala. 334, 30 South. 456.

The demurrer to the first count of the complaint was properly overruled. The contention of counsel for appellant that there was no breach of duty on the part of the railroad company, for that the appellee, Nelson, was carried safely and expeditiously between the terminus of his journey, is without merit. The carrier owes to its passenger something more than the duty of safe and expeditious carriage to the passenger's point of destination. As was said in *Birmingham Railway Company v. Baird*, supra: "As to them [the passengers], the contract of carriage imposes upon the carrier the duty, not only to carry safely and expeditiously between the terminus of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And this same duty is, of course, upon the carrier's agents. They are under the duty of protecting each passenger from avoidable discomfort and from insult, from indignities, and from personal violence. And it is not material whence the disturbance of the passenger's peace and comfort and personal security and safety comes or is threatened. It may be from another passenger or from

a trespasser, or other stranger, or from another servant of the carrier, or a fortiori from the particular servant upon whom the duty of protection peculiarly rests. In all such cases the carrier is liable in damages to the injured passenger." Here the wrong complained of was that the defendant's conductor, while the plaintiff was yet a passenger on defendant's train, falsely charged that the plaintiff had refused to pay his fare for his carriage as a passenger on said train, and upon arriving at the point of plaintiff's destination, viz., the city of Huntsville, immediately upon plaintiff alighting from the car pointed him out to police officers for the purpose of having him arrested. The relationship of passenger and carrier is not necessarily terminated by the safe transportation of the passenger to the carrier's depot or station at the destination of the passenger's journey, and not until the passenger has had reasonable time after disembarking from the train to leave the depot premises of the carrier. 2 Am. & Eng. Ency. Law (1st Ed.) 745. Here the alleged insult, indignity, or wrong complained of was perpetrated upon the plaintiff by the defendant's conductor immediately upon the plaintiff alighting from the train at the defendant's station or depot in the city of Huntsville. The relationship of carrier and passenger had not at this time been terminated. It is alleged, and there is evidence tending to support the allegations, that the defendant's conductor accused or charged the plaintiff with having ridden on the train from Decatur to Huntsville and with refusing to pay his fare, and was instrumental in procuring the arrest of the plaintiff on said charges. If the accusations were false, then there can be no doubt of the wrong perpetrated by the defendant's servant, and that it was such an indignity, insult, and injury to the plaintiff as might fix a liability on the defendant. *Birmingham Railway & Electric Company v. Baird*, supra; *A. G. S. R. R. Co. v. Tapia*, 94 Ala. 232, 10 South. 236. There was evidence which tended to support each and every allegation in the first count of the complaint; and, while there was a conflict in the evidence, yet the weight of the evidence in favor of the defendant was not so great as to justify us in holding that the trial court committed an error in overruling the defendant's motion for a new trial.

The pleas of the defendant, which were stricken from the file on the motion of the plaintiff, set up no matters of defense which were not available under the plea of the general issue. Consequently there was no injury to the defendant in striking the pleas. Error without injury constitutes no ground for reversal. *Sou. Ry. Co. v. Wilson*, 138 Ala. 510, 35 South. 561. It was open under the evidence for the jury to find that the plaintiff's fare for his transportation from Decatur to Huntsville was paid to and

accepted by the conductor. It is immaterial what the amount paid was if it was accepted by the conductor as fare for passage of the plaintiff. This created the relationship of passenger and carrier. There was, therefore, no error in the giving of the charge requested by the plaintiff. *A. G. S. R. R. Co. v. Yarbrough*, 83 Ala. 241, 8 South. 447, 8 Am. St. Rep. 715; 2 *Wood's Railroad Law*, pp. 1038, 1039, and note. If the defendant supposed that this charge had any misleading tendency, it could have been avoided by the asking of an explanatory charge. There was no error in the refusal of written charges 8, 14, and 19, requested by the defendant.

We have considered the questions raised on the admission and rejection of evidence, and we are unable to see that the trial court committed any error in its rulings. It follows, therefore, there being no reversible error in the record, the judgment of the circuit court should be affirmed on the motion.

On Rehearing.

WEAKLEY, C. J., and HARALSON, SIMPSON, and ANDERSON, JJ., are of the opinion that the verdict is so contrary to the great preponderance of the evidence and to the reasonable and natural inferences to be drawn therefrom that they are unwilling to affirm the judgment, and accordingly hold that a new trial should have been granted.

TYSON, DOWDELL, and DENSON, JJ., adhere to the original opinion, and hold that the motion for a new trial was properly overruled.

Reversed and remanded.

WEAKLEY, C. J. The appellee has applied for a rehearing upon the ground that this court is without jurisdiction to review the action of the circuit court in overruling the motion for a new trial; and this contention rests upon the fact that no formal judgment of the circuit court overruling the motion appears either in the bill of exceptions or record proper. We have held in several cases, where an appeal purports to be taken from a judgment granting a motion for a new trial, that such judgment must appear in the record proper; otherwise there is nothing to support the appeal. Where, however, as in this case, an appeal is taken from the judgment on the verdict of the jury, and the bill of exceptions shows a motion for a new trial, the overruling of such motion, and an exception reserved to the action of the court, there is a judgment to support the appeal; and on the appeal from the judgment on the verdict the ruling of the lower court denying a new trial may be reviewed, without any formal order or judgment in the bill of exceptions or elsewhere. *Wilk v. Key, Simmons & Co.*, 117 Ala. 285, 23 South. 6, Code 1896, § 434.

Application for rehearing overruled. All the Justices concur.

HARRIS et al. v. STEPHENSON.

(Supreme Court of Alabama. June 14, 1906.
Rehearing Denied June 30, 1906.)

1. JUDICIAL SALES—VACATION—COLLATERAL ATTACK—DILIGENCE.

Where property has been sold under a chancery decree, and same has been affirmed, it will not be set aside in a collateral proceeding unless the party seeking such relief acquiesces himself of want of diligence in resisting the confirmation.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Judicial Sales, § 89.]

2. EXECUTION—SALE—SETTING ASIDE—INADEQUACY OF PRICE.

Where a bill sought to set aside a sale of land under execution for inadequacy of price, but showed on its face that, though the sale included all of the tract, the most valuable part thereof had been previously sold under a chancery decree, which sale had been confirmed, and there was nothing in the bill to negative the fact that the amount paid at the execution sale was less than the value of the land sold, which was not covered by the chancery sale, the bill was demurrable.

3. ESTOPPEL—JUDICIAL SALE.

While the levy and sale of property by a person in general estops him from denying that the other party has a leviable interest therein, such doctrine does not extend to the divestiture of rights under previous sales made under different process.

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

"To be officially reported."

Bill by Richard L. Stephenson against C. C. Harris and others. From a decree in favor of plaintiff, defendants appeal. Reversed and rendered.

This was a bill filed by appellee against appellants seeking to have set aside the sale of certain land made by the register in chancery on the 22d day of February, 1897, the sale of a part thereof on May 28, 1903, and the sale of the entire tract on November 23, 1903, unless the defendant Harris will credit his said judgment or deficiency decreased with the just and fair value of said land, and unless said credit is made that the court will order all of said lands to be again sold free from any incumbrance or clouds cast on the same by any of the sales heretofore made and for general relief. The allegations of the bill are that prior to February, 1897, complainant, Stephenson, was seised and possessed of 1 house and 10 acres of land off the north end of the N. E. $\frac{1}{4}$ of section 36, township 5, range 5, in Morgan county, said land being on the west side of the Decatur and Danville road; that on the 23d day of February, 1897, the register of the chancery court of Morgan county, pursuant to a decree of the court rendered on the 7th day of September, 1896, sold 1 house and 10 acres of land lying two miles southwest of Decatur, Ala., and being part of the northern end of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 36, township 5, range 5, in Morgan county, Ala.; that at said sale C. C. Harris became the purchaser of the land for the sum of \$50; that the sale was reported

to the court and by it confirmed; that under said sale Harris went into possession of said land by causing the tenant of orator to attorn to said Harris, although only a small part—about one-half or less—of orator's land had been actually sold at said sale; that on the 10th day of April, 1897, Harris filed in this court a bill seeking to reform the description of the land so as to make it contain the proper description of the land intending to be sold, but that on the 2d day of June this bill was dismissed out of court by Harris. The bill alleges that the sale included that part of the land containing the house and improvement which was worth a large sum of money, to wit, \$700 or \$800, and that said sale was for a grossly inadequate price owing in part to the defective description, and which said Stephenson in the bill above referred to says that, owing to the awkwardly expressed description, and the mistake in the distance in the town of Decatur, and the fact that complainant Stephenson repudiates said sale creates a cloud upon Stephenson's title and affects the market value of the land, orator avers that such description did affect the value of the land. The bill further alleges that on the 23d day of March, 1903, an execution was sued out upon a personal decree which said Harris had obtained in said chancery court proceedings after said credit on the mortgage indebtedness of the \$50 bid by Harris at the register's sale, and under the said execution and on the 20th day of May, 1903, the sheriff sold the S. $\frac{1}{2}$ of the aforesaid 10 acres at public outcry to said Harris for the sum of \$25; that said sum of \$25 was a grossly inadequate price for the land, as it was intended to include all of orator's land not previously purchased at the aforesaid register's sale, and that the two prices bid and paid were grossly inadequate for the property conveyed, the said sum being less than the amount of unpaid costs against the orator in the chancery suit; that on August 21, 1903, another execution was issued on the deficiency decree and on September 28, 1903, all lands belonging to orator was sold by the sheriff of Morgan county at public outcry and bid in by Harris for the sum of \$25, but upon application of the complainant this sale was set aside and held for naught; on the 19th day of October, 1903, another execution was sued out on the deficiency judgment levied upon the following described land (here follows a description of the land) and sold it at public outcry to C. O. Harris for the sum of \$250; that at said sale Harris read a written statement claiming all those parts of the land previously sold under the purchases made by him at said previous sale, although the sheriff announced in calling bystanders together that he was selling 10 acres of land and a valuable house, the said Harris claiming a part of the S. $\frac{1}{2}$ under deed made by sheriff in April, 1903, and claiming all that part sold under the

register's deed heretofore referred to. The other facts sufficiently appear in the opinion.

Callahan & Harris, for appellants. E. W. Godbey, for appellee.

ANDERSON, J. After a sale of property under a decree of the chancery court and a confirmation of said sale, the sale will not be set aside upon a collateral proceeding unless the party seeking relief against said sale acquits himself of want of diligence in resisting confirmation. "When he will stand acquitted depends upon all the circumstances of the particular case. While the court is unwilling that its decree or process shall be employed to work illegality, injustice, or oppression, and willingly intervenes to rectify a misuse or abuse of either by restoring parties to the condition in which they were before the wrongs occurred, it is only the diligent they are active to serve." *Sayre v. Elyton Land Co.*; 73 Ala. 101; *Watson v. Tromble* (Neb.) 50 N. W. 331, 29 Am. St. Rep. 495, and note. The bill in the case at bar does not aver any effort on the part of the complainant to resist the confirmation of the sale by the chancery court or set up any sufficient excuse for the failure to do so, and the demurrer proceeding upon this theory should have been sustained.

The bill seeks to set aside the sale made under execution of November 23, 1893, because the price was inadequate, but shows upon its face that the amount paid at said sale was not inadequate. It is true the sale included all of the tract, but the bill shows upon its face that the most valuable part thereof had been previously sold, under the chancery sale, which had been confirmed, and there is nothing in the bill to negative the fact that the amount bid at the execution sale was less than the value of the land sold, which was not covered by the chancery sale. The demurrer in this respect should have been sustained.

It is needless to consider the validity of the sale made in May, 1903, as it would be futile to order a resale of the lands then sold, as they were included in the sale made in November, which said last sale the bill does not satisfactorily impeach. "There can be no injury in a bill which seeks to do a vain and useless thing." *Gardner v. Knight*, 124 Ala. 273, 27 South. 298.

We do not think that the levy and sale under the execution sale of November, 1893, divested the appellant Harris of the right and title he acquired under the chancery sale, upon the doctrine of estoppel. As a rule the levy upon and sale of property by a person estops him from denying that the other has a leviable interest therein. But we do not understand this doctrine to extend to a divestiture of rights under previous sales, made under different processes. On the other hand, a party could never increase or improve his title by purchasing at subsequent sales, without relinquishing under

a former purchaser, if such a contention be sound.

According to appellee's contention the purchaser at a mortgage foreclosure sale could not sell the equity of redemption of the mortgagor, or purchase the same under an execution sale, without annulling his title under the foreclosure sale. In the case at bar all the land had not been sold under the first sale, and the said Harris had the right to subject the other land to the satisfaction of his execution, and the fact that it was levied upon and sold in its entirety in no way estopped him from claiming under the chancery sale so much of the land as was thereby conveyed to him under said chancery sale.

The decree of the chancellor is reversed, and a decree is here rendered sustaining the demurrer to the bill.

Reversed and rendered.

WEAKLEY, C. J., and TYSON and SIMPSON, JJ., concur.

BRESLER v. BLOOM.

(Supreme Court of Alabama. June 20, 1906.)

1. EQUITY — JURISDICTION — ADMINISTRATION OF ESTATE — TRANSFER TO EQUITY.

Any person entitled to share in the distribution of an estate is entitled to have the estate administered in a court of equity without assigning any special reason for transferring the estate to such court.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 51-62.]

2. SAME — RIGHTS OF REMAINDERMEN.

Where a bill by a remainderman to transfer the administration of an estate from the probate to the chancery court alleged that defendant, as administrator, had invested a part of the property bequeathed by the will in other property, and had taken the title in his own name absolutely in disregard of plaintiff's reversionary rights, it was no objection to the granting of the relief prayed that the will devised and bequeathed the property to defendant for life.

3. SAME — PLEADING — DEMURRER TO BILL.

Where the grounds of a demurrer were addressed to a bill as a whole the demurrer was properly overruled, if complainant was entitled to any relief under the bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 508.]

Appeal from Chancery Court, Lauderdale County; William H. Simpson, Chancellor. "To be officially reported."

Bill by Frankie A. Bloom against Asher E. Bresler. From a judgment for plaintiff, defendant appeals. Affirmed.

This was a bill filed by appellee seeking to remove the administration of the estate of Kate Bresler from the probate to the chancery court. Complainant alleges that she is a daughter of Kate Bresler, formerly Kate Jacobs; that her mother is dead, leaving certain real estate and personal property to appellant during his lifetime with the reversion to complainant at appellant's death, that aft-

er the marriage of complainant's mother to appellant she intrusted a large amount of funds to the care and custody of appellant in the manner and for the purposes stated in the written instrument made in the handwriting of complainant's mother, and attached as Exhibit A to the bill of complaint. A copy of the will is also attached. The bill also alleges that complainant's mother left a will, by the terms of which appellant was appointed guardian of complainant and executor of the will without bond, and that will had been probated and letters testamentary had been issued to appellant. That appellant has not filed an inventory of the goods, chattels, money, books, papers, and evidences of debt belonging to the estate of complainant's mother, and that appellant has made no settlement with complainant, and has filed no accounts and vouchers for a settlement of his trust. It is also alleged that the defendant has invested a part of the funds, about \$3,000, intrusted to him by complainant's mother in a part of lot 125 in the city of Florence, Ala., and has wrongfully taken the conveyance to said property in his own name, and that defendant has invested another part of the funds in lot 69 in the city of Florence, and has wrongfully taken the title to said lot in his own name. The prayer was for a removal of the administration into the chancery court; an order requiring appellant to file an inventory of all the property left by complainant's mother; the statement of an account showing the money belonging to the estate and intrusted to appellant, and by him invested in property in his own name, and an order decreeing that complainant has a resulting trust in the lots above mentioned, and to declare a lien thereon for the purpose of securing her reversionary interest in the funds so invested, and for other further and general relief. Attached to the bill are interrogatories to be answered by defendant. Exhibit A to the bill is in the following language: "Being of sound mind, I here state what I have trusted to my husband and it belongs to my child Frankie Jacobs [now Bloom]. I first gave him \$100, next \$1,000, next \$1,250 for house occupied by Mrs. Hooks, then gave him \$600 I got from Cohen, and \$1,000 from Mrs. McFarland, \$400 from Patterson at Pineapple, \$400 from Eldred, and \$170 from Joe Herz, the \$208 for two years' interest from Barnes on United States and Mr. Cohen owes me \$756 on house. This is all my daughter's money earned by her own father and myself, and if anything should happen to me, I wish some one would be kind enough to attend to this, and see my darling girl gets her property, besides he has had all the interest." A copy of the will was also attached, leaving to respondent for the term of his natural life all real estate and personal property except some personal property left to complainant, all of said real and personal property to revert to complainant at the death of respondent.

ent. Demurrers were interposed to the bill: (1) Complainant has plain and adequate remedy at law. (2) The bill shows that Kate Bresler gave all her personal property and real estate, including the personal property claimed to have been delivered to defendant in trust to defendant for the term of his life. (3) The will shows on its face that the money claimed to have been trusted to defendant for the use and benefit of complainant to have given and bequeathed to defendant for and during the term of his life. (4) The bill does not show that defendant had any notice or knowledge of the letter made Exhibit A to the bill. (5) The bill shows on its face that the moneys sought to be recovered, or for which a resulting trust is claimed, were given and bequeathed to defendant for and during his natural life. The court overruled these demurrers, and from this decree this appeal is prosecuted.

Emmett O'Neal, for appellant. John T. Ashcraft and W. H. Mitchell, for appellee.

DENSON, J. Any person entitled to share in the distribution of an estate has the right to have the estate administered in a court of equity without assigning any special equity for transferring the estate to such court. *Bromberg v. Bates*, 98 Ala. 621, 13 South. 557; *Id.*, 112 Ala. 363, 20 South. 786; *Ligon v. Ligon*, 105 Ala. 464, 17 South. 89; *Baker v. Mitchell*, 109 Ala. 490, 20 South. 40; *Greenhood v. Greenhood* (Ala.) 39 South. 299. It seems that the statement of this proposition should be a sufficient answer to the first ground of the demurrer to the bill. The fact that the will devises and bequeaths the property to the defendant during his life presents no obstacle to the assumption by a court of equity of the administration of the estate; especially is this so, when the bill is filed by the remainderman, and it is averred in the bill that the defendant has invested a part of the property bequeathed by the will in other property, and has taken the title in his own name absolutely, and in disregard of complainant's reversionary rights, thus making it easy and possible for defendant to dispose of the property to innocent third parties, and finally deprive the complainant of her rights under the will. *Bethea v. Bethea*, 116 Ala. 265, 22 South. 561.

The fifth ground of demurrer is a misconception of the purpose of the bill. But we would not be understood as holding that the complainant is entitled to relief that would deprive the defendant of the use of property devised or bequeathed him during his life. The averments of the bill nor the demurrers call for a construction of the exhibit to the bill marked "A." Nor is it necessary to determine the effect of the will with respect to Exhibit A. It may be said of all the grounds of the demurrer that they are addressed to the bill as a whole, and if the

complainant is entitled to any relief at all, the demurrer is properly overruled. *George v. Railroad Co.*, 101 Ala. 607, 14 South. 752. That the complainant is entitled to have the administration of the estate removed to the chancery court seems to be clear.

The decree overruling the demurrer must be affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

NEVILLE v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. CRIMINAL LAW—EVIDENCE—CAPACITY TO FORM CRIMINAL INTENT—INFANTS.

To overcome the presumption that a boy under 14 years old was incapable of forming the felonious intent to steal, testimony of witness that he knew him, that he was a bright boy mentally, and that he talked with good sense, is competent.

2. CRIMINAL LAW—CONFESSION.

Statement of defendant to witness, when returning the case of the stolen watch, that he did not take it, but that another took it, is not a confession.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1140.]

3. SAME—ARGUMENTATIVE CHARGE.

A requested charge that there is no evidence that counsel for the state asked witness a certain question before she was put on the stand, and the statement to this effect by the state's counsel should not be considered by the jury, is properly refused as being an attempt to reply to the remarks of the solicitor to the jury, and therefore a mere argument.

4. SAME — INSTRUCTIONS — ASSUMPTION OF FACT.

A charge, on a prosecution of a boy under 14 years old, that, in determining whether he had sufficient intelligence to entertain a criminal intent, the fact that he was a bright boy may be considered, is erroneous in assuming that he was a bright boy, and so invading the province of the jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1754-1758.]

5. SAME — INFANTS — CAPACITY TO COMMIT CRIME—INSTRUCTIONS.

A charge on a prosecution of a boy under 14 years old, hypothesizing the facts as to his mental capacity to commit a crime, is erroneous in fixing the time at the date of the trial, instead of at the time of the crime.

Appeal from Morgan County Court; W. E. Skeggs, Judge.

"Not officially reported."

Tom Neville appeals from a conviction. Reversed and remanded.

Defendant was indicted, tried, and convicted of the larceny of a watch. The facts are sufficiently stated in the opinion of the court. At the request of the state, the court gave the following charge. "(2) Gentlemen of the jury: The criminal intent necessary to constitute larceny is a felonious intent on the part of the party taking the property of another to convert it to its own use or to deprive the real owner of it. If in this case you find that the defendant stole the watch as is al-

leged in the affidavit in this case, and if you find this from the evidence beyond a reasonable doubt, and if you find that the taking was in this county within 12 months before the making of the affidavit in this case, then you should convict the defendant notwithstanding the undisputed evidence in the case shows that the defendant is under 14 years of age, provided you find from the evidence that this defendant notwithstanding his youth is of sufficient intelligence to form the criminal intent necessary to constitute a taking larceny, and in determining whether defendant is of sufficient intelligence to have entertained this intent you may look to the fact that he is a bright boy, that he can read and write, and that he knows it is wrong to steal." Charge 2 requested by the defendant and refused by the court is as follows: "There is no evidence that counsel for the state asked the witness Elizabeth Howison before she was put on the stand if the defendant was in her house on Monday, and the statement to this effect by state's counsel should not be considered by you."

Callahan & Harris, for appellant. Massey Wilson and Brown & Kyle, for the State.

DOWDELL, J. The defendant, a boy of 10 years of age, was prosecuted on affidavit and warrant before the county court of Morgan county and convicted for the larceny of a watch. The law presumes that one under the age of 14 years, but over 7, is prima facie incapable of forming the felonious intent to steal; but this presumption may be met and overcome by evidence showing sufficient intelligence and capacity of forming and entertaining such intent. This the state sought to do in this case, by showing by the witness Thomas Howison that he knew the boy, and that he was a bright boy mentally, and that he talked with good sense, etc. This was competent evidence, and the court committed no error in its admission. *Martin v. State*, 90 Ala. 609, 8 South. 858, 24 Am. St. Rep. 844; *Godfrey v. State*, 81 Ala. 823, 70 Am. Dec. 494.

The statement of the witness Eliza Howison that the defendant, when he returned to her a part of the case of the watch alleged to have been stolen, stated to her that he did not take the watch, but that Arthur took it, was objected to on the ground that this was a confession of guilt, and was not shown to have been voluntary. The objection was without merit. The statement was not a confession of guilt, but, on the contrary, a denial of defendant's guilt, and the accusation of another person. 1 *Wigmore on Evidence*, § 821, and notes to section; *Pentacost v. State*, 107 Ala. 92, 18 South. 146; *McAdory v. State*, 62 Ala. 159; *State v. Broughton*, 29 N. C. 101, 45 Am. Dec. 507.

The defendant requested a number of charges in writing, all of which were given, except charge No. 2. This one was properly re-

fused, as it was nothing more nor less than an attempt to reply to the remarks of the solicitor to the jury, and was therefore a mere argument.

Charge No. 2, given at the instance of the solicitor, should have been refused, and the giving of it constitutes reversible error. This charge assumes as a fact that the defendant "was a bright boy." This was a question for the jury, and the court in giving it invaded the province of the jury. Moreover, the charge was otherwise faulty, in that, in hypothesizing the facts as to the mental capacity of the defendant, etc., it improperly fixed the time at the date of the trial, instead of at the time of the crime.

The court committed no error in other charges given at the request of the state. For the error in giving charge No. 2 the judgment will be reversed and the cause remanded.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concurring.

MOSS v. MOSLEY.

(Supreme Court of Alabama. Feb. 6, 1906.
On Rehearing July 6, 1906.)

1. MASTER AND SERVANT—DUTY OF SERVANT—COMPLAINT.

Where, in an action for death of a minor servant, the complaint explicitly averred the relation of master and servant to exist, and that intestate's death was caused by his conforming to an order given by his superior to perform dangerous work in cleaning up about certain machinery, the complaint was not defective for failure to allege that plaintiff was in the discharge of his duties at the time he was killed.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 809-814.]

2. SAME—OBVIOUS DANGERS.

Where intestate, who was inexperienced, was killed while performing a service required by his superior servant, to whose orders he was bound to conform, a complaint to recover against his master for such wrongful death was not objectionable for failure to allege that the dangers were not obvious, or that intestate was not fully warned or cautioned as to their existence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 816-821, 831.]

3. SAME—DISCHARGE OF DUTIES.

Plaintiff, as M.'s administrator, alleged that defendant's intestate was engaged in operating certain brick works, in which plaintiff's intestate, a boy under 14 years of age, and inexperienced, was employed at the time he was killed; that his death was proximately caused by the negligence of a person in defendant's service, to whom superintendence had been intrusted, in that, knowing that the place was necessarily dangerous, he directed plaintiff's intestate to clean up about certain machinery, so that, and as the proximate result, plaintiff's intestate was killed. *Held*, that such complaint was not demurrable for failure to show that plaintiff's intestate was in the discharge of his duty when killed, nor for indefiniteness of the allegations of negligence.

4. PLEADING—DEMURRER—SCOPE.

Where a replication to a plea was demurred to because it did not appear that plaintiff's claim was presented as required by law within 12 months after the grant of letters of administration on defendant's estate, the only question raised was whether the claim was presented within the time required.

5. EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION.

Code 1896, § 133, providing for the presentation of claims against the estates of deceased persons, does not exclude demands on which suits have been brought.

6. MASTER AND SERVANT—DEATH OF SERVANT—PLEADING—ISSUES AND PROOF.

In an action for death of a servant, caused by the alleged negligence of defendant's superintendent, an allegation that the superintendent knew that plaintiff's intestate was an experienced boy in and about the business, was not merely incidental, but was a material averment, which plaintiff was bound to prove.

7. EXECUTORS AND ADMINISTRATORS—CLAIMS—PRESENTATION AGAINST ESTATE.

When a defendant in a suit dies pendente lite and the suit is revived against deceased's personal representative, plaintiff is not bound to present the claim on which the suit is based to the administrator for allowance or file the same in the probate court.

8. PLEADING—ISSUES AND PROOF—IMMATERIAL ISSUES.

Where, in an action on a claim against decedent's estate, defendant pleaded that plaintiff had not presented his claim against the estate, on which plea plaintiff took issue, though the plea tendered an immaterial issue, the burden of proof was not on the plaintiff, and defendant was therefore not entitled to an affirmative charge on such issue, in the absence of any evidence to support or controvert the plea.

9. MASTER AND SERVANT—DEATH OF SERVANT.

In an action for death of a servant, evidence that intestate was a boy between 13 and 14 years old, and as to his size, the character of work he was directed to do, the place where the work was; that he had worked at defendant's brickyard only a short time, and that the work to which he was put by defendant's superintendent at the time of his injury was not his regular job, but was dangerous work, was admissible as bearing on the question whether intestate was inexperienced with reference to the particular work assigned him.

10. SAME—ASSUMED RISK.

A minor employé assumes such risks of the business in which he engages as a person of his apparent age, intelligence and capacity would discover and appreciate by the exercise of ordinary care.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 601-609.]

11. SAME—CARE AS TO MINOR SERVANT.

In an action for death of a minor employé, an instruction that defendant was liable if plaintiff's intestate was put to work at a task which was dangerous to a boy of intestate's experience, age, and capacity was erroneous.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 141.]

12. SAME—INSTRUCTIONS.

Where, in an action for death of a minor employé, the complaint averred that the work was necessarily dangerous, it was error for the court to refuse to charge that unless the jury believed that the work when performed in the usual way was necessarily dangerous, plaintiff could not recover.

13. TRIAL—INSTRUCTIONS—REFUSAL.

A request to charge that the undisputed evidence shows that intestate was a bright boy of his age and had more mental capacity than

the average boy of his age was properly refused as asserting no proposition of law.

14. SAME.

A request to charge merely for the purpose of answering an argument of opposing counsel was properly refused.

15. SAME—INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error for the court to refuse a request to charge covered by the instructions given.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

16. SAME—ELIMINATION OF EVIDENCE.

Where, in an action for death of a servant, there was evidence that defendant's superintendent, acting within the scope of his authority, ordered plaintiff's intestate to do the work he was doing at the time he was killed, an instruction that if it was not a part of intestate's duty to clean up around the brick machine, which he was doing when killed, plaintiff could not recover, was properly refused.

17. MASTER AND SERVANT—DEATH OF SERVANT—ACTION—INSTRUCTIONS.

Where, in an action for death of a servant, the complaint charged that intestate was inexperienced in the work he was set to do, a request to charge that unless intestate was without experience in the work he was doing when killed, plaintiff could not recover, should have been given.

18. TRIAL—ARGUMENTATIVE INSTRUCTIONS.

An instruction that the law is that one who has by his negligence proximately contributed to his injury cannot recover damages against another who has negligently caused his death, and that the rule is applicable though the person injured is under 14 years of age, if he has sufficient mental capacity, was properly refused as argumentative.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 561.]

19. MASTER AND SERVANT—DEATH OF SERVANT—ACTION—INSTRUCTIONS.

Where, in an action for death of a servant, a plea alleged that there was a safe way to do the work intestate was set to do, and that his death was caused by his negligent failure to resort to that way, but the plea did not aver that there was a "least dangerous way," a request to charge that if intestate had sufficient mental capacity to know, and knew, or, by the exercise of reasonable diligence, would have known that the "least dangerous way" to clean up the dirt was to use a shovel for that purpose, etc., and his failure to use a shovel proximately contributed to his injury and death, plaintiff could not recover, was properly refused.

20. SAME—CONTRIBUTORY NEGLIGENCE—METHODS OF WORK—QUESTION FOR JURY.

A servant who does not resort to the "least dangerous" way of performing the duties of his employment is not guilty of negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

21. SAME—INSTRUCTIONS.

An instruction that if intestate knew that to put his head between a certain moulder carrier, and a post would probably cause his injury, but put his head there through inattention or carelessness, plaintiff could not recover, was properly refused for failure to hypothesize that intestate's act proximately contributed to his injury.

22. EXCEPTIONS, BILL OF—SIGNING—TIME EXTENSION.

After the passage of Pamph. Acts 1886-87, p. 126, relating to the signing of bills of exceptions in the circuit court, a bill might be signed at any time during the trial term, and the court

in term time might fix the time in which the bill might thereafter be signed, and the judge in vacation might extend the time fixed by the court during the trial term, provided that in no case should the time allowed exceed six months, whether extended by the court, judge, or by agreement of parties, except that the right of the parties to extend the time for signing a bill of exceptions into the succeeding term was denied by Rule 30 (Code 1886, p. 810). Act February 23, 1889 (Acts 1888-89, p. 992) establishing the Birmingham city court, section 19 (page 1000), declared that all bills of exceptions relating to the trial of causes in that court must be signed within 60 days after the day on which the issue or issues of fact to which the bill of exceptions relates was tried, unless the time for signing is extended by agreement of the parties, or by order of the presiding judge, as authorized by law respecting the signing of bills of exceptions in the circuit court. *Held*, that the judge of such court had power in term time to extend the time for the signing of a bill of exceptions.

Denson, J., dissenting.

Appeal from City Court of Birmingham;
Chas. A. Senn, Judge.

"To be officially reported."

Action by W. L. Mosley, as administrator of the estate of George W. Mosley, deceased, against L. K. Moss. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action of damages for personal injury. The counts on which issue was joined were counts 1, 2, 3, 4, 5, and 11. Counts 3, 4, 5, and 11 were eliminated by charge of the court, leaving counts 1 and 2. Count 1 is set out in the opinion. Count 2, is as follows: Plaintiff, as the administrator of the estate of George Mosley, claims of the defendant the sum of \$10,000 as damages, for that the defendant on, to wit, the 22d day of August, 1902, was engaged in operating a brick works at or near Desoto, Ala., in Jefferson county, and that at said time and place, plaintiff's intestate, who was a boy of between 13 and 14 years of age, being under the age of 14, and inexperienced, was in the employ of said defendant in and about said works, and that while engaged at said time and place, plaintiff's intestate was killed. Plaintiff avers that said death was proximately caused by reason of the negligence of a person in the service and employment of the defendant, who had at said time and place superintendence intrusted to him and while he was in the exercise of such superintendence, namely, one G. D. Etter, and consisted in this: That said Etter, knowing at said time and place that plaintiff's intestate was an inexperienced boy in and about said business, and that it was necessarily dangerous for him to work in and about the machinery or moving parts of said brick works, negligently instructed him to work in and about the machinery or moving parts of said brick works, and to perform a dangerous service and negligently permitted or allowed the machinery of said brick works to be run or moved while the plaintiff's intestate was

performing said dangerous service, namely, cleaning up about said machinery or moving parts of said works, which was dangerous for plaintiff's intestate to perform, so that, and as a proximate result thereof, plaintiff's intestate was killed as aforesaid to plaintiff's damages as aforesaid. Demurrers were interposed to this count as well as to count 1, but the questions raised thereby are sufficiently set out in the opinion.

The defendant filed special pleas 11, 12, 13, 14, 15, 16, and 17, on which issue was joined as well as the general issue. Pleas 11. That the plaintiff's demand is barred by the 12 year statute of nonclaim, for that the same was not presented as a claim against the estate of defendant's intestate for more than 12 months after the grant of letters of administration thereon. (12) That plaintiff's intestate was guilty of negligence which proximately contributed to his injury in that he had sufficient mental capacity to know, and knew or by the exercise of reasonable care could have known that to place his head in the position where it was when he was injured was dangerous, and would result in injury and that negligently placing his head there in said position resulted in said injury. (13) That plaintiff's intestate was guilty of negligence which proximately contributed to his injury in that he had sufficient mental capacity to know and knew or by the exercise of reasonable care and diligence would have known that to place himself in the position in which he was injured would probably result in his injury; that knowing that said machinery was moving he negligently put himself in said position thereby causing his injury. (14) That plaintiff's intestate was guilty of negligence which proximately contributed to his injury in that his injury was caused by his placing himself in close proximity to certain moving machinery when he had sufficient mental capacity to know and knew or, by the exercise of reasonable diligence, would have known the probable consequences of his said act. (15) That plaintiff's intestate was guilty of negligence which proximately contributed to his injury in that such injury was caused by plaintiff's intestate, without necessity therefor, negligently placing his head in such position near said machinery that he was injured thereby, such injury being the probable consequence of his act, and that he had sufficient mental capacity to know or, did know or by the exercise of reasonable diligence, would have known what the probable consequences of his said act would be. (16) That plaintiff's intestate was guilty of negligence which proximately contributed to his injury in that there was a safe way in which to do the work he was doing when injury occurred; that he had sufficient mental capacity to know and knew, or, by the exercise of reasonable diligence, would have known of the danger of doing the work in any other way

than the safe way to do the same, and that his injury was caused by his negligent failure to do the same the safe way. (17) That plaintiff's intestate was guilty of negligence which proximately contributed to his injury in that in doing said work he negligently failed to keep himself in such position as to avoid the moving parts of the machinery, that he had sufficient mental capacity to avoid the same, and, by the exercise of reasonable care, could have avoided same, and that his injury resulted from his failure to avoid the same.

Special replications were filed to plea 11. Plaintiff says that he presented said claim against said estate within 12 months after the grant of letters of administration on the estate of said M. A. Moss, deceased, by filing said claim or statement thereof, verified by affidavit in the office of the judge of probate of Jefferson county, Ala., in which said letters were granted duly verified by the oath of the claimant having knowledge of the correctness of the claim, and that the amount claimed was justly due after allowing proper credits. (4) Comes the plaintiff and for further replication to plea 11 of the defendant says that on, to wit, the 2d day of June, 1903, he filed the following statement of said claim in the office of the judge of probate of Jefferson county, Ala., in which court letters of administration on the estate of said M. A. Moss were granted on the 19th day of November, 1902, which said statement and the indorsements thereon are as follows. (Here follows the claim.) And upon the filing of said claim the following docket entry was made upon the docket, kept for that purpose in said court. (Here follows the docket entry.) Plaintiff further avers that after the lapse of 12 months from the grant of letters of administration on said estate, but before the trial of said cause, said W. L. Mosley by leave of the probate court amended the affidavit filed as aforesaid on June 2, 1903, as a claim against the estate of said Moss, in the office of the judge of probate of Jefferson county by filing the following additional affidavit in the office of the said judge of probate in and for said county, state of Alabama, Jefferson county. Personally appeared before me, J. P. Stiles, judge of probate in and for said county and state, W. L. Mosley who being duly sworn, deposes and says that said claim against the estate of M. A. Moss, deceased, is for damages for the death of said George W. Mosley, who was killed while in the employ of said M. A. Moss, in and about the brick works belonging to or being operated by the said M. A. Moss, for the recovery of which damages a suit is now pending by W. L. Mosley as the administrator of the estate of George Mosley, deceased, in the city court of Birmingham, Ala., against the said M. A. Moss at the time of his death, and which is now pending in said court against L. K. Moss, as the administrator of the estate of

M. A. Moss, deceased. Affiant further states that said claim for the sum of \$10,000 is correct, and that the amount of the claim is justly due after allowing all proper credits and that he, as the administrator of the estate of George Mosley, made diligent inquiry and examination, and that he believes the amount of \$10,000, claimed is justly due after allowing all proper credits. Demurrers to these replications were filed. Those to two raising the question of verification. To fourth replication the following: (1) Set out in opinion. (2) For that it does not appear that said claim was duly verified as required by law. (3) For that it appears that said amendment of said claim was made after the expiration of 12 months after the grant of letters of administration on said estate. (4) For that it does not appear that said amendment was made with the permission or by leave of the judge of probate in which the letters were granted or of the said probate court or after notice to the defendant. (5) For that the statute does not apply to demands upon which action is pending at the time of the death of the decedent, as to allowing claims to be amended. (6) For that the statute providing for the presentation of claims against decedent's estates by filing same in the probate court is not applicable to actions revived against an administrator.

The facts as to the bill of exceptions sufficiently appear in the opinion. The court refused to give the defendant the general affirmative charge, and the following written charges requested by him: "(2) Unless you believe from the evidence that the work of cleaning up when performed in the usual way, whether by shovel or otherwise, was necessarily dangerous, your verdict must be for the defendant. (3) The undisputed evidence in this case shows that George Mosley was a bright boy of his age, and had more mental capacity than the average boy of his age. (5) If you believe from the evidence that the negligence which caused George Mosley's death consisted in the operation of a defective or unsafe machine, your verdict must be for the defendant. (6) If you believe from the evidence that George Mosley was hired to lift the brick off the belt, and that it was not a part of his duties as an employé of Moss to clean up around the brick machine, then your verdict must be for the defendant. (8) Unless you believe from the evidence that George Mosley was without experience in the work he was doing when killed, your verdict must be for the defendant. (9) The law is that one who has by his negligence proximately contributed to his injury cannot recover damages against another who has negligently caused his death, and this rule is applicable even though the person injured is under 14 years of age, if the evidence shows that he has sufficient mental capacity. (10) If you believe from the

evidence that George Mosley had sufficient mental capacity to know and knew or by the exercise of reasonable diligence would have known that the least dangerous way to clean up the dirt was to use a shovel for that purpose, and that he failed to use a shovel, and that his injury was proximately caused or contributed to by such failure, your verdict must be for the defendant. (11) If you believe from the evidence that George W. Mosley knew that the machinery was moving and knew what would be the probable result of placing himself in close proximity to the machine, and that his injuries resulted from his having placed himself in such proximity your verdict must be for the defendant. (12) If you believe from the evidence that Geo. Mosley knew that to put his head between the moulder carrier and the post would probably cause his injury, but put his head there through inattention or carelessness, your verdict must be for the defendant."

George W. Huddleston, for appellant. Jno. W. Tomlinson and R. McCullough, for appellee.

DENSON, J. This suit was commenced on the 12th day of September, 1902, by W. L. Mosley as the administrator of the estate of Geo. W. Mosley, deceased against M. A. Moss. On the 30th day of December, 1902, on the suggestion by the plaintiff of the death of the defendant, since the commencement of the suit, leave was granted by the court to the plaintiff to revive the suit against defendant's personal representative, when made known. On the 25th day of March, 1903, the court made an order reviving the suit against L. K. Moss as the administrator of the estate of M. A. Moss, deceased.

The first count of the complaint, as last amended, was in this language: "Plaintiff, as administrator of the estate of Geo. W. Mosley claims of defendant the sum of ten thousand dollars damages, for that the defendant on, to wit, the 22d day of August, 1902, was engaged in operating a brick works at or near Desoto, Alabama, in Jefferson county, Alabama, and that at said time and place plaintiff's intestate, who was a boy of between 13 and 14 years of age, being under the age of 14, and inexperienced, was in the employment of said defendant in and about said works, and that while employed at said time and place plaintiff's intestate was killed; plaintiff avers that said death was proximately caused by reason of the negligence of a person in the employment or service of the defendant, to whose orders or directions the plaintiff's intestate at the time of said death was bound to conform and did conform, and that said death resulted from his having so conformed, namely, one G. D. Etter, and consisted in this: that said Etter negligently instructed plaintiff's intestate to perform dangerous work, cleaning up in and about said

machinery or movable parts of said brick works, when he knew that plaintiff's intestate was inexperienced and that said work was necessarily dangerous for him to perform. So that, as a proximate result thereof, plaintiff's intestate was killed, all to plaintiff's damage as aforesaid." Manifestly, this count was framed with respect to subdivision 3 of section 1749 of the Code of 1896 "the employers' liability act." The demurrer of the defendant to the count was overruled, and the ruling of the court forms the basis of the first ground in the assignment of errors.

It is urged in the argument of counsel that the count was defective in not showing that plaintiff's intestate was killed while in the discharge of the duties of his employment. This criticism is hypercriticism, when the averments of the count are regarded. The relation of master and servant is explicitly averred. It also appears from the count that the intestate's death was caused by the intestate conforming to an order given to him by Etter, to perform work, cleaning up in and about said machinery or movable parts of said brick works, etc., and that Etter was a person in the employment of defendant to whose orders the intestate was bound to conform. It sufficiently appears that he was in the discharge of his duties, doing work for his master at the time he was killed. Next, it is urged against said count, that it is not shown by the count that the dangers of the work that plaintiff's intestate was set to do were latent or not obvious, nor that they were not known to the intestate, and that he was not fully warned and cautioned as to their existence. In support of this insistence, it has been argued that a servant is presumed to assume all obvious dangers and risks incident to the work which he undertakes to perform even though the work is extrahazardous. Leaving out of consideration the averments in the complaint that the plaintiff's intestate was less than 14 years of age; that he was inexperienced, and with the knowledge on the part of Etter that he was inexperienced, Etter set him to work, etc., we think the insistence and argument are unsound. It may be that the plaintiff's intestate could have been guilty of such contributory negligence as would have barred plaintiff's recovery, but it does not follow that he assumed the risk incident to the negligence of Etter, the person to whose orders he was bound to conform, and, as it averred, did conform. At least, it was not necessary to the validity of the count that it should have been averred that the dangers of the work he was set to do were latent or that they were not obvious, or that he was not fully warned and cautioned as to their existence. *Woodward Iron Co. v. Andrews*, 114 Ala. 243, on page 257, 21 South. 440, on page 448; *A. G. S. R. Co. v. Brooks*, 135 Ala. 401, bottom of

page 406, 33 South. 181, on page 182; K. O. M. & B. R. R. Co. v. Thornhill (Ala.) 37 South. 412; Schroeder v. Chicago & Alton R. R. Co. (Mo. Sup.) 18 S. W. 1094, 18 L. R. A. 827; Reno Employers' Liability Acts, § 190. The demurrer to count 1 was properly overruled.

The second count was framed under subdivision 2 of section 1749 of the Code of 1896. It is likewise urged against this count, that it does not show that the plaintiff's intestate was in the discharge of his duty when injured. We think the averments of the count afford sufficient answer to the insistence. It is further insisted in the brief of counsel that the allegations of negligence in this count are too vague and indefinite. In this respect the count, tested by the many cases decided by this court, is sufficient. Bear Creek Mill Co. v. Parker, 134 Ala. 293, 32 South. 700; Armstrong v. Montgomery St. Ry. Co., 123 Ala. 233, 26 South. 349; Birmingham S. R. R. Co. v. Cuzzart, 133 Ala. 262, 31 South. 979; S. Car & Foundry Co. v. Bartlett, 137 Ala. 235, 34 South. 20; A. G. S. R. R. Co. v. Davis, 119 Ala. 572, 24 South. 862; M. & O. R. R. Co. v. George, 94 Ala. 214, 10 South. 145; Leach v. Bush, 57 Ala. 145; S. Ry. Co. v. Burgess (Ala.) 42 South. 35.

The defendant in answer to the complaint among other pleas pleaded that the plaintiff's demand was barred by the statute of nonclaim. Notwithstanding, the suit was commenced against M. A. Moss and was revived against her personal representative within 12 months after her death, as is shown by the record, the plea was unchallenged by the plaintiff. Floyd v. Clayton, 67 Ala. 265. The plaintiff joined issue on the plea and filed two special replications numbered 2 and 4. It appears that the presentation and verification, as averred, were in substantial compliance with the statute. Therefore, the demurrer to replication 2 was properly overruled. Code 1896, § 133.

The first ground of the demurrer to the fourth replication to plea 11 is in this language: "For that it does not appear therefrom that said claim was presented as required by law, within 12 months after the grant of letters of administration on said estate." The only objection particularized by this ground of the demurrer goes to the time within which the presentation of the claim was made, and it is evident that the allegations of the replication answer this objection. The insistence of the appellant, however (necessarily based on this ground of the demurrer), is that the nature and amount of the claim are not sufficiently shown by the presentation as alleged in the replication. If it be conceded that the replication is defective in this respect, the demurrer does not present it, and the court could only look to the grounds of the demurrer as they were assigned in making its rulings. The statute expressly provides that "Any defect or insufficiency in the affidavit may be supplied by amendment at any time." Code 1896, §

133. The affidavit as shown by the amendment set out in the replication was in substantial compliance with the statute, and it appears by the averments of the replication to have been made by leave of the judge of probate. Hence, the second, third, and fourth ground of the demurrer to the replication were without merit. With respect of amendment, there is nothing in the statute, section 133 of the Code of 1896 which excludes demands on which suit is pending, therefore, the fifth and sixth grounds of the demurrer to the replication were not well assigned. All other matters sought to be presented for review are contained in the bill of exceptions, and this brings us to a consideration of the motion made by the appellee to strike the bill from the record.

Section 19 of the act to establish the city court of Birmingham, acts 1888-89, p. 1000, is in this language: "That all bills of exceptions relating to the trial of causes in said court must be signed by the presiding judge of said court within sixty days after the day on which the issue or issues of fact to which said bill of exceptions relates was tried, unless the time for signing such bill of exceptions is extended by agreement of parties or by order of the presiding judge, as now authorized by law respecting the signing of bills of exceptions in the circuit court."

The cause was tried on the 16th day of April, 1904. The bill of exceptions was signed on the 14th day of October, 1904.

The record shows that on the 4th day of June, 1904, there was filed with the clerk as one of the papers in the cause a paper writing in words and figures to wit:

"In the City Court of Birmingham. W. L. Mosley, Admr. v. L. K. Moss., Admr. For sufficient reasons appearing to the court it is ordered that the time for the presentation and signing of a bill of exceptions in above cause be and the same is hereby extended until October, 15th, 1904. Chas. A. Senn, Judge.

"We consent that the above order shall be made. John W. Tomlinson, Atty. for Pltff. George Huddleston, Atty. for Def.

"Filed in office this 4th day of June, A. D. 1904. John S. Gillespy, Clerk & Register."

No entry of the contents of the paper was made in the minutes of the court. The city court of Birmingham meets on the first Monday in October, and continues in session until the 1st day of July following, so the paper was filed in term time. Bills of exceptions are creations of statute law, they were not known in the common law. Hence, the validity of the paper purporting to be a bill of exceptions, when assailed, must be determined by the interpretation of the statute or statutes through which its right of recognition is claimed—its validity is asserted. The general law on the subject is contained in chapter 13 of the Code of 1896, §§ 612-622. By the very letter of section 19 of the "practice act" a bill of exceptions in a case tried in the city court of Birmingham may be le-

gally signed by the presiding judge at any time within 60 days after the day on which the issue or issues of fact to which the bill relates were tried. It must be observed that no power of extending the time within which the bill may be signed is conferred upon the court by the act, and in this respect it may be said that the act qualified the general law (section 617 of the Code of 1896) so far as it is applicable to the city court. In other words, the authority to sign the bill within 60 days after the trial, would seem to have been given in lieu of the power of the court to make the extension given by section 617 of the Code of 1896. The act provides, however, that the time for signing may be extended by agreement of parties or by order of the presiding judge, "*as now authorized by law respecting the signing of bills of exceptions in the circuit court.*" Italics ours.

No argument is necessary to show that the authority or right of the parties by agreement, and of the presiding judge by order to extend the time for the signing of the bill of exceptions as referred to the act, must be ascertained from and controlled by the statute and rules of practice applicable to the circuit court. We must look to them to determine the right of extension and the validity of such extension. Referring then to the statute it seems, that a distinction is there made between the court and the judge with respect of such extension. See the reasoning of Judge Tyson on this subject in Scott's Case (Ala.) 37 South. 366. See, also, Wright's Case, 136 Ala. 50, 34 South. 187. Section 617 of the Code of 1896, confers upon the court in term time the authority to fix a time within which a bill of exceptions may be signed, and provides that the judge in vacation may extend the time. Section 618 of the Code of 1896, provides, that, "The parties or their counsel, may by agreement in writing entered into in term time, fix a time in which the bill of exceptions may be signed, and may, in like manner extend such time."

Section 619 provides that "The time fixed by the court or judge may be extended by agreement of the parties or their counsel, and the time fixed by agreement may be extended by the judge in vacation." It is obvious from the preceding sections that the time fixed by the judge as referred to in section 619 means the time of extension fixed by the judge in vacation, for neither of the sections confers upon the judge authority in term time to fix any time of extension, the authority, in term time, being expressly conferred on the court while express authority is given in the same section to the judge to be exercised in vacation, to extend the time fixed by the court. Under the Code, then the time fixed by the court or by agreement of the parties in term time may be extended by agreement of the parties or by the judge in vacation. And if the parties in vacation extend the time previously given by the court or the parties, this time may be further ex-

tended by the judge in vacation, likewise an extension made by the judge in vacation may be extended by the agreement of the parties or further extension may be given by the judge.

Thus it seems to follow that under the law applicable to bills of exceptions in the circuit court the presiding judge as such has no power in term time to extend the time for signing a bill of exceptions, but the only authority he has is to be exercised in vacation with respect of extending the time already fixed either by the court, by agreement of parties or by himself as judge in vacation. It is clear under the practice act referred to that the time fixed by it for signing bills of exception may in term time be extended by agreement in writing of the parties and the time fixed by such agreement, under the act, construed in connection with the general statutes, may be extended by agreement in writing by the parties, or the time fixed by agreement of parties may be extended by order of the presiding judge made in vacation. And it is my view that the order of the presiding judge referred to in section 19 of the practice act does not relate to any order to be made in term time, but to orders which may be properly made under the general statutes by the presiding judge in vacation, extending the time of signing bills of exceptions. Further, that under said section, the court has no power to grant an extension of the time within which a bill of exceptions may be signed. It must be signed within the time specified in the statute or within the time fixed by agreement of the parties. The time fixed by the agreement of the parties as has been stated may be extended either by agreement of the parties, or by the presiding judge in vacation, likewise the time of extension so made by the presiding judge may be extended by the agreement of the parties and the time of signing the bill if covered by either of the categories will be valid.

Counsel for the appellant insists that the paper filed purporting to extend the time for signing the bill of exceptions for all practical purposes may be construed as an agreement of counsel within the meaning of section 618 of the Code of 1896. If this contention of counsel could be sustained and the paper held to be an agreement of the parties to extend the time for signing the bill, it would not avail the appellant anything, for the reason, that the bill of exceptions was signed after the next succeeding term of the court to the one at which the trial was had, was begun. Therefore, signed in violation of Rule 30 of practice pertaining to circuit and inferior courts. *Cooley v. U. S. Savings & Loan Associations*, 132 Ala. 590, 31 South. 521; *B'ham Ry. & Electric Co. v. James*, 138 Ala. 584, 36 South. 464; *Abercrombia & Williams v. Vandiver*, 140 Ala. 228, 37 South. 296. The foregoing views with respect to the motion to strike

the bill of exceptions are those of the writer. The other members of the court are of the opinion, and it must be accordingly held, that the bill of exceptions is valid, and that the motion to strike is without merit.

The remaining assignments of error relate to exceptions reserved to portions of the oral charge of the court and charges refused to the defendant. Issues were made up with respect of counts 1, 2, 4, 5, and 11 of the complaint, to which were filed the plea of the general issue and special pleas 11, 12, 13, 14, 15, 16, and 17, on which issue was joined. Issue was also joined on special replications 2 and 4 filed to plea 11. This plea presented the statute of nonclaim as a defense. And the special replications 2 and 4 allege a presentation of the claim by filing a statement of the claim in the office of the judge of probate. Counts 4, 5, and 11 were charged out at the request of the defendant.

It is insisted that the general affirmative charge requested by the defendant should have been given. This insistence is rested upon two grounds, first, it is contended that there is no evidence that tends to show that Etter, the superintendent of the brick works, knew that plaintiff's intestate was inexperienced. It is distinctly averred in the first and second counts of the complaint that Etter, the superintendent, "knew that plaintiff's intestate was an inexperienced boy in and about said business." This is not an incidental averment, but is made material by the pleader, therefore should be proved to the reasonable satisfaction of the jury. But it is not necessary that the facts should be proved by direct or positive evidence, but like every other material allegation it may be proved by circumstantial evidence. And unless in all the evidence there is absence of room for an inference to be drawn of the existence of the fact averred it cannot be taken away from the jury, but must be submitted under appropriate instructions for their determination. Ala. Steel & Wire Co. v. Wrenn, 136 Ala., bottom of page 493, 34 South. 970; Culver v. Ala. Midland R. R. Co., 108 Ala. 335, 18 South. 827. Upon due consideration of the evidence in this respect we are of the opinion the affirmative charge was properly refused.

Next, it is insisted that plea 11 put in issue the statute of nonclaim, that the proof was insufficient to show a presentation of the claim and that, therefore, the affirmative charge should have been given. We think it cannot be gainsaid, when a defendant in a suit dies pendente lite, and the suit is revived against the deceased's personal representative, it is not required that the claim upon which the suit is based should be presented to the administrator or filed in the probate court. In other words, the statute of nonclaim is inapplicable to such claims. Floyd v. Clayton, 67 Ala. 265. This being true, plea 11 presented a wholly immaterial issue. Nevertheless, it was recog-

nized by the plaintiff and if the plea was proved the defendant was entitled to the charge notwithstanding the immateriality of the plea. But the appellant (defendant) says and contends, that when the plea of nonclaim is filed the burden of proof is on the plaintiff to prove presentation of the claim. And in cases where the plea presents a material issue it cannot be doubted such is the law. Mitchell v. Lea, 57 Ala. 46. We think this rule with reference to the burden of proof is not applicable in cases where the issue presented is an immaterial one, and that to entitle defendant to the affirmative charge on that line of decisions which hold that proof of a plea presenting an immaterial issue entitles a defendant to the affirmative charge, the evidence in the case should show without conflict the truth of the facts averred in the plea. So, if there is no evidence tending to support plea 11 or to controvert its allegations, the defendant was not entitled to the affirmative charge on this insistence.

The proof tended to show plaintiff's intestate was a boy between 13 and 14 years old; it tended to show his size and the character of the work he was put to do and place where the work was. It also tended to show that he had worked at the brickyard only a short time and that the work to which he was put by the superintendent and which he was doing when he received his injuries was not his "regular job," and that it was dangerous work. We think all these matters were matters which the jury might properly consider in determining whether or not the boy was inexperienced with respect to the particular work assigned him. And while the oral charge of the court with respect of these matters may be argumentative in form, yet, the exception reserved to it cannot avail to reverse the case. The court further charged the jury that "There is another averment which plaintiff must prove; and that is, that this work was necessarily dangerous, which means that it would be necessarily dangerous in spite of proper warning and instruction. If you are reasonably satisfied from all this evidence, that this work which the boy was put to do was necessarily dangerous in that sense; that is, that it was dangerous to a boy of the experience, age and capacity that this boy was, that it was necessarily dangerous, however prudent and careful the instructions and warnings had been given, then the master had no right to put him at that kind of work and would be liable in case of his death." "The law recognizes the right of a master to employ an infant in a hazardous occupation on condition that he shall furnish such infant with such information relative to the perils of his situation as will enable him to comprehend the dangers and understand how to avoid them. But it is an actionable wrong for a master to expose in a hazardous employment one whom he

knows to be lacking in capacity to understand and appreciate the dangers surrounding him, however much he may have been instructed. A contrary rule of law would be egregiously inhuman."

But, "a minor, like an adult, assumes the obvious risk of injury from the condition of the business in which he engages, and those are obvious risks which a person of plaintiff's intestate's apparent age, intelligence, and capacity would discover and appreciate by the exercise of ordinary care." *Dresser's Employers' Liability*, § 96. Again, Mr. Dresser says: "By accepting the employment, a minor, equally with an adult, assumes the risk of injury, not only from the negligence of fellow servants and dangers incidental to the business, but also from the existing condition of affairs which he is competent to appreciate, and the danger of which he may avoid." *Dresser's Employers' Liability*, § 96; *Ala. Mineral R. Co. v. Marcus*, 115 Ala. 889, 22 South. 185.

The evidence in the case showed that the plaintiff's intestate was a bright, smart boy, of good intelligence, well grown for one of his age. There is also evidence tending to show that the superintendent, Etter, instructed and warned the boy of the dangers connected with the work; and there is also evidence in the record which tends to show that the danger was open and obvious. It was also shown that Etter called the boy's attention specially to the particular danger of being caught between the belt and the post—the place where he was caught and killed. To say that putting a boy to work that is dangerous renders the master absolutely liable for the boy's injury would be to deprive boys though smart, intelligent, and capable of appreciating the danger and of avoiding it, of the privilege of being employed in any dangerous work, for if this is the law no prudent master would give a minor employment about moving machinery which we judicially know is dangerous. It would also destroy in large measure the doctrine of assumption of risk which is so firmly engrafted in the law of master and servant as declared in our decisions. "Warnings to a servant take nothing from the inherent danger of the work; they merely enable him to avoid it." The charge is not stated as an abstract proposition, but as being applicable to the facts of the case. In the light of the evidence and the propositions of law above adverted to, we must hold that the court committed reversible error in that portion of the oral charge under consideration.

Charge 2, refused to the defendant, should have been given. The complaint in both counts avers that the work was necessarily dangerous. It is a material averment, and without proof of it to the reasonable satisfaction of the jury the plaintiff should not recover.

Charge 3 was properly refused. It asserts no proposition of law. Charge 4 is not assigned as error.

Charge 5 was properly refused. The bill of exceptions shows that it was requested merely for the purpose of answering an argument of opposing counsel. *Mitchell's Case*, 129 Ala. 25, 80 South. 348. Moreover, given charge 17 seems to cover it.

Charge 6 was properly refused. It ignores the insistence of plaintiff and the evidence tending to support it, that superintendent Etter, acting within the scope of his authority, ordered the boy to do the work he was doing at the time he was killed.

Charge 7 is not assigned as error.

Charge 8 should have been given, one of the material averments of the complaint is that the boy, George W. Mosley, was inexperienced in the work he was set to do.

Charge 9, besides possessing other vices, is argumentative, and was properly refused.

Charge 10 was properly refused. By plea 16 the defense is made that there was a safe way to do the work the boy was set to do, and that his injury was caused by his negligent failure to resort to that way. But the plea does not aver that there was a "least dangerous way," nor can it be said under all circumstances, that a servant who does not resort to the "least dangerous" way is guilty of negligence.

Charge 11, construed in connection with special plea 14, and in the light of the evidence, should have been given.

Charge 12 failed to hypothesize that the act of Mosley, set forth in the charge, proximately contributed to his injury.

For the errors pointed out the judgment is reversed, and the cause remanded.

Reversed and remanded.

On Rehearing.

WEAKLEY, C. J. The question to be considered is whether the bill of exceptions was signed at a time authorized by law.

By the act approved February 23, 1889, (Acts 1888-89, p. 992) amending a previous act, establishing the city court of Birmingham, it was provided that the court should hold one regular term in each year, commencing on the first Monday in September, and ending the last day of the succeeding June, thus constituting a term of 10 consecutive months. At the time of the passage of the amendatory act, the law regulating the signing of bills of exceptions in cases tried in circuit courts or in other courts of like jurisdiction, unless otherwise specially provided and authorizing the extension of the time for signing such bills, was found in section 2761 of the Code of 1886, in the act of February 22, 1887, entitled, "An act to regulate the signing and allowance of bills of exception" (Pamph. Acts 1886-87, p. 126) and in Rule 30

of Circuit Court Practice (Code 1886, p. 810). By section 2761 it was provided that "no bill of exceptions can be signed after the adjournment of the court during which the exception was taken, unless by consent or agreement of counsel in writing, except in such cases as is otherwise provided;" and the effect of this section was that a party desiring to take a bill of exceptions, must have secured the signature of the presiding judge at the trial term, unless the opposite party or his counsel were indulgent enough to consent to an extension of time. Rule 30 of Circuit Court Practice recognized this situation by affirming "that in all circuit and inferior courts of common-law jurisdiction, bills of exceptions may be signed by the presiding judge at any time during the term at which the trial or proceeding is had, or by written consent of the parties, or their counsel filed in the cause," but stipulating further that by the consent of the adversary party or his counsel the bill might be signed at any time before the next succeeding term, and not afterwards; Rule 30 by its concluding clause placing a limit as to time beyond which consent of parties could not authorize the signing of a bill of exceptions. In this state of the law, the Legislature again dealt with the subject because it was often inconvenient and burdensome to require a bill of exceptions to be prepared and signed during the trial term, and it did not seem just to withhold from the court or the presiding judge all power in its or his discretion to extend the time, whereby the excepting party would be placed at the mercy of his adversary in respect of securing an extension. To remedy this defect in the law, the act approved February 22, 1887 (Pamph. Acts 1886-87, p. 126), was passed, by the first section of which it was provided "that in all cases where bills of exceptions are authorized, the court in term time may, on the application of either party, fix the time in which the bill of exceptions shall be signed, and the judge in vacation may for good cause extend the time fixed in term time; provided, in no case shall the time allowed exceed six months; and provided further that nothing herein contained shall prevent parties from agreeing as to time as now provided by law."

After the enactment of the last-mentioned statute the law stood thus: A bill of exceptions might be signed at any time during the trial term; the court in term time might fix the time in which the bill might thereafter be signed, and the judge in vacation might extend the time fixed by the court during the trial term; but in no case could the time allowed exceed six months, whether extended by the court, judge, or by agreement of parties. The right of parties to agree to an extension was not impaired or destroyed by the act of February, 1887, and such right remain-

ed, but it was subject to the provision of Rule 30 which denied to the parties the right to extend the time for signing a bill into the succeeding term. It was also the settled construction that an extension of time in any proper form or by any authority must be made before the time for signing the bill had expired under existing conditions; in other words, that no lapse or chasm must intervene or occur. There are other provisions on the subject in the Code of 1896 (sections 618, 619), not contained in the act of February 22, 1887, and which were not in existence when the practice act of the Birmingham city court became a law on February 28, 1889, and hence cannot be considered in construing the latter act in so far as it undertakes to regulate the signing of bills of exceptions in cases tried in said city court.

We have been at some pains to set out with particularity of detail the state of the law on the subject of the signing of bills of exception in the circuit court, at the time of the passage of the Birmingham city court practice act, because it becomes necessary to consider the then existing law in ascertaining what was meant by the last clause of section 19, which declared that "all bills of exceptions relating to the trial of causes in said court must be signed within 60 days after the day on which the issue or issues of fact to which said bill of exceptions relates was tried, unless the time for signing such bill of exceptions is extended by agreement of parties or by order of the presiding judge, as now authorized by law respecting the signing of bills of exceptions in the circuit court." In analysing this section, it must be remembered at the outset that it relates to a court having a continuous term of ten months. Obviously, it would not have been wise to allow parties the whole of so long a term within which to have a bill of exceptions signed; the law giving parties the term within which to secure an authenticated bill was framed to apply to courts having comparatively short terms; and so section 19 fixed 60 days as the time that was proper in any event to be allowed, and that without grace or favor from the court, the judge or adversary parties or their counsel, at the same time compelling action within that period unless further indulgence could be obtained in some authorized manner. It is a matter of common knowledge among judges and practitioners that circuit courts in term time were accustomed, as a matter of course, under the act of February 22, 1887, to fix some reasonable time beyond the term, as, for example, 30 or 60 days, for the signing of bills, and so it was that the Legislature dealing with the city court of Birmingham and with its exceptionally long term, not only fixed a limit of 60 days so as to preclude the idea that parties at all events would have the whole term for obtaining a bill of exceptions, but also secured to the parties that reasonable

time as circuits courts in term time had been accustomed to do on application. Having done this, the Legislature proceeded to deal with the subject of extension of time, and by section 19 also authorized such extension "by agreement of parties or by order of the presiding judge." Did the Legislature by the clause "as now authorized by law respecting the signing of bills of exceptions in the circuit court" intend to withhold from a presiding judge the power, in term time, to make an extension of time for signing a bill, and to permit him only in vacation to exercise the power of extension which section 19 undoubtedly confers upon him? We do not think it at all probable that the framers of the practice act meant the statute to so operate. No good reason can be perceived why the presiding judge should have the power of extension during two months of vacation, and not have it during the 10 months of the term. Why should the Legislature place a party at the mercy of his adversary during 10 months, and rescue him from an unwilling or ungracious opponent during a short vacation? The policy of the law in force at the time of the passage of the Birmingham city court act was to relieve parties in respect of extensions of time for signing bills of exceptions from any dependence upon their adversaries. *Ladd v. State*, 92 Ala. 58, 9 South. 401. The statute under consideration ought not to receive a narrow construction, operating to produce consequences which in all human probability the framers of the statute neither foresaw nor intended.

Furthermore, the argument that by the reference in section 19 to the then existing law respecting the signing of bills of exceptions in the circuit court, it was intended to confine the exercise of the power of extension, expressly conferred on the presiding judge, to vacation proves too much, and is destructive of itself. By the general law, as we have already shown, the judge in vacation might extend the time that was fixed by the court during the term, but by the city court act no power at all is conferred on the court to fix or extend the time during the term, and hence under the construction contended for, the presiding judge could never make an extension, although section 19 provides that he may do so. Nor can section 619 of the Code of 1896 be called to the aid of the argument we are combatting, since that section was not in existence at the passage of the city court act. "The artificial manner in which many of our statutes are framed, the inaptness of expressions frequently used and the want of perspicuity and precision not infrequently met with, often requires the court to look less at the letter or words of the statute than at the context, the subject-matter, the consequence and effects, and the reason and spirit of the law, in endeavoring to ar-

rive at the will of the law giver." *Thompson v. State*, 20 Ala. 54.

It is a well-settled rule that "when words are not precise and clear, such construction will be adopted as shall appear the most reasonable and best suited to accomplish the object of the statute, and a construction which would lead to an absurdity ought to be rejected." *Sprowl v. Lawrence*, 33 Ala. 674. What then was intended by the concluding clause of section 19, and what field of operation may be found for it without eliminating from the section the power conferred on the presiding judge to extend the time for signing a bill of exceptions? The section did not purport to be a complete enactment on the subject with which it dealt. It did expressly confer upon the presiding judge and the parties by agreement the power of extension, but there were other regulations in the general law not specified in section 19, with which it was desired to supplement the express provisions of the section. These were, that the agreement of the parties must be in writing; that parties could not extend the time into the succeeding term, and that the time in no event could be extended beyond six months, and that no chasm must occur. It was not the purpose to limit the power of the presiding judge as to the time when he might make an order of extension; that is, as between the exercise of it in term time or in vacation; and we do no violence to the language of the section in so holding. The section was remedial and should be construed liberally to effectuate its evident purpose. By the terms of the city court act the presiding judge had the power in term time to extend the time for signing the bill in this case and he exercised the power by signing the order found in the record. It is true the order recites that sufficient reasons appeared to the court, yet the order of extension was signed by the presiding judge and it is evident he made the order. It would be extremely technical to hold the order was that of the court only, and not of the judge. In fact the difference between them in respect of an order of extension of time for signing a bill of exceptions is very insubstantial, and is material only because the law in certain cases establishes the difference. We have no difficulty in holding that the order of extension was made by the presiding judge, although it might be treated as having likewise been made by the court. Those taking the order seem to have been careful to have the judge give it a dual form.

The bill of exceptions was signed in time, and cannot be stricken. The result is that a rehearing must be granted, and the exceptions presented by the bill considered.

All the Justices concur in this opinion except DENSON, J., who states his views in his opinion upon the whole case.

ENGLE v. SIMMONS.

(Supreme Court of Alabama. June 30, 1906.)

1. HUSBAND AND WIFE—ACTION BY WIFE—TRESPASS.

Under Code 1896, § 2523, providing that the damages recoverable by a wife for injuries to her person are her separate property, and section 2527, declaring that a wife must sue for injuries to her person, a wife may sue for an injury to her person inflicted without physical violence by one entering the dwelling house occupied by herself and her husband, irrespective of the question as to the ownership of the house.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, §§ 767, 768.]

2. TRESPASS—ACTS CONSTITUTING.

A man entered the dwelling house of a married woman far advanced in pregnancy. After being informed that her husband was absent, and after refusing to leave at her request, he took an inventory of the household effects and made threats of what he intended to do in the collection of a claim against the husband. She was thrown into a state of nervous excitement, and labor pains, resulting in the premature birth of a child, were brought on. *Held*, that he was liable for the bodily pain she suffered, though no physical violence was inflicted.

Appeal from Circuit Court, Morgan County; Osceola Kyle, Judge.

"To be officially reported."

Action by Mary P. Engle against W. B. Simmons. From a judgment for defendant rendered on sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

John R. Sample and S. A. Lynne, for appellant. E. W. Godbey, for appellee.

DOWDELL, J. This is an action by the plaintiff, appellant here, to recover damages for the wrongful act of the defendant, whereby she was caused to suffer great physical pain and consequent temporary physical disability. The complaint as amended contained five counts, to all of which a demurrer was sustained by the trial court, and, the plaintiff declining to plead over, a judgment was rendered in favor of the defendant.

The principal and important question in the case is: Does the complaint as amended state a cause of action? It is a sound and just principle of law that, where one in violation of the law does an act which in its consequences is injurious to another, he is liable for the damages caused by such wrongful act. *Van Norden v. Robinson*, 45 Hun (N. Y.) 567. The allegations of the complaint show that the defendant entered into the dwelling house of the plaintiff, who was at the time far advanced in pregnancy, and in the absence of her husband, and with the evident purpose of collecting a claim against the husband, and after being informed by the plaintiff that her husband was absent from home, and after having been requested by plaintiff to leave the premises, he refused without legal cause or good excuse to do so, persisting in interrogating the plaintiff and in taking an inventory of her household effects,

making at the time threats of what he intended to do, whereby the plaintiff was thrown into a state of nervous excitement, bringing on labor pains attended with unusual severity continuing for three days, and resulting in the premature birth of a child, and causing a physical disability to the plaintiff which for a long time incapacitated her for the discharge of her household duties. That the defendant violated the law in his refusal to immediately leave the premises when ordered to do so, there can be no question, and that his subsequent conduct as alleged was wrongful is equally certain. The action was properly brought in the name of the wife. Sections 2523, 2527, Code 1896. The suit is for an injury to the plaintiff, and not for a trespass to the realty as supposed by appellee. It is wholly immaterial under the circumstances alleged whether the ownership of the premises was in the plaintiff or her husband, although it is averred that the possession of the dwelling was held under a contract of lease made by the wife. In *Watson v. Dilts* (Iowa) 89 N. W. 1068, 57 L. R. A. 561, 98 Am. St. Rep. 239, it was said: "Nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband, and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she sought to recover."

Nor is it important that no physical violence was done her person. The bodily pain and suffering which she endured was in direct line of causation from the alleged wrongful act of the defendant. *Armstrong v. Montgomery*, St. Ry., 123 Ala. 233, 26 South. 349. In a case similar to the one under consideration the Supreme Court of Texas, in an opinion by Gaines, J., said: "That a physical, personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation in an action at law, when the injury is intentional or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we cannot say that a recovery should not be had. Here, according to the allegations of the petition, the defendant has produced a bodily injury by means of that emotion, and it is for that injury the recovery is sought." *Hill v. Kimball* (Tex. Sup.) 13 S. W. 59, 7 L. R. A. 619. In the case of *Brownback v. Frailey*, 78 Ill. App. 262, it was said: "One who goes to the house of a pregnant woman and flourishes a whip, and makes threats in a boisterous manner, is liable for her miscarriage and sickness resulting from fright proximate-

ly occasioned thereby, which fright he must have observed by the exercise of ordinary care, even though he did not know of the condition of her health." To the same effect are the following cases: *Watson v. Dilts*, supra; *Razzo v. Varni*, 81 Cal. 289, 22 Pac. 848; *Chicago & N. W. R. Co. v. Hunerberg*, 16 Ill. App. 387; *Newell v. Whitcher*, 38 Am. Rep. 703. The plaintiff here was in her home, and had a right to the peaceful and undisturbed enjoyment of the same, and any unlawful entry or invasion thereof, which produced physical injury to her, whether by direct personal violence, or through nervous excitement the proximate result of the wrongful acts of the defendant, was a wrong for which she is entitled to recover.

It follows from the foregoing views that the trial court, in our opinion, erred in sustaining the demurrer to the amended complaint, and for which error the judgment appealed from must be reversed, and the cause remanded.

Reversed and remanded.

HARALSON, SIMPSON, and DENSON, JJ., concur.

BRADFORD v. STATE.

(Supreme Court of Alabama. June 30, 1906.)

1. CRIMINAL LAW—APPEAL—REVIEW—FINDINGS BY COURT.

While neither the act of February 6, 1891, nor the act amendatory thereof, approved February 10, 1899 (Acts 1898-99, p. 836), conferring on the county court of Lawrence county jurisdiction of misdemeanors, authorizes the Supreme Court to review the conclusions of the judge on the evidence in cases tried without a jury, where the facts are free from conflict, the action of the court in applying the law will be reviewed.

2. GAMING—PROSECUTION—BURDEN OF PROOF.

On a prosecution for betting at a game played with cards at a public place the burden is on the state to prove beyond a reasonable doubt that the place was a public one.

3. WITNESSES—CROSS-EXAMINATION—KNOWLEDGE OF WITNESS.

Where, on a prosecution for betting at a game played with cards at a public place, witnesses testified that they did not think the place could be seen from a certain public road, it was proper for the state on cross-examination, to ask the witnesses if they could testify that the playing at that place could not be seen from any point along the public road.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 931-943.]

4. GAMING—PROSECUTION—EVIDENCE—SUFFICIENCY.

On a prosecution for betting at a game played with cards at a public place, it appeared that the playing was done at night in a patch of woods about 150 feet from a church where religious exercises were going on and about the same distance from a public road. It was shown that the place could not be seen from the church and witnesses testified that they did not think it could be seen from the road, though they admitted that they could not testify that the playing could not be seen from any point along the public road. The place was not frequented for the purpose of gaming, and it ap-

peared that while three or four persons were attracted from the church by the light from the fire which defendant and his companions had made for the purpose of playing, the game stopped as soon as such persons came upon the scene. *Held*, that the evidence was insufficient to show the place a public one.

Appeal from Lawrence County Court; J. C. Kunpe, Judge.

"To be officially reported."

Grover Bradford was convicted of betting at a game played with cards at a public place, and he appeals. Reversed and remanded.

G. O. Chenault, for appellant. Massey Wilson, Atty. Gen., for the State.

DOWDELL, J. The defendant was tried and convicted by the county court of Lawrence county on an indictment for betting at a game played with cards in a public place. The indictment was found by grand jury at the Spring term, 1905, of the circuit court of Lawrence county, and was by that court transferred to the county court under the statute. The trial was by the court without a jury.

Neither the act approved February 6, 1891, nor the act amendatory thereof, approved February 10, 1899 (Acts 1898-99, p. 836), conferring jurisdiction in such cases on the county court, authorizes us to review the conclusions of the judge of that court on the evidence adduced before him in the trial of a case without a jury. But, as was said in the case of *Giles v. State*, 88 Ala. 230, 67 South. 271: "If, however, the facts put in evidence in a given case, or in respect to a particular matter, before the judge of that court, are free from conflict, and do not admit of adverse inferences or deductions, the action of the court in applying the law to those facts will be reviewed. In such case, the matter revised is a conclusion of law from undisputed facts, and not the finding of fact from the evidence adduced on the trial." *Skinner v. State*, 87 Ala. 105, 6 South. 399; *Hardy v. Ingram*, 84 Ala. 544, 4 South. 872; *Boyd v. State*, 88 Ala. 169, 7 South. 268, 16 Am. St. Rep. 31. Under the indictment in this case, the burden was on the state to prove beyond a reasonable doubt that the place at which the alleged playing occurred was a public place. The evidence showed without conflict that the playing was done at night in the woods about 150 yards from a church where religious exercises were going on, and about the same distance from a public road. The evidence further showed that there were trees and bushes between the church and the place of the playing, and so as to the public road; and furthermore, that the place could not be seen from the church. The defendant and only one other was engaged in the game, and no one else was present. The place was not one frequented for the purpose of gaming, and this was the only time

that the defendant had ever played cards at that place. Three or four persons were attracted and drawn from the church by the light from the fire, which the defendant and his companions had made for the purpose of playing, and when these persons came upon the scene the game stopped, and was not afterwards engaged in. There was no evidence that the place could be seen from the public road. Witnesses testified that they did not think it could be seen from the public road. But, the court permitted the state, against the objection of the defendant, to ask the witnesses if they could testify that the playing at that place could not be seen from any point along the public road, to which interrogatory they each answered in the negative. It may be that this question was permissible, and doubtless was, in view of the statement by the witness, that he did not think the place could be seen, but alone and of itself, it was insufficient to show that the place of playing cards could be seen from any point along the public road. This was negative evidence without any affirmative tendency. It was not enough to afford a reasonable inference of the existence of a fact in issue, and which it was incumbent upon the state to establish beyond a reasonable doubt, before a conclusion of the defendant's guilt could be reached.

We are of the opinion that on the undisputed evidence the question is one of law, and that the court erred in the judgment rendered.

Reversed and remanded.

WEAKLEY, C. J., and HARALSON and DENSON, JJ., concur.

TOWN OF NEW DECATUR v. SCHARFENBERG.

(Supreme Court of Alabama. April 4, 1906.
On Rehearing, June 30, 1906.)

1. MUNICIPAL CORPORATIONS—CHANGE OF GRADE OF STREET—DAMAGES—REMEDIES OF PROPERTY OWNER.

Where a municipal corporation undertakes to change the grade of a street to the injury of the owner of property abutting thereon, without first having made compensation, he is entitled to injunctive relief irrespective of the city's solvency or the fact that he might obtain full compensatory damages at law.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 989; vol. 18, Cent. Dig. Eminent Domain, § 768.]

2. SAME—DAMAGES—WAIVER.

A petition by the owner of property abutting on a street for the paying of the same is not a waiver of damages from a change of grade in constructing the pavement.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 958, 959.]

3. SAME—REMEDIES OF PROPERTY OWNER.

Where a city has commenced to change the grade of a street without making compensation for the injury to the owner of property abutting thereon, he may, on a bill for an in-

junction, have the street restored to its former condition.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 989; vol. 27, Cent. Dig. Injunction, § 414.]

4. INJUNCTION—MOTION TO DISSOLVE—NEW MATTER—EFFECT.

New matter not responsive to an injunction bill cannot be considered on a motion to dissolve.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 881, 886.]

5. SAME—TERMS ON DISSOLUTION.

In a suit by the owner of property abutting on a street for an injunction to restrain a change of the grade, no compensation for the injury having been awarded him, it was proper to dissolve the injunction on the making of a cash deposit and the execution of a bond to cover probable damages as ascertained on a reference.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 390.]

6. APPEAL—DECISIONS REVIEWABLE—EQUITY—DECREE OVERRULING PLEA TO BILL.

Under Code 1896, § 427, giving an appeal to the Supreme Court from a decree overruling a plea to a bill, the judgment of the Supreme Court may be had upon the sufficiency of a defense interposed by plea in advance of the taking of evidence or a hearing on the merits.

7. EQUITY—SETTING PLEA FOR HEARING—EFFECT.

The setting down of a plea to a bill in chancery for hearing on its sufficiency operates as an admission of truth of all the facts alleged for the purpose of invoking judgment whether the facts constitute a defense.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 409.]

8. SAME—PLEAS—NECESSITY OF VERIFICATION.

In the absence of any rule or statute requiring it, pleas to a bill in chancery need not be verified by affidavit.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 616.]

9. SAME—DUPLICITY.

A plea which does not contain independent sets of facts, each constituting a sufficient answer to the bill, is not duplicitous.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 403; vol. 39, Cent. Dig. Pleading, §§ 202-205.]

10. MUNICIPAL CORPORATIONS—CHANGING GRADE OF STREET—DAMAGES—WAIVER.

Where the owner of property abutting on a street, on being informed of a proposed change of grade, requested the city official in charge of the work to proceed with it, and the city, acting upon such declaration, incurred expenses in preparing for the change of grade and commenced the work, the property owner could not have an injunction to restrain the change of grade, though no compensation had been awarded him.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 958-961.]

11. SAME—NATURE OF LIABILITY—REMEDIES OF PROPERTY OWNER.

Where a city undertakes to change the grade of a street, without making compensation to the owner of property abutting thereon, the fact that there has been no negligence in or about the work does not defeat his right to have the street restored to its former condition.

12. EQUITY—PLEADING—BILL—SUFFICIENCY—DISMISSAL.

A city undertook to change the grade of a street without first making compensation to an

abutting owner, and he sued for an injunction. *Held*, that though a paragraph of the bill was susceptible of the construction that he based his relief to some extent upon a supposed property right in the street, it being also clearly susceptible of the construction that his right was predicated upon his property interest in his lot, which the bill showed would be substantially injured, the defect being amendable, and there being no ground of demurrer specifically raising the point as to his reliance on his rights in the street, the defect did not render the bill susceptible to a motion to dismiss.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 759.]

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

"Not to be officially reported."

Suit by William Scharfenberg against the town of New Decatur. From a decree in favor of complainant, defendant appeals. Affirmed in part, in part reversed, and remanded.

Brown & Kyle, for appellant. E. W. Godbey, for appellee.

WEAKLEY, C. J. The bill was filed to enjoin the town of New Decatur from damaging complainant's store property by certain proposed changes in the grades of the contiguous streets, upon the allegation that the municipality had not first paid complainant for the injury that would result, and to require the town to restore the streets to their former condition. Upon the filing of the bill, a preliminary injunction was issued. The defendant filed a motion to dismiss for want of equity, a motion to dissolve the injunction, a demurrer, several pleas, and a sworn answer. The chancellor overruled the motion to dismiss and the demurrer, and held the special pleas insufficient. He also overruled the motion to dissolve the injunction unconditionally; but, in response to a prayer to that effect in the answer, ordered a reference to the register to ascertain the probable damages, and, on the coming in of the report, the payment of the ascertained sum into court, and the execution of a bond to pay such damage as the complainant might sustain, the chancellor dissolved the injunction. *C. & W. R. R. Co. v. Withersow*, 82 Ala. 190, 8 South. 23.

Whatever may be the law elsewhere, it is too well settled in this state for further controversy "that, under constitutional guarantees, a municipal corporation may not take or injure the property of a citizen in the exercise of its power to improve its highways without first making compensation; and the right to injunctive relief in such a case as this exists without reference to the solvency or insolvency of the municipality and regardless of the consideration that he might recover full compensatory damages in an action at law." *City Council of Montgomery v. Lemle*, 121 Ala. 609, 25 South. 919; *Avondale v. McFarland*, 101 Ala. 381, 18 South. 504; *Niehaus v. Cooke*, 134 Ala. 223, 32 South. 728. We have, therefore, no doubt

of the equity of the bill, unless its equity is destroyed by the allegations it contains respecting the petition by defendant and other citizens to the city council, wherein they requested the paving of Second avenue in front of complainant's property, and preparatory to which the change of grade and other work complained of had been ordered. We are not of opinion that the petition merely to pave the avenue would be a waiver of damages growing out of the change in the grade of the highway, as set forth in the bill; such waiver of a constitutional right ought not to be lightly inferred, and cannot be clearly derived from the request to pave the avenue and the agreement to bear a part of the expenses of the paving. *Newville Road Case*, 8 Watts (Pa.) 172; *Barker v. City of Taunton*, 119 Mass. 392; *Birdseye v. City of Clyde (Ohio)* 55 N. E. 169; *Jones v. Borough of Bangor*, 144 Pa. 638, 23 Atl. 252. As said by the Supreme Court of Massachusetts in *Barker v. City of Taunton*, 119 Mass. 392, "it is no bar to the claim for damages made by the petitioner that he was one of the original petitioners for the improvement—that alone is not evidence of an assent that his property shall be taken for public use without compensation." While the court uses the words "taken for public use," the facts of the case show that it was similar to the one before us, and that damages were claimed for injury to plaintiff's premises by lowering the grade in the construction of a sidewalk. There, also, the plaintiff had merely petitioned for the construction of the sidewalk. The complainant would also have the right, upon the averments of his bill, no compensation having been first made for the injury, to require the city to restore the street to its former condition, as well as to enjoin further acts of damages. A court of equity does not administer partial justice, but, taking jurisdiction in a proper case, ever seeks to conclude the whole controversy. The motion to dismiss the bill for want of equity was properly overruled. What we have said above also applies to and covers the questions presented by the demurrer, and in overruling this no error was committed.

The answer did not deny the averments upon which the equity of the bill rested, and new matter, not responsive to the bill, cannot be considered on motion to dissolve. The defendant was not entitled to an unconditional dissolution. *Niehaus v. Cooke*, 134 Ala. 223, 32 South. 728. The chancellor followed the practice approved by this court and requested by the defendant, in dissolving the injunction upon the making of a cash deposit and the execution of the bond, thus allowing a public work to proceed, and the town has no cause of complaint against the ruling upon its motion to dissolve the injunction.

This leaves for consideration pleas 4, 5, and 6, assignments of error specifying these

as having been erroneously held insufficient.

Pleas 4 and 5 present substantially the same question and may be considered together. A careful reading of the bill shows that the gravamen of the complaint is that the city is preparing to change the grade of the highway in front of complainant's property, without his consent and against his objection. So far as the work has proceeded, it has been done in pursuance of the plan to alter the grade, preparatory to laying the brick pavement on the elevated line; and the incidental consequences, alleged in the bill, showing the modum of the injury, are all attributable to the execution of the purpose by the city to establish a new grade for the highway. The question, therefore, is whether under the averments of pleas 4 and 5 the complainant was entitled to restrain the proposed work, or, upon the hearing, if these pleas should be proven, ought to have a decree for compensation. By section 427 of the Code of 1896 an appeal lies to this court from a decree by the chancellor overruling a plea to a bill, or what is the same thing, holding it to be insufficient; in this way, the judgment of this court may be obtained upon the sufficiency of a defense in an equity case interposed by plea, in advance of the taking of evidence, or a hearing upon the merits. *Glasser v. Meryrovitz*, 119 Ala. 152, 24 South. 514. Several separate pleas may be filed or they may be incorporated in the answer, in which latter event they must be treated as independent pleas. The setting down of a plea for hearing upon its sufficiency operates as an admission of the truth of all the facts alleged for the purpose of invoking the judgment of the court upon the legal question whether these facts constitute a defense to the bill. *Tyson v. Land Co.*, 121 Ala. 414, 28 South. 507; *Glasser v. Meryrovitz*, 119 Ala. 152, 24 South. 514. Unless there be some rule or statute requiring it, pleas need not be verified by affidavit; these before us are not open to objection, because no one swears to their truth.

If duplicity be a ground of objection to a plea in equity, it is not under our system in the case of a plea in a court of law (*Bolling v. McKenzie*, 89 Ala. 470, 7 South. 658; *Corpening v. Worthington*, 90 Ala. 541, 12 South. 426) yet we are of opinion the pleas now under consideration are not double. They do not contain two independent facts, nor two separate sets of facts, each constituting a sufficient answer to the bill. We have already held that the petition for the paving did not, in and of itself, operate to waive the complainant's right to damages, or his equity to restrain the work until compensation should be paid or secured to him for the injury to his storehouse and lot under the practice of the chancery court in cases like this. The averments of the plea in respect of the petition for paving, and the decision of the city council to do the work, are matters of inducement leading up and

converging to the one defense which they bring forward. This defense is that the complainant on being informed as to the proposed change of grade, and with knowledge of the new curb line, requested the city officials in charge of the work to proceed with the work, saying he intended to raise his house anyway and that he wished the street properly fixed while they were about it, so there would be no trouble concerning the street thereafter; and that the defendant acting upon the declarations and conduct of the complainant had gone to much expense in preparing the avenue to be paved according to the plans of the engineers, and had rendered itself liable for the payment of large sums for laborers and teams engaged to plow up the street and prepare it for the brick pavement.

The important question then is whether a citizen who consents to a change of grade, requests that the change be made, and who thereby induces the city to incur expense in and about the work, can recover damages to his property because of the altered grade, or arrest the doing of the work in the midst of it, upon the ground that compensation for the injury had not first been paid him.

It has been expressly held that a person asking for the change of grade cannot complain; the case being within the maxim, "volenti non fit injuria." *Cross v. Kansas City*, 90 Mo. 13, 1 S. W. 749, 59 Am. Rep. 1. When a person has consented to the act being done he may not exercise his legal right in opposition to that consent. *Morris C. & B. Co. v. Lewis*, 12 N. J. Eq. 323. And this court in *Goetter v. Norman*, 107 Ala. 585, 19 South. 56, has expressed its approval of the rule as quoted by Mr. Story from a decision of the House of Lords: "It is a general law that if a man either by words or conduct has intimated that he assents to an act which has been done and that he will not offer opposition to it, although it could not have been lawfully done without his consent, and he thereby induces another to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have given faith to his words, or to the fair inference to be drawn from his conduct." A constitutional provision affecting simply property rights may be waived by the citizen. *Lee v. Tillotson*, 35 Am. Dec. 624; *Cooley's Con. Lim.* (7th Ed.) 250. Whether the facts set up by the fourth and fifth pleas be called a "waiver or an estoppel," we are of opinion they constitute a defense to the bill, and that the chancellor erred in holding them insufficient.

The sixth plea proceeds upon the theory that having the power to grade and pave streets, the absence of negligence in and about the work would defeat the right of the complainant to have the street restored to its former condition. It is not upon the want

of power to grade, nor upon the existence of negligence, that the equity of the bill rests. It rests upon the constitutional guaranty to the citizen against the taking or injuring of his property without prior compensation. The sixth plea was insufficient, and the chancellor's decree to that effect was not erroneous.

The decree of the chancellor, in so far as it holds 4 and 5 to be insufficient will be reversed and a decree will be here rendered declaring them sufficient. In all other respects his decree will be affirmed. The cause will be remanded. Let the costs of the appeal accruing in this court and the city court be divided equally between the parties.

Affirmed in part, reversed and rendered in part, and remanded.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

On Rehearing.

TYSON, J. I do not construe the averments of the bill as resisting the equity sought to be enforced upon an injury to complainant's interest in the avenue or street, but to his storehouse and lot abutting thereon. It is undoubtedly the law that the city has the legal right to change the grade of the street without compensation to adjoining lot owners if there be no injury done to their property. In other words, an adjoining lot owner on a street has no such property interest in the street as entitles him to compensation for a change of grade of the street by the city. As said in *City Council v. Townsend*, 84 Ala. 486, 4 South. 780, it is "both the privilege and duty of a city government to so grade the streets or change their grade as to make them safe and convenient, and this power is conclusively presumed to have been conferred when the dedication was made." But in the exercise of this privilege and duty, if the property of an abutting owner is or will be injured thereby, clearly under our constitutional provision and adjudged cases he may restrain the further prosecution of the improvement of the street by the city until just compensation is paid to him for the injury done or about to be done to his abutting property.

It may be that the eleventh paragraph of the bill is susceptible of the construction that complainant bases his relief to some extent upon his supposed property right in the avenue, but it is also clearly susceptible of the construction that his right is predicated upon his property interest in his storehouse and lot (and not in the avenue) which the bill distinctly shows will be substantially injured should the improvement by the city of grading the avenue be permitted to progress. There is no ground of demurrer specifically raising this point, and clearly the motion to dismiss cannot avail as against an amendable defect, which this is.

It is true the opinion does not exclude complainant's right to relief on account of his supposed property rights in the avenue. And its failure to do this coupled with certain expressions contained in it is calculated to lead to the conclusion that such a right exists. But this misleading tendency is overcome, I think, when we consider its entire context. My concurrence in the conclusion reached on this point, I wish to be understood, was upon the proposition that the equity of the bill is based upon complainant's right to compensation for the injury done his property abutting on the avenue, and not upon an injury to his supposed property interest in the avenue itself.

The other questions raised on the record are sufficiently clearly dealt with, so there is no need of discussing them further.

TOWN OF NEW DECATUR v. SMITH.
(Supreme Court of Alabama. April 4, 1906.
Rehearing Denied June 30, 1906.)

1. EQUITY—PLEA IN ABATEMENT—TIME FOR FILING.

Pleas in abatement are too late when filed along with other pleas going to the merits and on the same day that the answer was filed.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 399; vol. 1, Cent. Dig. Abatement and Revival, §§ 499, 500.]

2. MUNICIPAL CORPORATIONS — CHANGING GRADE OF STREET—DAMAGES—WAIVER.

The fact that the owner of property abutting on a street petitioned the city to pave the street did not estop her from maintaining a suit for an injunction to restrain the changing of the grade on constructing the pavement, for which change she had received no compensation.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 958-961.]

3. SAME — NATURE OF LIABILITY—REMEDIES OF PROPERTY OWNER.

In a suit by the owner of property abutting on a street to enjoin the city from changing the grade of the street, for which change she had received no compensation, and to require the city to restore the street to its former condition, the fact that there was no negligence in or about the work did not defeat complainant's right to have the street restored to its former condition.

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

"Not to be officially reported."

Suit by W. R. Smith against the town of New Decatur. From a decree in favor of complainant, defendant appeals. Affirmed.

Brown & Kyle, for appellant. E. W. Godbey, for appellee.

TYSON, J. The pleas in abatement were filed along with other pleas going to the merits of the bill, and also the same day that the answer to the bill was filed. They come too late.

Plea 3 attempts to assert an estoppel against the complainant, predicated upon the fact that she petitioned the respondent, municipal corporation, to pave the street with

brick, and the expense, etc., incurred by respondent, and her failure to object, etc. It does not aver that complainant consented to raising the grade of the street, as do pleas numbered 3 and 4 in the case of *Town of New Decatur v. Scharfenberg* (Ala.) 41 South. 1026. Plea 6 is, also, insufficient. *Town of New Decatur v. Scharfenberg*, in MS.

Affirmed.

WEAKLEY, C. J., and SIMPSON and ANDERSON, JJ., concur.

(117 La.)

No. 15,839.

LISSO & BRO. v. GIDDENS et al.

(Supreme Court of Louisiana, June 4, 1906.
Rehearing Denied June 28, 1906.)

1. PETITORY ACTION—DEFENDANT NOT PREJUDICED BY WARRANTOR'S DEFENSE.

The allegations of warrantor do not control nor defeat the right of the defendant.

2. PRESCRIPTION—POSSESSION.

The defendant was in possession of the property sold at tax sale; plaintiff takes nothing by prescription.

3. TAXATION—NOTICE TO TAX DEBTORS.

It does not satisfactorily appear that the tax debtor was notified as required.

4. SAME—REDEMPTION CERTIFICATE.

The auditor issued a "certificate of redemption" for the very taxes for which plaintiff claims the property was sold. Though issued after the time for redemption it remains as a fact that the state did not transfer the property which had been adjudicated to her for taxes for which the "certificate" issued. Moreover, the property had not been correctly assessed in the name of the tax debtor, nor had it been properly described.

5. SAME—REDEMPTION.

The state authorities did not go behind the certificate of redemption, nor seek to sell the property for taxes paid.

6. SAME—TAX SALE.

The act of sale of 1897 for the taxes of 1896 is null by reason of the fact that the taxes had been paid.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1267.]

7. SAME—ASSESSMENT.

Moreover, if there was any validity in the tax deed of 1896, the property, after one year had elapsed was not separately assessed as the property of the state as required by Act No. 80, p. 88, of 1888.

Provosty, J., dissenting.

(Syllabus by the Court.)

Appeal from Eleventh Judicial District Court, Parish of Red River; Charles Vernon Porter, Judge.

Action by Lisso & Bro. against Tandy K. Giddens, J. J. O'Bierne, and others, warrantors. Judgment for defendants, and plaintiffs appeal. Affirmed.

Scheen & Stephens, for appellants. William Augustus Wilkinson, for appellee Tandy K. Giddens. Jack & Fleming, for appellees J. J. O'Bierne and others, warrantors.

BREAUX, C. J. Plaintiff's action was petitory.

Plaintiff, as owner, claimed under a tax title, while defendant claimed under a recorded deed of purchase of anterior date.

Plaintiff's contention is that the property was regularly sold to the state in 1895 for the unpaid taxes of 1894, and that it was a second time sold to the state in 1897 for the unpaid taxes of 1896.

It was sold by the state to the plaintiff in satisfaction of the unpaid taxes of 1896, and no mention was made of the prior sale of 1895 in this deed by the state to the plaintiff.

The defendant, on the other hand, owns under a deed of sale by the heirs of O'Bierne made to him in January, 1903. The heirs of O'Bierne had acquired the property from the succession of Levy; and Levy, by mesne conveyance, traces ownership to the government.

This property was assessed in the name of the "Heirs of O'Bierne." It has always been in the possession of the "Heirs of O'Bierne," or that of their ancestors in title.

Plaintiff avers that the description of the land in his tax deed is correct, except that the southwest corner and southeast corner of the southwest quarter of the track, as described in the deed, should have been described as the south half of the southwest quarter, and the south half of the southeast quarter in section 7.

Plaintiffs ask to have the erroneous description corrected.

Plaintiff sets out that the certificate of redemption, which warrantors obtained, can be of no avail, because it was not obtained within the period for redemption. They aver that under Act No. 80, p. 88, of 1888, they are indefeasible owners of the property. They ask for judgment recognizing their title, and correcting the erroneous description before mentioned.

Plaintiffs also filed a plea of prescription of three years under article 233 of the Constitution of 1898, relating to tax title.

Defendant interposed a general denial, averred that he bought in good faith, pleaded his possession. In the event of his eviction, he asked for judgment against his warrantors.

The warrantors in their answer to defendant's call in warranty, denied that plaintiff has any right in the land and averred that their warrantees are the owners. They averred that they redeemed the land; that the state acknowledged their right as owners; and that, in consequence, she was without right to convey the property to the plaintiff.

The case was before this court on appeal from the first judgment of the district court, and it was remanded to admit evidence touching the recitals in the tax collector's deed, regarding service of notice on the tax debtor, the manner of service, and the date and extent of the original entry of the land, and for a further account of the title since the land was entered; also to take evidence

regarding the number of O'Bierne's heirs, and the extent of their interest as warrantors.

Evidence was heard in the district court after the case had been remanded, and again the district judge decided for the defendant.

Plaintiffs appeal.

Plaintiffs, in the first place urge, in substance, that the general denial of defendant in the answer is controlled by the special allegations in the answer of warrantors; that the latter must prevail and be controlling, not only in so far as the warrantors are concerned, but also as relates to plaintiffs.

The special allegation in the answer of warrantors which plaintiffs urge is controlling was that which sets forth that the land was adjudicated to the state in 1895, and remained the property of the state until December, 1898; that it was fully three years after the sale was made of the property at tax sale to the state that the owners redeemed the property from the state and received a certificate of redemption from the auditor.

This admission of the warrantor that the property had been owned by the state is the admission which plaintiffs claim is binding upon the defendant.

The defendant stoutly denies that it can be thus bound by a warrantor's allegation.

We are of opinion that the defendant cannot be thus controlled in his rights.

True, in pleadings, general are governed by special allegations; but not when the general allegations have been made by defendant and the special allegations by the warrantor. The latter cannot thus dispose of the rights of defendant. Each stands upon his legitimate ground of defense. Warrantors cannot admit away the right of their vendee; each must stand on his own rights.

In this view we hold that it is not, as contended by plaintiffs but on the contrary, defendants have not admitted the validity of the sale to the state.

We will state here that the whole case is before us on the evidence taken on the first trial and on the evidence taken on the second trial before the district court after the case had been remanded.

We have found no good reason upon which to sustain plaintiffs' plea of prescription under article 233 of the Constitution.

It will be borne in mind that defendant has always been in possession. His cause cannot very well be brought within the terms of the article cited, *supra*. This article has been interpreted several times, and no longer leaves room for much interpretation on this point.

We repeat that plaintiffs having never been in possession under the facts here, take nothing by prescription. *Boagni v. Pacific Improvement Company*, 111 La. 1063, 36 South. 129; *Tieman v. Johnston*, 114 La. 112, 38 South. 75.

The plea of prescription passes out of the case.

Did the state convey a title to plaintiffs? is the all important question.

As a preliminary to a decision on the merits of that question, we will state, as relates to notice to the tax debtor that the proof admitted after the case had been remanded does not add anything to the recitals of the deed; on the contrary, if anything, it impairs the weight of these recitals, and if there was not sufficient evidence before the court made to appear by the tax collector's deed that the notice required by the Constitution was served, there is less at this time; for the admitted testimony shows that no service appears on the rolls as required by section 41, Act No. 85, p. 126, of 1888, of notice given to the tax debtor.

There is no check mark on any of the assessment rolls, or any evidence of record to show notice, except the bare recital of the deed, which is to be taken as *prima facie* correct. No one seems to know that the service was made. The tax debtors were not residents of the parish in which the land was situated. If they were notified it must have been by mail. The postmaster's receipt of letters, containing notices to tax debtors, if any was ever issued, was not to be found. Moreover, there is no certificate from the sheriff for 1894, showing that notice had been given to delinquent tax debtors. He, the sheriff, shall certify on both tax rolls that he has served or mailed all of said notices. Certificates on either tax roll shall make full proof, until disproved in a judicial proceeding. Section 41, Act No. 85, p. 126, of 1888. Act No. 77, pp. 96, 97, of 1890, §§ 27, 28, is specially direct upon the subject. The tax debtor having been in possession, the stringent article of the Constitution of 1898 (article 233) has no application.

But we leave this subject without deciding the issues upon that point.

For the sake of some convenience in the discussion, we invert the order in which the issues have been presented, and take up for decision the question relating to the last act of sale; that is, the act of sale of 1897, for the payment of the taxes of 1896.

It will be borne in mind that this act of sale by the state to Lisso Bros., dated the 14th day of September, 1901, was made to them in payment of the debtors' taxes (warrantors here), of the year 1896, in the name, not of the heirs of O'Bierne, but of the heirs of O'Brien.

Excerpt from tax deed of 1897 for part of taxes of 1896:

"Name and description of property.
"Heirs of O'Brien. 320 acres—S. W. quarter of S. E. quarter of S. W. quarter, section 8; N. ½ of N. E. quarter; N. ½ of N. W. quarter, section 18, T. 11., R. 8, entered by Charles Petrovick."

Plaintiff admits there is an error in that section 8 should be section 7.

The sale of 1901 to Lisso Bros. was of property assessed in the name of the "Heirs of O'Bierne."

The deed in question refers exclusively to the taxes of 1896.

In this act of sale by the state to Lisso Bros. no mention was made of taxes of 1894; but it appears that in August, 1897, the land in question was adjudicated by the sheriff, as tax collector to the state of Louisiana for the taxes of 1896, and this is the tax deed which is made the basis of the tax sale by the state to Lisso Bros. On the day that the state sold to Lisso Bros. the property had not been properly assessed or not properly described. For some reason, not disclosed, the state did not choose to avail itself of the adjudication which had been made to it of the property for the taxes of 1894. We infer that it was because it had accepted the payment of the taxes of 1894, and had given full receipt to the tax debtors. It further appears that payment was made of all taxes due on the property for 1896, within 12 months from the date of the sale which was made the basis of the sale to Lisso Bros.

The clerk of the court of the parish of Natchitoches, in which the land is situated, who seems to have been quite familiar with assessments and tax matters in that parish, testified that all taxes had been paid. To finish the sentence in his words:

"In the interest of the O'Bierne heirs, on July 2, 1898, and for which the redemption certificate issued on December, 1898."

This redemption certificate was complete, and covered all taxes therein to its date.

The clerk is corroborated by the sheriff of the parish, as shown by the following, quoting:

"The supplemental assessment was made for said years and the roll shows that it was paid as I have said for years '95, '96, and '97, and that they were paid on July 2, 1898."

Now if the clerk is not in error in his statement that all taxes had been paid on July 2, 1898, then it is a fact that the taxes were paid within the 12 months after the property was adjudicated to the state in August, 1897. And this fact, together with the certificate of redemption, is a complete answer to all of plaintiffs' claim.

But let us concede that the certificate should not have been issued, we then take up the second branch of the case, and even then we do not find that they have a title for the following reasons: The plaintiffs did not buy with the least reference to the sale of 1895 for the taxes of 1894.

No reference whatever is made to the sale of 1896.

Now as to the title which fell to Lisso Bros. by the deed to them by the sheriff and tax collector in 1901. This title was null. Essential forms were omitted in that the property was not assessed separately for the taxes of 1894 as required by Act No. 85, p. 133, of 1888, § 61.

The following are in the main the provisions of the act:

"The same shall continue to be assessed in the name of the possessor to whom it belongs at the date of the sale until the lapse of one year; but the tax collector shall not sell the same under the assessment, but may sell the same after the expiration of 12 months under Act No. 80, p. 88, of 1888, as the property of the state provided the assessor shall designate such property as adjudicated to the state, and list and assess the same separately from all other property."

The property was not designated as adjudicated to the state, nor listed, nor separately assessed. The property is described in the deed of 1897, not as the property of the state, but as the property of the "Heirs of O'Brien." It was not sold as property of the state. It was not listed nor assessed in the name of the state, but in the misleading name of O'Brien.

This is a requirement precedent to the sale. Section 61, Act No. 106, p. 137, of 1890.

The property was sold for the taxes of 1896, claimed as due by the heirs of O'Brien, although plaintiff claims at the same time that the property was assessed by the state.

The law contains no provision for the re-advertisement of the property in the name of the tax debtor and second adjudication. Section 53, p. 130, Act No. 85 of 1888.

We return to the necessity there was under the law of selling the property for the state. Upon that subject there is recent unanimous utterance of this court:

"Considered from another point of view the state having continually since 1885 assessed the property to plaintiff and his author and collected taxes thereon, waived the prior forfeiture or adjudication to herself."

In *Martin v. Barbour*, 140 U. S. 646, 11 Sup. Ct. 949, 35 L. Ed. 546, the court said:

"The state is bound by the act of her officers in placing the lot on the tax books for the years 1885 and 1886, and receiving from the appellees the taxes for three years. Equity will treat the transaction as a waiver of the prior supposed forfeiture, and will regard the taxes paid for 1885 and 1886 as so much paid toward redemption, and will permit the payment of the rest." *Pitre v. Schlesinger*, 110 La. 234, 34 South. 425; *State v. Ober*, 34 La. Ann. 359; *Land Improvement Co. v. Wade*, 51 La. Ann. 251, 25 South. 106; *State ex rel. Benedict v. City*, 112 La. 408, 36 South. 475.

The discussion here is unanimous regarding the tax sale of 1897 for the payment of the taxes of 1896. Even if there is any vitality at all in the tax deed of 1895 to the state for the payment of the taxes of 1894 it would be strange if the title passed out of the state through the sale of 1897, admittedly null and void.

Be this as it may, the property was not listed and assessed in the name of the state after the sale of 1894. Under repeated decisions it could not be sold in 1897, as property of the tax debtor, and not of the state.

But the contention is made by plaintiffs that the state can do as she pleases with her own. That would be true if the state officers

In the proceedings had conferred some color of title upon the purchaser from the state. We do not think that they have in thus selling the property in the name of the original tax debtor.

Before closing we cite *Doullut v. Smith* (No. 16,011, handed down this day), 41 South. 913, in which it is held that a tax sale is null, because part of the tax had been paid. Here all the taxes for which the property was sold, according to the express terms of the deed, had been paid.

It was not really an act binding upon the state in any way. Besides, we do not think that plaintiff acquired title. The property remained in the tax debtor.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed.

MONROE, J., concurs in this opinion.

PROVOSTY, J., dissents, and hands down a separate opinion.

PROVOSTY, J. (dissenting). The land in dispute in this case was sold to the state at tax sale in 1895 for the unpaid taxes of 1894. The tax debtors, or former owners, had one year within which to redeem, upon paying the price of the sale with 20 per cent. additional thereon, together with all costs, penalties and interest, "and all taxes due up to the day of the redemption." Section 62, Act No. 85, p. 183, of 1888. For the purpose of fixing the amount of the latter taxes—that is to say, the taxes that would have accrued during the year allowed for the redemption, if the adjudication to the state had not been made—the law required that the property should be assessed for the year following the adjudication, but on a separate part of the tax roll, and with a proper memorandum showing that it had been adjudicated to the state. Sections 62, 63, Act No. 85, p. 183, of 1888; section 61, Act No. 106, p. 137, of 1890.

This requirement was complied with only in part, the proper memorandum was made, but the assessment, instead of being on a separate part of the roll, was at its usual place on the roll. The memorandum was to the effect that the property had been adjudicated to the state in 1895; it showed, therefore, that the property belonged to the state, and that no taxes could be due on it, and that the assessment was not a real assessment, but merely formal, merely for the purpose of fixing the amount which the former owner would have to pay in case he should desire to exercise the privilege to redeem within one year accorded him by the statute. Upon this mere simulacrum of an assessment, however, and although the property already belonged to the state, the tax collector proceeded, in 1897, to advertise the property for sale to satisfy this purely fictitious tax of 1896, and at the sale adjudicated it a second time to the state.

In 1898, three years after the adjudication of 1895, and, therefore, long after the delay for redemption (which was of one year from the date of the tax sale) had expired, the former owners of the property sought to redeem it. To that end they paid to the State Auditor the full amount of the taxes of 1894, with interest, penalties, and costs, and in addition the taxes of 1895 and 1896, and also the taxes of 1897 and 1898 on a so-called assessment made for the purpose by the tax collector on the basis of the valuation of the property made by the assessor in 1896; and they received from the Auditor a certificate of redemption.

In this tardy redemption proceeding no notice was taken of the tax sale of 1897, and, as a consequence, the apparent title which that sale had created in favor of the state remained extant and uncanceled on the books of the Auditor. And the Auditor, in 1901, finding this title on his books, and assuming it to be regular, proceeded to cause the property to be advertised for sale as property theretofore adjudicated to the state at tax sale, and not redeemed, as he is required to do with that class of property by Act No. 80, p. 88, of 1888. At this sale the plaintiffs, Lisso & Bro., were the highest bidders, and became the purchasers, and received from the tax collector a deed in due form. The property was thus advertised and sold as having been adjudicated to the state in 1897 for the taxes of 1896. No reference whatever was made in the proceedings, or in the deed to plaintiffs, to the adjudication of 1895 for the taxes of 1894.

Now, a word as to the land in dispute. It was never, or at any rate, not since 1873, in anybody's actual possession. It is described as old pine land of no value as land, uncleared, on which nobody ever lived, although in 1873 there was an old residence upon it which was burned down "to keep yellow fever from getting there." James J. O'Bierne, one of the three former owners, and the one who acted for the former owners in the redemption proceedings, refers to it in his testimony in the following terms:

"I haven't seen it since I turned it loose. I do not know whether it is improved or not. I think we got a fair value for it, though."

Presumably, by the expression: "Since I turned it loose," he meant since he let it be sold for taxes. And, evidently, by the expression: "I think we got fair value for it," he refers to the sale which he and his co-owners, his mother and sister (Mrs. Porter and Mrs. Wilson), made of the property to the defendant Giddens shortly after the redemption. This value, by the way, owing to the rapid increase in the value of timber lands in recent years, is of several thousand dollars.

The pleadings need be stated only in substance. Plaintiffs allege the adjudication to the state in 1895 for the taxes of 1894 and

their own adjudication in 1901, and that the defendant Giddens claims to be owner, and refuses to give up possession. They allege, further, that in the deed to them an error was made in the description of the land. They pray to be recognized as owners and to be placed in possession, and that the error of description in the deed be corrected.

The defendant contented himself with filing a general denial and calling his vendors in warranty.

The vendors, James J. O'Bierne, Mrs. Porter, and Mrs. Wilson, admitted the warranty, except as to the part of the land, which they said had been sold without warranty. They then averred, as follows: that the land was adjudicated to the state in 1895 for the taxes of 1894, as alleged by plaintiffs, but that they, the former owners, redeemed the same on the 2d of July, 1898; that the state, having parted with her title by said redemption, had no longer any title to convey to plaintiffs; that if said land was adjudicated to the state a second time after the adjudication of 1895, such adjudication was null and void, because by section 61, Act No. 85, p. 133, of 1888, as amended by Act No. 106, p. 137, of 1890, the tax collector is forbidden to sell a second time at tax sale property already adjudicated to the state.

After this answer had been filed, plaintiffs filed a supplemental petition, in which they alleged the adjudication in 1897 for taxes of 1896, and claimed title under that adjudication, also; and asked, in addition, that an error in the description of the property in the deed to the state under that adjudication be corrected.

Plaintiffs also filed a plea of prescription of three years in bar of any attack upon the state's title to the property.

In argument the defendant urges the nullity of the adjudication of 1895 on various grounds.

These grounds, the plaintiffs contend, the defendant cannot be permitted to urge because he did not set them up specially in his pleadings, and because the defense of the case belongs exclusively to the warrantors.

I do not agree with these contentions of plaintiffs. Nor do I think that the plea of prescription can be sustained. And I think that plaintiffs' suit is not an action to quiet a tax title under the provisions of Act No. 101, p. 127, of 1898, but a petitory action pure and simple. Finally, I think that the adjudication of 1897 was a mere selling to the state of property already belonging to the state, and was, as contended by defendant, an absolute nullity. On all these points I deem it unnecessary to elaborate my views, as I think the case is with the plaintiffs on the merits. I think, first, that the tax sale of 1895 to the state must be held to have been valid; second, that the title thus conveyed to the state was not divested by the attempt at redemption after the delay for redemption had expired; and, third,

that this title must be held to have passed to plaintiffs by the adjudication under the provisions of Act No. 80, p. 88, of 1888; and I proceed to consider these three propositions in regular order.

First, as to the tax sale of 1895 to the state. The grounds upon which defendant assails its validity are the following: First, that more property was assessed than was described, 320 acres being assessed and only 170 described, so that that part of the property which was described and which alone could pass by the sale was sold in part for a tax it did not owe; second, that instead of being in the names of the owners, James J. O'Bierne, Mrs. Porter, and Mrs. Wilson, the assessment upon which the sale was made was in the name of "Heirs of O'Brien;" third, that the tax for 1894, for which the sale was made, had been paid; fourth and last, that the owners, or tax debtors, were not served with notice of delinquency.

The first of these grounds is cured by the provisions of Act No. 80, p. 88, of 1888, under which the adjudication to plaintiffs was made. Section 4, par. 6 (page 89) of that act provides that "the proof of payment of only a portion of the taxes for which the property was adjudicated to the state, shall not in any manner affect the validity of the sale to the purchaser." Under this provision the fact that the property happens to be sold for a tax which it in part does not owe, does not have the effect of invalidating the sale.

The second objection, based on the defective designation of the owner, is fully met by section 4 of the same act, to the effect that said deed shall be conclusive evidence that the property was listed and assessed according to law. And by section 1 of the same act which provides that the assessment on which the sale to the state was made "is hereby declared to be legal and binding in every respect on the former owners." In the case of *In the Matter of Orloff Lake*, 49 La. Ann. 142, 3 South. 479, this court interpreted that statute as meaning that where there had been an assessment of some kind it should be taken to have been according to law, even though in the name of a person not the owner. And that doctrine was expressly reaffirmed in the case of *In re Douglas*, 41 La. Ann. 765, 6 South. 675, and was referred to with approval in the case of *Tibbler v. Land Co.*, 49 La. Ann. 1471, 22 South. 411, and in several other cases, and may, I think, be considered to be the settled jurisprudence.

The third objection that the taxes for 1894, for which the sale was made, had been paid, is clearly an afterthought. It was not urged at all when the case was before this court at the last session. It is clearly and manifestly without merit. There is absolutely no evidence of the taxes of 1894 having been paid except by the sale of the property in 1895. I will remark, in passing, that this plea of

payment is somewhat inconsistent with defendants' fourth and last ground of nullity, that of want of notice of delinquency, which I now proceed to consider, which is the only one giving rise to any difficulty whatever.

The question, whether notice of delinquency was given or not, is one purely of fact, so little evidence had been offered on this point when this case was before this court at the last session that the court thought that on this point the case could scarcely be considered as having been tried, and that in the interest of justice it should be remanded for further evidence; and this was done. It has returned to this court with so little additional evidence that the condition of the record can hardly be said to have improved.

The question whether notice of delinquency was given or not is one purely of fact. So his mother and sister, Mrs. Porter and Mrs. Wilson. I judge from the very meager record that Mrs. Porter is a very old person and was not in the habit of attending to the payment of the taxes on this property, but left the matter in the hands of her son. The most that she seems to have known was that she and her son and daughter had title to some land in the neighborhood of Grappes Bluff. The son, James J. O'Bierne, speaks of the time when "he turned the property loose," referring, presumably, to his having let it be sold for taxes; and he it was who attended to the redemption of the property. I think the fair inference from the record is that James J. O'Bierne had been in the habit of attending to the payment of the taxes on the property, and that the notices were usually served upon him, and that he and not the old lady, his mother, should have been produced as a witness to testify in regard to whether this notice had been served or not. On the first trial he had appeared as a witness, but had not been questioned as to this notice. On the second trial, the trial which was had in pursuance of the remanding of the case, he was not produced; but the old lady was called as a witness, and she testified that no notice had been served, so far as she knew. The only other evidence offered by defendant is the assessment roll itself, for the purpose of showing that no certificate appears thereon of the delinquency notice having been served.

On the other hand, plaintiffs offered the sheriff as a witness to prove by him that the notice had been properly mailed. Defendant objected to that officer being permitted to testify, on the ground that the record was the best evidence; and the court sustained the objection. The ruling was erroneous; the sheriff should have been allowed to testify. The point is not new. *Tieman v. Johnston*, 114 La. 112, 38 South. 75.

I think it is significant that when James J. O'Bierne came to defend this case as warrantor he did not set up this ground of nullity; in fact, did not question at all the validity of the tax sale of 1895; that, on the contrary, he alleged that the land had been

sold to the state in 1895 for the taxes of 1894, as alleged by plaintiffs, but that it had been redeemed from that sale. And I think it doubly significant that he did not, as a witness, say one word in regard to the delinquency notice not having been served on him.

On this condition of the record, I think that the defendant has failed to discharge the burden which rested upon him to show that the notice had not been served.

But he contends that the burden of proof in that regard did not rest on him but on the plaintiffs, and he invokes article 44 of the Code of Practice requiring the plaintiff in a petitory action to make out his title, and also the dictum in the cases of *Waddill v. Walton*, 42 La. Ann. 763, 7 South. 737, and *Lambert v. Craig*, 45 La. Ann. 1106, 13 South. 701, to the effect that a plaintiff in a petitory action "resting his title on a tax deed, must not only show a prima facie title but one absolutely good."

So far as the article of the Code of Practice is concerned it is completely satisfied when the plaintiff tenders a title which, in the absence of contrary proof, the courts are bound to accept as good; and that is exactly what the holder of a tax title does when he tenders his tax deed. Under the statutes and under the Constitution the courts are bound to accept such a deed as good until the contrary is shown. And this court not only has not said but, naturally, could not have said anything to the contrary. The court could not have intended to hold (in the teeth of repeated statutes and in the teeth of the very Constitution itself) that a tax deed was not prima facie evidence of the title or that prima facie proof does not mean that the party who has made it may rest until his adversary has rebutted it. Of course, the tax deed is not prima facie evidence that the tax debtor had title, but only that the title of the tax debtor, such as it was, has passed by the tax sale. And if an issue is raised in regard to the tax debtor's title, and an outstanding title is shown, the tax deed is not prima facie evidence that the tax debtor's title was better than this outstanding title, and, as a matter of course, the burden of proof lies on the plaintiff who relies upon it to show that it is better than the outstanding title. It is in that sense the above quoted dictum of the cases of *Waddill v. Walton* and *Lambert v. Craig* must be understood; that is to say, that the plaintiff in a petitory action, relying upon a tax title, must show a title absolutely good in the sense of being better than any other title that can be shown to the property.

The cases of *Waddill v. Walton* and *Lambert v. Craig* did not involve any question of burden of proof. In them, all the pertinent facts were proved, and there was no question of any fact left unproved whose existence or nonexistence, would have to be determined accordingly as the burden of proof rested

upon the one or the other litigant. The sole question in them was as to the validity, or sufficiency, of the title under all the facts as proved. In *Waddill v. Walton* no attack was made upon plaintiff's tax title; but the contention was that the tax debtor had no title. The tax debtor's title, such as it was, had been conveyed by the tax sale, but it was not the best title to the property; and in that sense it was not absolutely good. It was not good as to the whole world. It left a better title outstanding. So, likewise, in *Lambert v. Craig*, there arose no question as to burden of proof.

In the instant case, plaintiffs tender a deed which Act No. 80, p. 88, of 1888, § 4, subd. 6, provides "shall be conclusive evidence that all the prerequisites of the law were complied with by all the officers from the listing and assessment of said property up to and including the execution and registry of the deed to the purchaser."

A deed executed in pursuance of a statute which declares that the title of the state to property adjudicated to her at tax sale and not redeemed "is hereby declared good and perfect." If, after plaintiff had offered such a deed in evidence, the burden of proof has not shifted to defendant, the reason must be that the Legislature is powerless to shift the burden of proof, a thing no one will contend.

I conclude that the adjudication of 1895 was valid, and conveyed the title of the former owners to the state; and I pass to the second question, whether the title thus acquired by the state was divested by the attempt at redemption after the delay for redemption had expired. This question appears to me to be one offering no difficulty whatever. Unless, indeed, the Legislature is not the law-making power; and unless the State Auditor can override a duly enacted statute prescribing the mode in which the lands acquired by the state at tax sale and not redeemed in one year, shall be disposed of.

The Legislature has provided, in terms which could hardly have been made stronger or more explicit, that property adjudicated to the state at tax sale, and not redeemed within one year from the date of the adjudication, shall be sold at public auction to the highest bidder after 30 days' advertisement. Section 1, Act No. 80, p. 88, of 1888. Section 3 (page 89) of the same act provides:

"That when any property sold to the state for unpaid taxes has been once advertised and offered for sale in accordance with the provisions of this act, and has failed to sell, then—i. e., not until then—the Auditor of public accounts shall be authorized to receive bids for all such unsold property and sell the same and execute a deed thereto."

In view of this statute, it has to be, and is conceded that the Auditor was entirely without right or authority to divest the title of the state to this property in any other mode than the one thus expressly and explicitly prescribed. But it is said that, while his act

in the premises was illegal, null, and void, yet it has given rise to an estoppel which precludes the state from contesting the validity of the transaction. That proposition, in my humble judgment, is on a par with the proposition that if the Governor sold the statehouse his act would give rise to an estoppel which would preclude the state from contesting the validity of the transaction.

Precisely in the same way that the purchaser of the statehouse, in such a case, could not be heard to say he did not know the Governor did not have authority to make the sale, the defendant, in the instant case, cannot be heard to say the former owners, and would-be redemptioners, did not know that the Auditor did not have authority to divest the title of the state by this tardy redemption, or in any mode whatever, except that expressly provided by Act No. 80, p. 88, of 1888. It is elementary in the law of agency that persons dealing with an agent must, at their peril, inform themselves of the extent of his authority.

It is said, again, that all the state wants is the amount of the taxes due on the property. There are two peremptory reasons why this is not true. The first of these reasons is that the Legislature, far from saying that the state would be satisfied with the amount of the taxes due on the property, has said the very contrary; it has said expressly and explicitly that the state would be satisfied with nothing less than the full amount that the property will bring at public auction after 30 days' advertisement. The second of these reasons is that no provision is made by law for the assessment of the property after the delay for redemption has expired, and hence there is no provision of law for fixing the amount which would have to be paid as representing the taxes on the property for the years after the year allowed for redemption. This amount, therefore, would have to be fixed arbitrarily by the Auditor; or he would have to play assessor, as the tax collector did in the present case, and manufacture an assessment specially for the occasion. In doing this, perhaps, he would do as the tax collector did in this case; that is to say, disregard the increase in value of the property during the time the state has held it in absolute ownership, and adopt as the basis of his so-called assessment the valuation placed upon the property by the assessor when he last assessed it, when it was considered by the owner to be worth less than the amount of the taxes. How unfair such a proceeding is to the state need hardly be pointed out.

In the cases of *Martinez v. Tax Collector*, 42 La. Ann. 677, 7 South. 796; *Remick v. Lang*, 47 La. Ann. 914, 17 South. 761; and *Blood v. Negrotto*, 47 La. Ann. 1135, 17 South. 596, the plaintiff was denied the right to contest the validity of such a tardy redemption; but that was because he had no standing for doing so, he not having succeeded to the title

of the state, and being, therefore, a stranger to the question. But in the instant case the situation is wholly different; the plaintiffs have succeeded to the title of the state, and have, therefore, the same standing to contest the question as the state had. Those decisions are really in point for plaintiffs, for in them the nullity of the tardy redemption was conceded, only it was thought that the litigant was without standing to raise the question.

And this brings me to the third and last question, whether the adjudication to plaintiffs had the effect of transferring to them the title of the state which the tardy redemption had failed to divest. I think it did, unless there is no virtue in fundamental principles and in statutes duly enacted.

This property had been adjudicated to the state both in 1895 and in 1897, and it had not been redeemed within one year from the date of the adjudication; therefore the Auditor and tax collector had express statutory authority, as will be presently shown, to sell it at public auction to the highest bidder after thirty days' advertisement, in the manner in which it was sold to plaintiffs; and, as a consequence, the state is the vendor of plaintiffs, and, by a fundamental principle of the law of sale, applicable to the state just as much as to individuals, a vendor cannot contest the title of his vendee, and therefore by the sale which he makes, whatever title he has, or may theretofore acquire, passes to his vendee.

But for holding the title of the plaintiffs to be good and perfect, in so far as the state is concerned, there is not even any necessity of recurring to general principles, since there is a statute made expressly to cover such cases. I refer, of course, to Act No. 80, p. 88, of 1888, which makes it "the imperative duty" of the Auditor and tax collector to sell at public auction to the highest bidder after 30 days' advertisement; that is to say, in the manner in which the property in dispute was sold to plaintiffs, all the property of the state of the description of the one in dispute; that is to say, the property adjudicated to the state for taxes of 1880 and subsequent years, and not redeemed within the time prescribed by law; that is to say within one year from the date of the adjudication. And the act declares that when such a sale is made a deed shall be executed in

favor of the purchaser which shall be conclusive evidence that all the prerequisites to the validity of such sale from the assessment down were fulfilled and that such deed "shall vest the purchaser an absolute and perfect title."

If the language of this statute left room for doubt, or if it were doubtful that this statute was intended to apply to the state, and should conclude the rights of the state equally with those of private persons, such doubt would be promptly removed by a moment's consideration of the well-known purpose of the statute; which was to dispel the popular distrust of tax sales by giving to would-be purchasers at sales made under the statute the most positive and solemn assurance it lay in the power of the Legislature to give that the title of the purchaser at such sale should be, in the language of the statute, "absolutely good and perfect"; that all the prerequisites for the validity of the sale, from the assessment down, should be conclusively, *juris et de jure*, presumed, to have been fulfilled; and this to the end that the state might secure purchasers for her property and obtain a better price through competition. That under these circumstances the statute applies to the state, and that the state could not come and contest the title thus conveyed to her vendee, appears to me too plain for dispute. Very far from contemplating that the title of the purchaser at such a sale should be good only where the title purported to be conveyed was good, the statute, on the contrary, avowedly contemplates that whatever dross of a title is put into the crucible of the proceedings under its provisions, shall come out sterling gold.

I conclude that the land was conveyed to the state by the tax sale of 1895; that the title thus conveyed was not divested by the attempt at redemption after the delay for redemption had expired; and that such title must be held to have passed to the plaintiffs. Of course, title was thus conveyed only to that part of the property which was described in the adjudication and the deed to plaintiffs, and the description in said adjudication and said deed cannot be retrospectively corrected as prayed by the plaintiffs; but, in this dissenting opinion, I need not go into that feature of the case.

I therefore respectfully dissent from the opinion of the majority of the court.

MEMORANDUM DECISIONS.

BERGLIN v. LARSSON. (Supreme Court of Alabama. June 30, 1906.) Appeal from Circuit Court, Baldwin County; W. S. Anderson, Judge. "Not officially reported." Action by Eva Berglin against Matilda Larsson. From a judgment for defendant, plaintiff appeals. Affirmed. This was an action of detinue to recover possession of a piano, some sheet music, and a piano stool. The evidence for appellant tended to show that she was the adopted daughter of the appellee and her first husband Peter Bebol. That the piano came to her as a birthday present, that after the family moved to Alabama the father and mother often spoke of the piano as Eva's piano (Eva was the plaintiff in this action), and that after the father died she made a demand for the piano. The evidence for the appellee tended to show that she purchased the piano with her own money, some of which her husband had given her, and some of which she had earned by taking boarders, and that she had never given or sold the piano to any one. That plaintiff had offered to purchase it after making demand for it, and that she had agreed to sell, but nothing more than a skirt worth 40 cents had ever been paid for it. There was verdict and judgment for defendant, and plaintiff made a motion for new trial, based upon the verdict being contrary to the evidence. This motion was overruled, and the assignments of error relate to the action of the court in overruling the motion. Pillans, Hanaw & Pillans, for appellant. N. S. Stone, for appellee.

DENSON, J. The only errors assigned relate to the judgment of the court overruling appellant's motion to set aside the verdict of the jury, and to grant a new trial. We have carefully considered the evidence, and we will not disturb the judgment overruling the motion. The judgment appealed from is affirmed.

WEAKLEY, C. J., and HARALSON and DOWDELL, JJ., concur.

BIRMINGHAM BELT RY. CO. v. PAR-DUE et al. (Supreme Court of Alabama. May 17, 1906.) Appeal from City Court of Birmingham; C. W. Ferguson, Judge. "Not officially reported." Action between the Birmingham Belt Railway Company and C. C. Pardue and others. From a judgment against the railway company, it appeals. Appeal dismissed. Campbell & Walker, for appellant. John W. Tomlinson, for appellees.

PER CURIAM. This case having been settled by parties thereto, it is by agreement dismissed.

COUCH v. STATE. (Supreme Court of Alabama. June 30, 1906.) Appeal from Circuit Court, Morgan County; D. W. Speake, Judge. "Not officially reported." John C. Eyster, Lowe & Tidwell and Wert & Wert, for appellant. Massey Wilson, Atty. Gen., for the State.

PER CURIAM. This is an appeal from an order of the judge of the eighth Judicial Circuit denying bail on application for writ of habeas corpus. It is affirmed.

DISMUKES v. STATE. (Supreme Court of Alabama. June 30, 1906.) Appeal from Circuit Court, Marengo County; John T. Lackland, Judge. "Not officially reported." Massey Wilson, Atty. Gen., for the State.

HARALSON, J. We find no error in the record, and the judgment must be affirmed.

WEAKLEY, C. J., and DOWDELL and DENSON, JJ., concur.

HENDRIX v. STATE. (Supreme Court of Alabama. June 30, 1906.) Appeal from Circuit Court, Hale County; B. M. Miller, Judge. "Not officially reported." Charley Hendrix was convicted of crime, and appeals. Reversed. De Graffenreid & Evans, for appellant. Massey Wilson, Atty. Gen., for the State.

WEAKLEY, C. J. The testimony has been read in consultation; and the court is of opinion that the affirmative charge for defendant upon the whole case, and upon the second and third counts separately could not have properly been given. Although there is no direct and positive evidence that the seed cotton alleged in those counts to have been purchased by the defendant was the same as that which had been taken from Baker's field in beat 5, and there is likewise an absence of direct and positive evidence that the defendant at the time of the purchase, if he did purchase the cotton knew that it had been grown in beat 5, as alleged, yet there are facts and circumstances in evidence sufficient to carry the case to the jury, and from which the jury might infer the existence, beyond a reasonable doubt, of the essential facts alleged in the counts under consideration. There was, however, no evidence whatever that the defendant had purchased seed cotton, that had been grown in beat 4, as alleged in the first count. It was shown by the undisputed evidence that Baker's field from which the cotton was taken was in beat 5, and hence the circuit court erred in refusing the charge requested in writing by the defendant, that if the jury believed the evidence they could not convict the defendant under the first count of the indictment. For this error the judgment must be reversed, and the cause remanded. Reversed and remanded.

HARALSON, DOWDELL, and DENSON, JJ., concur.

MONTGOMERY, L. & W. P. CO. v. GREGG. (Supreme Court of Alabama. June 5, 1906.) Appeal from City Court of Montgomery; A. D. Sayre, Judge. "Not officially reported." Action between the Montgomery, L. & W. P. Company and one Gregg. From a judgment for the latter, the former appeals. Dismissed. Massey Wilson and Goodwin & McIntyre, for appellant. Rushton & Coleman, for appellee.

PER CURIAM. This cause being settled between the parties thereto, it is dismissed.

PETREE v. CARR. (Supreme Court of Alabama. May 17, 1906.) Appeal from Chancery Court, Franklin County; W. H. Simpson, Chancellor. "Not officially reported." Action between S. J. Petree and J. S. Carr. From a judgment in favor of the latter, the former appeals. Dismissed. James & Williams, for appellant. Almon & Almon, for appellee.

PER CURIAM. This appeal is dismissed for want of prosecution, and for want of assignment of error.

PROVITT v. STATE. (Supreme Court of Alabama. July 6, 1906.) Appeal from Law

Court, Pike County; A. H. Owens, Judge. "Not officially reported." Dean Provitt was convicted of an offense, and he appeals. Dismissed. D. A. Baker, for appellant. Massey Wilson, Atty. Gen., for the State.

PER CURIAM. On the application of the appellant, the appeal in this cause is dismissed.

SLOSS-SHEFFIELD STEEL & IRON CO. v. SMITH. (Supreme Court of Alabama. June 13, 1906.) Appeal from City Court of Birmingham; C. W. Ferguson, Judge. "Not officially reported." Action between the Sloss-Sheffield Steel & Iron Company and Sol Smith. From the judgment, the company appeals. Dismissed. Tillman, Grub, Bradley & Morrow, for appellant. Bowman, Harsh & Beddow, for appellee.

PER CURIAM. The appeal in this cause is dismissed on motion of the appellant.

SOFTLY v. MONTGOMERY. (Supreme Court of Alabama. May 17, 1906.) Appeal from Circuit Court, Franklin County; E. B. Almon, Judge. "Not officially reported." Action between Allen Softly and W. P. Montgomery. From a judgment in favor of Montgomery, Softly appeals. Appeal dismissed. James & Williams, for appellant. W. H. Key, for appellee.

PER CURIAM. This appeal is dismissed for want of prosecution, and for want of assignment of error.

STATE v. CROCKETT. (Supreme Court of Alabama. June 30, 1906.) Appeal from Probate Court, Houston County; Geo. W. Leslie, Judge. "Not officially reported." W. B. Crockett was granted bail, and the state appeals. Reversed. E. H. Hill, for the State.

PER CURIAM. This cause is appealed from an order of the judge of probate of Houston county, Ala., granting petitioner bail, and said order is reversed, and an order here made denying bail, and remanding prisoner to custody of the sheriff.

TAGERT v. STATE. (Supreme Court of Alabama. May 31, 1906.) Appeal from Criminal Court, Jefferson County; S. L. Weaver, Judge. "Not officially reported." J. W. Tagert was convicted of a criminal offense, and he appeals. Dismissed. See 39 South. 293. Vasser L. Allen, for appellant. Massey Wilson, Atty. Gen., for the State.

PER CURIAM. This cause having been submitted on briefs on the 19th day of April, 1906, now on motion of appellant, the said submission is hereby set aside, and the appeal dismissed.

TANNER v. EWING. (Supreme Court of Alabama. May 15, 1906.) Appeal from Circuit Court, Limestone County; D. W. Speake, Judge. "Not officially reported." Action between John B. Tanner and Albert G. Ewing, Sr. From the judgment, Tanner appeals. Reversed and remanded.

PER CURIAM. Error confessed and cause reversed, and remanded.

TENNESSEE COAL, IRON & R. CO. v. SPIDLE. (Supreme Court of Alabama. June 14, 1906.) Appeal from City Court of Birmingham; Charles A. Senn, Judge. "Not officially reported." Action between J. W. Spidle and the Tennessee Coal, Iron & Railway Company. From a judgment in favor of the former, the latter appeals. Dismissed by agreement. Per-

cy & Benners, for appellant. Bowman, Harsh & Beddow, for appellee.

PER CURIAM. Dismissed by agreement of counsel.

THOMPSON et al. v. THOMPSON. (Supreme Court of Alabama. June 30, 1906.) Appeal from Chancery Court, Macon County; W. L. Parks, Chancellor. "Not officially reported." Suit between W. W. Thompson and others, as executors, and others, and Mary W. Thompson. From an adverse decree said W. W. Thompson and others appeal, and also petition for mandamus. Appeal and application dismissed. O. S. Lewis & J. M. Chilton, for appellants. Whitson & Dryer, for appellee.

PER CURIAM. This was an appeal from a decree on demurrer and an original petition in this court for mandamus. On motion of the appellants, both the appeal and the application for mandamus is dismissed.

EDWARDS v. PEOPLE'S NAT. BANK. (Supreme Court of Florida. July 10, 1906.) In Banc. Action by the People's National Bank against Walter H. Edwards. Judgment for plaintiff and defendant brings error. George W. Dayton, for defendant in error.

PER CURIAM. Dismissed on motion of counsel for the defendant in error.

GRACY v. ATLANTIC COAST LINE R. CO. (Supreme Court of Florida. May 31, 1906.) Error to Circuit Court, Alachua County; James T. Wills, Judge. Action by L. C. Gracy against the Atlantic Coast Line Railroad Company. Judgment for defendant and plaintiff brings error. W. H. Palmer and Robt. E. Davis, for plaintiff in error.

PER CURIAM. Writ of error dismissed by the clerk, on præcipe of counsel for the plaintiff in error under Rule 23 (18 South. ix).

GRIFFING BROS. CO. v. WINFIELD. (Supreme Court of Florida. June 2, 1906.) Error to Circuit Court, Dade County; Minor S. Jones, Judge. Action by T. A. Winfield against the Griffing Brothers Company. Judgment for plaintiff and defendant brings error. Price & Rand, for plaintiff in error.

PER CURIAM. Writ of error dismissed by the clerk, on præcipe of counsel for the plaintiff in error under Rule 23 (18 South. ix).

HART v. HART. (Supreme Court of Florida. July 10, 1906.) In Banc. Appeal from Circuit Court, Marion County; William S. Bullock, Judge. Bill by Charles M. Hart against Leola Hart. Decree for complainant and defendant appeals. Thomas Palmer, for appellant.

PER CURIAM. Dismissed on motion of counsel for appellant.

ROPES v. STEWART. (Supreme Court of Florida, Division B. Feb. 13, 1906.) Error to Circuit Court, Volusia County; Minor S. Jones, Judge. Action by I. A. Stewart against E. E. Ropes. Judgment for plaintiff and defendant brings error. E. E. Ropes, in pro. per. Egford Bly, for defendant in error.

PER CURIAM. Judgment affirmed.

SANCHEZ & HAYA REAL ESTATE CO. v. BRADFORD. (Supreme Court of Florida. June 26, 1906.) In Banc. Appeal from Circuit Court, Hillsborough County; Joseph B. Wall, Judge. Bill by George P. Bradford

against the Sanchez & Haya Real Estate Company. Decree for complainant and defendant appeals. O. W. Stevens, for appellee.

PER CURIAM. Dismissed on motion of counsel for the appellee.

LUTZ et ux. v. HARTMAN MERCANTILE CO. (Supreme Court of Mississippi. June 18, 1906.) Appeal from Circuit Court, Lincoln County; M. H. Wilkinson, Judge. Action by W. S. Lutz and wife against Hartman Mercantile Company. Judgment for defendant and plaintiffs appeal. Affirmed. Appellants brought an action of debt in the circuit court against appellee to recover the penalty provided by section 2451 of the Annotated Code of 1892, which is as follows: "Any mortgagee or cestui que trust, or the assignee of any mortgagee or cestui que trust, of real or personal estate, having received full payment of the money due by the mortgage or deed of trust, shall enter satisfaction upon the margin of the record of the mortgage or deed of trust, which entry shall discharge and release the same, and shall bar all actions or suits brought thereon, and the title shall thereby revert in the grantor. And if such mortgagee or cestui que trust, or such assignee, by himself or his attorney, shall not, within one month after request, make such acknowledgment of satisfaction, the person so neglecting or refusing shall forfeit and pay to the party aggrieved any sum not exceeding the mortgage money, to be recovered by action; but such entry of satisfaction may be made by any one authorized to do it by the written authorization of the mortgagee or beneficiary,

and shall have the same effect as done by the mortgagee or beneficiary; and where the entry of satisfaction is made under written authorization, the mortgagor or grantor, or his heirs or assigns, shall be entitled to the custody of the writing conferring the authority, unless it be duly acknowledged and recorded in the office in which the mortgage or deed of trust is recorded." The declaration charged that appellee failed to enter satisfaction upon the margin of the record a certain deed of trust, and that he failed to make such entry within one month after a request so to do; that appellants had discharged the debt for which said deed of trust was given. The testimony showed that at the time of the payment by appellants to the appellee of the indebtedness in question, the trust deed could not be found; that it had not been placed of record but that appellee gave appellant a receipt for the money so paid, which receipt recited a full payment and that all deeds of trust were to be canceled. The testimony further showed that appellants had paid appellee all indebtedness which they owed, and that appellants had requested appellee to have all deeds of trust canceled. When the testimony for the plaintiffs (appellants) was in, a motion was made by the appellee for a peremptory instruction on the ground that the proof was at variance with the pleadings, which motion was sustained and from this action of the court, an appeal is prosecuted. A. C. & J. W. McNair, for appellants. P. Z. Jones, for appellee.

MAYES, J. This case is controlled by Mortgage Co. v. Burke, 80 Miss. 643, 82 South. 51. Affirmed.

END OF CASES IN VOL. 41.

INDEX.

ABANDONMENT.

Effect on claim by adverse possession, see "Adverse Possession," § 1.
Of family, as vagrancy, see "Vagrancy."
Of husband or wife, see "Husband and Wife," § 7.
Of railroad right of way, see "Railroads," § 1.

ABATEMENT.

Pleas in abatement, see "Equity," § 3; "Pleading," § 2.

ABATEMENT AND REVIVAL.

Death of party pending appeal as ground for dismissal, see "Appeal and Error," § 5.
Judgment as bar to another action, see "Judgment," § 4.
Pleas in abatement, see "Equity," § 3; "Pleading," § 2.
Pleas in abatement in ejectment, see "Ejectment," § 2.
Repeal of statute pending suit as ground for abatement of action founded on such statute, see "Statutes," § 6.
Right of action by or against personal representative, see "Executors and Administrators," § 4.

ABDUCTION.

See "Seduction."

ABETTERS.

Criminal responsibility, see "Criminal Law," § 2.

ABSTRACTS OF TITLE.

Furnished in ejectment, see "Ejectment," § 2.

ABUTTING OWNERS.

Assessments for expenses of public improvements, see "Municipal Corporations," § 3.
Compensation for taking of or injury to lands or easements for public use, see "Eminent Domain," §§ 2, 4.

ACCEPTANCE.

Of dedication, see "Dedication," § 1.
Of orders for goods, see "Sales," § 1.

ACCESSION.

Annexation of personal to real property, see "Fixtures."

ACCESSORIES.

Criminal responsibility, see "Criminal Law," § 2.

ACCIDENT.

Cause of death, see "Death," § 1.

ACCOMPLICES.

Criminal responsibility, see "Criminal Law," § 2.

ACCORD AND SATISFACTION.

See "Payment"; "Release."

*Where a claim is unliquidated or the amount disputed, a payment and acceptance of a less sum than claimed *held* an accord and satisfaction.—*Hand Lumber Co. v. Hall* (Ala.) 78.

The acceptance by an attorney of a check from his client in payment of services rendered *held* to constitute an accord and satisfaction.—*Hand Lumber Co. v. Hall* (Ala.) 78.

A claim of an attorney for services *held* unliquidated, and the amount thereof in dispute.—*Hand Lumber Co. v. Hall* (Ala.) 78.

ACCOUNT.

Accounting between partners, see "Partnership," § 4.
Accounting by executor or administrator, see "Executors and Administrators," § 5.
Accounting by parties to partition, see "Partition," § 1.
Accounting on partition, see "Partition," § 2.

ACKNOWLEDGMENT.

Operation and effect of admissions as evidence, see "Criminal Law," § 12; "Evidence," § 6.
Operation and effect of admissions as ground of estoppel, see "Estoppel," § 2.

§ 1. Taking and certificate.

*A certificate of acknowledgment of a deed *held* sufficient in connection with certain evidence to authorize the admission in evidence of a certified transcript thereof.—*Middlebrooks v. Stephens* (Ala.) 735.

A conveyance by a husband and wife of land occupied by them as a homestead *held* to have given the entire title to their grantee after the husband's death, though she was not examined separate from her husband.—*Campbell v. Noble* (Ala.) 745.

ACTION.

Bar by former adjudication, see "Judgment," § 4.

Election of remedy, see "Election of Remedies."
Jurisdiction of courts, see "Courts."

Laches, see "Equity," § 2.

Limitation by statute, see "Limitation of Actions."

Malicious actions, see "Malicious Prosecution."

Restraining action at law, see "Injunction," § 2.

Actions between parties in particular relations.

See "Attorney and Client," § 2; "Landlord and Tenant," § 4; "Master and Servant," §§ 9-11.

Co-tenants, see "Partition," § 2.

Partners, see "Partnership," § 4.

*Point annotated. See syllabus.

Actions by or against particular classes of persons.

See "Brokers," § 3; "Carriers," §§ 2-7, 9; "Corporations," § 6; "Counties," § 4; "Depositories," "Executors and Administrators," § 4; "Husband and Wife," § 4; "Infants," § 3; "Municipal Corporations," § 7; "Partnership," §§ 2, 4; "Principal and Agent," § 2; "Railroads," §§ 2, 4-8; "Sheriffs and Constables," § 1.

Stockholders, see "Corporations," § 4.

Taxpayers, see "Municipal Corporations," § 6.

Telegraph companies, see "Telegraphs and Telephones," § 1.

Particular causes or grounds of action.

See "Assault and Battery," § 1; "Bills and Notes," § 4; "Death," § 1; "Forcible Entry and Detainer," § 1; "Fraud," § 1; "Guaranty," § 2; "Insurance," § 7; "Judgment," § 7; "Libel and Slander," § 3; "Negligence," § 4; "Nuisance," § 2; "Trespass"; "Trove and Conversion," § 2.

Breach of contract, see "Contracts," § 4; "Sales," §§ 6, 7.

Breach of covenant, see "Covenants," § 2.

Claims against county, see "Counties," § 4.

Conversion of mortgaged chattels, see "Chattel Mortgages," § 3.

Delay in delivery of telegram, see "Telegraphs and Telephones," § 1.

Ejection of passenger, see "Carriers," § 9.

Enforcement of stockholders' liability, see "Corporations," § 4.

Failure of carrier to deliver goods, see "Carriers," § 3.

Failure to deliver telegram, see "Telegraphs and Telephones," § 1.

Failure to work on road, see "Highways," § 2.

Injuries from surface waters, see "Waters and Water Courses," § 1.

Injuries to animals by operation of railroad, see "Railroads," §§ 2, 8.

Loss of or injury to shipment, see "Carriers," §§ 4, 6.

Personal injuries, see "Carriers," § 9; "Master and Servant," §§ 9-11; "Railroads," §§ 5-7; "Shipping," § 1; "Street Railroads," § 1.

Price of goods, see "Sales," § 6.

Price of land, see "Vendor and Purchaser," § 4.

Recovery of goods sold, see "Sales," §§ 6, 8.

Recovery of overcharge paid to carrier, see "Carriers," § 7.

Recovery of payment, see "Payment," § 1.

Rent, see "Landlord and Tenant," § 4.

Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 4.

Wrongful enforcement of taxes, see "Taxation," § 3.

Wrongful execution, see "Execution," § 4.

Particular forms of actions.

See "Assumpsit, Action of"; "Detinue"; "Ejectment"; "Real Actions"; "Trespass," § 2; "Trove and Conversion."

Particular forms of special relief.

See "Creditors' Suit"; "Divorce"; "Injunction"; "Marshaling Assets and Securities"; "Partition," § 2; "Quieting Title"; "Specific Performance."

Alimony, see "Divorce," § 3; "Husband and Wife," § 6.

Cancellation of written instruments, see "Cancellation of Instruments."

Confirmation of tax title, see "Taxation," § 5.

Determination of adverse claims to real property, see "Quieting Title."

Dissolution of partnership, see "Partnership," § 4.

Enforcement of lien, see "Mechanics' Liens," § 4.

Establishment and enforcement of trust, see "Trusts," § 4.

Establishment of boundaries, see "Boundaries," § 1.

Foreclosure of mortgage, see "Mortgages," § 6.

Foreclosure of mortgage on property of married woman, see "Husband and Wife," § 3.

Reformation of written instrument, see "Reformation of Instruments."

Removal of cloud on title, see "Quieting Title."

Rescission of sale, see "Sales," § 3.

Restraining misapplication of public moneys, see "Municipal Corporations," § 6.

Separate maintenance of wife, see "Husband and Wife," § 6.

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

Setting aside judgment, see "Judgment," § 3.

Setting aside judicial sale, see "Judicial Sales."

Trial of tax title, see "Taxation," § 5.

Trial of title to property sold on execution, see "Execution," § 3.

Particular proceedings in actions.

See "Costs"; "Damages"; "Depositions"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Stipulations"; "Trial."

Bill of particulars, see "Pleading," § 6.

Verdict, see "Trial," § 13.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers."

Proceedings in exercise of special or limited jurisdictions.

Criminal prosecutions, see "Criminal Law."

Suits in equity, see "Equity."

Suits in justices' courts, see "Justices of the Peace," § 3.

Review of proceedings.

See "Appeal and Error"; "Certiorari"; "Exceptions. Bill of"; "Justices of the Peace," § 4; "New Trial."

§ 1. Grounds and conditions precedent.

*The court will not pass on the constitutionality of a statute that has been repealed.—*Doss v. Board of Com'rs of Mermentau Levee Dist. (La.)* 720.

§ 2. Nature and form.

*An owner of personality converted by another cannot waive the tort and recover for money had and received unless there has been a sale of the property by the latter.—*Southern Ry. Co. v. City of Attalla (Ala.)* 664.

A mortgagee of chattels, by calling on one who converts them to pay the amount realized therefrom, held not to waive his right to sue for conversion.—*Baker v. Hutchinson (Ala.)* 809.

When one of two partners gave bond and caused the firm property to be sequestered, and the writ was dissolved, and the other partner sued on the bond, and damages claimed were in excess of the bond, held, that the action was not an action ex delicto as against the principal prescribed in one year.—*St. Gene v. Boimare (La.)* 557.

ACTION ON THE CASE.

See "Trespass," § 2.

ACT OF LEGITIMATION.

See "Bastards," § 1.

*Point annotated. See syllabus.

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.

ADJOINING LANDOWNERS.

See "Boundaries"; "Party Walls."

ADJUDICATION.

Of courts in general, see "Courts," § 2.
Operation and effect of former adjudication, see "Judgment," §§ 4, 5.

ADMINISTRATION.

Of charity, see "Charities," § 1.
Of estate of decedent, see "Executors and Administrators."
Of estate of ward, see "Guardian and Ward," § 1.
Of property by receiver, see "Receivers," § 2.
Of trust property, see "Trusts," § 3.

ADMIRALTY.

See "Shipping."

ADMISSIONS.

As evidence in civil action, see "Evidence," § 6.
As evidence in criminal prosecutions, see "Criminal Law," § 12.
To prevent continuance in criminal prosecution, see "Criminal Law," § 13.

ADOPTION.

Acts 1872, p. 79, No. 31, prescribing a different manner of adopting children, supersedes Rev. St. §§ 2323-2328, though not having a repealing clause, and a tutor ad hoc need not be appointed.—Succession of Dupre (La.) 324.

Under Civ. Code, art. 213, parents no longer have any authority over a foundling, and for all purposes of adoption of the foundling the situation is as if the parents were dead.—Succession of Dupre (La.) 324.

Where a minor has neither parent nor tutor, the notarial act by which he is adopted need not be signed by any one for him.—Succession of Dupre (La.) 324.

ADULTERY.

See "Bigamy."

ADVANCES.

By landlord to tenant, see "Landlord and Tenant," § 4.

ADVERSE CLAIM.

To real property, see "Quieting Title."

ADVERSE POSSESSION.

See "Limitation of Actions."
Competency of evidence on issue of, see "Evidence," § 4.
Declarations as evidence of, see "Evidence," § 7.
Evidence of in action of ejectment, see "Ejectment," § 2.
Sufficiency of title acquired by to maintain ejectment, see "Ejectment," § 1.
Under interspousal donation, see "Husband and Wife," § 5.

§ 1. Nature and requisites.

*Adverse possession is not available where no declaration of an intention to claim adversely has been filed with the judge of probate.—Campbell v. Noble (Ala.) 745.

To establish title by adverse possession, the claimants must show a hostile possession under claim of right, for 10 years, actual, exclusive, open, notorious, and continuous.—McCreary v. Jackson Lumber Co. (Ala.) 822.

*Where land is claimed by adverse possession of claimant and his prior successive grantees, a continuous possession must be proved.—Hoyle v. Mann (Ala.) 835.

*A temporary abandonment held sufficient to invalidate a claim of adverse possession.—Hoyle v. Mann (Ala.) 835.

*A deed executed while another is in adverse possession of the land is good as color of title.—Hoyle v. Mann (Ala.) 835.

*An objection to a deed offered as color of title in ejectment that it did not appear that the grantor had title to the land held unsustainable.—Hoyle v. Mann (Ala.) 835.

*Where defendants and the authors of their title were in actual and continuous possession as owners since the year 1856, they have acquired title by prescription of 30 years.—Moulierre v. Coco (La.) 113.

*Defendants' title cannot be affected by the nonregistry of an anterior deed in their chain of title, and they can add the sum of their author's possession to their own for the purpose of prescription.—Moulierre v. Coco (La.) 113.

*A valid sheriff's deed, showing a sale under a judgment together with such writ and judgment, constitute a just title, which may serve as the basis of the prescription of 10 years, under Civ. Code, art. 3478.—Leverett v. Loeb (La.) 584.

§ 2. Operation and effect.

*The doctrine of constructive possession to land held not to apply to specified cases.—Lawrence v. Doe ex dem. Alabama State Land Co. (Ala.) 612.

§ 3. Pleading, evidence, trial, and review.

*Where in ejectment plaintiff establishes a complete chain of title to the land, defendant has the burden of proving the defense of adverse possession relied on.—Lawrence v. Doe ex dem. Alabama State Land Co. (Ala.) 612.

*In ejectment, the question whether defendant had title by adverse possession held for the jury.—Lawrence v. Doe ex dem. Alabama State Land Co. (Ala.) 612.

An instruction held to correctly define possession sufficient to acquire title by adverse possession.—Lawrence v. Doe ex dem. Alabama State Land Co. (Ala.) 612.

An instruction in ejectment held misleading as to the acts of possession sufficient to ripen into title by adverse possession.—Lawrence v. Doe ex dem. Alabama State Land Co. (Ala.) 612.

*Where, in ejectment, defendant relied on adverse possession, and the evidence on the issue of adverse possession was in conflict, the question of adverse possession must be submitted to the jury.—Theodore Land Co. v. Lyon (Ala.) 682.

*In ejectment to recover certain land, whether plaintiff had title by adverse possession held for the jury.—McCreary v. Jackson Lumber Co. (Ala.) 822.

A stranger in possession is presumed to hold under the owner, and the burden of proof is on

*Point annotated. See syllabus.

him to show that the owner knew his possession to be hostile, or that it was so notorious as to raise a presumption of such notice.—*Wilson v. Johnson* (Fla.) 395.

Whether a mortgagee and adjudicatee has examined the title of his debtor and informed himself of its defects is a question of fact, and, in the absence of affirmative proof, he is entitled, for the purpose of the plea of the prescription of 10 years, *acquisitio rei*, to the presumption of good faith, under Civ. Code, art. 3481.—*Leverett v. Loeb* (La.) 584.

ADVERTISEMENT.

For bids for public improvements, see "Municipal Corporations," § 3.

AFFIDAVITS.

See "Depositions."

As evidence of publication of notice required precedent to enactment of local law, see "Statutes," § 7.

Verification of pleading, see "Equity," § 3.

Particular proceedings or purposes.

See "Injunction," § 4.

Continuance in criminal prosecution, see "Criminal Law," § 18.

Criminal prosecutions, see "Criminal Law," § 6.

Prosecution for trespass, see "Trespass," § 3.

Trial of right of property levied on, see "Execution," § 2.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

AGRICULTURE.

Partnership for agricultural purposes, see "Partnership," § 4.

The crop privilege, conferred by Civ. Code, art. 3217, is intended to secure the reimbursement only of money, actually used for the purchase of necessary supplies and the payment of necessary expenses for the farm, and the person seeking to enforce the privilege must prove that the money was so used.—*National Bank of Commerce v. Sullivan* (La.) 480.

The right of pledge, under Acts 1874, p. 114, Act No. 68, is intended to bear upon the crop as security for the reimbursement of the money that the planter "may require" for necessary expenses of the crop and plantation, and not as security for money already advanced.—*National Bank of Commerce v. Sullivan* (La.) 480.

The privilege for advances conferred by Civ. Code, art. 3217, is not confined to the growing crop, but bears upon the products after they are severed from the soil, and follows them into the hands of the purchaser.—*National Bank of Commerce v. Sullivan* (La.) 480.

Where a planter obtained advances for the making of his crop from a bank, the fact that the bank collected the proceeds of a draft drawn by him on a cotton seed oil company and credited same to his account could not be presumed to convey notice to the bank that the planter had sold his cotton seed in violation of his contract with it.—*National Bank of Commerce v. Sullivan* (La.) 480.

*Point annotated. See syllabus.

AIDER BY VERDICT.

In civil actions, see "Pleading," § 8.

AIDERS AND ABETTERS.

Criminal responsibility, see "Criminal Law," § 2.

ALIMONY.

See "Divorce," § 3; "Husband and Wife," § 1.

ALTERATION.

Of geographical or political divisions, see "Counties," § 1.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

Discharge of surety, see "Principal and Surety," § 2.

AMENDMENT.

In particular remedies or special jurisdiction.

See "Attachment," § 1; "Parties," § 3.

Of particular acts, instruments, or proceedings.

See "Statutes," § 4.

Abstracts of title furnished in ejectment, see "Ejectment," § 2.

Affidavits charging criminal offense, see "Criminal Law," § 6.

Pleading, see "Equity," § 4; "Pleading," § 1.

Pleading in action against partnership, see "Partnership," § 2.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," §§ 1, 2; "Courts," § 5.

ANIMALS.

Action of assumpsit for use of, see "Assumpsit," § 1.

Carriage of live stock, see "Carriers," § 8.

Damages for killing, see "Damages," § 5.

Detinue for recovery of, see "Detinue."

Evidence as to following trail of accused dogs, in prosecution for homicide, see "Homicide," § 8.

Exemption from execution, see "Exemptions," § 1.

Injuries from operation of railroads, see "Railroads," §§ 6, 8.

Jurisdiction of court to establish stock-law district, see "Courts," § 1.

Negligence in permitting escape, see "Negligence," §§ 1, 2.

Railroad cattle guards, see "Railroads," § 2.

Requisites of indictment for selling diseased animal, see "Indictment and Information," § 3.

Right to keep hogs in city, see "Municipal Corporations," § 4.

Taking case or question from jury in action for injuries to, see "Trial," § 5.

Acts 1894-95, p. 749, authorizing the establishment in a certain way of stock-law districts in a certain county, *held* not repealed by Acts 1903, p. 431, authorizing their establishment in the several counties in another way.—*Mayfield v. Court of County Com'rs of Tusaloosa County* (Ala.) 932.

The description of a stock-law district in the order of the commissioner's court establishing it, *held* to satisfy the requirements of

Acts 1894-95, p. 749, § 3.—*Mayfield v. Court of County Com'rs of Tuscaloosa County (Ala.)* 932.

ANNULMENT.

Of will, see "Wills," § 3.

ANSWER.

In pleading, see "Equity," § 3; "Pleading," § 2.

ANTENUPTIAL CONTRACTS.

See "Husband and Wife," § 2.

APPEAL AND ERROR.

See "Certiorari"; "Exceptions, Bill of"; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," §§ 3, 5.

Costs, see "Costs," § 3.

In criminal prosecutions, see "Criminal Law," § 6.

Remedy by appeal or mandamus, see "Mandamus," § 1.

Rules of appellate courts, see "Courts," § 2.

Review in special proceedings.

See "Habeas Corpus," § 2; "Quo Warranto," § 2.

For assessment of damages for taking of or injuries to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

Homologation of provisional tableau of tutrix, see "Guardian and Ward," § 2.

Inquisition of lunacy, see "Insane Persons," § 1. Proceedings before masters in chancery, see "Equity," § 6.

Review of criminal prosecutions.

See "Criminal Law," §§ 38-45; "Homicide," § 16.

For non support, see "Husband and Wife," § 7.

Review of proceedings of nonjudicial officers or bodies.

Assessment of taxes, see "Taxation," § 2.

§ 1. Nature and grounds of appellate jurisdiction.

*The appellate court properly determines the question of its jurisdiction as to the amount in dispute from the facts disclosed by the transcript.—*Doullut v. Smith (La.)* 913; *In re Smith, Id.*

*An appeal will not be entertained where only academic questions are involved.—*McDaniel v. Hurt (Miss.)* 381.

§ 2. Decisions reviewable.

*An appeal does not lie from an order dismissing a petition by attorneys for a reference to determine the value of their services and for an order declining to give effect to their discharge until their compensation had been secured or paid.—*Kelly & Middleton v. Horsley (Ala.)* 902.

Under Code 1896, § 427, an appeal may be taken from the overruling of a plea to a bill so as to obtain the judgment of the Supreme Court on a defense, without the taking of evidence or a hearing on the merits.—*Town of New Decatur v. Scharfenberg (Ala.)* 1025.

Where the sheriff refused to pay district attorney commission on certain fines already collected, and declared his intention not to pay the same on future fines in mandamus to compel the payment of commission, the only amount in dispute in determining the jurisdiction of the appellate court is the commis-

sion on fines already collected.—*State ex rel. Broussard v. Henderson (La.)* 496.

*The final judgment defined.—*Bossier's Heirs v. Hollingsworth & Jackson (La.)* 553.

*Interlocutory judgments are appealable only when they work irreparable injury to the parties cast.—*Bossier's Heirs v. Hollingsworth & Jackson (La.)* 553.

Where several alleged causes of action are cumulated, a judgment dismissing one or more of them, on an exception of no cause of action, but leaving the demand, though reduced, still pending, is interlocutory.—*Bossier's Heirs v. Hollingsworth & Jackson (La.)* 553.

§ 3. Right of review.

*Code 1896, §§ 1331, 1332, held not to authorize one of defendants to complain of the trial court's action in failing to tax costs against plaintiff on account of a defendant who died pending the case.—*Prestwood v. McGowin (Ala.)* 779.

An ex parte judgment sending heirs into possession cannot affect the right of the state to claim inheritance tax, and the state is without standing to appeal from such an order.—*Succession of Schirm (La.)* 53.

*The right to appeal can be waived after judgment.—*S. H. Keoughan & Co. v. Equitable Oil Co. (La.)* 88.

*Under Code Prac. art. 567, a valuable consideration is not necessary to support the waiver of an appeal.—*S. H. Keoughan & Co. v. Equitable Oil Co. (La.)* 88.

§ 4. Presentation and reservation in lower court of grounds of review.

Where the question of variance between the complaint and the proof was not raised in the trial court, the court on appeal will not determine the question.—*Odom v. Moore (Ala.)* 162.

Assignments of error relating to objections to testimony will not be considered, the decree not showing the objections were ruled on.—*Sellers v. Farmer (Ala.)* 291.

*Where plaintiff did not call the trial court's attention to the fact that a request to charge had been marked "Given," when it had been in fact refused, he could not complain thereof on appeal.—*Fowler v. Prichard (Ala.)* 667.

*Allowing an amendment to a pleading not having been objected to below may not be complained of on appeal.—*A. G. Rhodes & Son Co. v. Charleston (Ala.)* 746.

*An exception to a charge on a particular ground held not to authorize its review on any other ground.—*A. G. Rhodes & Son Co. v. Charleston (Ala.)* 746.

The failure to tax costs against plaintiff on account of certain defendants, in favor of whom pleas of coverture were sustained, held not reviewable on appeal where no objection was made.—*Prestwood v. McGowin (Ala.)* 779.

In the absence of a demurrer to a bill in chancery on the ground of multifariousness, such question cannot be considered on appeal.—*Ellis v. Crawson (Ala.)* 942.

*An appellate court will not consider any grounds of objection to the admissibility of evidence, except such as were made in the court below; the plaintiff in error being confined to the specific grounds of objection made by him in the trial court.—*Hoodless v. Jernigan (Fla.)* 194.

Objection to the form of the oath of the jury is too late when made for the first time on appeal.—*Dunaway v. Ferst (Fla.)* 451.

*Where there has been a dispute as to a boundary resulting in a breach of the peace in

*Point annotated. See syllabus.

several ejectment suits, and there are other difficulties, both parties agree that equity was the proper forum, and a bill is filed by one of them, and defendant does not object to the jurisdiction, but answers and submits his defense, and a decree is rendered from which the defendant appeals. the appellate court will not consider objections to the jurisdiction not raised below.—*Williams v. Wetmore* (Fla.) 545.

*The supreme court is not at liberty of its own motion to deal with a possessory action as though it were petitory.—*Garland v. Wunderlich* (Ga.) 644.

*After trial and judgment it is too late to object that the transfer of the case from one of the divisions to the other of the civil district court, parish of Orleans, was irregular.—*Fluker v. De Grange* (La.) 591.

Where an exception of no cause of action is tried with the merits in the district court without objection by defendant, who obtains judgment on the merits, the appellate court properly hears the case as it was heard in the district court on the merits.—*Doullut v. Smith* (La.) 913; *In re Smith*, Id.

A judgment void on its face will be reversed, though its invalidity is urged for the first time on appeal.—*Alexander v. Porter* (Miss.) 6.

*Where a bill to cancel conveyances made under trust deeds alleged an assignment of a trust deed, and the answer admitted such assignment, it could not be questioned on appeal by complainant.—*Watkins v. McDonald* (Miss.) 376.

*In an action to cancel conveyances made under trust deeds, it cannot be contended for the first time on appeal that the holder of the trust deed exhausted her power by appointment of a certain substituted trustee.—*Watkins v. McDonald* (Miss.) 376.

Where answer to a proper question is irresponsible and objectionable, the party objecting to the answer should move to exclude it.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

An appellant cannot complain of unresponsive answers of a witness where he made no motion to exclude the answers.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

On appeal, testimony cannot be regarded as ground for reversal merely because it appears to be incompetent when taken in connection with other testimony to which no objection was made by appellant.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

§ 5. Parties.

Where a daughter married pending suit, and her husband was made a party, the father thereupon ceased to represent the daughter, and cannot plead for her on appeal.—*Pattison v. Gulf Bag Co.* (La.) 224.

*Where pending an appeal from the judgment of interdiction the appellant interdict dies, the suit abates and the appeal must be dismissed.—*In re Jones* (La.) 431.

*Where a minor after attaining majority appeals from a judgment homologating a provisional account filed by the natural tutrix administering the succession of the deceased father and husband, the creditors whose claims are recognized on such account who have been paid and who have an interest in maintaining the judgment of homologation must be made parties to the appeal.—*Succession of Guillebert* (La.) 653; *In re Grenier*, Id.

§ 6. Requisites and proceedings for transfer of cause.

*Where a motion for a new trial is seasonably filed, the judgment does not become final until

*Point annotated. See syllabus.

the motion is disposed of.—*State v. Kitchens* (Ala.) 871.

*Where security for costs merely is given on appeal, held that it need not bind appellant, but merely contain an acknowledgment of the surety that he binds himself.—*Mayfield v. Court of County Com'rs of Tuscaloosa County* (Ala.) 932.

*Statement of who under Code 1896, §§ 431, 2827, shall approve the security for costs on appeal in a certiorari case.—*Mayfield v. Court of County Com'rs of Tuscaloosa County* (Ala.) 932.

§ 7. Effect of transfer of cause or proceedings therefor.

*A suspensive appeal will lie from an order refusing a preliminary injunction, but will not suspend or postpone the trial of the case on its merits.—*Murphy v. Police Jury of St. Mary Parish* (La.) 647; *In re Police Jury of St. Mary Parish*, Id.

§ 8. Supersedeas or stay of proceedings.

Where plaintiffs' suit is dismissed, so that Code Prac. art. 575, fixing the amount of suspensive appeal bonds, is inapplicable, the amount of the bond for suspensive appeal must be fixed by the judge, or the appeal will be dismissed.—*Day v. Bailey* (La.) 223.

Under Civ. Code, art. 395, a suspensive appeal from a judgment on the question of the recusation vel non of the judge to whom the question of the nomination of a curator for an interdict is presented does not lie.—*Interdiction of Watkins* (La.) 242, 243; *In re Mutersbaugh*, Id.

*Under Acts 1904, p. 25, No. 22, registry of a notice of action does not change the legal situation as it stood before the passage of the act, according to which the bond for a suspensive appeal from a judgment dismissing a petitory action need be only in such sum as the judge may fix as sufficient to secure costs.—*Wells v. Blackman* (La.) 648; *In re Wells*, Id.

§ 9. Record and proceedings not in record.

Where the acts of the trial court on motion to strike certain pleas and parts thereof is not presented by bill of exceptions, it will not be considered on appeal.—*Allen v. Alston* (Ala.) 159.

*A bill of exceptions will not be considered on appeal unless signed within the time allowed or agreed upon.—*Burns v. Gibbs* (Ala.) 303.

An order or agreement extending the time for signing a bill of exceptions must affirmatively appear to have been made within the time previously allowed or agreed on.—*Burns v. Gibbs* (Ala.) 303.

*Rulings on demurrers to replication which appear only in the bill of exceptions and not in the record proper will not be reviewed on appeal.—*Forbes & Carlross v. Davidson* (Ala.) 312.

*Where the record fails to show the organization of the trial court, the appeal will be dismissed.—*Pensacola, A. & W. R. Co. v. Big Sandy Iron Co.* (Ala.) 418; *Big Sandy Iron Co. v. Pensacola, A. & W. R. Co.*, Id.; *Mayhall v. Eddleman* (Ala.) 425.

*That rulings on a motion for discontinuance may be reviewed, motion or grounds thereon and exception held required to be presented by bill of exceptions.—*Stallings v. Gilbreath* (Ala.) 423.

Where a demurrer was stricken from the files on motion, it could only be incorporated

in the record on appeal by bill of exceptions.—Commissioners' Court of Chilton County v. State (Ala.) 463, 465.

A motion to strike a demurrer from the files can only be made a part of the record by bill of exceptions.—Commissioners' Court of Chilton County v. State (Ala.) 463, 465.

*A recital in a bill of exceptions signed in vacation, that an order was made in term time for the signing of the bill in vacation, *held* not to supply the omission from the record proper of the order.—Central of Georgia Ry. Co. v. Carroll (Ala.) 517.

A bill of exceptions signed in vacation cannot be considered on appeal where there is in the record proper no order made in term time for the signing of the bill in vacation.—Central of Georgia Ry. Co. v. Carroll (Ala.) 517.

The overruling of a demurrer to a complaint as amended is not reviewable where the record does not show the allegations of the amendment.—Central of Georgia Ry. Co. v. Carroll (Ala.) 517.

*A bill of exceptions cannot be considered unless it affirmatively appears that it was signed within the statutory time.—Parker v. State (Ala.) 724.

Where the lien sought to be enforced is not set out in the bill of exceptions, assignments of error relating to discrepancies between the lien filed and the status of the suit as to the parties, cannot be considered on appeal.—Saunders v. Tuscumbia Roofing & Plumbing Co. (Ala.) 982.

*Where an appeal is taken from a judgment on the verdict and the bill of exception shows an exception to the overruling of a motion for a new trial, the denial of the new trial may be reviewed without any formal order or judgment thereon appearing in the bill of exceptions or elsewhere.—Southern Ry. Co. v. Nelson (Ala.) 1006.

*When the bill of exceptions does not show the ruling of the court upon a motion for a new trial or any exception to such ruling, an appellate court cannot consider the merits of such motion or any assignment of error based thereon.—Hoodless v. Jernigan (Fla.) 194.

*The appellate court, though a case has been decided by it on appeal, will not go beyond the record in hand to examine into the facts of the decided case.—Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co. (La.) 492.

§ 10. Assignment of errors.

Where an appeal was properly taken by a court of county commissioners in their official capacity, it was not rendered objectionable by the fact that the assignment of errors commenced with the words "come now appellants," etc.—Commissioners' Court of Chilton County v. State (Ala.) 463, 465.

Failure to tax costs against plaintiff on sustaining pleas of coverture *held* not reviewable on appeal in the absence of assignment of error on the point.—Prestwood v. McGowin (Ala.) 779.

*An assignment that the court erred in the exclusion of evidence on defendant's motion referring to "_____ page of record," *held* insufficient.—McCreary v. Jackson Lumber Co. (Ala.) 822.

Without an assignment of error to the denial of a new trial, the sufficiency of the evidence to sustain the verdict cannot be reviewed.—Nashville, C. & St. L. Ry. v. Moore (Ala.) 984.

An agreement for the reassignment of a case has the effect of setting aside the assignment.

*Point annotated. See syllabus.

so that the timeliness of the filing of an answer to the appeal has to be determined with reference to the assignment thereafter made, and not with reference to that set aside.—Des Allemands Lumber Co. v. Morgan City Timber Co. (La.) 332.

§ 11. Dismissal, withdrawal, or abandonment.

An appeal from a decree in a proceeding for mandamus issued under an act becoming inoperative pending the proceeding will be dismissed.—Browne v. State (Ala.) 407.

*An appeal from a decree in a cause which has become a moot case will not be entertained merely for the purpose of ascertaining who is liable for the costs.—Campbell v. Shelby County (Ala.) 407, 408.

*Where a statute on which the rights of the parties depend is repealed, an appeal will not be entertained from a decree in the cause.—Campbell v. Shelby County (Ala.) 407, 408.

An appeal will not be dismissed because the record did not show that a statement of the facts found was entered on the minutes, as required by Code 1896, § 3320.—Matthews v. Southern Ry. Co. (Ala.) 662.

A motion to dismiss for want of jurisdiction will not be granted unless there is good ground therefor.—Marshall v. Town of Mansura (La.) 56.

Motion to dismiss appeal denied where the facts alleged do not sustain the grounds thereof.—Marshall v. Town of Marksville (La.) 57.

§ 12. Review—Interlocutory, collateral, and supplementary proceedings and questions.

The court on appeal from a decree cannot review an order denying a petition by the defeated party, made at a term subsequent to the one at which the decree was rendered.—Gilbreath v. Farrow (Ala.) 1000.

*The extraordinary supervisory powers of the Supreme Court over inferior tribunals will not be exercised on suspensive appeal from an order refusing a preliminary injunction on the complaint of defendant.—Murphy v. Police Jury of St. Mary Parish (La.) 647; *In re* Police Jury of St. Mary Parish, Id.

§ 13. — Parties entitled to allege error.

*Where the court sustained plaintiff's objection to arguments of defendant's counsel, plaintiff was not entitled to assign the same for error on appeal.—Cutcliff v. Birmingham Ry., Light & Power Co. (Ala.) 873.

*Where plaintiff consented to an instruction requested by defendant, he could not assign the giving thereof for error on appeal.—Cutcliff v. Birmingham Ry., Light & Power Co. (Ala.) 873.

*Under Code Prac. arts. 888, 889, warrantors who have not perfected their appeal, nor filed an answer to the appeal of defendant, cannot ask that the judgment on the call in warranty be reversed or amended.—Foster v. Meyers (La.) 551.

An appellant cannot assign error on the modification of an erroneous instruction, since if not content with the instruction as modified he should have declined to read it to the jury.—Mississippi Cent. R. Co. v. Hardy (Miss.) 505.

§ 14. — Presumptions.

Where the questions put to witnesses do not appear on appeal, it will be presumed that the answers were responsive thereto.—Southwestern Alabama Ry. Co. v. W. C. Maddox & Son (Ala.) 9.

It is to be presumed in favor of a decree that it was based on pleas and proof thereof.—*Sellers v. Farmer* (Ala.) 291.

*The silence of the record in a garnishment suit as to the affidavit required by Acts 1894-95, p. 415, *held* not to create a presumption of want of jurisdiction on appeal by the garnishee.—*Brookside Dry Goods Co. v. City Furniture Co.* (Ala.) 659.

*Where the record shows no ruling on a demurrer to a pleading, the court on appeal must assume that the demurrer was abandoned.—*Southern Ry. Co. v. City of Attalla* (Ala.) 664.

*A demurrer, not shown of record, to a plea open to demurrer on some ground, *held* presumed to have been properly sustained.—*A. G. Rhodes & Son Co. v. Charleston* (Ala.) 746.

*Where the bill of exceptions fails to show at what stage of the proofs certain evidence was offered, or for what purpose, and the grounds upon which the introduction of such evidence was objected to and the grounds upon which the same was excluded, the appellate court cannot presume error in the exclusion of such evidence.—*Hoodless v. Jernigan* (Fla.) 194.

*The duty devolves upon the plaintiff in error or his counsel to make the errors complained of appear by a proper and fair record of all the facts and circumstances pertinent to such alleged error.—*Hoodless v. Jernigan* (Fla.) 194.

*In the absence of a bill of exceptions, proper evidence of essential facts in pais will be presumed.—*Dunaway v. Ferst* (Fla.) 451.

*The presumption is in favor of the correctness of the judgment appealed from, and where the transcript fails to show the contrary, it will be affirmed.—*Burbank v. Succession of Barton* (La.) 567.

§ 15. — Discretion of lower court.

Discretion of trial court in refusing to permit witness for plaintiff to repeat in rebuttal evidence offered in chief *held* not to be reviewed on appeal.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

The exercise of the court's discretion in permitting a substitution of attorneys will not be reviewed on appeal, in the absence of a clear showing of abuse of discretion.—*Kelly & Middleton v. Horsley* (Ala.) 902.

*Permitting leading questions is not reviewable.—*Smith v. Hope* (Fla.) 69.

*In both civil and criminal cases the trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court when a clear abuse thereof is made to appear.—*Hoodless v. Jernigan* (Fla.) 194.

*Where the ruling admitting evidence after argument is an abuse of discretion, relief may be had in the appellate court.—*Wilson v. Johnson* (Fla.) 395.

*The discretion of the trial court in regulating the introduction of evidence will only be interfered with if abused.—*Wilson v. Johnson* (Fla.) 395.

*Rulings on application for a continuance will not be reversed unless an abuse of discretion is shown.—*Wilson v. Johnson* (Fla.) 395.

Where an abuse of judicial discretion as to granting or continuing injunctions is clearly made to appear, it is the duty of an appellate court to interfere.—*Godwin v. Phifer* (Fla.) 597.

§ 16. — Questions of fact, verdicts, and findings.

Under Code 1896, § 3319 et seq., a finding of the trial court on oral testimony *held* not re-

viewable on appeal.—*Nichols v. Ragsdale* (Ala.) 633.

The findings of the trial court sitting as a jury will not be disturbed on appeal unless plainly erroneous.—*McGeever v. S. H. Harris & Sons* (Ala.) 930.

*Where, in an action to cancel conveyances made under trust deeds, a certain trustee swore that he refused to act, a finding that he so refused will not be disturbed on appeal.—*Watkins v. McDonald* (Miss.) 378.

§ 17. — Harmless error.

*Where the trial court overruled a demurrer to a plea, no question of its sufficiency arises on an appeal by defendant.—*Odum v. Moore* (Ala.) 162.

*Where the evidence warranted the allowance of a larger sum than that allowed by the jury, the refusal to grant a new trial on the application of the defeated party was not erroneous.—*Odum v. Moore* (Ala.) 162.

Where the court on the undisputed facts could have given an affirmative charge in favor of plaintiff, it was not error to refuse instructions requested by defendant.—*Western Union Telegraph Co. v. Whitson* (Ala.) 405.

*Where the plaintiff is entitled to the general affirmative charge on a proper issue, and the verdict is in his favor on that issue, error in respect to that issue was without injury.—*Stallings v. Gilbreath* (Ala.) 423.

*Rulings on special pleadings and on objections to parts of the testimony *held* harmless error.—*Bailey v. Gary, Kennedy & Co.* (Ala.) 672.

*In an action for goods sold, error in the rulings on evidence to support plaintiff's claim *held* not prejudicial.—*Gould v. Cates Chair Co.* (Ala.) 675.

Where the evidence is sharply in conflict, the appellate court will not set aside an order granting a new trial on the ground that the verdict was contrary to the weight of the evidence, unless the evidence is plainly and palpably in favor of the verdict.—*Owen v. McDermott* (Ala.) 730.

The admission of irrelevant evidence which could not have affected the verdict, is not reversible error.—*Saunders v. Tuscumbia Roofing & Plumbing Co.* (Ala.) 982.

*Where the peremptory charge was properly given, any remarks by the trial judge in the presence of the jury are harmless.—*Wilson v. Johnson* (Fla.) 395.

*A judgment for defendant on trial of a traverse of the affidavit in attachment will not be disturbed for alleged errors, where on the admitted facts the jury could not have rendered a different verdict.—*Peace River Phosphate Min. Co. v. Singleton* (Fla.) 594.

§ 18. — Harmless error in rulings as to pleadings.

Striking out special pleas *held* under the circumstances not reversible error.—*W. J. Bennett & Co. v. Brooke* (Ala.) 149.

*The erroneous overruling of demurrers to pleas was harmless where there was no evidence to support the counts of the complaint to which the pleas were addressed.—*Hooks v. Huntsville Ry. Light & Power Co.* (Ala.) 273.

*Any error in sustaining a demurrer to a plea was without injury where another plea was substantially the same and was not demurred to.—*Forbes & Carless v. Davidson* (Ala.) 312; *Springfield v. Hurley* (Ala.) 942.

Any error in sustaining demurrers to special pleas was harmless, where the facts alleged

*Point annotated. See syllabus.

therein were available under the general issue.—*Western Ry. of Alabama v. Mitchell* (Ala.) 427.

*Rulings on demurrers to pleas will not be reviewed where the pleas were withdrawn during the trial.—*Rock Island Sash & Door Works v. Moore & Handley Hardware Co.* (Ala.) 806.

*Where an affirmative charge in favor of defendant was given with reference to a count in a complaint, a ruling on a demurrer to such count was harmless to defendant.—*Birmingham Ry., Light & Power Co. v. Clarke* (Ala.) 829.

*Error in denying an amendment to a complaint is harmless if the amendment is but a repetition of matter in the original complaint.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

*The overruling of a demurrer to a rejoinder held harmless.—*Ryan v. Young* (Ala.) 954.

§ 19. — Harmless error in rulings as to evidence.

*In action for death of person attempting to board street car, exclusion of evidence held without injury where witness was afterwards allowed to testify to the same matter.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

*Error in overruling objections to questions to witnesses was without injury where the questions were not answered.—*Forbes & Carless v. Davidson* (Ala.) 312.

*In forcible entry and detainer, the exclusion of a memorandum of service of a notice to quit on one of the defendants held not prejudicial.—*Fowler v. Prichard* (Ala.) 667.

The error in overruling an objection to a question asked a witness calling for a statement as to the contents of an instrument was harmless where the witness stated that he did not know the contents.—*Theodore Land Co. v. Lyon* (Ala.) 682.

In ejectment by trustees of a religious corporation, the exclusion of certain evidence held prejudicial error.—*Malone v. La Croix* (Ala.) 724.

*Where a deed was introduced in evidence, the admission of a conclusion or opinion of a witness as to what kind of an instrument it was was harmless.—*McCreary v. Jackson Lumber Co.* (Ala.) 822.

In an action for ejection of a passenger, the exclusion of evidence that plaintiff became more abusive than ever was not reversible error.—*Nashville, C. & St. L. Ry. v. Moore* (Ala.) 984.

In an action for injuries received by a bridge tender by collision with defendant's boat at the draw, admission of evidence of how much plaintiff had earned as a carpenter, when he was not at the time of the injury acting as carpenter, held not prejudicial.—*Stoker v. Hodge Fence & Lumber Co.* (La.) 211.

*A ruling as to the admissibility of certain evidence held harmless.—*Gulf & C. Ry. Co. v. Hartley* (Miss.) 382.

§ 20. — Harmless error in instructions.

Where, under pleadings, plaintiff was entitled to affirmative charge, refusal of charge requested by defendant held not error.—*Nashville, C. & St. L. Ry. v. Walley* (Ala.) 134.

Where the affirmative charge was properly given for plaintiff, there was no error in refusing charges requested by the defendant.—*W. J. Bennett & Co. v. Brooke* (Ala.) 149.

In an action for breach of a contract of sale, certain instructions held not prejudicial to the seller.—*Equitable Mfg. Co. v. Howard* (Ala.) 628.

*Where plaintiff was permitted to recover on counts in the complaint on certain notes, adverse rulings with reference to common counts joined in the same complaint were without prejudice.—*Boyet v. Standard Chemical & Oil Co.* (Ala.) 756.

§ 21. — Error waived in appellate court.

*Grounds of error not insisted upon in the brief of counsel on appeal are waived.—*Birmingham Ry., Light & Power Co. v. Oden* (Ala.) 129.

An assignment of error not insisted on in appellant's argument and brief will be deemed waived.—*Montgomery St. Ry. Co. v. Lewis* (Ala.) 736.

*An assignment of error not insisted on in the brief will not be considered.—*A. G. Rhodes & Son Co. v. Charleston* (Ala.) 746.

§ 22. — Decisions of intermediate courts.

*Where an action was treated as *ex contractu*, on a prior appeal and on a retrial a further appeal would be determined on the same theory.—*Western Union Telegraph Co. v. Manker* (Ala.) 850.

Where testamentary capacity and alleged undue influence in making a will are adjudged by the county judge on evidence and the will is sustained, and such adjudication is affirmed by the circuit court, and the evidence sustains such adjudication, the Supreme Court will not interfere.—*Sweetser v. Ladd* (Fla.) 705.

§ 23. — Subsequent appeals.

*Where, after a decision on appeal that a demurrer to a plea should have been sustained, it did not appear that the demurrer was ruled on, an assignment of error on a subsequent appeal predicated on the former ruling was unavailable.—*Equitable Mfg. Co. v. Howard* (Ala.) 628.

*The principles enunciated in a former opinion are the law of this case, and cannot be reviewed or reversed upon a subsequent writ of error.—*Hoodless v. Jernigan* (Fla.) 194.

*A decision as to the payment of costs becomes the law of the case with reference to all interveners and opponents.—*Campbell v. J. I. Campbell Co.* (La.) 702.

§ 24. Determination and disposition of cause.

A judgment will not be reversed for the exclusion of evidence which is not legal, competent, relevant, or material.—*King v. Southern R. Co.* (Ala.) 639.

When the Supreme Court is equally divided the judgment of the lower court will be affirmed.—*Mugge v. Tate, Jones & Co.* (Fla.) 603.

Where the court on appeal condemned the defendant to declare whether she accepted or not the succession of her daughter, the lower court cannot add to the decree of the Supreme Court.—*Reems v. Dielman* (La.) 217.

*Where, in a partition among heirs, the court ordered a sale, and subsequently consulted the demands of the heirs against each other and ordered distribution, the judgment will be affirmed when the evidence is too uncertain to enable the court to render a judgment on the respective demands of the parties.—*Faure v. Faure* (La.) 494.

Under the express provisions of Const. 1890, § 147, no decree in chancery may be reversed for want of jurisdiction, for error as to whether the cause was of equity or common-law jurisdiction.—*Mississippi Fire Ass'n v. Stein* (Miss.) 66.

In a suit to restrain trespasses, an amendment of the answer and cross-bill, so as to seek a ref-

*Point annotated. See syllabus.

formation of a contract between the parties, *held* within the trial court's discretion.—*Barataria Canning Co. v. Ott* (Miss.) 373.

A reformation of a provision in a deed so as to express the true intent of the parties, that the lessor should have the exclusive right to oysters, *held* not barred by a former construction of the provision on appeal.—*Barataria Canning Co. v. Ott* (Miss.) 378.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," §§ 3, 10, 11.

APPLICATION.

Of assets in general, see "Marshaling Assets and Securities."

APPOINTMENT.

Of corporate officers, see "Corporations," § 5.
Of executor or administrator, see "Executors and Administrators," § 1.

APPORTIONMENT.

Of tax, see "Taxation," § 2.

ARBITRATION AND AWARD.

§ 1. Award.

Where the parties attempt a statutory arbitration, and the record fails to show compliance with Rev. St. 1892, §§ 1222, 1225, 1229, there is no award on which a motion can be based to set aside, as provided in section 1227, or on which a final judgment can be entered.—*Readdy v. Tampa Electric Co.* (Fla.) 535.

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 4.
In criminal prosecutions, see "Criminal Law," § 23.

ARREST.

See "Escape."

Homicide in making, see "Homicide," §§ 3, 9.
Illegal arrest, see "False Imprisonment."

§ 1. On criminal charges.

*A policeman of a town has a right to arrest persons for violations of the ordinances without warrant, if the offense was committed in his presence.—*Hammond v. State* (Ala.) 761.

ARREST OF JUDGMENT.

In criminal prosecutions, see "Criminal Law," § 36; "Larceny," § 2.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," §§ 2, 4, 13, 14, 16.

Province of court and jury in prosecution for assault with intent to kill, see "Criminal Law," § 24.

§ 1. Civil liability.

*In an action by an employé against a master for an assault, evidence *held* to show that plaintiff was in fault, and that he cannot recover damages, though defendant was not justified in law in his conduct.—*Massett v. Keff* (La.) 330.

Evidence in an assault and battery case *held* sufficient to go to the jury on the question of punitive damages.—*Kitteringham v. McClutchie* (Miss.) 65.

§ 2. Criminal responsibility.

On a prosecution for assault and battery, requested instructions on self-defense *held* properly refused.—*Collock v. State* (Ala.) 727.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 3.
Of expenses of public improvements, see "Municipal Corporations," § 3.
Of tax, see "Taxation," § 2.

ASSETS.

Marshaling, see "Marshaling Assets and Securities."

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 10; "Criminal Law," § 42.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."
Fraud as to creditors, see "Fraudulent Conveyances."

Transfers of particular species of property, rights, or instruments.

See "Bills and Notes," § 4.
Bills of lading, see "Carriers," § 2.
Interest in trust fund, see "Trusts," § 2.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Disqualification of judge to take charge of assignment proceedings, see "Judges," § 2.

§ 1. Rights and remedies of creditors.

*A creditor of an insolvent filing a petition before the register in chancery seeking a preference is not thereby estopped from asserting that a fund in the hands of the assignee is a trust fund held for his benefit.—*Hutchinson v. National Bank of Commerce* (Ala.) 143.

A demurrer to a cross-petition, filed under Ann. Code 1892, c. 8, relative to assignment for the benefit of creditors, *held* properly sustained.—*Metcalfe v. Merchants' & Planters' Bank* (Miss.) 377.

*A general charge in a cross-petition, filed under Ann. Code 1892, c. 8, in relation to assignments for the benefit of creditors, to the effect that the assignment was not "lawfully executed," etc., *held* demurrable.—*Metcalfe v. Merchants' & Planters' Bank* (Miss.) 377.

The fact that an improper assignee or receiver had been appointed *held* no basis for a cross-petition, under Ann. Code 1892, c. 8, relative to assignments for the benefit of creditors.—*Metcalfe v. Merchants' & Planters' Bank* (Miss.) 377.

The trial court's action in compelling complainants to elect whether they would proceed as upon an original bill in equity or as upon a cross-petition, under Ann. Code 1892, c. 8, in relation to assignments for the benefit of creditors, *held* proper.—*Metcalfe v. Merchants' & Planters' Bank* (Miss.) 377.

Public moneys deposited by a sheriff in bank *held* a trust fund, entitled to priority of pay-

ment out of assets, under Ann. Code 1892, § 3077.—*Metcalf v. Merchants' & Planters' Bank (Miss.)* 377.

ASSISTANCE. WRIT OF.

Homicide in resistance of execution of, see "Homicide," § 3.

A peremptory mandamus directing the sheriff to execute certain writs of possession *held* erroneously granted where such writs had become functus officio by lapse of time.—*Reeves v. State (Ala.)* 927.

ASSOCIATIONS.

See "Beneficial Associations"; "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 8.

ASSUMPSIT, ACTION OF.

Pleading former action of assumpsit in bar to action for conversion, see "Trove and Conversion," § 2.

*Where a suit was brought on the common counts for use of certain oxen, plaintiff was not confined to proving a contract to pay a particular price to entitle him to a verdict.—*Wilson v. Taylor (Ala.)* 824.

ASSUMPTION.

Of risk by employé, see "Master and Servant," §§ 7, 11.

ATTACHMENT.

See "Execution"; "Garnishment."

Against partnership, see "Partnership," § 2. Exemptions, see "Exemptions"; "Homestead." Harmless error, see "Appeal and Error," § 17.

Liability of sheriff for unauthorized levy, see "Sheriffs and Constables," § 1. Validity of attachment issued by justice after expiration of term of office, see "Justices of the Peace," § 1.

Writs of, as evidence, see "Evidence," § 9.

§ 1. Proceedings to procure.

Attachment proceedings may not be amended so as to create a lien affecting the rights of another attaching creditor previously legally fixed upon the same property.—*Haas v. Cook (Ala.)* 731.

Plaintiff in attachment *held* not in a position to question irregularities in another attachment.—*Haas v. Cook (Ala.)* 731.

§ 2. Levy, lien, and custody and disposition of property.

A replevy bond given by defendant in attachment construed, and *held* sufficient.—*Haas v. Cook (Ala.)* 731.

§ 3. Quashing, vacating, dissolution, or abandonment.

The execution of the forthcoming bond by a defendant in attachment *held* not to validate a void levy nor deprive the defendant of his right to vacate the same on motion.—*Jones v. Baxter (Ala.)* 781.

ATTEMPT.

To commit crime, see "Criminal Law," § 1.

*Point annotated. See syllabus.

ATTENDANCE.

Of juror, see "Jury," § 3.

Of witness, see "Witnesses," § 1.

ATTESTATION.

Of deed, see "Deeds," § 1.

ATTORNEY AND CLIENT.

Accord and satisfaction of attorney's claim for services, see "Accord and Satisfaction."

Allowance of attorneys' fees on final settlement by executor or administrator, see "Executors and Administrators," § 5.

Appealability of order dismissing petition for reference to determine value of attorneys' services, see "Appeal and Error," § 2.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 4.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 23.

Attorneys' fees in action on bill or note, see "Bills and Notes," § 4.

Attorneys in fact, see "Principal and Agent."

Estoppel to allege error in rulings as to argument of counsel, see "Appeal and Error," § 13.

Mandamus to compel court to refuse to recognize change of attorneys, see "Mandamus," § 1.

Review of discretion of lower court in permitting substitution of attorneys, see "Appeal and Error," § 15.

§ 1. Retainer and authority.

*A client may dispense with the services of an attorney at law subject to the attorney's lien on a fund brought into court through his efforts on a judgment obtained by his services.—*Kelly & Middleton v. Horsley (Ala.)* 902.

After judgment an attorney under the general authority from his client to act is without authority to make a gratuitous waiver of appeal.—*S. H. Keoughan & Co. v. Equitable Oil Co. (La.)* 88.

*An attorney for an executrix has no right, as such, to waive her rights or make a settlement for her with the heirs at law.—*Succession of Landry (La.)* 490.

§ 2. Duties and liabilities of attorney to client.

Claim for money collected by attorney *held* on an implied contract within Code 1896, § 28, requiring actions on implied contracts to be brought by the person really interested.—*Allen v. Alston (Ala.)* 159.

§ 3. Compensation and lien of attorney.

*An attorney's lien does not attach to lands or things other than moneyed judgments.—*Kelly & Middleton v. Horsley (Ala.)* 902.

*An agreement by attorney for contingent fee *held* not the purchase of a litigious right, and is valid.—*Succession of Landry (La.)* 228.

AUDIT.

Of claims against county, see "Counties," § 3.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.

Of attorney, see "Attorney and Client," § 1.

Of broker, see "Brokers," § 1.

Of corporate officers or agents, see "Corporations," § 5.

AWARD.

See "Arbitration and Award," § 1.

BAIL.

Effect of allowance of bail on right to prosecute for murder in first degree, see "Criminal Law," § 5.

Habeas corpus to procure, see "Habeas Corpus," § 2.

Preliminary examination precedent to granting bail, see "Criminal Law," § 6.

BAILMENT.

Embezzlement or larceny by bailee, see "Embezzlement."

Particular species of bailments, and bailments incident to particular occupations.

See "Carriers," §§ 2-7; "Depositories" "Pledges."

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Rights, remedies, and discharge of bankrupt.

Where J. filed a voluntary proceeding in bankruptcy in Georgia in 1900, and a creditor resisted his discharge, and the court refused the same, and J. moved to Florida and in 1903 filed an application in bankruptcy in that state, and the creditor was notified but did not appear, and the court made a general order discharging J., in an action to enforce the debt against J. in the state court, the discharge will be applied to the debt due when not within any of the exceptions of Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428].—Bluthenthal v. Jones (Fla.) 533.

BANKS AND BANKING.

Bank as depository, see "Depositories."

Establishment of trust in funds deposited in bank, see "Trusts," § 4.

Indictment for receiving deposits in insolvent bank, see "Indictment and Information," § 4.

Liability of bank for trespass on property held as security, see "Mortgages," § 8.

§ 1. Functions and dealings.

In view of the instructions of a holder of a draft sending it to a bank for collection, the relation of creditor and debtor or general depositor held not to arise.—Hutchinson v. National Bank of Commerce (Ala.) 143.

BAR.

Of action by former adjudication, see "Judgment," § 4.

BASTARDS.

Action for wrongful death of, see "Death," § 1.

§ 1. Illegitimacy in general.

It is not essential to the validity of an act of legitimation that it negative the existence of the various causes which would constitute impediments to the legitimation.—Davenport v. Davenport (La.) 240.

*Marriage is not the only mode of legitimation. Legitimation may also be effected by notarial act.—Davenport v. Davenport (La.) 240.

An act held one of legitimation, and not of mere acknowledgment, under Civ. Code 1900, art. 203.—Davenport v. Davenport (La.) 240.

*Point annotated. See syllabus.

BATTERY.

See "Assault and Battery."

BAYOUS.

See "Navigable Waters," § 1.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 8.

That officers of a branch charitable association in good faith used in paying pressing creditors, including complainant, a per capita tax collected for transmission to the parent association, and without authority, but in good faith, executed a mortgage on its property to pay pressing creditors, including complainant, will not justify the appointment of a receiver under Acts 1888, p. 312, No. 159, § 1.—Stendell v. Longshoremen's Protective Union Benev. Ass'n (La.) 225.

BENEFITS.

Acceptance of as ground of estoppel, see "Estoppel," § 2.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE

In civil actions, see "Evidence," § 5.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 4.

Of witness, see "Witnesses," § 4.

BIDS.

For municipal contracts, see "Municipal Corporations," § 3.

BIGAMY.

Requisites of indictment for, in general, see "Indictment and Information," § 3.

*On a trial for bigamy, evidence of acts, declarations, or admissions of accused in recognition of the alleged first wife as his legal wife, held admissible.—Caldwell v. State (Ala.) 413.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF EXCHANGE.

See "Bills and Notes."

BILL OF LADING.

See "Carriers," § 2.

BILL OF PARTICULARS.

See "Pleading," § 6.

BILLS AND NOTES.

Acceptance of, as accord and satisfaction, see "Accord and Satisfaction."
 Amendment of pleading in action to cancel, see "Pleading," § 5.
 Application of maxims of equity in suit to cancel note, see "Equity," § 1.
 Collection by bank, see "Banks and Banking," § 1.
 Effect of failure to pay note secured by mortgage on right to foreclose, see "Mortgages," § 5.
 Evidence of conditional sale, see "Sales," § 8.
 Execution of note by municipality, see "Municipal Corporations," § 6.
 Harmless error in action on, see "Appeal and Error," § 20.
 In fraud of creditors, see "Fraudulent Conveyances," § 1.
 Marshaling assets for payment of, see "Marshaling Assets and Securities."
 Negotiability of bills of lading, see "Carriers," § 2.
 Parol or extrinsic evidence, see "Evidence," § 10.
 Secured by mortgage, see "Chattel Mortgages," § 1.

§ 1. Construction and operation.

Where a sheriff, being a collector of taxes, gave a check signed "Perkins, T. C.," the letters "T. C.," evidently meaning tax collector, were notice sufficient to place payee on his guard in receiving the check.—*State v. Jahraus* (La.) 575.

§ 2. Negotiability and transfer.

*A note may be pledged without the special indorsement of the pledgor.—*Clark v. Whitaker* (La.) 580.

The maker of a note and the acceptor of drafts are primarily liable and the transferee thereof is secondarily liable on a subsequent transfer.—*Campbell v. J. I. Campbell Co.* (La.) 696.

§ 3. Rights and liabilities on indorsement or transfer.

Where a wife sold certain property to her son and took his note, and the husband sold it to defendant, and he had the proceeds placed to the credit of the firm of which he was a member, there was no equity which could give rise to the presumption of bad faith against the holder.—*Clark v. Whitaker* (La.) 580.

A bona fide purchaser of a note for a consideration before maturity is protected at least to the extent of the amount paid by him.—*Clark v. Whitaker* (La.) 580.

§ 4. Actions.

A plea of set-off in an action on a note held demurrable on the grounds specified.—*Noble v. Anniston Nat. Bank* (Ala.) 136.

A plea of set-off arising from the conversion of property in an action on a note held not demurrable on the grounds specified.—*Noble v. Anniston Nat. Bank* (Ala.) 136.

A plea in an action on a note setting up a payment by mistake as a set-off held demurrable.—*Noble v. Anniston Nat. Bank* (Ala.) 136.

A plea in an action on a note setting up damages as a set-off held demurrable.—*Noble v. Anniston Nat. Bank* (Ala.) 136.

*A plea in an action on a note setting up misrepresentations held demurrable.—*Noble v. Anniston Nat. Bank* (Ala.) 136.

A plea in an action on a note setting up a failure of consideration held demurrable.—*Noble v. Anniston Nat. Bank* (Ala.) 136.

*Point annotated. See syllabus.

A plea in an action on a note setting up a want of consideration held demurrable.—*Noble v. Anniston Nat. Bank* (Ala.) 136.

*In a suit on certain notes, there was no objection to embodying in one count a claim for all attorney's fees claimed in the suit.—*Boyet v. Standard Chemical & Oil Co.* (Ala.) 756.

The evidence being conflicting whether a note was transferred by the payee to plaintiff in payment of claims, or was placed by the payee in a bank simply as collateral for plaintiff's debts to it, so that the payee was entitled to it on payment of such debts from other sources, held the case was for the jury.—*Elledge v. Gray* (Miss.) 2.

BLOODHOUNDS.

Relevancy of evidence as to training of bloodhounds, see "Criminal Law," § 8.

BOARD.

State medical boards, see "Physicians and Surgeons."

Of health, see "Health," § 1.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.

Of goods, see "Sales," § 4.

Of lands see "Vendor and Purchaser," § 4.

BONDS.

Liabilities of undisclosed principal of signer of bond, see "Principal and Agent," § 2.

Sureties on bonds, see "Principal and Surety."

Bonds for performance of duties of trust or office.

See "Justices of the Peace," § 1; "Notaries."

Bonds in judicial proceedings.

See "Appeal and Error," §§ 6, 8; "Attachment," §§ 2, 3; "Detinue."

Dissolution of injunction, see "Injunction," § 4.

BOUNDARIES.

Jurisdiction of appellate courts of actions involving, see "Courts," § 5.

Of counties, see "Counties," § 1.

Presentation of questions relating to for purpose of review, see "Appeal and Error," § 4.

Venue of prosecutions for offenses committed on boundaries between counties, see "Criminal Law," § 4.

§ 1. Evidence, ascertainment, and establishment.

*Chancery will not undertake to settle confused boundaries, unless some equity is superinduced by the act of the parties or by those through whom they claim.—*Hays v. Bouchelle* (Ala.) 518.

A bill to establish a boundary held to state a cause of action within the jurisdiction of equity.—*Hays v. Bouchelle* (Ala.) 518.

BREACH.

Of condition, see "Insurance," § 6.

Of contract, see "Contracts," §§ 3, 4; "Vendor and Purchaser," § 3.

Of covenant, see "Covenants," § 1.

Of warranty, see "Sales," §§ 5, 6.

BRIDGES.

Injuries to servant from defective bridge, see "Master and Servant," § 3.

§ 1. Regulation and use for travel.

Plaintiff as a citizen and resident of a town and parish *held* not entitled to maintain an action to compel the authorities to invest the surplus revenues arising from the operation of a toll bridge, and use the interest accruing therefrom for the maintenance and operation of the structure as a free bridge.—*Laforest v. Town of Thibodaux* (La.) 568.

BRIEFS.

On appeal or writ of error, see "Criminal Law," § 44.

BROKERS.

See "Principal and Agent."

Licenses to, see "Licenses," § 1.

§ 1. Employment and authority.

*A contract giving one the exclusive agency for a year for sale of real estate, being without mutuality, *held* revocable before sale.—*Jayne v. Drake* (Miss.) 372.

§ 2. Compensation and lien.

*A sale of land by a broker *held* not a compliance with his authority, precluding a recovery of commissions.—*Crosthwaite v. Lebus* (Ala.) 853.

§ 3. Actions for compensation.

In an action by a broker for commissions, evidence *held* not to sustain judgment for plaintiff.—*Macmurdo v. Mason* (La.) 215.

BUILDING AND LOAN ASSOCIATIONS.

An estimate made by a building and loan association as to the time when the stock will mature cannot be *held* to be a guaranty, but is merely the expression of an opinion.—*Ebersole v. Southern Building & Loan Ass'n* (Ala.) 150.

BURDEN OF PROOF.

In civil actions, see "Evidence," § 8.

BURGLARY.

Evidence of other offenses, see "Criminal Law," § 9.

Harmless error in rulings on evidence, see "Criminal Law," § 44.

Relevancy of evidence, see "Criminal Law," § 8.

§ 1. Offenses and responsibility therefor.

*Where defendant entered prosecutrix's pantry with intent to steal, after the pantry was locked, he was guilty of burglary, though he had access in the performance of his duties as a servant.—*Pointer v. State* (Ala.) 929.

Rev. St. § 854, providing that whoever enters a dwelling house in the daytime with intent to steal shall be guilty of crime, is not repealed by Acts 1902, p. 162, No. 107, § 6, relating to vagabondage.—*State v. Curtis* (La.) 58.

§ 2. Prosecution and punishment.

*An indictment for burglary *held* to sufficiently aver corporate character of prosecutor.—*Peck v. State* (Ala.) 759.

*It is sufficient in an indictment for burglary to lay the ownership of the building broken into and entered in the person in the possession and occupancy thereof.—*Peck v. State* (Ala.) 759.

*In a prosecution for burglary evidence that on the day following the night of the larceny defendant carried goods similar to those stolen to a house where they were found, and of the relations between defendant and the woman of the house, *held* admissible.—*Pointer v. State* (Ala.) 929.

*An indictment for burglary *held* demurrable as not showing a breaking into a building of the kind mentioned in the statute.—*Dickinson v. State* (Ala.) 929.

*In the absence of a plea denying the existence of a corporation alleged to be the owner of a railroad car burglarized, no proof of its existence was required under Acts 1900-01, p. 2285.—*Burrow v. State* (Ala.) 987.

*In a prosecution for burglary of a foreign railroad car, the ownership of the car *held* properly laid in the railroad that was using it at the time of the burglary.—*Burrow v. State* (Ala.) 987.

An indictment for violation of Rev. St. § 854 properly charged that defendant entered the house with such intent.—*State v. Curtis* (La.) 58.

A verdict of guilty, under an indictment charging the entry of a house in the daytime with intent to steal, implies that the facts proven show the intent alleged.—*State v. Curtis* (La.) 58.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."

Amendment of pleading, see "Pleading," § 5. Application of maxims of equity, see "Equity," § 1.

Presentation in lower court of questions for review, see "Appeal and Error," § 4.

Review of questions of fact, see "Appeal and Error," § 16.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

Setting aside judicial sale, see "Judicial Sales."

Grounds for cancellation or rescission of particular instruments.

Contracts for sale of goods, see "Sales," §§ 3. 4.

Contracts in general, see "Contracts," § 3.

Deed of railroad right of way, see "Railroads," § 1.

Insurance policy, see "Insurance," § 4.

Lease, see "Landlord and Tenant," § 1.

§ 1. Right of action and defenses.

*A deed not delivered voluntarily and obtained by deception was properly set aside.—*Bryson v. Bridges* (Fla.) 28.

§ 2. Proceedings and relief.

*On a bill to cancel a lease for fraud, the fraud must be distinctly alleged and clearly proved.—*Smith v. Collins* (Ala.) 825; *Abel v. Same* (Ala.) 826.

*In order to support a decree rescinding or canceling a lease for fraud, the evidence must create more than a mere probability of the truth of the charge of fraud.—*Smith v. Collins* (Ala.) 825; *Abel v. Same* (Ala.) 826.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Harmless error in action for death of passenger, see "Appeal and Error," § 19.

Harmless error in action for ejection of passenger, see "Appeal and Error," § 19.

*Point annotated. See syllabus.

Opinion evidence in action for death of passenger, see "Evidence," § 11.
 Opinion evidence in action to recover transportation furnished, see "Evidence," § 11.
 Reception of evidence in action for injuries to passenger, see "Trial," § 3.
 Res gestæ in action for ejection of passenger, see "Evidence," § 4.

§ 1. Control and regulation of common carriers.

*A railroad company rendering services to one corporation so as to enable it to serve the public and without sufficient excuse refusing to render similar service to another public corporation, *held* guilty of an unjust discrimination.—*State v. Atlantic Coast Line R. Co. (Fla.)* 705.

§ 2. Carriage of good—Bills of lading, shipping receipts, and special contracts.

The transfer of a bill of lading fraudulently procured, for property to which the consignor had no title, *held* not to vest title in the transferee of the bill as against the owner.—*Merchants' Nat. Bank v. Bales (Ala.)* 516.

*A contract for transportation made by a railroad company is subject to the provisions of the Constitution and laws existing when the contract is made.—*State v. Atlantic Coast Line R. Co. (Fla.)* 705.

*Railroad company *held* not bound by a bill of lading given by its agent for sugar not received or delivered for transportation.—*Henderson v. Louisville & N. R. Co. (La.)* 252; *In re Louisville & N. R. Co., Id.*

*Acts 1868, p. 193, No. 150, does not modify the common-law rule that railroad company is not bound by a bill of lading given by an agent for sugar not received or delivered for transportation.—*Henderson v. Louisville & N. R. Co. (La.)* 252; *In re Louisville & N. R. Co., Id.*

*Acts 1868, p. 193, No. 150, makes such bills of lading negotiable as are issued in accordance with its provisions for property actually received for storage, transportation, or other purposes.—*Henderson v. Louisville & N. R. Co. (La.)* 252; *In re Louisville & N. R. Co., Id.*

§ 3. — Transportation and delivery by carrier.

That the delivering carrier had no waybill for freight shipped *held* no excuse for its refusal to deliver to the owner or consignee on demand.—*Bowdon v. Atlantic Coast Line Ry. Co. (Ala.)* 294.

A plea by a carrier sued for the non-delivery of goods *held* bad for failing to contain matter in avoidance of its contract and for failing to show an attempt by notice to effect a delivery of the goods.—*Broadwood v. Southern Express Co. (Ala.)* 769.

§ 4. — Carrier as warehouseman.

*A carrier's liability does not end on the arrival of the goods at destination until the owner or consignee has had a reasonable time to remove them.—*Bowdon v. Atlantic Coast Line Ry. Co. (Ala.)* 294.

In an action against a delivering carrier for goods alleged to have been destroyed by fire, evidence that the station to which the goods were shipped was a prepay station, and that it was the custom of defendant's agent there to deliver goods without production of the bill of lading, *held* admissible.—*Bowdon v. Atlantic Coast Line Ry. Co. (Ala.)* 294.

In an action against a carrier for the loss of a manuscript, *held* proper to permit plaintiff to testify as to the time spent in its preparation and what he considered it worth.—*Southern Express Co. v. Owens (Ala.)* 752.

*Where the proximate cause of loss of goods was the negligence of the shipper in marking or packing, the carrier is not responsible.—*Broadwood v. Southern Express Co. (Ala.)* 769.

Evidence *held* material to show that when goods were injured defendant had possession of them as carrier, and not as warehouseman.—*Louisville & N. R. Co. v. Dunlap (Ala.)* 826.

§ 5. — Limitation of liability.

*A carrier cannot limit its liability for negligence by an agreed valuation on consideration of reduced charges, when the agreed valuation is greatly less than the real value and the contents of the package are not disclosed.—*Southern Express Co. v. Owens (Ala.)* 752.

*A consignee suing a carrier for nondelivery of goods *held* entitled to recover the value of the goods, notwithstanding the valuation fixed by the shipper.—*Broadwood v. Southern Express Co. (Ala.)* 769.

*A stipulation in a contract with a carrier for the transportation of goods limiting the time for the giving of notice of loss *held* reasonable.—*Broadwood v. Southern Express Co. (Ala.)* 769.

*A carrier *held* to have the burden of showing that the cause of the injury to a shipment was one which under the bill of lading exempted it from liability.—*Louisville & N. R. Co. v. Dunlap (Ala.)* 826.

A mere depredator *held* not a robber within a bill of lading exempting a carrier from liability for injury to a shipment caused by "robbery."—*Louisville & N. R. Co. v. Dunlap (Ala.)* 826.

§ 6. — Connecting carriers.

Where the destination of goods shipped was not on the initial carrier's line, its duty might be discharged by a delivery to the connecting carrier designated in the bill of lading or in the absence of such designation, to a carrier on the route "in the usual and customary way."—*Southern Ry. Co. v. Goldstein Bros. (Ala.)* 173.

A pleading *held* not to show a waiver on the part of a carrier of a stipulation in the contract of carriage as to notice of claim of damage.—*Broadwood v. Southern Express Co. (Ala.)* 769.

§ 7. — Discrimination and overcharge.

In an action against a carrier by a consignee to recover overcharges on freight, certain evidence as to efforts to collect the overcharges *held* admissible.—*Southwestern Alabama Ry. Co. v. W. C. Maddox & Son (Ala.)* 9.

*An action against a carrier for excessive freight charges *held* one in the nature of an action for money had and received.—*Southwestern Alabama Ry. Co. v. W. C. Maddox & Son (Ala.)* 9.

The payment of certain overcharges on freight *held* not voluntary.—*Southwestern Alabama Ry. Co. v. W. C. Maddox & Son (Ala.)* 9.

*A railroad company *held* bound to serve all the members of the public alike who apply for service under like conditions.—*State v. Atlantic Coast Line R. Co. (Fla.)* 529.

*Where a railroad company delivers between stations on its line the poles and wires of one telegraph company, it may be compelled by mandamus to perform a similar service for another telegraph company.—*State v. Atlantic Coast Line R. Co. (Fla.)* 529.

*A railroad company voluntarily transporting and delivering between stations employes and freight for an incorporated public telegraph company, and refusing similar service to others,

*Point annotated. See syllabus.

without sufficient excuse, *held* guilty of unjust discrimination.—*State v. Atlantic Coast Line R. Co.* (Fla.) 705.

*Under Ann. Code 1892, § 4291, an express company *held* liable in actual damages for discrimination in rates, even where discrimination was not out of distinct purpose.—*American Express Co. v. Crawley* (Miss.) 261.

Under Ann. Code 1892, §§ 4291, 4287, 4288, an express company discriminating in rates out of distinct purpose *held* liable for twice the damages sustained by the party discriminated against.—*American Express Co. v. Crawley* (Miss.) 261.

§ 8. Carriage of live stock.

*Carrier *held* liable for value of hogs shipped to other parties than those named as consignees in bill of lading.—*Southern Ry. Co. v. Webb* (Ala.) 420.

§ 9. Carriage of passengers.

*Person attempting to board moving train at night while incumbered with a bundle *held* guilty of negligence.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

In action for death of person attempting to board a street car, instruction as to conductor's duty to look out for decedent *held* not error.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

In action for death of person attempting to board street car, charge ignoring presence of the flagman and train dispatcher on car *held* not error where evidence failed to show that they had any duties to perform on the car with reference to the reception or discharge of passengers.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

In action for death of person attempting to board street car, certain evidence *held* not relevant on issue whether the place was one of the street car company's stopping places.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

*In action for death of person in attempting to board electric car, count *held* demurrable as failing to show relation of carrier and passenger.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

Under evidence in action for death of persons attempting to board street car, instruction that, if decedent attempted to board the car at a place where the cars did not usually or frequently stop, the defendant was not liable, *held* not error.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

*Street car company *held* liable for death caused by sudden starting of car only where person was attempting to board at regular stopping place.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

In an action for injuries to a passenger in a collision between a street car and a railroad train, an instruction that the operatives of the car are not bound to come to a full stop before crossing the track unless they know or had reasonable cause to believe a train was approaching *held* properly refused, as contravening Code 1896, § 3441.—*Montgomery St. Ry. Co. v. Lewis* (Ala.) 736.

In an action for injuries to a street car passenger in collision with a railroad train, an instruction *held* properly refused as misleading and ignoring the duty to stop imposed on the operatives of the street car by Code 1896, § 3441.—*Montgomery St. Ry. Co. v. Lewis* (Ala.) 736.

In an action for injuries to a street car passenger in collision with a railroad train at a

crossing, evidence *held* to warrant a finding that the operatives of the street car were guilty of a willful violation of Code 1896, § 3441.—*Montgomery St. Ry. Co. v. Lewis* (Ala.) 736.

*Under Code 1896, § 3441, a complaint in an action for injuries to a street car passenger in a collision with a railroad train *held* not objectionable as an insufficient attempt to particularize defendant's negligence.—*Montgomery St. Ry. Co. v. Lewis* (Ala.) 736.

*A street car passenger *held* not guilty of contributory negligence precluding a recovery for injuries sustained by the sudden starting of a car.—*Cutcliff v. Birmingham Ry., Light & Power Co.* (Ala.) 873.

*Statement of duty and liability of carrier to a person who boards a train merely to give necessary assistance to a passenger in taking passage.—*Southern Ry. Co. v. Patterson* (Ala.) 964.

In an action for ejection of a passenger, a request to charge *held* properly refused as premitting inquiry concerning the degree of force employed to overcome plaintiff's resistance and as assuming facts in controversy.—*Nashville, C. & St. L. Ry. v. Moore* (Ala.) 984.

Crim. Code 1896, § 4345, providing that in prosecutions for assault, etc., evidence of opprobrious words, etc., may be given in mitigation or justification, *held* inapplicable to an action for the ejection of a passenger.—*Nashville, C. & St. L. Ry. v. Moore* (Ala.) 984.

In an action for the ejection of a passenger, a request to charge, under Code 1896, § 3441, that the conductor of a train may eject all persons who use obscene or abusive language in the presence and hearing of passengers, *held* properly refused as misleading.—*Nashville, C. & St. L. Ry. v. Moore* (Ala.) 984.

*Under Code 1896, § 3457, it was immaterial to the right of a conductor to eject a passenger for use of obscene and improper language that the passenger's conduct was in fact offensive to other passengers.—*Nashville, C. & St. L. Ry. v. Moore* (Ala.) 984.

*The failure of a sleeping car company to fulfill its contract with a passenger for continuous passage *held* not the proximate cause of injuries to the passenger.—*Pullman Co. v. Stern* (Miss.) 383.

*The testimony of a passenger injured in a railroad accident *held* to show a defect, and to require the railroad to explain the accident in order to escape liability.—*Brown v. Yazoo & M. V. R. Co.* (Miss.) 383.

CARRYING WEAPONS.

See "Weapons."

CATTLE.

See "Animals."

CAUSE OF ACTION.

See "Action."

CEMETERIES.

Jurisdiction of equity of remedy for breach of covenant to use property for cemetery purposes, see "Equity," § 1.

CERTIFICATE.

Of acknowledgment of written instrument, see "Acknowledgment," § 1.

*Point annotated. See syllabus.

Of performance of work under municipal contract, see "Municipal Corporations," § 3.
To practice medicine, see "Physicians and Surgeons."

CERTIORARI.

In criminal prosecutions, see "Criminal Law," §§ 21, 40.
Reception of evidence in absence of accused as ground for, see "Criminal Law," § 21.
Review of proceedings before justices of the peace, see "Justices of the Peace," § 4.
Security for costs on appeal, see "Appeal and Error," § 6.

§ 1. Nature and grounds.

Certiorari is the proper remedy to review a final judgment against a garnishee confirming a void judgment nisi.—*Ex parte National Lumber Mfg. Co. (Ala.)* 10.

Certiorari *held* the proper remedy for attacking as void on its face the order of the commissioner's court, a court of limited jurisdiction, establishing a stock-law district under Acts 1894-95, p. 749.—*Mayfield v. Court of County Com'rs of Tuscaloosa County (Ala.)* 932.

CESSPOOL.

Adoption of cesspools as part of municipal system of sanitation, see "Municipal Corporations," § 4.
Judicial notice of ordinances relating to, see "Evidence," § 1.

CHALLENGE.

To juror, see "Jury," § 4.

CHAMPERTY AND MAINTENANCE.

Contract for contingent fee for attorney, see "Attorney and Client," § 3.
Deed of land in adverse possession of another as color of title, see "Adverse Possession," § 1.

*A sale of personalty by one claiming title to it *held* void as against one at the time holding it adversely.—*Posey v. Gamble (Ala.)* 416.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of criminal prosecutions, see "Criminal Law," § 4.

CHARACTER.

Evidence in prosecution for homicide of character of parties, see "Homicide," §§ 5, 9.
Of accused in criminal prosecutions, see "Criminal Law," § 9.
Of prosecutrix in seduction, see "Seduction," § 1.
Of witness, see "Witnesses," § 4.

CHARGE.

To jury in civil actions, see "Trial," §§ 6-12.
To jury, in criminal prosecutions, see "Criminal Law," §§ 24-31.

CHARITIES.

Charitable association, see "Beneficial Associations."

§ 1. Construction, administration, and enforcement.

*The cy pres doctrine in the administration of trusts *held* not recognized in Alabama.—*Universalist Convention of Alabama v. May (Ala.)* 515.

CHATTEL MORTGAGES.

See "Pledges."

Conversion of mortgaged goods, see "Trove and Conversion," § 2.

Declarations as evidence of ownership of mortgaged property, see "Evidence."

In fraud of creditors, see "Fraudulent Conveyances," § 1.

Materiality of evidence in action for possession of mortgaged property, see "Evidence," § 4.

Opinion evidence in action for conversion of mortgaged property, see "Evidence," § 11.

Waiver of conversion of mortgaged chattels by action on contract, see "Action," § 2.

§ 1. Requisites and validity.

The fact that notes to secure which a chattel mortgage was given do not bear the name of the mortgagor's wife, as recited in the mortgage, *held* not to impair the mortgage as security for the notes as obligations of the mortgagor.—*Baker v. Hutchinson (Ala.)* 809.

*The rule excluding parol evidence does not apply to the introduction of evidence that an instrument on its face a bill of sale is in fact a mortgage.—*Smith v. Hope (Fla.)* 69.

§ 2. Construction and operation.

Warehouse receipts for cotton, issued to a chattel mortgagor of the crop, and the registration of the mortgage, *held* to charge a purchaser of the cotton with notice that it was subject to the mortgage lien.—*D. P. Haynes & Bro. v. W. C. Gray & Co. (Ala.)* 615.

§ 3. Rights and liabilities of parties.

In an action by a chattel mortgagee to recover for the conversion of a part of a mortgaged cotton crop, the burden was on plaintiff to show that the cotton was raised by the mortgagor.—*D. P. Haynes & Bro. v. W. C. Gray & Co. (Ala.)* 615.

*A purchaser of a portion of a mortgaged cotton crop with notice of the lien *held* liable to the mortgagee in an action on the case.—*D. P. Haynes & Bro. v. W. C. Gray & Co. (Ala.)* 615.

The complaint, in an action by a mortgagee for conversion of the mortgaged chattels, *held* to sufficiently show their wrongful taking and conversion.—*Baker v. Hutchinson (Ala.)* 809.

*The complaint by a mortgagee for conversion of the mortgaged chattels *held* to sufficiently plead plaintiff's lien.—*Baker v. Hutchinson (Ala.)* 809.

A plea in an action by a mortgagee for conversion of the mortgaged chattels *held* bad in not showing they had been released from the mortgage.—*Baker v. Hutchinson (Ala.)* 809.

*Plaintiff in an action by a mortgagee for conversion of the mortgaged chattels *held* authorized to introduce in evidence the mortgage and secured notes.—*Baker v. Hutchinson (Ala.)* 809.

Evidence in an action by the mortgagee of a crop for its conversion *held* sufficient to show the land on which it was grown was owned by the mortgagor.—*Baker v. Hutchinson (Ala.)* 809.

*Point annotated. See syllabus.

A plea in an action by a mortgagee for conversion of the mortgaged chattels *held* bad in not showing that the mortgage under which they were taken was superior to that of plaintiff.—*Baker v. Hutchinson* (Ala.) 809.

§ 4. Rights and remedies of creditors.

*Retention of possession by mortgagor, or provision in mortgage authorizing the same, *held* not to invalidate the instrument against the mortgagor's existing or subsequent creditors.—*Rike v. Ryan* (Ala.) 959.

*Unless a mortgage is purposely withheld from record for the purpose of concealment, and to give the mortgagor a false credit, the only effect of it is to postpone it to after-acquired liens.—*Rike v. Ryan* (Ala.) 959.

Where a chattel mortgage was executed and properly delivered to the mortgagee, as provided by Rev. St. 1892, § 1983, a valid lien was thereby created.—*Mercantile Exch. Bank v. Taylor* (Fla.) 22.

CHEAT.

See "Fraud."

CHECKS.

See "Bills and Notes."

CHILDREN.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants"; "Parent and Child."

Applicability of instructions to pleadings and evidence in action for death of child, see "Trial," § 9.

Contributory negligence on part of children, see "Negligence," § 3.

Injuries to, caused by operation of street railroads, see "Street Railroads," § 1.

Province of court and jury as to weight to be given to testimony of, see "Criminal Law," § 24.

Requests for instructions in action for death of child, see "Trial," § 10.

CHURCH.

See "Religious Societies."

CITIES.

See "Municipal Corporations."

CITIZENS.

Equal protection of laws, see "Constitutional Law," § 6.

Privileges and immunities, see "Constitutional Law," § 5.

CIVIL RIGHTS.

See "Constitutional Law," §§ 3, 5, 6.

CLAIMS.

Against county, see "Counties," § 3.

Against estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.

Against estate of decedent, see "Executors and Administrators," § 2.

Against property in hands of receiver, see "Receivers," § 3.

To property levied on, see "Execution," § 2.

CLASS LEGISLATION.

See "Constitutional Law," § 5.

*Point annotated. See syllabus.

CLERKS OF COURTS.

Transmission by clerk, of record on change of venue, see "Criminal Law," § 4.

CLOUD ON TITLE.

See "Quietling Title."

COLLATERAL ATTACK.

On judicial sale, see "Judicial Sales."

COLLATERAL SECURITY.

See "Pledges."

COLLATERAL UNDERTAKING.

See "Guaranty."

COLLECTION.

By bank, see "Banks and Banking," § 1.
Of taxes, see "Taxation," § 3.

COLLISION.

Liability of vessel owners for personal injuries caused by collision with draw, see "Shipping," § 1.

Of street car with other vehicle, see "Street Railroads," § 1.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMMERCE.

Carriage of goods and passengers, see "Carriers."

Licensing persons engaged in interstate commerce, see "Licenses," § 1.

§ 1. Subjects of regulation.

*Code 1896, § 5087, in so far as it attempts to prohibit residents of other states from soliciting orders for spirituous liquors to be transported into the state, *held* violative of the commerce clause of the federal Constitution.—*Moog v. State* (Ala.) 166.

*Act Congress, Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177], providing that intoxicating liquors on arrival in any state shall be subject to state laws, *held* inapplicable to liquors transported into a state until the transportation is completed.—*Moog v. State* (Ala.) 166.

COMMERCIAL PAPER.

See "Bills and Notes."

COMMISSION.

Inquisition of lunacy, see "Insane Persons," § 1.
To take testimony, see "Depositions."

COMMISSIONERS.

Jury commissioners, see "Jury," §§ 2, 3; "Larceny," § 2.

COMMISSIONERS' COURTS.

See "Courts," § 1.

COMMISSIONS.

Of broker, see "Brokers," §§ 2, 3.

COMMITMENT.

On charge of crime, see "Criminal Law," § 6.
On conviction of crime, see "Criminal Law," § 87.

COMMON CARRIERS.

See "Carriers."

COMMON COUNTS.

See "Assumpsit, Action of."

COMMUNITY PROPERTY.

See "Husband and Wife," § 5.

COMPARATIVE NEGLIGENCE.

See "Negligence," § 3.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.
Of attorney, see "Attorney and Client," § 3.
Of broker, see "Brokers," §§ 2, 3.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 4.
Of evidence in criminal prosecution, see "Criminal Law," § 10.
Of grand juror, see "Grand Jury."
Of juror, see "Jury," § 4.
Of witnesses in general, see "Witnesses," § 2.

COMPLAINT.

In criminal prosecution, see "Criminal Law," § 6; "Indictment and Information."
In pleading, see "Pleading."

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Payment"; "Release."

COMPUTATION.

Of interest, see "Interest," § 1.
Of period of limitation, see "Limitation of Actions," § 1.
Of time, see "Time."

CONCEALED WEAPONS.

See "Weapons."

CONCEALMENT.

Effect on limitations in equity, see "Equity," § 2.

CONCLUSION.

Of witness, see "Evidence," § 11.

CONCURRENT JURISDICTION.

Of courts, see "Courts," § 6.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 8.

CONDITIONS.

In contracts and conveyances.

See "Deeds," § 2.

Insurance policies, see "Insurance," §§ 5, 6.

Precedent to actions or other proceedings.

On guaranty, see "Guaranty," § 2.
Redemption, see "Mortgages," § 7.
To recover goods sold, see "Sales," § 8.
To set aside judicial sale, see "Judicial Sales."
To subject stock subscriptions to payment of corporate debts, see "Corporations," § 4.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 15.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 2.
Of parties to contract or conveyance, see "Fraudulent Conveyances," § 1.

CONFIRMATION.

Of sale of property of insane person, see "Insane Persons," § 2.
Of sale on execution, see "Execution," § 8.
Of tax title, see "Taxation," § 5.

CONFUSION OF GOODS.

Of landlord and tenant, effect on landlord's lien, see "Landlord and Tenant," § 4.

CONNECTING CARRIERS.

See "Carriers," § 6.

CONSIDERATION.

Necessity of consideration in deed to prevent resulting trust, see "Trusts," § 1.
Of contract in general, see "Contracts," §§ 1, 3.

Of particular classes of contracts.

See "Bills and Notes," § 4; "Fraudulent Conveyances," § 1; "Mortgages," §§ 1, 6.
Lease, see "Landlord and Tenant," § 1.
Limitation of liability of carrier, see "Carriers," § 5.
Sale of realty, see "Vendor and Purchaser," § 1.
Waiver of appeal, see "Appeal and Error," § 3.

CONSOLIDATION.

Of railroads, see "Railroads," § 3.

CONSPIRACY.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 13.
Instructions in general, see "Criminal Law," § 31.
Sufficiency of evidence, see "Criminal Law," § 17.

*Point annotated. See syllabus.

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Determination of constitutionality of repealed statute, see "Action," § 1.

Effect of concession of counsel as to irregularity in passage of law on determination as to constitutionality, see "Stipulations."

Judicial notice of repeal of statute by Constitution, see "Evidence," § 1.

Restraining election in violation of Constitution, see "Injunction," § 2.

Provisions relating to particular subjects.

See "Appeal and Error," § 24; "Counties," § 1;

"Courts," § 3; "Eminent Domain," §§ 1, 4;

"Executors and Administrators," § 4; "Ex-

emptions," § 1; "Habeas Corpus," § 2;

"Health," § 1; "Homestead," §§ 1, 2; "In-

toxicating Liquors," § 2; "Judges," § 1;

"Jury," § 1; "Licenses," § 1; "Municipal

Corporations," § 3; "Pleading," § 1; "Time."

Appellate jurisdiction in criminal prosecutions,

see "Criminal Law," § 38.

Assessments for public improvements, see

"Municipal Corporations," § 3.

Enactment and validity of statutes, see "Stat-

utes," § 1.

Special or local laws, see "Statutes," § 2.

Subjects and titles of statutes, see "Statutes,"

§ 3.

Rights of persons accused or convicted of crime.

Necessity of indictment or presentment in crim-

inal prosecution, see "Indictment and In-

formation," § 1.

§ 1. **Construction, operation, and enforcement of constitutional provisions.**

To hold that the Legislature intended the word "taking," as used in Act 1896, p. 142, No. 96, to mean an unlawful appropriation of lands, thereby enabling corporations to acquire title by the short prescription of two years, would be tantamount to declaring the act unconstitutional.—*Amet v. Texas & P. Ry. Co. (La.) 721; In re Amet, Id.*

§ 2. **Police power in general.**

Inferential and consequential damage to private property arising out of health laws does not violate the federal Constitution.—*Logan v. Childs (Fla.) 197.*

§ 3. **Personal, civil, and political rights.**

Cr. Code 1896, § 4762, making it an offense to knowingly sell a horse having the disease of choking, having for its purpose the prevention of fraud, held a proper exercise of the police power.—*Wester v. State (Ala.) 969.*

*The sixth amendment to the federal Constitution has reference only to powers exercised by the government of the United States.—*Pittman v. State (Fla.) 385.*

§ 4. **Obligation of contracts.**

Gen. Acts 1900-01, p. 164, amending Code 1896, § 2630, relating to usury, when applied to a usurious mortgage executed prior to its adoption, held not in conflict with Const. 1901, § 95, prohibiting the impairment of the obligation of contracts.—*Barclift v. Fields (Ala.) 84.*

§ 5. **Privileges or immunities, and class legislation.**

*Laws 1899, p. 119, c. 4730, providing that a homestead shall descend to the widow of the owner thereof and shall not be subject to devise, is not a violation of the 14th amendment of the Constitution of the United States.—*Saxon v. Rawls (Fla.) 594.*

*Point annotated. See syllabus.

§ 6. **Equal protection of laws.**

Rules and regulations by railroad commissioners are by law deemed prima facie reasonable and just, and their enforcement will not deprive the railroad company of equal protection of the laws.—*State v. Atlantic Coast Line R. Co. (Fla.) 705.*

§ 7. **Due process of law.**

*The assessment of a portion or all of the cost of a street improvement against lands abutting or in the immediate vicinity of the improvement held not a violation of Fed. Const. 14th Amendment.—*Harton v. Town of Avondale (Ala.) 934.*

*Rules and regulations made by the railroad commissioners are by law deemed prima facie reasonable and just, and enforcement of such rule against a railroad company will not be a taking of property without due process of law.—*State v. Atlantic Coast Line R. Co. (Fla.) 705.*

Acts 1904, p. 58, c. 76, imposing a privilege tax on certain money lenders, held invalid as depriving one of property without due process of law.—*Hyland v. Sharp (Miss.) 264.*

CONSTRUCTIVE POSSESSION.

See "Adverse Possessions," § 2.

CONTEMPT.

Conduct of witness in criminal prosecution constituting, see "Criminal Law," § 20.

Enactment of statutes relating to, see "Statutes," § 1.

§ 1. **Acts or conduct constituting contempt of court.**

*Where a case has been finally decided, and a person representing the defendant, in satisfying the judgment, writes to counsel for plaintiff a letter intemperately criticising the judgment, such criticism cannot be made the basis of a proceeding for contempt.—*Fellman v. Mercantile Fire & Marine Ins. Co. (La.) 49; In re Cooke, Id.*

§ 2. **Power to punish and proceedings therefor.**

Where the judge has no personal knowledge of the matter imputed as contempt, he can punish only after hearing on rule to show cause.—*Fellman v. Mercantile Fire & Marine Ins. Co. (La.) 53; In re Cooke, Id.*

CONTEST.

Of will, see "Wills," § 3.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 18.

Review of rulings relating to, see "Appeal and Error," § 15.

CONTRACTS.

Admissions as evidence of, see "Evidence," § 6.

Agreements within statute of frauds, see "Frauds, Statute of."

Cancellation, see "Cancellation of Instruments."

Creation of co-tenancy by, see "Tenancy in Common," § 1.

Damages for breach, see "Damages," §§ 2, 5.

Form of action, whether on contract or in tort, see "Action," § 2.

Harmless error in action for breach, see "Appeal and Error," § 20.

Impairing obligation, see "Constitutional Law," § 4.
 Operation and effect of champerty, see "Champerty and Maintenance."
 Parol or extrinsic evidence, see "Evidence," § 10.
 Reformation, see "Reformation of Instruments."
 Release of contract debt, see "Release," § 1.
 Specific performance, see "Specific Performance."
 Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of persons.

See "Carriers," § 2; "Corporations," § 6; "Infants," § 2; "Master and Servant"; "Municipal Corporations," § 3; "Principal and Agent," § 2.

Contracts relating to particular subjects.

See "Depositories"; "Interest"; "Party Walls."
 Ground for mechanics' liens, see "Mechanics' Liens," § 1.
 Hiring of convicts, see "Convicts."
 Making bequest or devise, see "Wills," § 1.
 Traffic contracts between railroads, see "Railroads," § 3.
 Transportation of goods, see "Carriers," § 2.

Particular classes of express contracts.

See "Bills and Notes"; "Covenants"; "Guaranty"; "Insurance"; "Partnership"; "Sales."
 Act of legitimation, see "Bastards," § 1.
 Agency, see "Principal and Agent."
 Bills of lading, see "Carriers," § 2.
 Employment, see "Master and Servant."
 Leases, see "Landlord and Tenant."
 Marriage settlements, see "Husband and Wife," § 2.
 Mutual benefit insurance, see "Insurance," § 8.
 Party wall agreements, see "Party Walls."
 Sale of realty, see "Vendor and Purchaser."
 Stipulations in actions, see "Stipulations."
 Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Assumpsit, Action of."

Particular modes of discharging contracts.

See "Accord and Satisfaction"; "Payment"; "Release."

§ 1. Requisites and validity.

*Contract *held* void as an unreasonable restraint of trade.—Webb Press Co. v. Bierce (La.) 203.

Under Wilson's Rev. & Ann. St. 1903, of Okl. §§ 819-821, a contract whereby a party contracted not to engage in business in a particular place for pecuniary consideration given by one proposing to enter into business in such place is void.—Webb Press Co. v. Bierce (La.) 203.

§ 2. Construction and operation.

An agreement that one named should not be liable for the expense of a certain proceeding *held* not to sustain a claim against the maker's estate by those employed in another proceeding by the person named.—Elrod v. Elrod (Ala.) 290.

*Where a seller agreed to file a bond with a bank to perform the contract of sale without any time being fixed, it was bound to file such bond within a reasonable time.—Equitable Mfg. Co. v. Howard (Ala.) 628.

A bond executed by the seller of certain goods *held* not filed within a reasonable time as required by the contract of sale.—Equitable Mfg. Co. v. Howard (Ala.) 628.

*Point annotated. See syllabus.

*A contract for the repair of a dwelling constructed, and *held* to authorize the owner to terminate it on specified conditions.—Davis v. State (Ala.) 681.

*Where the parties to a contract of employment deal with it as a divisible one *held*, that such construction, doing no violence to its terms, will be sanctioned by the court.—Powell v. Russell (Miss.) 5.

§ 3. Rescission and abandonment.

*Neither inadequacy of consideration, mistake in law, or partial failure of consideration, is sufficient, in the absence of fraud, to authorize the cancellation of a contract.—Stephenson v. Atlas Coal Co. (Ala.) 301.

*When one of the parties breaks the contract, the other party must elect between demanding a dissolution of the contract and exacting a continued performance of it.—Des Allemands Lumber Co. v. Morgan City Timber Co. (La.) 332.

§ 4. Performance or breach.

In an action for breach of a contract of sale, evidence that it took three or four days for a letter to pass between the buyer and seller *held* admissible.—Equitable Mfg. Co. v. Howard (Ala.) 628.

Whether a bond alleged to have been sent to a bank by the seller of certain goods, as required by the contract of sale, was received by the bank, *held* for the jury.—Equitable Mfg. Co. v. Howard (Ala.) 628.

In an action for breach of a contract of sale, an instruction *held* properly refused as submitting a question of law to the jury.—Equitable Mfg. Co. v. Howard (Ala.) 628.

A contract by a planter, in consideration of advances by the factor, to ship his crop to the latter or to a consignee to be designated by him *held* to have been violated.—National Bank of Commerce v. Sullivan (La.) 480.

CONTRADICTION.

Of witness, see "Witnesses," § 4.

CONTRIBUTION.

Subrogation to rights of judgment creditor against co-debtor, see "Subrogation."

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 3.

Argumentative instructions relating to, see "Trial," § 8.

Of passenger, see "Carriers," § 9.

Of person injured by operation of railroad, see "Railroads," §§ 6, 7.

Of servant, see "Master and Servant," §§ 8, 9, 10, 11.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

Conveyances by or to particular classes of persons.

See "Infants," § 1; "Insane Persons," § 2.

Married women, see "Husband and Wife," § 3.

Conveyances of particular species of, or estates or interests in, property.

Separate property of married women, see "Husband and Wife," § 3.

Particular classes of conveyances.

See "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

Partition deeds, see "Partition," § 1.

Tax deeds, see "Taxation," § 4.

CONVICTS.

Habeas corpus by convict hired out under contract afterwards annulled, see "Habeas Corpus," § 2.

*Statement of power of judge of probate under Code 1896, § 4525, to annul the contract of hiring of convicts sentenced to hard labor for the county and hired out by the county commissioners.—*Ossie v. State* (Ala.) 945.

CORPORATIONS.

Best and secondary evidence as to merger liquidation or license to do business, see "Evidence," § 5.

Defective corporation as partnership, see "Partnership," § 1.

Interest of stockholders as beneficiaries of trust, see "Trusts," § 2.

Operation of judgment in garnishment as bar to right to enforce stockholders' liability on subscription, see "Judgment," § 4.

Opinion evidence as to authority of corporate agent, see "Evidence," § 11.

Receivers in general, see "Receivers," § 1.

Titles of acts relating to, see "Statutes," § 3.

Particular classes of corporations.

See "Beneficial Associations"; "Building and Loan Associations"; "Municipal Corporations"; "Railroads"; "Religious Societies"; "Street Railroads."

Banks, see "Banks and Banking."

Insurance companies, see "Insurance."

Sleeping car companies, see "Carriers," § 9.

Telegraph and telephone companies, see "Telegraphs and Telephones."

Water companies, see "Waters and Water Courses," § 2.

§ 1. Incorporation and organization.

Under Code 1896, § 4122, subd. 7, and subdivision 55, a corporation engaged in the brewing business and paying the brewers' license tax is nevertheless liable to the corporation privilege tax.—*Spira v. State* (Ala.) 465.

§ 2. Corporate existence and franchise.

Where stockholders of a corporation permit corporate name to be used in the business, in the same place and under the same manager, they are estopped to deny its continued existence.—*Pattison v. Gulf Bag Co.* (La.) 224.

§ 3. Capital, stock, and dividends.

Where stockholders of a corporation conveyed to it \$50,000 worth of property in payment for that much stock and \$25,000 bonds, that the bonds were not delivered until after the corporation was organized did not entitle the stockholders to have the whole value of the property credited as against creditors of the corporation as a payment on stock alone.—*Montgomery Iron Works v. Roman* (Ala.) 811.

§ 4. Members and stockholders.

Acts 1903, p. 388, permitting the marshaling of assets of an insolvent corporation for the payment of creditors, has no application to a bill by a contract creditor to subject a stock

subscription to his claim.—*Dickinson v. Traphagan* (Ala.) 272.

*Under the express provisions of Code 1896, § 823, a creditor of a corporation has no right to file a bill to subject a stock subscription to the claim unless complainant is a judgment creditor.—*Dickinson v. Traphagan* (Ala.) 272.

A general statute imposing liability on shareholders includes married women.—*Dickinson v. Traphagan* (Ala.) 272.

The mere insolvency of a corporation does not enable a contract creditor to maintain a bill to subject a stock subscription to his claim without first obtaining a judgment and having an execution returned nulla bona.—*Dickinson v. Traphagan* (Ala.) 272.

A bill by a contract creditor to subject a stock subscription to his claim held insufficient for not alleging a compliance with Const. 1901, § 232; Code 1896, c. 28, art. 16.—*Dickinson v. Traphagan* (Ala.) 272.

*In an action by creditors of a corporation to recover an alleged unpaid stock subscription, limitations held not to run until judgment and return of nulla bona against the corporation.—*Montgomery Iron Works v. Roman* (Ala.) 811.

§ 5. Officers and agents.

Assignment in name of corporation by its vice president, without corporate seal, held not admissible in evidence in absence of proof of his authority to execute it.—*Allen v. Alston* (Ala.) 159.

The expenses of a suit against the officers of a corporation to oust them from office are at the charge of the corporation.—*Stendell v. Longshoremen's Protective Union Benev. Ass'n* (La.) 228.

§ 6. Corporate powers and liabilities.

To authorize a judgment by default against a corporation the record must show that proof was made that the person on whom process was served was such an officer as by law was authorized to receive service on behalf of the corporation.—*Ex parte National Lumber Mfg. Co.* (Ala.) 10.

Where an owner sold property to a company in consideration of its organizing a stock corporation, and the company did not intend to pay anything for the stock which it should receive, the owner held entitled to sue the company and the corporation.—*A. J. Cranor Co. v. Miller* (Ala.) 678.

A contract by a company for the purchase of property construed, and held to require it to pay for the shares of stock which should be issued to it by a corporation to be organized.—*A. J. Cranor Co. v. Miller* (Ala.) 678.

*A corporation is responsible for a libel, the publication of which was sanctioned by its manager, in a matter which concerned the business of the corporation.—*Pattison v. Gulf Bag Co.* (La.) 224.

§ 7. Insolvency and receivers.

Where a creditor of a corporation holds a vast majority of claims against it, his request to the receiver, on its insolvency, for a sale of its assets in bulk, will be granted, unless there is some conclusive reason to the contrary.—*Wenar v. Leon L. Schwartz* (La.) 360.

§ 8. Foreign corporations.

*One delivering the property sold to a corporation held not entitled to set aside the sale on the ground of the failure of the corporation to comply with Constitution and Code 1896, § 1316, relating to foreign corporations.—*A. J. Cranor Co. v. Miller* (Ala.) 678.

*Point annotated. See syllabus.

CORRECTION.

Of abstract of title furnished in ejectment, see "Ejectment," § 2.
 Of assessment of taxes, see "Taxation," § 2.
 Of irregularities and errors at trial, see "Criminal Law," § 85.

COSTS.

Assignment of error as to rulings relating to, see "Appeal and Error," § 10.
 Effect of decision on prior appeal relating to, see "Appeal and Error," § 23.
 Exceptions for purpose of review of rulings relating to, see "Appeal and Error," § 4.
 In ejectment, see "Ejectment," § 3.
 Payment on taking appeal, see "Appeal and Error," § 6.
 Right to review rulings relating to, see "Appeal and Error," § 3.

§ 1. Nature, grounds, and extent of right in general.

Complainant *held* not entitled to any costs below or on appeal though entitled to relief as to a matter brought in by amendment of bill.—Grayson v. Haislip (Ala.) 951.

§ 2. Persons, property, and funds liable.

Where defendant, being insolvent, agreed that a third party should recover judgment on claims which he had bought up, and by a seizure obtain a privilege on the property with intent that preference should be obtained by the president of defendant company and plaintiff, a creditor attached the same property, alleging that the prior proceedings were void, and judgment on appeal is rendered in favor of plaintiff maintaining attachment perpetuating the injunction and annulling the judgment in the first action, defendant in the revocatory action is liable in solido with the principal defendant for the costs of the attachment.—Bank of Patterson v. Urban Co. (La.) 244.

§ 3. On appeal or error, and on new trial or motion therefor.

Judgment affirmed by the Supreme Court *held* to conclude all possessory rights claimed by plaintiff, and affirm those of defendant to a sufficient extent to throw the cost of the execution of writ on sequestration on the party cast in the suit.—Jennings-Heywood Oil Syndicate v. Housier-Laterille Oil Co. (La.) 255.

*Where pending an appeal from a judgment of interdiction the appellant interdict dies, as no judgment can be rendered, each party must pay his own costs.—In re Jones (La.) 431.

§ 4. In criminal prosecutions.

Code 1896, §§ 1344, 1345, *held* not to authorize recovery from clerk of court of costs paid in a criminal prosecution by motion for retraxation.—Tribble v. State (Ala.) 183.

Costs paid by accused in a criminal prosecution and turned over to the state treasurer cannot be recovered by motion to retrax costs.—Tribble v. State (Ala.) 183.

CO-TENANCY.

See "Tenancy in Common."

COUNTERFEITING.

See "Forgery."

COUNTIES.

See "Municipal Corporations."

Assignments of error in action by or against county officer, see "Appeal and Error," § 10.

*Point annotated. See syllabus.

Effect on venue of criminal prosecution of invalidity of statute readjusting boundaries of counties, see "Criminal Law," § 4.
 Injunctions affecting, see "Injunction," § 2.
 Judicial notice of county officers, see "Evidence," § 1.
 Mandamus to county officers, see "Mandamus," § 2.

§ 1. Creation, alteration, existence, and political functions.

*Act Sept. 30, 1903 (Loc. Acts 1903, p. 462), *held* to contravene Const. 1901, § 89, in taking territory from one county and adding it to another, thus reducing the former to less than 600 square miles.—Kline v. State (Ala.) 952.

*Act creating new county *held* not unconstitutional, and not to be enjoined because entailing additional expense on taxpayers.—Conner v. Gray (Miss.) 186.

Act creating new county in compliance with Const. § 260, *held* not unconstitutional, as depriving officers of the right to hold their office for the balance of the term.—Conner v. Gray (Miss.) 186.

Where counties out of which a new county is to be created do not complain of the act, it will not be declared unconstitutional as depriving them of a legal board of supervisors, or as violating Const. §§ 255, 87.—Conner v. Gray (Miss.) 186.

§ 2. Property, contracts, and liabilities.

The police jury of a parish has no authority to sell or exchange a courthouse and grounds, without legislative sanction, for the purpose of acquiring another site for a new courthouse.—Dupuy v. Police Jury of Iberville (La.) 91.

§ 3. Claims against county.

Disallowance of a claim by county commissioners without an entry on the minutes of the court *held* ineffectual as an audit of the claim.—Commissioners' Court of Chilton County v. State (Ala.) 463, 465.

An order of the court of county commissioners entered in its minutes *held* a proper audit and disallowance of petitioner's claim.—Commissioners' Court of Chilton County v. State (Ala.) 463, 465.

Under Code 1896, § 1417, the making of a contract between a county and an architect for services and the entering of such contract on the minutes of the court *held* not an audit of the architect's claim thereunder so as to require the probate judge to issue a warrant under section 1416.—Smith v. McCutchen (Ala.) 619.

§ 4. Actions.

Where a claim against a county had been disallowed, claimant's remedy was by action against the county, under Code 1896, § 13.—Commissioners' Court of Chilton County v. State (Ala.) 463, 465.

COURTS.

Authority of police board to reduce assessments, see "Taxation," § 2.

Contempt of court, see "Contempt."

Judicial notice of decisions or proceedings, see "Evidence," § 1.

Justices' courts, see "Justices of the Peace."

Mandamus, see "Mandamus," § 1.

Presentation in lower court of objections to transfer of causes between divisions of court, see "Appeal and Error," § 4.

Presumptions on appeal as to time of holding court, see "Criminal Law," § 44.

Province of court and jury, see "Trial," § 6.

Review of decisions, see "Appeal and Error"; "Certiorari," § 1.

Right to trial by jury, see "Jury," § 1.

Showing organization of trial court in record on appeal, see "Appeal and Error," § 9.
 Sufficiency of bill of exceptions signed in vacation, see "Appeal and Error," § 9.
 Want of jurisdiction ground for dismissal of appeal, see "Appeal and Error," § 11.

Jurisdiction of proceedings affecting particular classes of persons.

See "Insane Persons," § 2.

Jurisdiction of proceedings relating to particular species of property or estates.

Estates of insane persons, see "Insane Persons," § 2.

Jurisdiction of particular actions or proceedings.

See "Habeas Corpus," § 2; "Partition," § 2.

Special jurisdictions and particular classes of courts.

See "Criminal Law," §§ 3, 4.

Appellate jurisdiction, see "Criminal Law," §§ 38-45.

§ 1. Nature, extent, and exercise of jurisdiction in general.

*The circuit court held possessed of jurisdiction to render judgment in ejectment transferred to it from the county law and equity court of a county pursuant to an invalid statute.—*Pelham v. Miller* (Ala.) 418.

The word "the" in an order of a commissioner's court establishing a stock-law district under Acts 1894-95, p. 749, held a clerical error for "three," so that the order is not void as failing to show jurisdiction of such inferior court to act.—*Mayfield v. Court of County Com'rs of Tuscaloosa County* (Ala.) 932.

§ 2. Establishment, organization, and procedure in general.

Under Code 1896, §§ 928, 930, the circuit judge may hold special terms during the session of a regular term of the court.—*Williams v. State* (Ala.) 992.

*An appellate court, equally with suitors, is bound by its rules, and they must be construed as statutes would be construed.—*Hoodless v. Jernigan* (Fla.) 194.

*When Supreme Court is equally divided the judgment of the lower court will be affirmed.—*Mugge v. Tate, Jones & Co.* (Fla.) 603.

§ 3. Courts of general original jurisdiction.

Acts 1896-97, p. 802, creating the county court of Cleburne county, is not unconstitutional for conferring on the county court the same jurisdiction and powers as the circuit court.—*State v. Fuller* (Ala.) 990.

Where the amount of a license tax depends on the construction of the revenue statutes, the legality of the tax is in contestation and an appeal lies directly to the Supreme Court.—*State v. Orfila* (La.) 227; *In re Fitzpatrick*, Id.

Courts of probate jurisdiction.

*Where the parties to a partition claimed under a will, and their only interest was a distributive share of the proceeds of the sale of the property, the probate court had no jurisdiction in statutory partition to adjust such rights.—*Greer v. Herren* (Ala.) 783.

§ 5. Courts of appellate jurisdiction.

Under the express provisions of Acts 1888-89, p. 998, amending an act establishing the city court of Birmingham, it is the duty of the Supreme Court on appeal to review the conclusion and judgment of the court on the evidence and if error intervene to render such judgment as should have been rendered.—*McGeever v. S. H. Harris & Sons* (Ala.) 930.

*Point annotated. See syllabus.

Where in a boundary suit the matter in dispute involves the ownership of an intervening strip of property, the value of that property determines the jurisdiction of the court.—*Gasquet v. Conway* (La.) 44.

Where a suit is brought to recover taxes paid, the sole question is whether an error has been committed, and where it is possible for plaintiff to recover after payment, and such issues are not within the jurisdiction of the Supreme Court on appeal.—*McCaleb v. Board of Com'rs for the Buras Levee Dist.* (La.) 217.

Where in a suit for injunction the matter in dispute is not as to amount and value such as would authorize Supreme Court to reverse the judgment, the appeal will be dismissed and the case transferred to the Court of Appeals, under Acts 1904, p. 135, No. 56.—*Krantz v. Noonan* (La.) 364.

A claim for damages manifestly inflated will not confer jurisdiction on the Supreme Court.—*Samuel Israelite Baptist Church v. Thomas* (La.) 564.

Under Acts 1904, p. 135, No. 56, held a matter of discretion of the Supreme Court either to transfer or dismiss an appeal improperly taken, and, where a claim for damages is manifestly inflated to confer jurisdiction, the appeal will be dismissed.—*Samuel Israelite Baptist Church v. Thomas* (La.) 564.

*Questions held not to involve the legality of the tax, and as the amount claimed is less than \$2,000, the Supreme Court is without jurisdiction on appeal.—*Page v. Thompson* (La.) 571.

§ 6. Concurrent and conflicting jurisdiction, and comity.

*A bill in chancery held maintainable by legatees or distributees for removal to such court of the administration of an estate on a showing merely that the probate court has not assumed jurisdiction for final settlement.—*Colquitt v. Gill* (Ala.) 784.

A bill for removal of an administration to the chancery court held not required to allege that decedent died or that the estate had assets in the county where administration was pending. Code 1896, § 55.—*Colquitt v. Gill* (Ala.) 784.

*Though the statutory jurisdiction of the probate and chancery courts to partition property is concurrent, the tribunal first acquiring jurisdiction is entitled to exercise the same exclusive of the other.—*Finch v. Smith* (Ala.) 819.

COVENANTS.

Jurisdiction of equity of remedy for breach, see "Equity," § 1.

Relating to party wall, see "Party Walls."

§ 1. Performance or breach.

In an action for breach of a warranty, owing to a third person having been in possession at the time of the conveyance, held not necessary for plaintiff to show that the possessor had filed a claim of adverse possession under Code 1896, §§ 1541, 1545.—*Prestwood v. McGowin* (Ala.) 779.

§ 2. Actions for breach.

In an action for breach of warranty, proof of adverse possession, without proof of title in the possessor, held sufficient.—*Prestwood v. McGowin* (Ala.) 779.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 4.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Creditors' Suit"; "Fraudulent Conveyances"; "Marshaling Assets and Securities."

Remedies against surety, see "Principal and Surety," § 3.

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 4.

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of assignments, see "Assignments for Benefit of Creditors," § 1.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

Under Code 1896, §§ 819, 820, the fact that the claims of some of complainants in a bill for discovery of assets contain a waiver of exemptions does not render it beyond the power of the court to grant the relief prayed.—*Etheridge Bros. v. Swann, Abrams Hat Co. (Ala.)* 465.

CREDITS.

Taxation of, see "Taxation," § 1.

CRIMINAL LAW.

Arrest of accused, see "Arrest," § 1.

Attendance of witnesses, see "Witnesses," § 1.

Competency of jurors, see "Jury," § 4.

Competency of witnesses, see "Witnesses," § 2.

Convicts, see "Convicts."

Costs in criminal prosecutions, see "Costs," § 4.

Examination of witnesses, see "Witnesses," § 3.

Grand jury, see "Grand Jury."

Impeachment of witnesses, see "Witnesses," § 4.

Indictment, information, or complaint, see "Indictment and Information."

Right to trial by jury, see "Jury," § 1.

Summoning jury, see "Jury," § 3.

Particular offenses.

See "Assault and Battery," § 2; "Bigamy"; "Burglary"; "Contempt"; "Embezzlement"; "Escape"; "Forgery"; "Gaming," § 1; "Homicide"; "Incest"; "Larceny"; "Libel and Slander," § 4; "Rape"; "Seduction," § 1; "Trespass," § 3; "Vagrancy."

Abandonment of wife, see "Husband and Wife," § 7.

Against liquor laws, see "Intoxicating Liquors," §§ 6, 7.

Failure of taxpayer to work on road, see "Highways," § 2.

Illegal practice of medicine, see "Physicians and Surgeons."

In use of weapons, see "Weapons."

§ 1. Nature and elements of crime and defenses in general.

*Under Code 1896, § 5306, authorizing a conviction for an attempt to commit any offense charged, the state may indict for any attempt in lieu of the offense.—*Bradford v. State (Ala.)* 471.

§ 2. Parties to offenses.

Under Code 1896, § 5306, there may be aiders and abettors in manslaughter.—*Morris v. State (Ala.)* 274.

*Under Code 1896, § 4308, each of two or more persons who by prearrangement enter on a common enterprise, and a felony is contemplated, held guilty of the felony committed.—*Morris v. State (Ala.)* 274.

§ 3. Jurisdiction.

*Where accused was properly in court, it was immaterial to the court's right to try him that the warrant on which he was arrested was functus officio.—*Roland v. State (Ala.)* 963.

§ 4. Venue.

*Under Code 1896, § 4972, the circuit court of Lawrence county had jurisdiction to try defendant for a murder committed on an island in the Tennessee river, a little nearer to the Limestone county line than to that of Lawrence county.—*Patterson v. State (Ala.)* 157.

*The court of Lawrence county had jurisdiction to try defendant for a murder committed on an island in the Tennessee river, within a quarter of a mile of such county, under Code 1896, § 1400.—*Patterson v. State (Ala.)* 157.

*Where an act taking territory from one county and adding it to another is unconstitutional, an indictment for a crime committed in the territory so changed should be found in the original county.—*Kline v. State (Ala.)* 952.

An ex parte order directing the sheriff of another county to retain custody of accused held not an adjudication that there was danger of violence to him as against the state on the issue of prejudice on an application for change of venue.—*Williams v. State (Ala.)* 902.

A circuit court of a proper county held to have acquired jurisdiction on a change of venue in a criminal case, though the clerk's certificate substituted for the words "relating to the case," as used in Rev. St. 1892, § 2934, the words "so far as the same relates to the indictment against A. for murder," and transmits two indictments for murder against A.—*Thompson v. State (Fla.)* 899.

*Under Rev. St. 1892, § 2934, a clerk in transmitting record on change of venue in a criminal case is required to certify only the copies of the record entries.—*Thompson v. State (Fla.)* 899.

*Though on change of venue the clerk transmits two original indictments for the same offense, jurisdiction is not lost thereby when it clearly appears on which indictment the change was made.—*Thompson v. State (Fla.)* 899.

Prejudice in parish held insufficient cause for a change of venue.—*State v. Pointdexter (La.)* 688.

§ 5. Former jeopardy.

*A judgment affirming an order allowing bail to accused charged with homicide held not to preclude the state from prosecuting accused for murder in the first degree.—*Morris v. State (Ala.)* 274.

*Jeopardy does not arise on an indictment insufficient to support a conviction.—*Sims v. State (Ala.)* 413.

*The silence of accused, or his failure to object to an illegal discharge of the jury before verdict, does not constitute a consent to such discharge or a waiver of the constitutional inhibition against a second jeopardy.—*Allen v. State (Fla.)* 593.

*If a jury is discharged for insufficient reason and without the defendant's consent, the discharge is equivalent to an acquittal.—*Allen v. State (Fla.)* 593.

*A person is in legal jeopardy when he is put on trial before a competent court on a sufficient indictment and the jury has been charged with his deliverance.—*Allen v. State (Fla.)* 593.

*The filing of an information for manslaughter does not preclude a subsequent indictment for

*Point annotated. See syllabus.

murder, and until the pendency of an indictment or information does not constitute jeopardy.—*State v. Ruffin* (La.) 647.

*A removal of a juror as prejudiced against the accused on information from the district attorney, where the judge states that he satisfied himself that the juror would be hostile to the accused, does not afford to the accused ground to sustain the plea of former jeopardy or other irregularity.—*State v. Pointdexter* (La.) 688.

§ 6. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

The conclusion of the court trying a criminal case without the intervention of a jury *held* to constitute a verdict of a jury, under Code, 1896, § 3319, so that it cannot be reversed by the Supreme Court.—*Mayhall v. State* (Ala.) 290.

Acts 1900-01, p. 1342, *held* not to authorize the Supreme Court to review the finding of the county court of a county trying a criminal case without the intervention of a jury.—*Mayhall v. State* (Ala.) 290.

*A justice *held* authorized to permit the filing of an amendment to an affidavit charging a criminal offense.—*Jones v. State* (Ala.) 299.

On an application for bail, the judge of the criminal court *held* authorized to remand petitioner to answer indictments without bail independent of the validity of the original commitment.—*Wray v. State* (Ala.) 878.

The clerk of the circuit court and ex officio clerk of Shelby county *held* to have authority to take the affidavit of a prosecutor in a prosecution for the wrongful sale of intoxicating liquors under Acts 1896-97, p. 123.—*Roland v. State* (Ala.) 963.

*The county court *held* to have power to allow the substitution of a lost affidavit on which a prosecution for the illegal sale of liquor was based.—*Roland v. State* (Ala.) 963.

§ 7. Arraignment and pleas, and nolle prosequi or discontinuance.

*Under Code 1896, § 4939, the denial of an application to file a plea of not guilty by reason of insanity on the day of the trial *held* not an abuse of discretion.—*Gordon v. State* (Ala.) 847.

*Under Code 1896, § 5262, after a trial on the merits a conviction will be reversed unless defendant pleaded not guilty or that the plea was entered for him by the court.—*Hamilton v. State* (Ala.) 940.

§ 8. Evidence—Facts in issue and relevant to issues, and res gestæ.

Where it is proposed to introduce evidence as to the trailing of accused by dogs, certain evidence *held* proper, as tending to show the qualifications of the dogs.—*Richardson v. State* (Ala.) 82.

On a prosecution for murder, certain questions to a witness *held* proper, as introductory to his testimony as to the trailing of tracks by dogs from the place of the crime to defendant's house.—*Richardson v. State* (Ala.) 82.

Evidence that the negroes on witness' place were usually called by the name "McLeod" *held* inadmissible to show that such name by which deceased was referred to in the indictment was his surname.—*Stallworth v. State* (Ala.) 184.

*On a trial for homicide, certain evidence *held* a part of the res gestæ.—*Morris v. State* (Ala.) 274.

*On a trial for larceny, certain evidence *held* admissible as a part of the res gestæ.—*Echols v. State* (Ala.) 298.

*In a prosecution for carnally knowing or abusing a female under 10 years of age in which the place of the alleged crime was undisputed, evidence that the mud at this place was like the mud on defendant's trousers was admissible.—*Sims v. State* (Ala.) 413.

In a prosecution for carnally knowing or abusing a female under 10 years of age, testimony that a short time before the alleged offense defendant cursed and abused witness and struck her with a stick of wood was irrelevant and prejudicial.—*Sims v. State* (Ala.) 413.

In a prosecution for crime, evidence that defendant's father tried to get witness to offer a witness for the state money to leave the vicinity was not admissible without proof that defendant procured, knew of or consented to his father's action.—*Sims v. State* (Ala.) 413.

*In a criminal case *held* proper to admit in evidence a portion of a letter written by defendant as affording an inference of a consciousness of guilt.—*Bradford v. State* (Ala.) 462.

*On a prosecution for the larceny of a locket, evidence as to the taking of a pocketbook and money *held* competent as constituting a part of the same transaction.—*Bradford v. State* (Ala.) 462.

*Where the state introduced evidence of flight, it was error to refuse to permit defendant, a negro, to show by a white man in the neighborhood that he immediately surrendered himself to witness by whom he was delivered to the sheriff.—*Allen v. State* (Ala.) 624.

*In a criminal case evidence of flight and all connected facts is admissible.—*Allen v. State* (Ala.) 624.

*In a prosecution for murder, evidence that at the time of his arrest defendant drew a pistol *held* competent.—*Glass v. State* (Ala.) 727.

*On a prosecution for murder, *held* error to admit testimony that after deceased had received the fatal wound people near the scene of the crime cried "Murder!"—*Benjamin v. State* (Ala.) 739.

*In a criminal case certain evidence *held* properly admitted as part of the res gestæ.—*Hammond v. State* (Ala.) 761.

An interrogatory asked by deceased of witness if he knew whether a certain negro driver was married or single *held* immaterial.—*Walker v. State* (Ala.) 878.

*In a prosecution for homicide a dying declaration by deceased *held* admissible as res gestæ.—*Walker v. State* (Ala.) 878.

Evidence that certain shoes of defendant which he wore on the night of the burglary fitted tracks near the place of the burglary *held* admissible.—*Hargrove v. State* (Ala.) 972.

Evidence as to the training of certain bloodhounds by which accused was trailed *held* sufficient to justify the admission of evidence with reference to the trailing.—*Hargrove v. State* (Ala.) 972.

*Evidence describing the details of what occurred at the time of the homicide constituting one continuous transaction is admissible as res gestæ.—*Williams v. State* (Ala.) 992.

*Declarations of accused while at the scene of the killing *held* admissible as res gestæ without proof that they were voluntary.—*Williams v. State* (Ala.) 992.

§ 9. — Other offenses, and character of accused.

*In prosecution for violation of liquor laws, evidence of other offenses *held* admissible to es-

*Point annotated. See syllabus.

establish identity of defendant.—*Untreiner v. State* (Ala.) 170.

*Where, in a criminal prosecution, character is properly in issue, it must be proved by general reputation, and not by evidence of particular acts or conduct.—*Jackson v. State* (Ala.) 178.

*In a prosecution for burglary it was error to permit evidence over objection that accused had worked 30 days on the streets for larceny arising out of the same facts.—*Pointer v. State* (Ala.) 929.

*In a prosecution for forgery, it is competent to show that about the time of the alleged forgery other similar instruments had been forged by him, and the fact that defendant was under indictment for the forgery of some of the other instruments does not affect their admissibility in evidence.—*Pittman v. State* (Fla.) 385.

§ 10. — Materiality and competency in general.

*Defendant *held* to have the right to bring out all, or give his version, of a conversation proved by the state, though it was immaterial and irrelevant.—*Ray v. State* (Ala.) 519.

The state was improperly allowed to show that a certain witness had been summoned as a witness in behalf of the defendant where the only purpose of so doing was to prejudice the jury against defendant.—*Glass v. State* (Ala.) 727.

In a prosecution for trespass, after warning the admission of evidence that after prosecutor closed up the roadway in question he cut a new roadway which was used to reach the same points to which the old road led was not error.—*Cross v. State* (Ala.) 875.

*Evidence of circumstances tending to connect the accused with the commission of the alleged crime, even though inconclusive is properly admitted.—*Pittman v. State* (Fla.) 385.

*Testimony is admissible that the sheriff carried the prisoner to the place of the shooting and placed his feet in certain footprints, and that the fit was perfect, where the prisoner made no objections.—*State v. Graham* (La.) 90.

The rule that it must be shown that the shoes were compared with the footmarks before they were put on them cannot be followed, where the jury is made by law the sole judge of the weight and sufficiency of the evidence.—*State v. Graham* (La.) 90.

*Where the state proves an admission by accused, defendant has the right to prove all that was said at the time, but cannot introduce self-serving statements made on another occasion.—*State v. Thompson* (La.) 107.

§ 11. — Best and secondary, and demonstrative evidence.

On a trial for homicide the boots of decedent showing the condition of his feet *held* properly admitted in evidence.—*Hill v. State* (Ala.) 621.

§ 12. — Admissions, declarations, and hearsay.

*Where deceased was referred to in an indictment by an assumed name, such name could not be proved by a hearsay statement made to a witness by a third person.—*Stallworth v. State* (Ala.) 184.

Where the facts under which declarations were made by accused on trial for homicide show that they were voluntarily made, evidence of the declarations is admissible as against the objection that a proper predicate was not laid.—*Morris v. State* (Ala.) 274.

Where a defendant is on trial for murder, and not for a conspiracy to commit murder, declarations of defendant showing a conspiracy to commit murder are admissible, not as the declarations of a conspirator, but as the declarations of accused.—*Morris v. State* (Ala.) 274.

In a prosecution for rape, evidence that defendant had offered money to the foster father of prosecutrix to stop criminal proceedings was incompetent.—*Sanders v. State* (Ala.) 466.

On a prosecution for larceny, a confession *held* properly admitted.—*Daniels v. State* (Ala.) 525.

§ 13. — Acts and declarations of conspirators and codefendants.

*Before declarations of a co-conspirator are admissible against another, a foundation must be laid by proof sufficient in the opinion of the judge to establish *prima facie* the existence of the conspiracy.—*Morris v. State* (Ala.) 274.

*Where a defendant is on trial for murder and not for a conspiracy to commit murder, evidence of his declarations tending to show a conspiracy is not inadmissible, though there is no other proof showing the conspiracy.—*Morris v. State* (Ala.) 274.

*In a prosecution for homicide, conversations between defendant and third persons immediately before the difficulty, and showing a conspiracy to take deceased's life or do him great bodily harm, *held* admissible.—*Hanners v. State* (Ala.) 973.

§ 14. — Opinion evidence.

On a prosecution for murder, *held* error to permit a witness to state why he thought dogs used to trail defendant quit the trail at a certain point, so that they had to be called back and again placed on the trail.—*Richardson v. State* (Ala.) 82.

*A person *held* competent on a trial for larceny to give his opinion of the value of the goods stolen.—*Echols v. State* (Ala.) 298.

*On a trial for homicide a nonexpert witness *held* competent to testify to the character of the wounds examined and found by him on the body of decedent.—*Hill v. State* (Ala.) 621.

*A question asked a witness in a criminal case *held* not objectionable as calling for a conclusion.—*Hill v. State* (Ala.) 621.

*In a criminal case, testimony of a witness that if persons had exchanged pistols witness would have seen it was inadmissible as a conclusion.—*Hammond v. State* (Ala.) 761.

*Nonexpert evidence is admissible to show that deceased was conscious at a particular time.—*Walker v. State* (Ala.) 878.

*A nonexpert witness *held* qualified to testify that a wound examined by him made by a bullet was a penetrating one.—*Williams v. State* (Ala.) 992.

*An expert was entitled to express his opinion as to the place where the bullet which produced deceased's death entered his head.—*Williams v. State* (Ala.) 992.

*In a prosecution for forgery, it is not error to permit a witness to testify as to the signature of the defendant, when such witness has testified that he had seen defendant sign his name on different occasions, and thought he was familiar with defendant's signature.—*Pittman v. State* (Fla.) 385.

An old man, familiar with firearms, is a competent witness to express the opinion that from the report heard by him the weapon used was a pistol.—*State v. Graham* (La.) 90.

*Point annotated. See syllabus.

§ 15. — Confessions.

On a prosecution for murder, a confession by defendant *held* properly admitted.—Richardson v. State (Ala.) 82.

*On a prosecution for an attempt to escape, defendant's confession *held* properly admitted.—Bradford v. State (Ala.) 471.

*In a criminal prosecution, a confession of guilt *held* inadmissible as not voluntarily made.—Peck v. State (Ala.) 759.

*A voluntary confession by accused *held* admissible.—Hamilton v. State (Ala.) 940.

*A statement *held* not a confession.—Neville v. State (Ala.) 1011.

§ 16. — Evidence at preliminary examination or at former trial.

*Where it was shown that a witness was a permanent resident of a foreign state, and that he had not been subpoenaed, his evidence given on the preliminary trial of the defendant was properly admitted.—Morris v. State (Ala.) 274.

§ 17. — Weight and sufficiency.

To show a conspiracy to do an unlawful act it is not indispensable that the evidence should show the existence of the conspiracy any definite time prior to the doing of the act.—Morris v. State (Ala.) 274.

*It is not necessary to prove a conspiracy by positive evidence, but its existence may be inferred from the attendant circumstances.—Morris v. State (Ala.) 274.

Evidence *held* competent to overcome the presumption that a boy under 14 years was incapable of forming a criminal intent.—Neville v. State (Ala.) 1011.

*A charge is properly refused which tends to mislead the jury into the belief that they are bound to lend the same credence to the testimony of accused as a witness as to that of any disinterested witness.—Blanton v. State (Fla.) 789.

§ 18. Time of trial and continuance.

*It was not an abuse of discretion to require a showing on defendant's application for a continuance, and to decline the same on the state solicitor's admitting the showing subject to legal exceptions.—Stallworth v. State (Ala.) 184.

*By the express provisions of Code of 1896, § 5007, a mistake in the name of a juror for the trial of a capital case in the venire or list of jurors delivered to defendant is not necessarily sufficient cause to quash the venire, or to delay or continue the trial.—Hammond v. State (Ala.) 761.

*It was not error for the court to refuse to delay the trial of a criminal case and issue an attachment for a witness who was not shown at the time to be within the jurisdiction of the court.—Gaines v. State (Ala.) 865.

*Refusal of the court to delay the trial of accused because of the absence of a witness *held* proper where his intended testimony was admitted by the state and was merely cumulative.—Gaines v. State (Ala.) 865.

*Where accused was represented by four attorneys, and 15 days elapsed from the arrangement to the day of trial, insufficiency of time to prepare for the trial was no ground for continuance.—State v. Pointdexter (La.) 688.

*Where accused has obtained subpoenas for his witnesses, and one of the witnesses served is absent, the court may demand before granting a postponement of the case that defendant make a showing in aid thereof, and if the district attorney makes the admissions demanded

of him by Acts 1894, p. 117, No. 84, as a condition of an immediate trial, it is not reversible error to rule the defendant to trial.—State v. Stewart (La.) 798.

*An affidavit for continuance for absence of witness *held* fatally defective in not giving his residence.—Donald v. State (Miss.) 4.

§ 19. Trial—Preliminary proceedings.

*Under Cr. Code 1896, § 5009, accused is not entitled to a list of talesmen summoned to complete the jury after the special venire has been exhausted.—Untreiner v. State (Ala.) 285.

*Defendant in a criminal prosecution *held* to have waived his right under Bill of Rights, § 6, to a copy of the indictment.—Howard v. State (Ala.) 301.

*A list of jurors served on accused containing the names of four persons who were drawn but not summoned was erroneous.—Walker v. State (Ala.) 878.

*Under Code 1896, § 5005, where the trial of a capital case was set for the second week of the term, an order directing the service of a list of jurors drawn for the first week of the term, together with the list of special jurors drawn for the trial of the case, *held* erroneous.—Walker v. State (Ala.) 878.

*It is not necessary that defendant shall have notice of the indictment nor a copy of it previous to his arraignment.—Dix v. State (Ala.) 924.

*The accused is not entitled to service of the list of talesmen summoned to complete the panel after the regular venire has been exhausted.—State v. Thompson (La.) 107.

That defenses in a criminal case are antagonistic, and that one defendant seeks to fix the crime on another, are insufficient to justify the conclusion that in denying a severance the trial judge has abused his discretion.—State v. Johnson (La.) 117.

*An objection that no copy of the indictment or copy of venue was served *held* overthrown by a statement of the court and sheriff's return.—State v. Pointdexter (La.) 688.

§ 20. — Course and conduct of trial in general.

*It is the right and duty of the court to maintain its dignity, preserve an orderly procedure, and punish offenses against it; and the action of a witness in becoming voluntarily intoxicated and appearing on the witness stand with a bottle of liquor in his pocket is offensive both to the order and dignity of the court.—Sims v. State (Ala.) 413.

In a prosecution for felony it is error to allow the verdict to be received by the clerk during a recess of the court, in the absence of the prisoner, though with the consent of his counsel.—Wells v. State (Ala.) 630.

In all criminal cases the verdict must be rendered in open court, and in the presence of the accused.—Wells v. State (Ala.) 630.

*In a prosecution for felony or misdemeanor the erroneous reception of the verdict, in the absence of the defendant and the discharge of the jury, *held* an acquittal which could not be cured by the reconvening of the jury.—Wells v. State (Ala.) 630.

*In a prosecution for a misdemeanor accused may waive his right to be present when the verdict is returned.—Wells v. State (Ala.) 630.

*In felony cases a verdict of guilty cannot be returned in the absence of defendant, whose presence must be affirmatively shown by the record.—Dix v. State (Ala.) 924.

*Point annotated. See syllabus.

*It is not necessary that the accused should be personally present when his case is set down for trial.—*State v. Le Blanc* (La.) 105.

§ 21. — Reception of evidence.

In a criminal prosecution, it was within the discretion of the court to excuse one of the witnesses from the operation of the rule.—*Brooks v. State* (Ala.) 156.

Where a prosecution for gaming was tried on an affidavit, the state was not bound to elect the game the witness had in mind when he made the affidavit.—*Winston v. State* (Ala.) 174.

Refusal to require the state on a trial for rape to fix the date of the offense *held* not error.—*Coker v. State* (Ala.) 303.

*It was within the discretion of the court as to whether the evidence of a witness should be excluded because he, while under the rule, had talked with another witness about the case.—*Benjamin v. State* (Ala.) 739.

*It is within the discretion of the court to permit the re-examination of a witness in rebuttal over accused's objection.—*Cross v. State* (Ala.) 875.

*If evidence apparently incompetent only because its relevancy is not apparent, or because it is not the best evidence, is offered, the court may receive it conditionally, if counsel promises to supply the necessary foundation afterward, and if this is not done the court should exclude the evidence on its own motion, but, if the failure to connect be not apparent, the objecting party should move to exclude.—*Pittman v. State* (Fla.) 385.

*Testimony for the state in rebuttal to contradict a material fact brought out by the defense is proper.—*Thompson v. State* (Fla.) 899.

Objections to questions that may bring out proper testimony are properly overruled.—*Thompson v. State* (Fla.) 899.

An affidavit on an application for certiorari and prohibition in a criminal case that a witness in answer to an attachment appeared before the trial judge and "gave evidence in connection with the case," and that the accused were not present, *held* no ground for certiorari and prohibition.—*State v. Kiernan* (La.) 55; *In re Kiernan*, Id.

*Under Rev. St. 1870, § 1010, transcribed notes of a stenographer, unsigned by the accused and unverified by the signature of the magistrate or witness, do not constitute evidence of such statements.—*State v. Thompson* (La.) 107.

Under Rev. St. 1870, § 1010, transcribed notes of a stenographer, unsigned by the accused and unverified by the signature of the magistrate or witness, do not constitute evidence of such statements.—*State v. Thompson* (La.) 107.

*Defendant in a criminal action is not entitled to demand as a matter of right that the district attorney should call all the eyewitnesses to the alleged crime charged against him to the stand as witnesses.—*State v. Stewart* (La.) 798.

§ 22. Objections to evidence, motions to strike out, and exceptions.

A motion to exclude the entire answer of a witness, a part of which was competent, *held* properly overruled.—*Hill v. State* (Ala.) 621.

*Where a witness gives a responsive answer, the party calling forth the answer has no right to have it excluded.—*Hammond v. State* (Ala.) 761.

*The testimony should not be stricken out on the ground that it is not sufficient proof of

what was intended to be proved by the party introducing it.—*Maloy v. State* (Fla.) 781.

*A motion to strike testimony is properly denied where part of the testimony is clearly proper.—*Thompson v. State* (Fla.) 899.

§ 23. Arguments and conduct of counsel.

On a trial for selling liquor without a license, an objection to certain remarks by counsel for accused *held* properly sustained.—*Duke v. State* (Ala.) 170.

*In a prosecution for murder, certain statements of the state solicitor in his argument to the jury *held* improper.—*Glass v. State* (Ala.) 727.

In a prosecution for murder, the refusal to exclude from the jury certain remarks of the solicitor for the state *held* not error.—*Fuller v. State* (Ala.) 774.

*A reply by the state's solicitor to remarks of defendant's counsel with reference to the state's failure to produce an alleged conspirator *held* not error.—*Hanners v. State* (Ala.) 973.

*Remarks of assistant district attorney *held* cured by the reading and explaining to the jury by the judge of Acts 1904, p. 77, No. 41, providing that failure of accused to testify shall not be considered for or against him.—*State v. Thompson* (La.) 107.

§ 24. Province of court and jury in general.

*The affirmative charge should be given for the defendant, where there was no evidence to establish the venue.—*Walker v. State* (Ala.) 176.

Where it was a question for the jury whether deceased's name was correctly laid in the indictment, an instruction directing an acquittal if the jury believed the evidence *held* properly refused.—*Stallworth v. State* (Ala.) 184.

*An instruction on a trial for homicide prosecuted on the theory of the existence of a conspiracy *held* erroneous for assuming that the evidence of a conspiracy was circumstantial.—*Morris v. State* (Ala.) 274.

*On a trial for homicide, a charge *held* erroneous as a charge on the effect of the evidence.—*Morris v. State* (Ala.) 274.

An instruction on a trial for homicide *held* erroneous as assuming that malice on the part of the son of accused, who did the killing, was not indulged in by the accused.—*Morris v. State* (Ala.) 274.

*The court in a criminal case has no authority to take any material question of fact from the jury, where there is any tendency in the evidence to support it.—*Morris v. State* (Ala.) 274.

*Where in a criminal case there was a conflict in the evidence, the court properly refused a general charge in favor of accused.—*Coker v. State* (Ala.) 303.

An instruction that under the undisputed evidence accused bore a good character was properly refused.—*Allen v. State* (Ala.) 624.

In a prosecution for assault with intent to murder, an instruction on self-defense *held* properly refused.—*Pearson v. State* (Ala.) 733.

*An instruction in a criminal case that the jury should be very cautious and careful in weighing the testimony of a child who had testified *held* properly refused.—*Gordon v. State* (Ala.) 847.

*Where there was evidence sufficient to warrant a conviction, the refusal of a general charge in favor of defendant *held* proper.—*Gordon v. State* (Ala.) 847.

*Point annotated. See syllabus.

A general affirmative charge in favor of accused cannot be given when the evidence affords an inference adverse to him.—Hargrove v. State (Ala.) 972.

*In a prosecution for homicide, instructions held properly refused as invading the province of the jury.—Hanners v. State (Ala.) 973.

*A charge held bad assuming a fact.—Neville v. State (Ala.) 1011.

*It is not error to refuse a charge tending to mislead the jury into the belief that the judge was satisfied that any material fact had been established by the evidence.—Blanton v. State (Fla.) 789.

§ 25. Necessity, requisites, and sufficiency of instructions.

In a prosecution for homicide, refusal of an instruction that, in order to justify a conviction, the jury must believe beyond a reasonable doubt that deceased's name was correctly alleged in the indictment, held erroneously refused.—Stallworth v. State (Ala.) 184.

On a trial for homicide, the court held required to recall the jury and correct an erroneous instruction in the presence of accused and his counsel.—Morris v. State (Ala.) 274.

*An instruction on a trial for rape held abstract and properly refused.—Coker v. State (Ala.) 303.

*An instruction directing an acquittal if any one of the jurors have a reasonable doubt as to accused's guilt is erroneous.—Outler v. State (Ala.) 460.

*On a prosecution for murder, it was proper to instruct that the jury must consider the testimony of defendant in the light of the interest he had in the prosecution.—Hammond v. State (Ala.) 761.

*In a prosecution for homicide an instruction on circumstantial evidence held properly refused.—Gordon v. State (Ala.) 847.

*An instruction in a criminal case that circumstantial evidence "is wholly inferior in cogency, force, and effect to direct evidence" held properly refused.—Gordon v. State (Ala.) 847.

An instruction that defendant's guilt must be made out by evidence of a conclusive nature and tendency held properly refused.—Gordon v. State (Ala.) 847.

*An instruction that if, after hearing all the evidence, there is left in the mind of the jury a presumption of innocence in favor of accused, they should acquit, held properly refused.—Gordon v. State (Ala.) 847.

An exception to an uncompleted sentence in the court's oral charge is unavailable.—Cross v. State (Ala.) 875.

An instruction that if witnesses testifying to the crime were in the opinion of the jury unreliable, defendant could not be convicted, held properly refused as premitting their corroboration.—Hamilton v. State (Ala.) 940.

*A charge in a criminal case must be construed as a whole though it consists of separate paragraphs.—Grisham v. State (Ala.) 997.

A charge as to mental capacity of a boy under 14 to commit a crime held erroneous in fixing the time at the date of the trial instead of at the time of the crime.—Neville v. State (Ala.) 1011.

*The trial judge should not single out and give undue prominence to the testimony of the defendant, and the fact of his interest in the result of the trial.—Keigans v. State (Fla.) 886.

*Point annotated. See syllabus.

Under Rev. St. § 2383, it is proper for the trial judge on a trial for murder to instruct the jury to specify in the verdict the degree of homicide of which they may find the defendant guilty.—Keigans v. State (Fla.) 886.

§ 26. — Instructions as to credibility of witnesses.

*In a criminal prosecution, an instruction that the jury have the sole right to believe or not to believe, etc., held properly refused.—Untreiner v. State (Ala.) 285.

An instruction held erroneous for failing to hypothesize the existence of a certain fact.—Hill v. State (Ala.) 621.

*A requested instruction as to the impeachment of a witness held erroneously refused.—Hammond v. State (Ala.) 761.

*On a prosecution for murder, a requested instruction as to the circumstances under which testimony of witnesses might be disregarded held erroneously refused.—Hammond v. State (Ala.) 761.

*A requested instruction as to the jury's right to consider the testimony of a witness, notwithstanding impeaching testimony, held erroneously refused.—Hammond v. State (Ala.) 761.

*It was proper to refuse a requested instruction that if any witness was shown to have sworn falsely to any material fact, his testimony might be disregarded.—Hamilton v. State (Ala.) 940.

§ 27. — Instructions as to reasonable doubt.

*In a prosecution for homicide, an instruction on reasonable doubt held correct and improperly refused.—Patterson v. State (Ala.) 157.

*The court, on a trial for crime, should charge that, where the evidence convinces the jury that there is a probability of the innocence of accused, the verdict should be not guilty.—Morris v. State (Ala.) 274.

In a prosecution for murder, an instruction as to defendant's lack of motive in committing the offense held properly refused.—Glass v. State (Ala.) 727.

*An instruction on reasonable doubt held not reversible error, though misleading.—Hammond v. State (Ala.) 761.

*A request to charge on reasonable doubt in a criminal case held properly refused as requiring too high a degree of proof.—Gordon v. State (Ala.) 847.

*A request to charge in a criminal case using the expression "all doubt" in place of "a reasonable doubt" held properly refused.—Gordon v. State (Ala.) 847.

*An instruction that, "unless" the jury after carefully weighing all the evidence "cannot" feel an abiding conviction of defendant's guilt, they must find the defendant not guilty, held properly refused.—Gordon v. State (Ala.) 847.

*It is error to charge that a reasonable doubt is a doubt which would satisfy a reasonable man.—Vaughn v. State (Fla.) 881.

§ 28. — Argumentative instructions.

*An instruction that the fact that defendant was a one-armed man was a circumstance which the jury might consider in determining whether defendant could have safely withdrawn from the combat was properly refused as argumentative.—Patterson v. State (Ala.) 157.

*An instruction as to defendant's ability to retreat held properly refused as argumentative.—Patterson v. State (Ala.) 157.

*An instruction on a trial for homicide held argumentative.—Morris v. State (Ala.) 274.

*In a criminal prosecution, a requested charge *held* argumentative and properly refused.—*Sims v. State* (Ala.) 413; *Neville v. State* (Ala.) 1011.

An instruction on a trial for homicide *held* properly refused because argumentative.—*Outler v. State* (Ala.) 460.

An instruction *held* erroneous because argumentative.—*Hill v. State* (Ala.) 621.

*In a prosecution for murder, a requested instruction *held* argumentative and properly refused.—*Glass v. State* (Ala.) 727.

*An instruction on circumstantial evidence *held* properly refused as argumentative.—*Gordon v. State* (Ala.) 847.

*An instruction that in weighing the testimony of a witness, the jury should consider that he was shot by the defendant *held* objectionable as argumentative.—*Williams v. State* (Ala.) 992.

§ 29. — Confused or misleading instructions.

An instruction on a trial for homicide, relating to defendant being found guilty as an aider or abettor, *held* misleading.—*Morris v. State* (Ala.) 274.

In a criminal prosecution, instructions that, if the jury did not believe the evidence, they should find for accused and could not find for the state, *held* properly refused.—*Untreiner v. State* (Ala.) 285.

On a trial for homicide, an instruction *held* misleading.—*Outler v. State* (Ala.) 460.

An instruction that words, whether opprobrious or otherwise, if used by defendant to deceased, did not warrant deceased in striking or attempting to strike defendant with a piece of wood, *held* properly refused as misleading.—*Allen v. State* (Ala.) 624.

*Where there was direct evidence in a case, an instruction that the evidence should be almost as clear and convincing as direct evidence in order to justify a conviction was properly refused.—*Gordon v. State* (Ala.) 847.

§ 30. — Application of instructions to case.

*In a prosecution for homicide, a request to charge on manslaughter in the second degree *held* properly refused as abstract.—*Untreiner v. State* (Ala.) 285.

An instruction on a trial for rape, directing an acquittal unless the name of the prosecutrix was a certain name, *held* properly refused.—*Coker v. State* (Ala.) 303.

*Charges incorrectly stating the evidence are properly refused.—*Sims v. State* (Ala.) 413.

In a prosecution for rape on a negress, requested instructions that the known character and habits as to chastity of females of the negro race in general might be considered on the question of consent were properly refused.—*Sanders v. State* (Ala.) 466.

§ 31. — Instructions excluding or ignoring issues, defenses, or evidence.

*An instruction on a trial for homicide committed by the son of accused *held* erroneous because ignoring the evidence showing a conspiracy between accused and the son.—*Morris v. State* (Ala.) 274.

*An instruction on a trial for homicide *held* erroneous as ignoring an element of self-defense.—*Morris v. State* (Ala.) 274.

*An instruction on a trial for homicide *held* misleading as leading the jury to believe that

retreat and imminent peril are not in the case.—*Morris v. State* (Ala.) 274.

*An instruction on a trial for homicide committed by the son of accused *held* erroneous for ignoring the evidence, showing that accused entered willingly into the difficulty with the decedent.—*Morris v. State* (Ala.) 274.

*An instruction in a criminal case which ignores a part the evidence is properly refused.—*Morris v. State* (Ala.) 274.

*An instruction on a trial for homicide *held* properly refused because ignoring certain evidence.—*Morris v. State* (Ala.) 274.

An instruction *held* not objectionable as abstract.—*Knight v. State* (Ala.) 734.

A requested instruction, to the effect that there was no evidence that defendant aided in the killing, *held* properly refused.—*Knight v. State* (Ala.) 734.

*A requested instruction on conspiracy *held* not warranted by the evidence.—*Knight v. State* (Ala.) 734.

*An instruction that the highest degree of murder of which accused could be convicted was murder in the second degree *held* properly refused.—*Gordon v. State* (Ala.) 847.

A request to charge with reference to certain evidence *held* properly refused as withdrawing a part of the testimony from the jury.—*Hanners v. State* (Ala.) 973.

§ 32. Requests for instructions.

*It is not error to refuse an instruction covered by instructions given.—*Morris v. State* (Ala.) 274; *Hill v. State* (Ala.) 621; *Williams v. State* (Ala.) 992; *Maloy v. State* (Fla.) 791.

*Refusal of a request to charge *held* not error, where it is substantially the same as another request given at accused's instance.—*Patterson v. State* (Ala.) 157.

*On a trial for homicide, the refusal to give an instruction *held* not erroneous in view of the charge given.—*Morris v. State* (Ala.) 274.

*The failure of the court in a criminal case to limit evidence competent as affecting the credibility of the witness to such purpose is not a matter of which accused can complain, in the absence of a motion on his part to so limit it.—*Morris v. State* (Ala.) 274.

*It is not error to refuse requested charges which have been substantially given.—*Sims v. State* (Ala.) 413.

*A requested instruction on circumstantial evidence covered by other charges may be properly refused.—*Gordon v. State* (Ala.) 847.

It is not error to refuse instructions covered by those given at the request of the accused.—*Hainey v. State* (Ala.) 968.

*It was the duty of accused, if he desired certain evidence to be limited to a particular purpose, to request an instruction to that end.—*Hanners v. State* (Ala.) 973.

*Explanations of charges given in a prosecution for homicide *held* proper.—*Williams v. State* (Ala.) 992.

*Where the court has accurately instructed on the law of self-defense, it is not error to refuse other instructions merely elaborations of the same subject.—*Blanton v. State* (Fla.) 789.

*There is not error in the refusal to reiterate charges already given in substance.—*Blanton v. State* (Fla.) 789.

*A trial judge is not bound to give special charges requested by defendant, where the law has been fully stated in the general charge already given.—*State v. Le Blanc* (La.) 105.

*Point annotated. See syllabus.

*Special charges are properly refused when covered by the general charge, or where their omission is favorable to the defendant.—*State v. Cook* (La.) 434.

§ 33. — Objections to instructions or refusal thereof, and exceptions.

*An exception to the charge in a criminal case *held* an exception to the charge as a whole, which was unavailing unless the charge was entirely erroneous.—*Untreiner v. State* (Ala.) 285.

*When an exception is taken to a part of the oral charge, the part excepted to must be bad as a whole, or the exception is unavailing.—*Sims v. State* (Ala.) 413.

*Objections to a charge not made before verdict will not be considered.—*State v. Bush* (La.) 793.

§ 34. — Verdict.

*It was proper for the court to refuse to permit accused or his counsel to poll the jury, and to require the clerk to perform such duty.—*Jackson v. State* (Ala.) 178.

*Where jurors on being polled assented to their verdict of conviction, their motives or reasons for rendering such verdict could not be inquired into.—*Jackson v. State* (Ala.) 178.

*In a prosecution for felony it is error to allow the verdict to be received by the clerk during a recess of the court in the absence of the prisoner though with the consent of his counsel.—*Wells v. State* (Ala.) 630.

*In all criminal cases the verdict must be rendered in open court and in the presence of the accused.—*Wells v. State* (Ala.) 630.

*In a criminal case the right of polling the jury is secured to either party.—*Cowart v. State* (Ala.) 631.

*A verdict in a criminal case *held* so rendered that it would not support a conviction though it did not amount to an acquittal.—*Cowart v. State* (Ala.) 631.

The right of polling the jury in a misdemeanor case may be waived by the prisoner.—*Cowart v. State* (Ala.) 631.

*There having been no prejudicial separation of the jury, it was not error for the court to direct them to return to their room and put their verdict of conviction in proper form.—*Gaines v. State* (Ala.) 865.

Where the record shows that the verdict was properly indorsed on the information, that it was entered on the minutes without the name and official capacity of the foreman being added is immaterial.—*State v. Warren* (La.) 361.

*Where defendant was found guilty of manslaughter and recommended to mercy, such recommendation is no qualification of the verdict, and must be considered as surplusage.—*State v. Cook* (La.) 434.

§ 35. — Waiver and correction of irregularities and errors.

*Evidence of accused, a negro, that he immediately surrendered himself to a white man who delivered him to the sheriff, *held* not to cure error in refusing to admit evidence of the white man to the same effect.—*Allen v. State* (Ala.) 624.

It is immaterial that evidence admitted over accused's objection was incompetent when offered if it is subsequently rendered competent.—*Hanners v. State* (Ala.) 973.

§ 36. Motions for new trial and in arrest.

*The motion for a new trial in a criminal case is addressed to the sound discretion of the

court and not revisable.—*Dawson v. State* (Ala.) 803.

Where a person accused of murder pleads to the indictment, goes to trial, and is convicted, he cannot, on a motion for a new trial, raise the question of the right to a preliminary examination.—*State v. Le Blanc* (La.) 105.

*Objections to the charge cannot be entertained in a motion in arrest of judgment.—*State v. Le Blanc* (La.) 105.

§ 37. Judgment, sentence, and final commitment.

Record on the trial of a capital case *held* not to show a compliance with Code 1896, § 5004, relating to the drawing of jurors.—*Morris v. State* (Ala.) 274.

In prosecutions for felony the record of conviction must affirmatively show that the prisoner was personally present when the jury returned their verdict.—*Wells v. State* (Ala.) 630.

*A judgment entry on conviction should show an adjudication by the court on the verdict.—*Pearson v. State* (Ala.) 733.

The record *held* to sufficiently show defendant's arraignment.—*Knight v. State* (Ala.) 911.

*Record *held* to sufficiently show by implication the personal presence of accused during the sitting of the court from the arraignment to the rendition of the verdict.—*Dix v. State* (Ala.) 924.

Under Act Dec. 7, 1900 (Acts 1900-01, p. 217), amendatory of the act to establish a criminal court of Jefferson county, § 10, the opinion of the court as to the necessity of drawing and summoning a grand jury *held* valid though not expressed in writing.—*Dix v. State* (Ala.) 924.

*Objections to an indictment which may be remedied by an amendment or cured by verdict should not be urged in a motion in arrest of judgment, but in a motion to quash.—*State v. Stewart* (La.) 798.

§ 38. Appeal and error, and certiorari—Form of remedy, jurisdiction, and right of review.

*On dismissal of appeal in a criminal case, where merits of case are not passed on, party *held* entitled to prosecute second appeal.—*Porter v. State* (Ala.) 421.

*Under Code 1896, § 4313, an appeal in a criminal case will not lie from a judgment by confession for a fine and costs.—*Collins v. State* (Ala.) 672.

After sentence and final judgment, only issues of a grave character are subject to review.—*State v. Kiernan* (La.) 55; *In re Kiernan*, Id.

*Where, in a criminal case appealed from a mayor's court to the district court, the parties went to trial, and the district court ruled that the affidavit furnished no basis for prosecution and discharged the accused, the case presented merely an alleged error of law over which the Supreme Court has no appellate jurisdiction, and which does not call for the exercise of the extraordinary supervisory powers given by Const. 1898, art. 94.—*State ex rel. Town of Minden v. Hunter* (La.) 578; *In re Roberts*, Id.

Party fined for violation of a municipal corporation ordinance, unsuccessfully contesting the legality of that ordinance in the trial court *held* entitled to an appeal to the Supreme Court on that issue, regardless of the amount involved.—*Town of Homer v. Brown* (La.) 711.

Under the Constitution of 1898, the class of cases wherein an issue in the trial court as to the legality or constitutionality of ordinances gives a direct right of appeal to the Supreme Court *held* to cover municipal ordinances where-

*Point annotated. See syllabus.

in no fine has been authorized or directed to be imposed for their violation.—*Town of Homer v. Brown* (La.) 711.

§ 39. — Presentation and reservation in lower court of grounds of review.

A general objection to documentary evidence offered in a criminal case, stating no grounds of objection, is insufficient to present the ruling for review on appeal.—*Brooks v. State* (Ala.) 156.

*The court on appeal in a criminal case will not consider the question of the illegality of testimony where no exception was taken there-to.—*Coker v. State* (Ala.) 303.

In order to support an appeal by the state from an order granting bail in a capital case, under Code 1896, § 4314, it is not necessary that the state should have reserved an exception to the judgment.—*State v. Sikes* (Ala.) 777.

*Under Cr. Code 1896, §§ 4313, 4333, an objection to an indictment for failure to allege the means by which the offense was committed *held* reviewable on appeal from the conviction, though then raised for the first time.—*Gaines v. State* (Ala.) 865.

*An exception reserved to the mere failure or refusal of the court to instruct the jury orally on the law of self-defense, was unavailable to present any question for review of appeal.—*Williams v. State* (Ala.) 992.

Where the court's oral charge consisted of several paragraphs, an exception thereto as a whole was unsustainable, unless all the paragraphs were bad.—*Grisham v. State* (Ala.) 997.

An exception to the court's failure to charge on all the offenses embraced in the indictment *held* not available where accused failed to request specific instructions thereon.—*Grisham v. State* (Ala.) 997.

*An assignment predicated upon the refusal of the trial court to give a certain requested instruction cannot be considered by an appellate court, in the absence of any showing that an exception was taken to said ruling.—*Pittman v. State* (Fla.) 385.

*General objections to evidence are without weight before an appellate court, unless the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose, or under any circumstances.—*Pittman v. State* (Fla.) 385.

*An appellate court will not consider any grounds of objection to the admissibility of evidence, except such as were made in the court below.—*Pittman v. State* (Fla.) 385.

*In the absence of proper exceptions to rulings on evidence, they will not be considered when assigned as error.—*Maloy v. State* (Fla.) 791.

*In the absence of proper objections and exceptions, an assignment of error that the court erred in its cross-examination of the defendant, a witness for himself, will not be considered.—*Maloy v. State* (Fla.) 791.

*Objections to the charge, but made for the first time in a motion for a new trial, come too late.—*State v. Le Blanc* (La.) 105.

A motion for new trial which merely presents the theory of the defense as to the facts brings up nothing upon which the Supreme Court can act.—*State v. Warren* (La.) 361.

§ 40. — Proceedings for transfer of cause, and effect thereof.

Where a judgment admitting a person charged with a capital offense to bail recited a notice of appeal by the state when the judgment was rendered, the appeal was taken within the 30 days

required by Crim. Code 1896, § 4316.—*State v. Sikes* (Ala.) 777.

A relator on an application for certiorari should make a prima facie showing by annexing papers showing the party applying is entitled to a hearing.—*State v. Kiernan* (La.) 55; In re *Kiernan*, Id.

§ 41. — Record and proceedings not in record.

*Where accused was granted 30 days to file his bill of exceptions on December 8, 1905, an extension not granted until January 8, 1906, was too late, though January 7th was on Sunday.—*Norman v. State* (Ala.) 295.

*A bill of exceptions signed after the 60 days permitted by Act Jan. 23, 1891 (Acts 1890-91, p. 227), for the filing of bill of exceptions in the Supreme Court, and after the commencement of a new term of the trial court, cannot be considered.—*Davis v. State* (Ala.) 298.

Under Code 1896, § 215, the record *held* to sufficiently show that the bill of exceptions was filed in term time.—*Sanders v. State* (Ala.) 466.

Though a judgment entry recites action on a demurrer, it not being disclosed by the record, it cannot be considered.—*Bradford v. State* (Ala.) 471.

Recitals in a bill of exceptions *held* not to supply omissions of orders in the record extending the time for the signing of the bill, and the bill could not be considered on appeal.—*Mitchell v. State* (Ala.) 518.

In a criminal case the record should show an order requiring the sheriff to serve a copy of the indictment and venire on accused one entire day before that fixed for trial, under Code 1896, § 5273.—*Allen v. State* (Ala.) 624.

A bill of exceptions signed within 30 days fixed by the trial judge for signing the same *held* signed within the time allowed by Crim. Code 1896, § 4316, for taking the appeal.—*State v. Sikes* (Ala.) 777.

*On an appeal from a judgment in a criminal case, the conviction will not be reversed on the facts where the bill of exceptions does not set out all the evidence.—*State v. Sikes* (Ala.) 777.

The court's action in excusing a juror in a criminal case "for good and sufficient cause" cannot be reviewed where the cause was not shown by the appeal record.—*Gaines v. State* (Ala.) 865.

On appeal in a criminal case, certain grounds of a motion in arrest of judgment *held* to present questions properly presentable only by bill of exceptions.—*Dix v. State* (Ala.) 924.

Under Acts 1890-91, p. 915; Acts Gen. Assembly 1890-91, p. 227, where the 60 days given by the statute for filing a bill of exceptions extends into the term next ensuing after the term of conviction, counsel *held* without power to extend the time to sign the bill.—*Dix v. State* (Ala.) 924.

Under Acts 1894-95, p. 1227, *held* that an order made by the city court of Talledega instead of by the presiding judge thereof extending the time for the signing of a bill of exceptions was of no effect.—*Keith v. State* (Ala.) 953.

Where pleas to which a demurrer was sustained and the demurrer are only brought up in the bill of exceptions, the ruling cannot be reviewed.—*Williams v. State* (Ala.) 992.

Where a bill of exceptions shows that a question on cross-examination to one of defendant's witnesses was objected to, but does not show that it was answered, there is no reversible

*Point annotated. See syllabus.

error disclosed, though the objections were improperly overruled.—*State v. Le Blanc* (La.) 105.

*A ruling that no proper foundation had been laid for the admission of proof of prior communicated threats *held* reviewable on appeal when all the evidence on which the court acted is brought up by bill of exceptions.—*State v. Rambo* (La.) 359.

*Where overt act on the part of the prosecuting witness is relied on as a defense to shooting with intent to kill, and neither the bill of exceptions nor the evidence annexed show the relation between such act and the shooting, the Supreme Court will accept as correct the ruling of the trial judge that no overt act was proved.—*State v. Warren* (La.) 361.

*Objections to letters admitted in evidence in a criminal case cannot be considered when they are not annexed to a bill of exceptions or included in the transcript on appeal.—*State v. Cook* (La.) 434.

A bill of exceptions should show the pertinency of requested special charges by a sufficient recital of facts.—*State v. Cook* (La.) 434.

A judge is without authority to sign bills of exception after the appeal has been lodged in the Supreme Court.—*State v. Ruffin* (La.) 647.

§ 42. — Assignment of errors and briefs.

*General assignment of error to all the refusals to give separate instructions will not be considered except so far as to ascertain if any one of them was properly refused.—*Maloy v. State* (Fla.) 791.

§ 43. — Dismissal, hearing, and rehearing.

*Where the state appeals from an order discharging defendant charged with murder, and the defendant is hanged by a mob, the appeal will be dismissed.—*State v. Rogers* (La.) 477.

§ 44. — Review.

In a prosecution of a physician for practicing without a certificate, the allowance of a question as to whether he held himself out to the world as a practicing physician *held* not prejudicial to defendant.—*Brooks v. State* (Ala.) 156.

In a prosecution for gaming, indefiniteness of a question concerning other games played on the premises in controversy *held* cured by the witness' answer.—*Winston v. State* (Ala.) 174.

*The denial of a motion for a new trial in a criminal case cannot be reviewed on appeal.—*Jackson v. State* (Ala.) 178.

*The subsequent admission of evidence cured any error in the former exclusion thereof.—*Untreiner v. State* (Ala.) 285.

*An application for a new trial in a criminal case is addressed to the discretion of the court, and is not revisable on appeal.—*Coker v. State* (Ala.) 303.

Error in the admission of evidence *held* not ground for reversal under Code 1896, § 4333.—*Hill v. State* (Ala.) 621.

The error, if any, in overruling an objection to a question asked a witness *held* harmless in view of the answer.—*Hill v. State* (Ala.) 621.

*On appeal from a conviction, the existence of evidence sufficient to warrant the refusal of an affirmative charge presumed where bill of exceptions did not set out all of the evidence.—*Pearson v. State* (Ala.) 733.

Under Code 1896, § 4333, the admission of certain evidence in a prosecution for burglary, if

erroneous, *held* harmless.—*Peck v. State* (Ala.) 759.

*Where on appeal the oral charge of the court was not set out, it would be presumed that charges given for the defendant were not in conflict with the oral charge.—*Hammond v. State* (Ala.) 761.

The motion for a new trial in a criminal case is addressed to the sound discretion of the court and not revisable.—*Dawson v. State* (Ala.) 803.

*Where accused was only sentenced for burglary under a good count in the indictment he was not prejudiced by a defect in another count attempting to charge grand larceny.—*Burrow v. State* (Ala.) 987.

*Where a regular term of court was required by statute to be held on May 15, 1905, it would be presumed, in the absence of evidence to the contrary, that a special term held in another county on May 22d was not held until after the adjournment of the general term.—*Williams v. State* (Ala.) 992.

On appeal from the county court of Lawrence County from a conviction of misdemeanor the Supreme Court *held* to have authority to review the action of the trial court in applying the law to facts in respect to which there is no conflict [Act Feb. 6, 1891, as amended by Acts 1898-99, p. 836].—*Bradford v. State* (Ala.) 1024.

*In both civil and criminal cases the trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with by an appellate court when a clear abuse thereof is made to appear.—*Hoodless v. Jernigan* (Fla.) 194.

*Where there are assignments of error which are not argued, but merely repeated in the brief, an appellate court is not required to do more than read the record in connection with such assignments, and if it discovers no plain error the judgment will not be reversed.—*Pittman v. State* (Fla.) 385.

*The trial court is authorized to regulate the order of the introduction of evidence, and its discretion in this matter will only be interfered with when a clear abuse thereof appears.—*Pittman v. State* (Fla.) 385.

*An application for a continuance is addressed to the sound discretion of the trial court, and the denial of such a motion will not be reversed, unless there has been a palpable abuse of this discretion.—*Pittman v. State* (Fla.) 385.

*The refusal in a criminal case to order a view in another county will not be disturbed; no abuse of discretion being shown.—*Thompson v. State* (Fla.) 899.

That the trial judge refused to allow a witness for the defense to be asked whether he knew the general reputation of witness for the state for veracity is no ground for reversal, where the answer expected to be made was not made known to the court, nor on a motion for new trial.—*State v. Rester* (La.) 231.

*The Supreme Court is without jurisdiction to reverse a conviction on questions of fact.—*State v. Dartez* (La.) 653.

The fact that by consent of counsel for the state and the defendant the witnesses for both sides had been ordered to be kept where they could hear the testimony given on the trial *held* not to have the effect of preventing the district attorney communicating with the state witnesses.—*State v. James County* (La.) 702.

*Point annotated. See syllabus.

Permitting introduction of a letter on a motion for continuance cannot, in the absence of a further showing, be held prejudicial.—*Donald v. State* (Miss.) 4.

§ 45. Determination and disposition of cause.

*Where there is no error affecting the merits necessitating the grant of a new trial or the vacation of the verdict, but simply an unauthorized sentence, the court on appeal will reverse the judgment and sentence, leaving the verdict to stand as a basis for a proper sentence.—*Irvin v. State* (Fla.) 785.

§ 46. Punishment and prevention of crime.

*Where the penalty prescribed is imprisonment in the penitentiary or a money fine, a primary sentence of imprisonment in the county jail is unauthorized.—*Irvin v. State* (Fla.) 785.

*Under Acts 1891, p. 55, c. 4026, where the primary punishment imposed was a fine and costs of prosecution only, the court should fix a period of imprisonment in the county jail, instead of in the state penitentiary, on nonpayment of such fine and costs.—*Thompson v. State* (Fla.) 899.

The exercise of the court's discretion in imposing the maximum penalty held not illegal, though influenced by information obtained outside the trial.—*Donald v. State* (Miss.) 4.

CROPS.

See "Agriculture."

Cotenancy in, see "Tenancy in Common," § 1. Injuries to crops by stock passing through defective cattle guards, see "Railroads," § 2. Mortgage of, see "Chattel Mortgages," § 3. Renting on shares, see "Landlord and Tenant," § 5.

CROSS BILL.

See "Equity," §§ 3, 4.

CROSS-EXAMINATION.

See "Witnesses," §§ 3, 4.

CRUELTY.

Ground for divorce, see "Divorce," § 1.

CUSTODY.

Of property levied on, see "Attachment," § 2.

CUSTOMS AND USAGES.

*Proof of a custom among traveling salesmen alone is inadmissible as affecting the principals of such salesmen.—*Gould v. Cates Chair Co.* (Ala.) 675.

*It cannot be presumed that a manufacturer domiciled in North Carolina had knowledge of a custom in Alabama.—*Gould v. Cates Chair Co.* (Ala.) 675.

CY PRES DOCTRINE.

See "Charities," § 1.

DAMAGES.

Allowance as interest of slightly excessive damages awarded in verdict, see "Trial," § 13. Compensation for property taken for public use in general, see "Eminent Domain," §§ 2, 4.

*Point annotated. See syllabus.

Compensation for taking property of co-tenants for public use, see "Tenancy in Common," § 3. Injury to health of mother as element of damages for malicious arrest of child, see "Parent and Child."

Damages for particular injuries.

See "Death," § 1; "Malicious Prosecution," § 1; "Trespass," § 2.

Breach by seller of contract for sale of goods, see "Sales," § 7.

Injuries caused by public improvements, see "Municipal Corporations," § 3.

Injuries from surface waters, see "Waters and Water Courses," § 1.

Negligent transmission of telegram, see "Telegraphs and Telephones," § 1.

Recovery in particular actions or proceedings.

See "Detinue"; "Ejectment," § 4; "Trove and Conversion," § 2.

§ 1. Nominal damages.

*The violation of a person's legal right through a tort gives rise to a right of action and a verdict for at least nominal damages, without specification as to the particular damage resulting.—*Davis v. Arkansas Southern R. Co.* (La.) 587.

§ 2. Grounds and subjects of compensatory damages.

*Where plaintiffs found a park which they had engaged from defendant for a picnic occupied by another party, and defendant tendered them a less eligible place, which they refused to take, held, that they were entitled to damages.—*O'Meallie v. Moreau* (La.) 243.

Though a breach of contract has happened through an honest mistake, yet the actual damages caused by it must be allowed.—*O'Meallie v. Moreau* (La.) 243.

Profits the making of which constituted the sole inducement for entering into the contract are not too speculative or remote to be claimed as damages on a breach of the contract.—*Des Allemands Lumber Co. v. Morgan City Timber Co.* (La.) 332.

Certain items held a part of the cost of executing a contract, to be deducted in arriving at the net profits.—*Des Allemands Lumber Co. v. Morgan City Timber Co.* (La.) 332.

§ 3. Measure of damages.

*In an action for injuries to a servant, a requested instruction on damages held properly refused.—*Huggins v. Southern Ry. Co.* (Ala.) 858.

*In an action for injuries to a railroad fireman incapacitating him for employment as an engineer or fireman, plaintiff was not entitled to give evidence of promises of promotion on the question of damages.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

§ 4. Inadequate and excessive damages.

In an action for personal injuries, verdict of \$1,000 held not inadequate.—*Stoker v. Hodge Fence & Lumber Co.* (La.) 211.

*In an action for injuries, a verdict for \$10,000 held not excessive.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

§ 5. — Pleading, evidence, and assessment.

*In an action for killing plaintiff's mare, plaintiff held entitled to recover interest on the damages sustained from the date of the accident to the date of the trial.—*Nashville, C. & St. L. Ry. v. Allen* (Ala.) 633.

*Evidence held competent, in an action for injury to goods from oil being poured over them, to show the lasting effect of the oil.—*Louisville & N. R. Co. v. Dunlap* (Ala.) 826.

*In an action for damages by the overflow of a railroad drain, evidence of the rental value and market value of plaintiff's property alleged to have been injured, just prior to the overflow, *held* inadmissible.—*Central of Georgia Ry. Co. v. Keyton* (Ala.) 918.

Where, in an action for personal injuries, allegations of injury were in general terms, evidence as to the extent of injury to plaintiff's arms was admissible.—*Stoker v. Hodge Fence & Lumber Co.* (La.) 211.

Profits of part of a period covered by a contract *held* not a criterion for determining what the ultimate profits would probably have been if the full term had been accomplished.—*Des Allemands Lumber Co. v. Morgan City Timber Co.* (La.) 332.

Where a logging contract is wrongfully terminated, the contractor, who has made no money during the time that the contract was in force, in order to recover prospective profits for the unexpired term, must show that by reason of some change in the conditions he would be able to make a profit in the future.—*Des Allemands Lumber Co. v. Morgan City Timber Co.* (La.) 332.

*In an action for injuries to a servant, certain testimony given by plaintiff *held* not susceptible of the construction that it showed him to be a poor man without property.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

DEATH.

Applicability of instructions to pleadings and evidence in action for, see "Trial," § 9.
Caused by operation of railroad, see "Railroads," § 7.

Contributory negligence as defense to action for causing, see "Negligence," § 3.
Harmless error in action for, see "Appeal and Error," § 19.

Of party pending appeal, see "Appeal and Error," § 5.

Opinion evidence in action for, see "Evidence," § 11.

Requests for instructions in action for, see "Trial," § 10.

Wrongful death of passenger, see "Carriers," § 9.

Wrongful death of servant, see "Master and Servant," §§ 2, 5, 9-11.

§ 1. Actions for causing death.

Under Code 1896, § 27, evidence of age of decedent *held* inadmissible in action for wrongful death.—*Smith v. Birmingham Ry. Light & Power Co.* (Ala.) 307.

An administrator of a deceased minor can, under Rev. St. 1892, §§ 2342, 2343, recover for the wrongful death of his intestate, where such minor leaves neither widow, nor minor child, nor any person dependent on him for support.—*Bowden v. Jacksonville Electric Co.* (Fla.) 400.

*It is not necessary, when a wife sues for the negligent killing of her husband, that she should in her pleadings negative the existence of minor children, the issue of her marriage.—*Davis v. Arkansas Southern R. Co.* (La.) 587.

*It is not necessary, in an action by a wife for the wrongful death of her husband, that she should allege that a right of action survived to herself.—*Davis v. Arkansas Southern R. Co.* (La.) 587.

*No action can be maintained in Mississippi for the death of one killed in Louisiana owing to the alleged negligence of defendant, unless such a right of action is given by the law of Louisiana.—*Runt v. Illinois Cent. R. Co.* (Miss.) 1.

Under Merrick's Rev. Civ. Code La. 1900, art. 2315, and article 8556, cl. 8, *held*, that neither the mother nor administrator of a bastard not legitimized can maintain an action for his death.—*Runt v. Illinois Cent. R. Co.* (Miss.) 1.

*Acts 1898, p. 82, c. 65, modifying Ann. Code 1892, § 683, *held* to fix the measure of damages in an action by a parent for the death of a minor child.—*Cumberland Telephone & Telegraph Co. v. Anderson* (Miss.) 263.

In an action by a mother for the death of a minor son, an instruction authorizing the jury to consider the loss of prospective gratuities from the son to the mother after he became of age, in determining the measure of damages, *held* erroneous.—*Cumberland Telephone & Telegraph Co. v. Anderson* (Miss.) 263.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Creditors' Suit"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Executors and Administrators."
Testimony as to transactions with persons since deceased, see "Witnesses," § 2.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," §§ 7, 8.

As evidence in criminal prosecutions, see "Criminal Law," § 12.

Dying declarations, see "Homicide," §§ 10, 16.

In pleading, see "Pleading," § 8.

Of intention to claim land adversely, see "Adverse Possession," § 1.

DECREE.

In equity, see "Equity," § 7.

DEDICATION.

Establishment of highway, see "Highways," § 1.

§ 1. Nature and requisites.

*The fact that a street appears on the map which is referred to in some of several deeds to lands in the vicinity is not equivalent to a dedication.—*City of Mobile v. Fowler* (Ala.) 468.

*Mere testimony that certain lands formed a part of a street before it was fenced in was not sufficient to show that it was used for such length of time as to become a public highway.—*City of Mobile v. Fowler* (Ala.) 468.

*Acceptance of a dedication may either be formal by the action of the municipal or other authorities, or may be inferred by long public use.—*City of Mobile v. Fowler* (Ala.) 468.

*A dedication must be accepted in order to become irrevocable.—*City of Mobile v. Fowler* (Ala.) 468.

*The platting of land by the owner and dividing it off by streets and avenues and selling lots with reference to a map showing the streets amounts to a complete dedication of the streets thereon disclosed.—*City of Mobile v. Fowler* (Ala.) 468.

*Point annotated. See syllabus.

*An intent to dedicate may be considered in determining the existence of a dedication for public use.—*McGourin v. Town of De Funiak Springs* (Fla.) 541.

*Where the owner of land makes a town plat thereof, laying out streets, and conveys lots with reference to such plat, he shows an intent to dedicate the streets to public use.—*McGourin v. Town of De Funiak Springs* (Fla.) 541.

*Evidence held not to show an intent to dedicate certain streets.—*McGourin v. Town of De Funiak Springs* (Fla.) 541.

*A plat held not evidence of an intention to dedicate certain streets.—*McGourin v. Town of De Funiak Springs* (Fla.) 541.

*Only the owner of an absolute fee can make an absolute dedication to a public use.—*Bruce v. Seaboard Air Line Ry.* (Fla.) 883.

*A party claiming title to land in the actual adverse possession of another cannot, as against such adverse occupant, make an absolute and final dedication of the land to a public use.—*Bruce v. Seaboard Air Line Ry.* (Fla.) 883.

DEEDS.

Acknowledgment of execution, see "Acknowledgment."

Cancellation, see "Cancellation of Instruments."

Covenants in deeds, see "Covenants."

Harmless error in admission of evidence relating to, see "Appeal and Error," § 19.

In fraud of creditors, see "Fraudulent Conveyances."

Reformation, see "Reformation of Instruments."

Resulting trusts under deed without consideration, see "Trusts," § 1.

Deeds by or to particular classes of persons.

See "Infants," § 1; "Insane Persons," § 2.

Married women, see "Husband and Wife," § 3.

Deeds of particular species of, or estates or interest in, property.

Separate property of married women, see "Husband and Wife," § 3.

Particular classes of deeds.

Of trust, see "Mortgages."

Partition deeds, see "Partition," § 1.

Tax deeds, see "Taxation," §§ 4, 5.

§ 1. **Requisites and validity.**

*Where the grantor of a deed writes his own name, it is sufficient if the deed is attested by one witness, as provided by Code 1896, § 982.—*McCreary v. Jackson Lumber Co.* (Ala.) 822.

§ 2. **Recording and registration.**

The registration of an act of sale signed by the vendor alone will effect a registry of the sale.—*Lepine v. Marrero* (La.) 216.

A deed held not to have imposed a condition subsequent.—*Thornton v. City of Natchez* (Miss.) 498.

DEFAMATION.

See "Libel and Slander."

DEGREES.

Of homicide, see "Homicide," §§ 12, 14.

DELAY.

Laches, see "Equity," § 2.

*Point annotated. See syllabus.

DELIVERY.

Of gift, see "Gifts," § 1.

Of goods by carrier, see "Carriers," § 3.

Of telegram, see "Telegraphs and Telephones," § 1.

DEMONSTRATIVE EVIDENCE.

In criminal prosecutions, see "Criminal Law," § 11.

DEMURRER.

In pleading, see "Equity," § 3; "Pleading," § 4.

To evidence, see "Trial," § 5.

To indictment, see "Indictment and Information," §§ 5, 7.

DEPARTURE.

In pleading, see "Pleading," § 5.

DEPOSITARIES.

*Where real estate is sold by authentic act, and the money is deposited in a bank, to be paid when the title shall have been found good, the money so deposited is beyond the control alike of the purchaser and the seller.—*Holliday v. Hammond State Bank* (La.) 198.

Where purchaser of real estate has signed the act of purchase, but by agreement with the seller places the price in a bank, to be paid after the title shall have been found good, and there is a defect of which the purchaser knew, and which it was the purpose of the agreement to give the seller opportunity to cure, the money cannot be withdrawn by the purchaser without the consent of the seller until such opportunity shall have been exhausted.—*Holliday v. Hammond State Bank* (La.) 198.

Where money has been deposited in a bank to await an examination of title, and suit is brought against the bank for its recovery by the purchaser, and by the seller intervening and claiming it as the price of the property sold, the objection on behalf of the bank and intervener that the purchaser cannot prove by parol the circumstances under which the deposit was made was one which neither the bank nor the intervener could urge.—*Holliday v. Hammond State Bank* (La.) 198.

DEPOSITIONS.

See "Witnesses."

Best and secondary evidence of exhibits attached to, see "Evidence," § 5.

*Code 1896, § 1841, in relation to depositions, held not to require the commissioner to take down the answers of a witness in the commissioner's own handwriting.—*Ebersole v. Southern Building & Loan Ass'n* (Ala.) 150.

*A deposition held not subject to a motion to quash because no copy of certain papers referred to in one of the interrogatories had been served on the opposite party before the issuance of a commission and the taking of the deposition.—*Equitable Mfg. Co. v. Howard* (Ala.) 628.

*Answers in a deposition responsive to the interrogatories to which no objection was made held not open to objection at the trial.—*Creel v. Keith* (Ala.) 780.

DESCENT AND DISTRIBUTION.

See "Executors and Administrators"; "Homestead," § 2; "Wills."
 Descent of proceeds of sale accruing after death of seller, see "Sales," § 1.
 Right of state to review judgment sending heirs into possession, see "Appeal and Error," § 3.
 Sufficiency of proof of title by descent to sustain action of ejectment, see "Ejectment," § 2.
 Title of statutes relating to descent of property, see "Statutes," § 3.

DESCRIPTION.

Names of individuals, see "Names."
 Of property in tax deed, see "Taxation," § 5.

DESERTION.

Ground for divorce, see "Divorce," § 1.

DETINUE.

Relevancy and materiality of evidence, see "Evidence," § 4.

*Damages for detention of perishable property, in an action of detinue, may cover loss for deterioration of the property.—*Merchants' Nat. Bank v. Bales* (Ala.) 516.

Where a claimant of property sought to be recovered in detinue made himself a party, under Code 1896, § 2634, he subjected himself to the same judgment as would have gone against the original defendant.—*Merchants' Nat. Bank v. Bales* (Ala.) 516.

*Where G.'s agent obtained possession of property without the consent of the owner or anyone authorized to bind him, the owner was entitled to recover the same wherever found.—*Merchants' Nat. Bank v. Bales* (Ala.) 516.

*The facts which plaintiff must show in order to recover in detinue stated.—*Ryall v. Pearson Bros.* (Ala.) 673.

*A plea of the general issue in detinue held the equivalent of a plea of non detinet at the common law.—*Ryall v. Pearson Bros.* (Ala.) 673.

In detinue for a mule, an allegation of the complaint as to when the mule was sold by plaintiff to a certain person held a substantial correspondence with the evidence as to the sale.—*Holman v. Clark* (Ala.) 765.

*In detinue for a mule, held, that there was no such variance between the color of the mule given in the complaint and that in a mortgage under which plaintiff claimed as to render the mortgage inadmissible.—*Holman v. Clark* (Ala.) 765.

Where, in detinue for a mule, there is a substantial correspondence between the description of the mule in the complaint and the proof, the age of the mule given in the complaint is immaterial.—*Holman v. Clark* (Ala.) 765.

Under a complaint in an action on a detinue bond alleging that the writ was issued by C., a notary public and ex officio justice of the peace, it was permissible to prove that C. was a de facto justice.—*Williams v. Finch* (Ala.) 834.

DEVISES.

See "Wills."

DILATORY PLEAS.

See "Pleading," § 2.

DIRECTING VERDICT.

In civil actions, see "Trial," § 5.
 In criminal prosecutions, see "Criminal Law," § 24.

DISABILITIES.

Contributory negligence of persons under disability, see "Negligence," § 3.
 Effect on limitation, see "Limitation of Actions," § 1.

DISCHARGE.

From service as juror, see "Jury," § 3.

From indebtedness, obligation, or liability.

See "Accord and Satisfaction"; "Bankruptcy," § 1; "Release."
 Liability as guarantor, see "Guaranty," § 1.
 Liability as surety, see "Principal and Surety," § 2.

DISCLAIMER.

In pleading in ejectment, see "Ejectment," § 2.

DISCRETION OF COURT.

Conduct of trial, see "Trial," § 2.
 Continuance in criminal prosecution, see "Criminal Law," § 18.
 Dissolution of injunction, see "Injunction," § 4.
 Examination of witness, see "Witnesses," § 3.
 New trial of criminal prosecution, see "Criminal Law," § 36.
 Plea of not guilty, see "Criminal Law," § 7.
 Punishment for criminal offense, see "Criminal Law," § 46; "Homicide," § 17.
 Quashing indictment, see "Indictment and Information," § 5.
 Reception of evidence in civil action, see "Trial," § 3.
 Reception of evidence in criminal prosecution, see "Criminal Law," § 21.
 Review in civil actions, see "Appeal and Error," § 15.
 Review in criminal prosecutions, see "Criminal Law," § 44; "Homicide," § 16.
 Separation and exclusion of witnesses, see "Criminal Law," § 21.
 Severance in criminal prosecution, see "Criminal Law," § 19.

DISCRIMINATION.

By carrier, see "Carriers," §§ 1, 7.

DISMISSAL AND NONSUIT.

Misjoinder of parties as ground for, see "Parties," § 3.
 Presentation in record on appeal of questions relating to, see "Appeal and Error," § 9.

In particular actions or proceedings.

See "Habeas Corpus," § 2; "Partition," § 2.
 Appeal or writ of error, see "Appeal and Error," §§ 8, 9, 11; "Criminal Law," § 43.
 Certiorari to justice of the peace, see "Justices of the Peace," § 4.
 For custody of child, see "Parent and Child."
 Suit in equity, see "Equity," § 4.
 To redeem from foreclosure, see "Mortgages," § 7.
 To restrain ultra vires acts of municipal corporations, see "Municipal Corporations," § 7.

DISPENSARY ACT.

See "Intoxicating Liquors," § 5.

*Point annotated. See syllabus.

DISQUALIFICATION.

Of judge, see "Judges," § 2.
Of juror, see "Jury," § 4.

DISSOLUTION.

Of injunction, see "Injunction," § 4.
Of partnership, see "Partnership," § 4.

DISTRIBUTION.

Of assets of partnership on dissolution, see "Partnership," § 4.
Of estate of decedent, see "Executors and Administrators," § 3.

DISTRICT AND PROSECUTING ATTORNEYS.

Argument and conduct of in criminal prosecutions, see "Criminal Law," § 23.
Jurisdictional amount in controversy in mandamus to compel payment of commissions on fines to, see "Appeal and Error," § 2.

DISTRICTS.

Stock law districts, see "Animals."

DIVORCE.

Custody of child of divorced parents, see "Parent and Child."
Estoppel by record in divorce suit, see "Estoppel," § 1.
Separate maintenance, see "Husband and Wife," § 6.

§ 1. Grounds.

Where plaintiff and defendant lived together as husband and wife nearly half a century, and their children are of age and married, it is too late to apply for a separation from bed and board because of alleged cruel and abusive treatment.—*Smith v. Smith* (La.) 238.

*A husband *held* entitled to a divorce on the ground of desertion.—*Graves v. Graves* (Miss.) 384.

§ 2. Jurisdiction, proceedings, and relief.

In a suit by a husband for divorce, evidence of statements of the wife as to her relations with her husband is admissible.—*Graves v. Graves* (Miss.) 384.

§ 3. Alimony, allowances, and disposition of property.

Alimony can be allowed to the wife after divorce, under Civ. Code, art. 160, only from the property, and not in excess of one-third of the income of the husband.—*Jackson v. Burns* (La.) 40.

*Where wife in her petition for divorce prays for alimony from judicial demand, she may be awarded a lump sum for maintenance during litigation.—*Jackson v. Burns* (La.) 40.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 9.

DOMICILE.

Matrimonial domicile, see "Husband and Wife," § 1.

DONATIONS.

See "Gifts."
Interspousal donations, see "Husband and Wife," § 5.

DOWER.

Election between testamentary provisions and dower, see "Wills," § 5.

DRAFT.

See "Banks and Banking," § 1; "Bills and Notes," § 2.

DRAINS.

Evidence of damages from overflow, see "Damages," § 5.
Evidence of similar facts in action for injuries from overflow, see "Evidence," § 4.
Opinion evidence in action for injuries from overflow, see "Evidence," § 11.

DUE PROCESS OF LAW.

See "Constitutional Law," § 7.

DUPLICITY.

In indictment, see "Indictment and Information," §§ 4, 7.
In pleading in equity, see "Equity," § 3.

DYING DECLARATIONS.

See "Homicide," §§ 10, 16.

EASEMENTS.

See "Dedication"; "Highways."

EJECTION.

Of passenger, see "Carriers," § 9.

EJECTMENT.

See "Real Actions."

Competency of evidence, see "Evidence," § 4.
Contradiction of witnesses, see "Witnesses," § 4.

Declarations as evidence, see "Evidence," § 7.
Evidence of adverse possession, see "Adverse Possession," §§ 1, 3.

Harmless error, see "Appeal and Error," § 19.
Jurisdiction in general, see "Courts," § 1.
Multifariousness in bill to enjoin, see "Equity," § 3.

Opinion evidence, see "Evidence," § 11.
Presentation in lower court of questions for review, see "Appeal and Error," § 4.

Remedy by ejectment or action to quiet title, see "Quieting Title," § 1.
Restraining action of ejectment, see "Injunction," § 2.

§ 1. Right of action and defenses.

Plaintiff in ejectment must rely on the strength of his own title, and not on the weakness of defendant's title.—*Malone v. La Croix* (Ala.) 724.

*Where plaintiffs acquired a prior possession through their grantors, who took without notice of adverse possession by one through whom defendants claimed, plaintiffs *held* entitled to recover in ejectment against a trespasser or one claiming under a later possession.—*McCreary v. Jackson Lumber Co.* (Ala.) 822.

*Point annotated. See syllabus.

Where in ejectment defendant proved color of title and a bona fide purchase, he was relieved from proving an outstanding title by plaintiff's proof that the title was in the patentee with whom plaintiffs were not connected.—*McCreary v. Jackson Lumber Co. (Ala.)* 822.

*One claiming by prior possession under color of title cannot recover in ejectment where the evidence fails to show continuous possession to time of the dispossession by defendant, or an intention to return.—*McCreary v. Jackson Lumber Co. (Ala.)* 822.

*Where neither party in ejectment has the true title, the older possession gives the better right.—*McCreary v. Jackson Lumber Co. (Ala.)* 822.

*Where plaintiffs in ejectment had title, they were entitled to recover possession.—*Dennis v. Price (Ala.)* 840.

Where one of the defendants in ejectment admitted possession, the only plea open to him was the general issue, which put plaintiffs to proof of their title.—*Dennis v. Price (Ala.)* 840.

Where one of the defendants in ejectment admitted possession, it was no bar to plaintiff's recovery that the other defendant jointly sued was not in possession.—*Dennis v. Price (Ala.)* 840.

*Plaintiff in ejectment must recover on the strength of his own title.—*Ropes v. Minshew (Fla.)* 538.

§ 2. Pleading and evidence.

In ejectment a witness held properly cross-examined as to the claim of others to the land in controversy.—*Lawrence v. Doe ex dem. Alabama State Land Co. (Ala.)* 612.

It was improper in ejectment to permit a witness to state that he had "sold those lands," referring to lands covered by a plat.—*Hoyle v. Mann (Ala.)* 835.

In ejectment, evidence that witness made a sale of certain land not shown to be part of the land in controversy, contiguous thereto, or covered by the same color of title, held incompetent.—*Hoyle v. Mann (Ala.)* 835.

In ejectment, questions asked whether anybody living on the land paid witness \$50 therefor, as agent of B., and whether purchasers from B. had been disturbed, held inadmissible.—*Hoyle v. Mann (Ala.)* 835.

In ejectment, evidence as to whether defendant said anything to witness concerning the land, and when B.'s heirs learned that the lands had been sold by their mother, held irrelevant.—*Hoyle v. Mann (Ala.)* 835.

In ejectment, the question how or by what means defendant induced the heirs of B. to convey their interest to him held immaterial.—*Hoyle v. Mann (Ala.)* 835.

A question asked of a witness in ejectment, "Why did you think it took a deed from both parties to make a good title?" was improper.—*Hoyle v. Mann (Ala.)* 835.

Where a person buys land claimed to be in the adverse possession of another, it is immaterial whether the purchaser knew of such adverse possession.—*Hoyle v. Mann (Ala.)* 835.

Where in ejectment complainant's abstract showed that he claimed entirely by adverse possession under B.'s deed, defendant could not force plaintiff back to a common source, in order to strengthen his own title.—*Hoyle v. Mann (Ala.)* 835.

*A clerical error in an abstract furnished in ejectment, as required by Code 1896, § 1531, may be corrected.—*Hoyle v. Mann (Ala.)* 835.

*Point annotated. See syllabus.

An alleged insufficient abstract furnished in ejectment under Code 1896, § 1531, must be made before trial.—*Hoyle v. Mann (Ala.)* 835.

*A plea of one of the defendants in ejectment held a disclaimer, and not a plea in abatement.—*Dennis v. Price (Ala.)* 840.

*If plaintiff in ejectment claims title by descent, it is sufficient for him in the first instance to prove heirship, and that his ancestor was the person last seised.—*Wilson v. Johnson (Fla.)* 895.

§ 3. Trial, judgment, enforcement of judgment, and review.

*A judgment for costs against defendant in ejectment held not erroneous.—*Lawrence v. Doe ex dem. Alabama State Land Co. (Ala.)* 612.

In ejectment, an instruction authorizing a finding for plaintiff if the jury believe the evidence held proper.—*Theodore Land Co. v. Lyon (Ala.)* 682.

*In ejectment, whether the grantor of plaintiff's ancestor was in possession when he conveyed the land held for the jury.—*McCreary v. Jackson Lumber Co. (Ala.)* 822.

In ejectment defendant held not entitled to a general charge on the theory that both parties claimed from a common source from which defendant had proved a perfect title.—*Hoyle v. Mann (Ala.)* 835.

Where plaintiffs in ejectment had title, they were entitled to recover costs as to those in possession.—*Dennis v. Price (Ala.)* 840.

*Where in ejectment one of the defendants disclaimed, plaintiffs were entitled to judgment for the land without costs, unless issue was taken on the disclaimer, in which event they were entitled to a judgment for the land and costs if the issue was proved, under Code 1896, § 1533.—*Dennis v. Price (Ala.)* 840.

*A verdict in ejectment, which simply finds that plaintiffs are entitled to fee-simple estate of the land described therein, does not authorize entry in behalf of the plaintiffs of a judgment for recovery of possession.—*Ropes v. Minshew (Fla.)* 538.

§ 4. Damages, mesne profits, improvements, and taxes.

*A defendant in ejectment may prove valuable improvements in reduction or extinguishment of the rental damages, irrespective of the statutory suggestion of adverse possession, though he would not be entitled to judgment over without such suggestion.—*New v. Young (Ala.)* 523.

ELECTION.

Between counts in indictment, see "Indictment and Information," § 4.

Between testamentary provisions and other rights, see "Wills," § 5.

ELECTION OF REMEDIES.

For breach of contract in general, see "Contracts," § 8.

Waiver of tort by action on contract, see "Action," § 2.

*To make a case for the application of the doctrine of election of remedies, the party must have actually two inconsistent remedies.—*Southern Ry. Co. v. City of Attalla (Ala.)* 664.

ELECTIONS.

Of corporate officers, see "Corporations," § 5.

Restraining election, see "Injunction," § 2.

To determine popular will as to incurring indebtedness by municipality, see "Municipal Corporations," § 6.

ELECTRICITY.

*Where wires strung by an electric light company and by a telephone company are likely to touch, either or both parties must remedy such dangerous condition, and where an injury occurs both are liable.—*Simmons v. Shreveport Gas, Electric Light & Power Co. (La.)* 248; *Smullins v. Same, Id.*

EMBEZZLEMENT.

Variance between allegations and proof, see "Indictment and Information," § 6.

*Where there was no proof that the money charged to have been embezzled was lawful money of the United States, and the money was not shown to have had any value, defendant was entitled to the general charge in his favor.—*Knight v. State (Ala.)* 911.

In a prosecution for embezzlement, facts held insufficient to establish as a matter of law that the embezzlement took place in C. county.—*Knight v. State (Ala.)* 911.

In a prosecution for embezzlement of money while being carried by a mail carrier to a bank for hire, defendant held not shown to have been a common carrier.—*Knight v. State (Ala.)* 911.

EMINENT DOMAIN.

Determination of constitutional questions relating to, see "Constitutional Law," § 1.

Injunction to restrain taking private property for public use, see "Injunction," § 1.

Opinion evidence of value of property taken or injured, see "Evidence," § 11.

Public improvements by municipalities, see "Municipal Corporations," § 3.

Taking property of co-tenants for public use, see "Tenancy in Common," § 3.

§ 1. Nature, extent, and delegation of power.

*The requirement in Civ. Code, art. 2637, concerning expropriation of the "dwelling house, yard, garden, and other appurtenances," does not apply to a tenement bought and held merely as an investment.—*Louisiana & A. Ry. Co. v. Moseley (La.)* 585.

That a number of citizens guaranty a railroad company that property needed for its terminal facilities shall not cost beyond a certain sum does not divest the company of its right to proceed for the expropriation of such property.—*Louisiana & A. Ry. Co. v. Moseley (La.)* 585.

Under Code 1892, §§ 854-858, and section 4291, repealing Acts 1886, p. 93, c. 38, a telephone company held not entitled to exercise the power of eminent domain, notwithstanding Const. § 195.—*Alabama & V. Ry. Co. v. Cumberland Telephone & Telegraph Co. (Miss.)* 258.

§ 2. Compensation.

*A telephone line along a highway held not an additional servitude entitling the abutting owner to compensation.—*Hobbs v. Long Distance Telephone & Telegraph Co. (Ala.)* 1003; *Horton v. Same (Ala.)* 1006; *Richardson v. Same, Id.*; *Pryor v. Same, Id.*

*Where a railroad wrongfully builds its road and depot buildings on the land of another, and thereafter the owner sells the land to a third person, the latter cannot recover of the railroad company for the tort, but the right of action remains in the original owner.—*Bruce v. Seaboard Air Line Ry. (Fla.)* 883.

*Railroad right of way held not to pass with plantation at sheriff's sale, but the obligation to pay for it, which the railroad owed to the owners at the time of the appropriation, continued to be a debt due to these owners after they had repurchased the property.—*Scovell v. St. Louis Southwestern Ry. Co. (La.)* 723; *In re St. Louis Southwestern Ry. Co., Id.*

§ 3. Proceedings to take property and assess compensation.

The jury of freeholders, in an expropriation case, should be taken from the vicinage.—*Louisiana Ry. & Navigation Co. v. Morere (La.)* 236.

The price paid for neighboring property by a railway company for its right of way is held admissible to show value.—*Louisiana Ry. & Navigation Co. v. Morere (La.)* 236.

So long as assessments are not made at the market value, the offering of them to show value in expropriation cases is not competent.—*Louisiana Ry. & Navigation Co. v. Morere (La.)* 236.

If the only change in property since an estimate of value was made has been a steady rise, the remoteness of the estimate is no ground of objection to the plaintiff.—*Louisiana Ry. & Navigation Co. v. Morere (La.)* 236.

The verdict of the jury in a case between other parties for the expropriation of property of similar character in the neighborhood is good evidence of value.—*Louisiana Ry. & Navigation Co. v. Morere (La.)* 236.

Statement of a notary that the price recited in an act is the true price, so far as he knows, is not sufficient proof of the price to make the act admissible as proof of value.—*Louisiana Ry. & Navigation Co. v. Morere (La.)* 236.

Where in an expropriation suit a lump sum is claimed as damages, and the petition sets forth a number of distinct elements of damage, testimony in support of the claim is properly rejected.—*Louisiana Ry. & Navigation Co. v. Sarpy (La.)* 477.

Where in expropriation proceedings the jury is impaneled without objection, and the case continued under agreement that the defendant shall answer on a certain day, a motion to quash the venire and dilatory exceptions came too late on the date fixed for trial.—*Louisiana Ry. & Navigation Co. v. Sarpy (La.)* 477.

A foreign corporation which seeks to expropriate a right of way must meet objections to legality of its organization by proving the regularity thereof.—*Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co. (La.)* 492.

Expropriation proceedings are to be tried summarily, and a defendant, who when the case is called for trial presents an exception involving questions of fact as well as law, cannot insist on a separate trial of the same before the judge.—*Louisiana & A. Ry. Co. v. Moseley (La.)* 585.

Where two juries have assessed damages at about the same amount, and their verdicts are sustained by a preponderance of the evidence, there is no reason why the court should disturb the last verdict.—*Louisiana & A. Ry. Co. v. Moseley (La.)* 585.

Where, in an expropriation case, an exception is referred to the merits, and the question is afterwards ruled on in connection with applications for separate charges and for a new trial, and the rulings are affirmed on appeal, the exceptor has no just cause of complaint.—*Louisiana & A. Ry. Co. v. Moseley (La.)* 585.

*The right of a telegraph company to exercise the power of eminent domain cannot be defeated by the owner of the land showing the illegality of the incorporation of the company.

*Point annotated. See syllabus.

—Alabama & V. Ry. Co. v. Cumberland Telephone & Telegraph Co. (Miss.) 258.

§ 4. Remedies of owners of property.

Under Const. § 227, in an action by an owner of a lot abutting on a street to recover damages for the construction of a railroad embankment in the street, *held* that the jury may not, under Code 1896, § 1718, consider enhancement in value from the operation of the road.—Birmingham Ry., Light & Power Co. v. Oden (Ala.) 129.

*The measure of damages to which the owner of property abutting on a street is entitled under Const. § 227, on construction of a public utility in the street under a franchise, determined.—Birmingham Ry., Light & Power Co. v. Oden (Ala.) 129.

Under Const. § 227, *held*, that in an action by the owner of a lot abutting on a street in which a railroad embankment had been constructed under a franchise, to recover damages from the construction, it was error to admit evidence as to what amount of material would be required to fill in plaintiff's lot to bring it to a level with the car rail on the embankment.—Birmingham Ry. Light & Power Co. v. Oden (Ala.) 129.

*In an action by the owner of property abutting on a street for damages, under Const. art. 227, from the construction of a railroad embankment in the street under a franchise, demurrers to the complaint *held* properly overruled.—Birmingham Ry. Light & Power Co. v. Oden (Ala.) 129.

Under Const. § 227, in an action by the owner of a lot abutting on a street to recover damages for the construction of a railroad embankment in the street, *held* necessary for plaintiff to prove that the construction was done under a franchise.—Birmingham Ry. Light & Power Co. v. Oden (Ala.) 129.

*Two years' prescription prescribed by Acts 1896, p. 142, No. 96, *held* to apply only where the property has been taken in pursuance of a judgment of expropriation.—Scovell v. St. Louis Southwestern Ry. Co. (La.) 723; In re St. Louis Southwestern Ry. Co., Id.

The terms "taking" or "expropriation," as used in Acts 1896, p. 142, No. 96, *held* equivalent.—Amet v. Texas & P. Ry. Co. (La.) 721; In re Amet, Id.

A prescription of two years applies only when there has been a judgment of expropriation and the corporation has entered into possession before the payment of the compensation awarded.—Amet v. Texas & P. Ry. Co. (La.) 721; In re Amet, Id.

The term "taken," in the state Constitution of 1898, art. 167, and in the Constitution of 1879, *held* to have been used in its proper significance in legislation relative to the exercise of the power of eminent domain.—Amet v. Texas & P. Ry. Co. (La.) 721; In re Amet, Id.

Railroad appropriating right of way over private land *held* not liberated from its debt to the owners thereby by their act in laying off the land into streets and squares, according to a map placed of record, and selling lots as per the map.—Scovell v. St. Louis Southwestern Ry. Co. (La.) 723; In re St. Louis Southwestern Ry. Co., Id.

EMPLOYES.

See "Master and Servant."

ENTIRE CONTRACT.

See "Sales," § 2.

*Point annotated. See syllabus.

ENTRY, WRIT OF.

See "Ejectment"; "Real Actions."

EQUITABLE ESTOPPEL

See "Estoppel," § 2.

EQUITABLE LIENS.

Defective mortgages as constituting, see "Mortgages," § 1.

EQUITY.

Costs in equity, see "Costs," § 1.

Defective mortgage as constituting equitable lien, see "Mortgages," § 1.

Disposition of cause on appeal, see "Appeal and Error," § 24.

Equitable estoppel, see "Estoppel," § 2.

Form of remedy by partition, see "Partition," § 2.

Presentation in lower court of questions for review, see "Appeal and Error," § 4.

Relief against judgment, see "Judgment," § 3.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Creditors' Suit"; "Fraudulent Conveyances"; "Injunction"; "Marshaling Assets and Securities"; "Partition," § 2; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Contracts to devise or bequeath, see "Wills," § 1.

Establishment of boundaries, see "Boundaries," § 1.

Restraining assessment for public improvements, see "Municipal Corporations," § 3.

Will contest, see "Wills," § 3.

§ 1. Jurisdiction, principles, and maxims.

*A bill in a suit to cancel a note and mortgage on the ground that they were without consideration *held* not demurrable as subject to the equitable rule relative to parties in *pari delicto*.—Phillips v. Bradford (Ala.) 657.

*Lessees of turpentine land, having broken their lease, *held* not entitled to maintain a bill against the lessors for trespass in cutting boxed trees for lumber.—Ashe-Carson Co. v. Bonifay (Ala.) 816.

It was no objection to a remainderman's bill to have the administration of the estate transferred to a court of equity, that the will devised to the administrator a life estate in the property.—Bresler v. Bloom (Ala.) 1010.

*A distributee of a decedent's estate is entitled to have the estate administered in equity without assigning any special reason for transferring the estate to that court.—Bresler v. Bloom (Ala.) 1010.

*Where there is an adequate and complete remedy at law, a resort to equity is improper.—Barnett v. Hickson (Fla.) 806.

*Where a deed to a city contained a provision holding the grantee to an implied covenant to use the land forever for burial purposes, on a cessation of such use by the grantee, the remedy of the grantor was at law and not in equity for an injunction or a reconveyance.—Thornton v. City of Natchez (Miss.) 498.

*Equity cannot be invoked merely to enforce a forfeiture, or to divest an estate for breach of a subsequent condition against a vendee in possession.—Thornton v. City of Natchez (Miss.) 498.

§ 2. Laches and stale demands.

A defendant *held* not a trustee of an express trust so as to save complainants from the bar of the 10-year statute of limitations.—*Thornton v. City of Natchez* (Miss.) 498.

Fact that complainants in equity were nonresidents *held* of no avail to them as against 10-year statute of limitations.—*Thornton v. City of Natchez* (Miss.) 498.

Complainants in equity *held* not in position to claim relief against the 10-year statute of limitations on the ground of concealed fraud, under Ann. Code 1892, §§ 2731, 2749, 2762.—*Thornton v. City of Natchez* (Miss.) 498.

§ 3. Pleading.

Under chancery rule 76 *held* issue is to be treated as silently joined on pleas in the answer.—*Sellers v. Farmer* (Ala.) 291.

A bill to correct certain deeds and to enjoin an ejectment suit against the original owner of the land and the prior grantee of a portion thereof *held* maintainable to prevent a multiplicity of suits.—*Sicard v. Guylou* (Ala.) 474.

Damages sought to be recouped in a cross-bill *held* of the same nature as those claimed in the bill, and that the cross-bill was therefore well filed.—*Ashe-Carson Co. v. Bonifay* (Ala.) 816.

*Inadequacy of legal remedies *held* not an essential element of a cross-bill which if it relates to the subject-matter of the original bill may bring forward purely legal claims.—*Ashe-Carson Co. v. Bonifay* (Ala.) 816.

*In a suit new issues in relation to the original matter may be raised by a cross-bill.—*Ashe-Carson Co. v. Bonifay* (Ala.) 816.

*A cross-bill is proper when necessary to do complete justice between the parties and to adjust all the equities between them.—*Ashe-Carson Co. v. Bonifay* (Ala.) 816.

*A bill in chancery may be inconsistent and repugnant in averment without being multifarious.—*Ellis v. Crawson* (Ala.) 942.

*A bill in chancery contesting a will under Code 1896, §§ 4298, 4299, *held* not demurrable for repugnancy.—*Ellis v. Crawson* (Ala.) 942.

*Where all the grounds of a demurrer were addressed to a bill as a whole it was properly overruled if complainant was entitled to any relief under the bill.—*Bresler v. Bloom* (Ala.) 1010.

*In the absence of any rule or statute requiring it, pleas to a bill in chancery need not be verified by affidavit.—*Town of New Decatur v. Scharfenberg* (Ala.) 1025.

*The setting down of a plea for hearing on its sufficiency *held* to admit the truth of all facts alleged for the purpose of invoking judgment as to whether the facts constitute a defense.—*Town of New Decatur v. Scharfenberg* (Ala.) 1025.

*A plea which does not contain independent sets of facts, each constituting a sufficient answer to the bill, is not duplicitous.—*Town of New Decatur v. Scharfenberg* (Ala.) 1025.

*Pleas in abatement *held* filed too late.—*Town of New Decatur v. Smith* (Ala.) 1028.

§ 4. Dismissal before hearing.

Though on motion to dismiss a bill for want of equity it is to be considered as amended in all amendable defects, it cannot be considered as amended by the averment of new, additional, or independent facts.—*Stephenson v. Atlas Coal Co.* (Ala.) 301.

Time for the amendment of a bill will not be allowed after a decree on a motion to dis-

miss for want of equity.—*Stephenson v. Atlas Coal Co.* (Ala.) 301.

*Where defendants in equity filed a cross-bill and prayed affirmative relief, the dismissal of the bill did not dispose of the cross-bill.—*Webster v. De Bardeleben* (Ala.) 831.

*A bill for an injunction will not be dismissed because of certain defect which was amendable and not raised by demurrer.—*Town of New Decatur v. Scharfenberg* (Ala.) 1025.

§ 5. Hearing, submission of issues to jury, and rehearing.

Where parties to a suit in equity agree before an examiner that each will pay the costs of taking the testimony of his own witnesses and the cross-examination of his adversary's witnesses, and complainant pays his share and defendant fails to pay after notice, complainant sets the case down for hearing, and the examiner files a report of complainant's testimony, but does not file a report of defendant's testimony, and no steps are taken by defendant to procure the filing, and the chancellor proceeds and renders a final decree, there is no error of which defendant can avail himself on appeal.—*Williams v. Wetmore* (Fla.) 545.

When a cause is set down for a hearing upon the bill and answer, all the averments of the answer are to be taken as true, and, where the answer contains the usual general denial and contains no admission of certain material allegations in the bill, such allegations cannot be assumed to be true.—*Godwin v. Phifer* (Fla.) 597.

§ 6. Masters and commissioners, and proceedings before them.

Rules of circuit courts in suits in equity No. 84 is to be construed in connection with Rev. St. 1892, § 1425, and, so construed, master in chancery should give the respective parties notice when his report is to be filed, that they may except.—*Cepero v. Hartridge* (Fla.) 192.

Where the record on appeal from a decree in equity fails to show notice given appellant of the master's report, and there is nothing to show waiver of notice, and the record fails to show that the case was set down for hearing as provided in rule circuit court in suits in equity Nos. 85, 86, and the case was heard and a decree made without notice to appellant, the decree will be reversed.—*Cepero v. Hartridge* (Fla.) 192.

Testimony before a former master in a cause when certain minors, subsequently made parties, were not parties, is inadmissible as against such newly made minor parties in further proceedings before a second master appointed after such minors were made parties.—*Mote v. Morton* (Fla.) 607.

*All parties in interest in a cause not under default on a reference to a master have a right to notice of the proceedings in the master's office.—*Mote v. Morton* (Fla.) 607.

*On reference to ascertain the fact depending on testimony, the report should show the basis of the findings, and the evidence should be filed with the report.—*Mote v. Morton* (Fla.) 607.

§ 7. Decree and enforcement thereof.

A decree in favor of a tenant in common as to her share of the rents *held* not authorized against certain co-tenants by the bill and a pro confesso.—*Austin v. Barber* (Miss.) 265.

ERROR, WRIT OF.

See "Appeal and Error."

*Point annotated. See syllabus.

ESCAPE.

Confessions as evidence in prosecution for attempt to escape, see "Criminal Law," § 15.

An escape held punishable under Code 1896, § 4710, but not under section 4705 or section 4707.—Bradford v. State (Ala.) 471.

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 1.

Of counties, see "Counties," § 1.

Of highways, see "Highways," § 1.

Of railroads, see "Railroads," § 2.

Of trusts, see "Trusts," § 4.

ESTATES.

Decedents' estates, see "Executors and Administrators."

Estates for years, see "Landlord and Tenant." Tenancy in common, see "Tenancy in Common."

Trusts, see "Trusts," § 2.

ESTOPPEL.

By judgment, see "Judgment," §§ 4, 5.

Of landlord to set up claim for rent or advances, see "Landlord and Tenant," § 4.

Of municipal corporation to deny liability on note, see "Municipal Corporations," § 6.

To allege error, see "Appeal and Error," § 13.

To allege infancy, see "Infants," § 2.

To deny corporate existence, see "Corporations," § 2.

To deny insurance, see "Insurance," § 3.

To plead inconsistent defenses, see "Pleading," § 2.

To restrain municipal improvement, see "Municipal Corporations," § 3.

§ 1. By record.

*Where a husband, sued for divorce, alleges that there is no lawful issue of the marriage, he is bound by such allegations; it appearing that a judgment of nonsuit only was rendered in said suit.—State ex rel. Curtis v. Thompson (La.) 367.

§ 2. Equitable estoppel.

*Plaintiff held not estopped from suing to set aside as fraudulent a transfer of land in which she had an interest.—Austin v. Jones (Ala.) 408.

A statement filed by insurance corporation under Code 1896, § 1109, held not to estop shareholders who had executed their notes to the corporation, which notes were included in the statement, from denying that they were unconditional obligations.—Anderson v. Buckley (Ala.) 748.

*One of the essential elements of an estoppel in pais is knowledge of the facts on which the estoppel is sought to be predicated.—Crosthwaite v. Lebus (Ala.) 853.

*An estoppel in pais is never presumed, but must be proved.—Crosthwaite v. Lebus (Ala.) 853.

The rule that a levy and sale of property by a person estops him from denying that the other party had a leviable interest therein does not extend to the divestiture of rights under previous sales under different process.—Harris v. Stephenson (Ala.) 1008.

*Estoppel en pais arises only where the other party has been led to change his position, and the mere bringing of the suit in support of which the estoppel is invoked is a change of position.—Des Allemands Lumber Co. v. Morgan City Timber Co. (La.) 332.

*Point annotated. See syllabus.

Though the auditor was slow in requiring the statement of the accounts of the sheriff, and the judge and district attorney did nothing in the matter, and the defaulting officer continued in the enjoyment of the public confidence, third parties cannot avail themselves of the laches of other officers of the state.—State v. Jahraus (La.) 576.

*Ignorance of his rights held to preclude a claim of estoppel by silence against one having an interest in land mortgaged by another as his in fee.—Scottish-American Mortg. Co. v. Bunkley (Miss.) 502.

*One having an interest in land was not estopped by his silence at a time when he knew that another was mortgaging the land as his in fee where his interest appeared of record.—Scottish-American Mortg. Co. v. Bunkley (Miss.) 502.

*In order for one to be estopped by his conduct, the other party must have relied thereon.—Scottish-American Mortg. Co. v. Bunkley (Miss.) 502.

EVIDENCE.

See "Depositions"; "Witnesses."

Applicability of instructions to evidence, see "Trial," § 9.

Correction of errors in reception of evidence in criminal prosecution, see "Criminal Law," § 35.

Error in exclusion, ground for new trial, see "New Trial," § 1.

Incorporation of in bill of exceptions, see "Exceptions, Bill of," § 1.

Instructions relating to, see "Trial," §§ 7, 8.

Newly discovered evidence ground for new trial, see "New Trial," § 1.

Questions of fact for jury, see "Trial," § 5.

Reception at trial, see "Criminal Law," § 21; "Trial," § 3.

Verdict or findings contrary to evidence, see "New Trial," § 1.

As to particular facts or issues.

See "Adverse Possession," § 3; "Damages," § 5; "Dedication," § 1; "Estoppel," § 2;

"Gifts," § 1; "Names"; "Statutes," § 7.

Authority of agent, see "Principal and Agent," § 2.

Claim against decedent's estate, see "Executors and Administrators," § 2.

Contracts of married women, see "Husband and Wife," § 3.

Existence of agency, see "Principal and Agent," § 1.

Existence of custom, see "Customs and Usages."

Fraud in procuring judgment, see "Judgment," § 3.

Mortgage character of bill of sale absolute in form, see "Chattel Mortgages," § 1.

Negligent management of vessel, see "Shipping," § 1.

Sale of intoxicating liquors, see "Intoxicating Liquors," § 7.

In actions by or against particular classes of persons.

See "Brokers," § 3; "Carriers," §§ 4, 7-9; "Depositories"; "Executors and Administrators," § 4; "Infants," § 3; "Master and Servant," § 10; "Principal and Agent," § 2; "Railroads," §§ 6, 8.

Telegraph companies, see "Telegraphs and Telephones," § 1.

In particular civil actions or proceedings.

See "Cancellation of Instruments," § 2; "Divorce," § 2; "Ejectment," §§ 1, 2; "Forcible Entry and Detainer," § 1; "Fraud," § 1; "Injunction," § 3; "Libel and Slander," § 3; "Negligence," § 4; "Partition," § 2;

"Quieting Title," § 2; "Reformation of Instruments," § 2; "Specific Performance," § 2; "Trespass," § 2; "Trove and Conversion," § 2.

Actions for causing death, see "Death," § 1.
Condemnation proceedings, see "Eminent Domain," § 3.

For assault and battery, see "Assault and Battery," § 1.

For breach of contract, see "Contracts," § 4; "Sales," § 6.

For breach of covenant, see "Covenants," § 2.
For conversion of mortgaged chattels, see "Chattel Mortgages," § 3.

For damages caused by exercise of power of eminent domain, see "Eminent Domain," § 4.
Foreclosure, see "Mortgages," § 6.

For injuries from surface waters, see "Waters and Water Courses," § 1.

For injuries to animals on or near railroad, see "Railroads," § 8.

For loss of or injury to shipment, see "Carriers," § 4.

For negligent transmission of telegram, see "Telegraphs and Telephones."

For personal injuries, see "Carriers," § 9; "Master and Servant," § 10; "Railroads," § 6; "Shipping," § 1; "Street Railroads," § 1.

For price of goods, see "Sales," § 6.

For wrongful execution, see "Execution," § 4.

On bill or note, see "Bills and Notes," § 4.

Probate proceedings, see "Wills," § 3.

Proceedings before master in chancery, see "Equity," § 6.

To enforce mechanic's lien, see "Mechanics' Liens," § 4.

To enforce mortgage on property of married woman, see "Husband and Wife," § 3.

To establish trust, see "Trusts," § 4.

To recover goods sold, see "Sales," § 6.

To recover overcharge paid to carrier, see "Carriers," § 7.

To rescind sale, see "Sales," § 3.

To set aside judgment, see "Judgment," § 3.

To try tax title, see "Taxation," § 5.

Trial of right to property levied on, see "Execution," § 2.

Trial of right to property sold on execution, see "Execution," § 3.

In criminal prosecutions.

See "Bigamy," § 2; "Burglary," § 2; "Criminal Law," §§ 8-17; "Forgery," § 2; "Gaming," § 1; "Homicide," §§ 5-11; "Larceny," § 2; "Rape," § 2; "Seduction," § 1; "Trespass," § 3.

Exceptions for purpose of review, see "Criminal Law," § 39.

For carrying concealed weapon, see "Weapons."

For illegally practicing medicine, see "Physicians and Surgeons."

For offenses against liquor laws, see "Intoxicating Liquors," § 7.

Review and procedure thereon in appellate courts.

See "Appeal and Error," § 16.

Assignments of error in rulings, see "Appeal and Error," § 10.

Harmless error in rulings, see "Appeal and Error," §§ 17, 19; "Criminal Law," §§ 44; "Homicide," § 16.

Objections for purpose of review, see "Criminal Law," § 39.

Presentation in lower court of questions relating to for review, see "Appeal and Error," § 4.

Presentation in record of objections for purpose of review, see "Criminal Law," § 41.

Presumptions on appeal as to existence of evidence, see "Criminal Law," § 44.

Presumptions on appeal as to rulings, see "Appeal and Error," § 14.

Review of discretion of lower court as to rulings, see "Appeal and Error," § 15; "Criminal Law," § 44.

Review of discretion of trial court in rulings, see "Homicide," § 16.

Rulings relating to evidence as ground for reversal, see "Appeal and Error," § 24.

§ 1. Judicial notice.

*Courts held to judicially know whether the officer by whom writs of attachment were purporting to be issued was the commissioned officer and to judicially know the genuineness of such officer's signature.—*Ryan v. Young* (Ala.) 954.

*The court knows judicially of the repeal of a statute by the Constitution.—*Campbell v. Shelby County* (Ala.) 407, 408.

*Courts will take judicial notice of the division of the Methodist Episcopal Church of the territory, and of the articles of separation with reference to division of the common property.—*Malone v. La Croix* (Ala.) 724.

The Supreme Court on appeal cannot take judicial notice of the decisions of the courts of other states.—*Southern Express Co. v. Owens* (Ala.) 752.

Courts held not bound to take judicial knowledge of de facto state or county officers.—*Williams v. Finch* (Ala.) 834.

The court does not know judicially that a municipal ordinance providing for cesspools in its system of sanitation is oppressive or unreasonable.—*Logan v. Childs* (Fla.) 197.

*Courts will not take judicial notice of foreign statutes not offered in evidence under which a company is organized.—*Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co.* (La.) 492.

*The district court is without authority to take judicial notice of proceedings in a case in another jurisdiction.—*Cumberland Telephone & Telegraph Co. v. St. Louis, I. M. & S. Ry. Co.* (La.) 492.

*The court takes judicial notice of the public laws of the state.—*Doss v. Board of Com'rs of Mermentau Levee Dist.* (La.) 720.

§ 2. Presumptions.

*When a defendant can by his own testimony throw light on matters at issue necessary to his defense and peculiarly within his knowledge, and fails to testify, the presumption is that the facts do not exist.—*State v. Jahraus* (La.) 575.

§ 3. Burden of proof.

An intervener who fails to support his claim by proof will be dismissed.—*Campbell v. J. I. Campbell Co.* (La.) 696.

§ 4. Relevancy, materiality, and competency in general.

*Evidence concerning the uncommunicated motive or purpose of a witness with reference to certain acts to which he had testified held inadmissible.—*Reeder v. Huffman* (Ala.) 177.

In an action for a constable's failure and refusal to seize certain personal property, it was not permissible to inquire of the witness whether he would have told the constable he had the property, if the constable had inquired.—*Reeder v. Huffman* (Ala.) 177.

*A defendant claiming title by adverse possession cannot when sued in ejectment by a party showing a complete chain of title testify why he did not pay taxes on the premises.—*Lawrence v. Doe ex dem. Alabama State Land Co.* (Ala.) 612.

*A witness to an accident held not entitled to testify as to the condition of the track 18

*Point annotated. See syllabus.

months thereafter, in the absence of proof that the conditions were the same.—*Redus v. Milner Coal & R. Co. (Ala.)* 634.

On an issue as to whether certain wood belonged to plaintiff or to a certain corporation, evidence tending to show the nature of transactions between plaintiff and the corporation *held* erroneously excluded.—*Smiley v. Hooper (Ala.)* 660.

*In forcible entry and detainer, evidence as to what witness said at the time he came on the property after the entry *held* inadmissible.—*Fowler v. Prichard (Ala.)* 667.

In detinue for a mule claimed by plaintiff under a mortgage, the execution of a certain other mortgage by plaintiff on all his property, and not including the mule in controversy, *held* inadmissible.—*Holman v. Clark (Ala.)* 765.

*In detinue for a mule claimed under a mortgage on a sale by plaintiff, *held* proper to permit plaintiff to give certain testimony explanatory of the mortgagor's possession of the mule prior to the execution of the mortgage.—*Holman v. Clark (Ala.)* 765.

*In an action for trespass in the removal of plaintiff's furniture, evidence that plaintiff at the time was crying *held* admissible as *res gestæ* as bearing on the question of plaintiff's alleged consent.—*Terry v. Williams (Ala.)* 804.

*In an action for delay in delivering a telegram, evidence that when the telegram was received witness was present and saw plaintiff crying *held* admissible on the issue of mental suffering.—*Western Union Telegraph Co. v. Manker (Ala.)* 850.

*In an action for damages from overflow of a railroad drain, evidence concerning other overflows before suit brought and after defendant began to maintain the drain *held* admissible.—*Central of Georgia Ry. Co. v. Keyton (Ala.)* 918.

*A question to a witness *held* objectionable as seeking his uncommunicated motive.—*Western Union Telegraph Co. v. Long (Ala.)* 965.

In an action for ejectment of a passenger, evidence that other passengers called on the conductor to eject plaintiff, and their opinions, etc., *held* inadmissible as *res gestæ*.—*Nashville, C. & St. L. Ry. v. Moore (Ala.)* 984.

The price paid for neighboring property by a railway company for its right of way *held* admissible to show value.—*Louisiana Ry. & Navigation Co. v. Morere (La.)* 236.

*The exclusion of exhibits attached to a deposition *held* proper.—*Marx v. Ely (Ala.)* 411.

*Where, in forcible entry and detainer, the commencement of a prior suit was a mere collateral matter, it was not necessary that it should be established by the record as the best evidence.—*Fowler v. Prichard (Ala.)* 667.

*A question asked a witness as to whether he had a certain map in his possession was competent to establish the predicate for the introduction of secondary evidence.—*Theodore Land Co. v. Lyon (Ala.)* 682.

*Where it is shown that a writing is out of the state, parol evidence it admissible to prove its contents.—*Hoyle v. Mann (Ala.)* 835.

*Certain proof *held* a sufficient predicate for the admission of secondary evidence.—*Saunders v. Tusculumbia Roofing & Plumbing Co. (Ala.)* 982.

*The sufficiency of the predicate for the admissibility of secondary evidence determined.—*Saunders v. Tusculumbia Roofing & Plumbing Co. (Ala.)* 982.

*The existence and loss of a procès verbal of a probate sale having been proven, parol evidence is admissible to show the contents of lost instrument.—*Moullierre v. Coco (La.)* 113.

§ 5. Best and secondary evidence.

Parol evidence is inadmissible to show that a corporation has gone into liquidation, or that a foreign corporation has been licensed to do business in the state, or that one corporation has been merged into another.—*Pattison v. Gulf Bag Co. (La.)* 224.

Parol evidence is admissible to show an agreement of sale of neighboring property to show value, but not to affect title to real estate.—*Louisiana Ry. & Navigation Co. v. Morere (La.)* 236.

§ 6. Admissions.

Where a witness admitted signing an answer admitting the averments of a bill, the bill was admissible to prove the admissions.—*New v. Young (Ala.)* 523.

*In an action for injuries to a servant, *held* proper to admit in evidence a written statement, the truth of which plaintiff had admitted, though he declined to sign it.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*Verbal admissions are the weakest kind of evidence, especially when the exact language cannot be given, and when the purpose is to eke out a written contract or to put a particular interpretation upon such contract.—*Des Allemands Lumber Co. v. Morgan City Timber Co. (La.)* 332.

§ 7. Declarations.

Where witness filed an answer admitting the allegations of a prior bill to set aside certain deeds, which answer was offered in a subsequent ejectment suit, she was not entitled to testify that she thereafter filed an amended answer denying the allegations of the bill.—*New v. Young (Ala.)* 523.

*The rule permitting the introduction in evidence of declarations of ownership by a party in adverse possession for the purpose of establishing adverse possession does not include acts of parties who have never been in possession.—*Lawrence v. Doe ex dem. Alabama State Land Co. (Ala.)* 612.

*In forcible entry and detainer, evidence of a conversation between witness and a third person with reference to the property was inadmissible.—*Fowler v. Prichard (Ala.)* 667.

*On an issue as to the ownership of a mule at the time that a mortgage was executed thereon, *held*, that a witness should have been permitted to testify that the mortgagor claimed the mule as his own when the mortgage was executed.—*Holman v. Clark (Ala.)* 765.

*A chain of title in ejectment cannot be proved by hearsay testimony as to what a person did or did not claim.—*Hoyle v. Mann (Ala.)* 835.

*Declarations in absence of party *held* not admissible against him.—*Baker v. Drake (Ala.)* 845.

*Declarations of party in possession asserting title, as to history and source of title, *held* not admissible.—*Baker v. Drake (Ala.)* 845.

§ 8. Hearsay.

*In an action against a sheriff for selling under execution against another wood belonging to plaintiff, declarations of the superintendent of a corporation *held* incompetent to prove that the one who bought the wood acted as the corporation's and not plaintiff's agent.—*Smiley v. Hooper (Ala.)* 660.

*Point annotated. See syllabus.

§ 9. Documentary evidence.

Certain testimony *held* sufficient proof of the authenticity of writs of attachment to warrant their admission in evidence.—*Ryan v. Young* (Ala.) 964.

§ 10. Parol or extrinsic evidence affecting writings.

*A contract of sale of coal *held* not subject to modification or explanation by parol evidence as to place of measurement.—*Shelby Iron Co. v. Dupree* (Ala.) 182.

Parol evidence *held* not admissible to vary a contract of sale.—*Brennard Mfg. Co. v. Citronelle Mercantile Co.* (Ala.) 671.

*Where there are two contracts it is competent to show by parol that they relate to one and the same transaction.—*Rock Island Sash & Door Works v. Moore & Handley Hardware Co.* (Ala.) 806.

*In the absence of fraud or mistake parol evidence is inadmissible to contradict the plain terms of a receipt.—*Murphy v. Black & Laird* (Ala.) 877.

*Where a note and mortgage were signed by a husband and wife, parol evidence is admissible to establish that she signed as surety only.—*Gibson v. Wallace* (Ala.) 960.

*Parol evidence is inadmissible against the affirmative showing of the journals of the Legislature to show irregularities in the passage of an act.—*Wade v. Atlantic Lumber Co.* (Fla.) 72.

The fraud in which a person buys real estate in his own name, instead of in that of his principal, is not provable by parol.—*Barrow v. Grant's Estate* (La.) 220.

Where a mortgage is sought to be annulled on the ground that the mortgagor was not the owner, the issue involves title, and parol evidence is inadmissible.—*Barrow v. Grant's Estate* (La.) 220.

A regular receiver's receipt and certificate on which a patent issued in due course cannot be contradicted by unauthorized entries on the register of sales book or the tract book kept by the local officials of the United States Land Office.—*Foster v. Meyers* (La.) 551.

§ 11. Opinion evidence.

In action for death of person attempting to board street car, testimony that decedent was not thrown from the car by jerking in its movement *held* not objectionable as conclusion.—*Smith v. Birmingham Ry. Light & Power Co.* (Ala.) 307.

*In action for injuries to employé at saw-mill, permitting witness to be asked whether the person running the saw had control over the assistant *held* not error in view of other evidence introduced.—*Forbes & Carlous v. Davidson* (Ala.) 312.

*Question to witness whether, if plaintiff had used ordinary care in oiling machinery, he could have been injured, *held* properly excluded.—*Forbes & Carlous v. Davidson* (Ala.) 312.

*In an action for injuries to a servant, a question to a witness as to how, in his opinion, the plaintiff got hurt in oiling the machinery, was properly excluded.—*Forbes & Carlous v. Davidson* (Ala.) 312.

In an action by a mortgagee of certain cotton for conversion, a statement of a warehouseman that it was his best judgment that the cotton evidenced by certain receipts issued to the mortgagor was taken out by defendants *held* admissible.—*D. P. Haynes & Bro. v. W. C. Gray & Co.* (Ala.) 615.

A question as to whether rails are used on mine switches as heavy as those used on the

main line of a railroad was not objectionable as calling for an opinion of the witness.—*Redus v. Milner Coal & R. Co.* (Ala.) 634.

*A witness may testify that the authority of a traveling salesman of a corporation was limited to his taking orders subject to approval by the corporation.—*Gould v. Cates Chair Co.* (Ala.) 675.

*In an action to recover transportation furnished by plaintiff to defendants, testimony of defendants as to whether or not they owed plaintiff for the transportation was not a conclusion, but a collective fact and competent.—*Owen v. McDermott* (Ala.) 730.

*Certain testimony of a witness *held* properly admitted as the statement of a fact, and not a conclusion.—*Holman v. Clark* (Ala.) 765.

*In ejectment, it was proper to exclude evidence of a witness that he was in possession of the title.—*McCreary v. Jackson Lumber Co.* (Ala.) 822.

*In an action for injuries to a brakeman while between cars endeavoring to couple them, it was proper to permit plaintiff's superintendent to testify that the cars could have been coupled without plaintiff going between them.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

*In an action for injuries to a brakeman *held* proper to permit a railroad man to give an opinion as to coupling cars.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

*A question asking plaintiff to state if his property was damaged by the overflow of a drain in question *held* objectionable as calling for a conclusion.—*Central of Georgia Ry. Co. v. Keyton* (Ala.) 918.

*In an action for damages caused by the overflow of a railroad drain questions as to whether the overflow necessitated any repairs or affected the property as "tenant property," *held* inadmissible as calling for a conclusion.—*Central of Georgia Ry. Co. v. Keyton* (Ala.) 918.

*In an action for damages caused by the overflow of a drain, evidence that the overflow damaged plaintiff's property "a very great deal," *held* objectionable as an opinion and as invading the province of the jury.—*Central of Georgia Ry. Co. v. Keyton* (Ala.) 918.

*In an action for the overflow of a drain a question asked plaintiff to state the effect of the overflow on his houses and lots *held* not objectionable as calling for the conclusion or opinion of the witness.—*Central of Georgia Ry. Co. v. Keyton* (Ala.) 918.

*That a witness can testify as an expert as to value, it is sufficient that he has some knowledge of the value of the property in question.—*Louisiana Ry. & Navigation Co. v. Morere* (La.) 236.

*In an expropriation proceeding, a witness not disqualified to testify as to the value of the property because of his statement that he would consider among other things the amount paid to him by plaintiff in compromise of a proceeding for the expropriation of property owned by him and his wife.—*Louisiana Ry. & Navigation Co. v. Sarpy* (La.) 477.

*A witness *held* not qualified to testify as to value in expropriation proceedings.—*Louisiana Ry. & Navigation Co. v. Sarpy* (La.) 477.

§ 12. Evidence at former trial or in other proceeding.

*Documents found in the record of another suit against a corporation in liquidation, offered in evidence on trial of oppositions to a receiver's account, cannot be received as evidence against the creditors of the insolvent.—*Ziegler v. Interior Decorating Co.* (La.) 59.

*Point annotated. See syllabus.

§ 13. Weight and sufficiency.

*In a civil case, an instruction requiring proof of issuable facts with "reasonable certainty" held properly refused.—*Eagle Iron Co. v. Baugh* (Ala.) 663.

EXAMINATION.

Of person accused of crime, see "Criminal Law," § 6.

Of witnesses in general, see "Witnesses," § 3.

EXCEPTIONS.

In judicial proceedings.

Criminal prosecutions, see "Criminal Law," § 39.

In expropriation proceedings, see "Eminent Domain," § 3.

Necessity for purpose of review, see "Appeal and Error," § 4.

Taking exceptions at trial, see "Trial," § 3; "Criminal Law," § 33.

To instructions in criminal prosecution, see "Criminal Law," § 25.

To pleading, see "Pleading," § 4.

EXCEPTIONS, BILL OF.

In criminal prosecutions, see "Criminal Law," § 41.

Necessity for purpose of review, see "Appeal and Error," § 9.

§ 1. Nature, form, and contents in general.

A recital in a bill of exceptions held to show that the bill was tendered and signed in term time.—*Maddox v. Maddox* (Ala.) 426.

*A bill of exceptions held not subject to a motion to strike for failure to comply with Circuit Court Rule 33, subd. 5 (Code 1896, p. 1201), requiring consideration of testimony.—*Boyett v. Standard Chemical & Oil Co.* (Ala.) 756.

The rules contemplate that in making up bills of exceptions based upon the admission or rejection of evidence, where the evidence forming the subject of the exception does not show its pertinency upon its face, and there is other evidence either admitted, or proffered, that will show its pertinence, such other connecting evidence should be set forth in the bill of exceptions.—*Hoodless v. Jernigan* (Fla.) 194.

§ 2. Settlement, signing, and filing.

*Where the time fixed for the settlement of a bill of exceptions has expired without the entry of an order extending the time, the court cannot by order grant further time.—*Mitchell v. State* (Ala.) 518.

*A bill of exceptions signed after the time allowed will not be considered on appeal.—*Penton v. Williams* (Ala.) 783.

Court Rule 30 (Code 1896, p. 1200) limiting extensions for the signing of bills of exceptions by agreement to a time prior to the next succeeding term of court, does not apply to extensions granted by the presiding judge.—*Harton v. Town of Avondale* (Ala.) 934.

Under Code 1896, § 617, the judge of the Birmingham city court held without authority to extend the time for the signing of a bill of exceptions during the sitting of the court.—*Harton v. Town of Avondale* (Ala.) 934.

Under Code 1896, §§ 617, 619, 620 (Acts 1888-89, p. 995), where a judgment of the Birmingham city court was rendered January 31, 1905, and successive orders extending the time for signing the bill of exceptions to December 1st had been granted, a bill was properly signed

on November 13, 1905.—*Harton v. Town of Avondale* (Ala.) 934.

*An order extending the time for the signing of a bill of exceptions held of no effect.—*Riddle v. Regan* (Ala.) 953.

Where, after a bill of exceptions was signed, the act creating the circuit was declared unconstitutional, the establishment of the bill by the Supreme Court must have been had within 30 days under Gen. Laws 1903, pp. 396, 398, being inapplicable thereto.—*Nashville, C. & S. L. Ry. v. Reynolds* (Ala.) 1001.

Under Pamph. Acts 1886-87, p. 126, Rule 30 (Code 1886, p. 810) and Act February 23, 1889 (Acts 1888-89, p. 992) establishing the Birmingham City Court, section 19 (page 1000), a judge of that court held to have authority in term time to extend the time for the signing of a bill of exceptions.—*Moss v. Mosley* (Ala.) 1012.

EXCESSIVE DAMAGES.

See "Damages," § 4.

Allowance as interest of slightly excessive damages awarded in verdict, see "Trial," § 13.

For failure to deliver telegram, see "Telegraphs and Telephones," § 1.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

See "Homicide," §§ 8, 9, 13.

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Conclusiveness of former adjudication in action for wrongful seizure, see "Judgment," § 5.

Enforcement of mortgage against purchaser under execution, see "Mortgages," § 1.

Exemptions, see "Exemptions"; "Homestead." In action by or against municipality, see "Municipal Corporations," § 7.

Return of execution as condition precedent to suit to subject stock subscription to payment of corporate debt, see "Corporations," § 4.

Sale of property wrongfully levied on as conversion, see "Trove and Conversion," § 1.

Sufficiency of instructions in action for wrongful sale under execution, see "Trial," § 8.

§ 1. Stay, quashing, vacating, and relief against execution.

*A circuit judge under Rev. St. 1892, § 1196, has full power, either in term time or vacation, to stay an execution issued from the circuit court and resort to equity held unnecessary.—*Barnett v. Hickson* (Fla.) 606.

§ 2. Claims by third persons.

Evidence that, when one gave credit for which he afterwards obtained judgment under which he levied execution, he did not know claimant was asserting title to the horse on which execution was levied, held immaterial.—*Baker v. Drake* (Ala.) 845.

An affidavit in a claim proceeding involving \$500, filed in the circuit court, is a proceeding in that court, though made before a justice of the peace.—*Dunaway v. First* (Fla.) 451.

The seizing creditor under an executory process can cause the seizure to be released and the writ returned, and where he does so, a third oppositions claiming the proceeds of the

*Point annotated. See syllabus.

expected sale fall with the writ.—Sevey v. Chappuis Co. (La.) 62.

Where the claim of the wife to property seized is based upon a transfer to her under a dation en paiement, the seizing creditor has the right to contest such claim on the ground of the nonexistence of the debt and on the ground that the value of the property given in payment did not bear a just proportion to the amount of the wife's claim.—Pelletier v. State Nat. Bank (La.) 640.

Where wife files a third opposition, seizing creditor *held* to have a legal interest in defending the legality of his own proceedings and resisting the claims of the wife by means of any legal defense.—Pelletier v. State Nat. Bank (La.) 640.

§ 3. Sale.

Purchaser at attachment sale *held* not entitled, on being substituted for defendant as sole movant therefor, to have the sale set aside.—Nearen v. Farrow (Ala.) 421.

A bill to set aside an execution sale of land for inadequacy of price *held* demurrable.—Harris v. Stephenson (Ala.) 1008.

In a petitory action, in support of a title derived from a sale under execution, the title *held* established.—Fontelieu v. Fontelieu (La.) 120.

To establish a title from a sale by the sheriff, one must show a valid judgment, a writ issued in conformity thereto, and a sale pursuant to the writ; but, where the original records are lost or destroyed, the existence of those elements may be proved by secondary evidence.—Fontelieu v. Fontelieu (La.) 120.

§ 4. Wrongful execution.

*Persons authorizing an officer to make a wrongful execution, but having nothing to do with the levy or seizure, are not liable as trespassers.—Stallings v. Gilbreath (Ala.) 423.

In an action against a sheriff for selling under execution wood levied on under execution against another, proof that plaintiff has bought the wood as agent for another party *held* sufficient to defeat recovery.—Smiley v. Hooper (Ala.) 660.

Certain evidence *held* relevant to an issue as to whether wood levied on under execution against another was in fact the property of plaintiff.—Smiley v. Hooper (Ala.) 660.

In an action against a sheriff for selling under execution against another wood belonging to plaintiff, an instruction that the jury must be reasonably satisfied as to plaintiff having the legal title *held* proper.—Smiley v. Hooper (Ala.) 660.

When the claims of the wife to the ownership of the property fell, the demand for damages for its seizure by a creditor of the husband fell also.—Pelletier v. State Nat. Bank (La.) 640.

EXECUTORS AND ADMINISTRATORS.

See "Wills."

Authority of attorney for, see "Attorney and Client," § 1.

Best and secondary evidence of process verbal of probate sale, see "Evidence," § 5.

Competency of executor as witness to will, see "Wills," § 2.

Courts of probate, see "Courts," § 4.

Jurisdiction of equity in administration of estates of decedents, see "Equity," § 1.

Parties on appeal in action by or against, see "Appeal and Error," § 5.

Right of heirs to have judgment against administrator set aside, see "Judgment," § 3.

Right to maintain action for causing death, see

"Death," § 1.

Testimony as to transactions with decedents, see "Witnesses," § 2.

Transfer of administration from probate to chancery court, see "Courts," § 6.

§ 1. Appointment, qualification, and tenure.

*An administrator may be appointed on the estate of a deceased minor.—Bowden v. Jacksonville Electric Co. (Fla.) 400.

After the final account of succession has been filed and homologated, and everything may be properly settled among the heirs in partition, and there is no peremptory ground for removal presented, the executor will not be removed.—Succession of Gerard (La.) 206.

§ 2. Allowance and payment of claims.

*The rule as to the presumption against payment for services rendered between members of a family stated.—Patteson v. Carter (Ala.) 133.

Code 1896, § 183, providing for presentation of claims against decedents' estates, *held* not to exclude demands on which suits are pending.—Moss v. Mosley (Ala.) 1012.

Where defendant dies pendente lite and the suit is revived against his personal representative, plaintiff is not bound to present his claim to the administrator nor file the same in the probate court.—Moss v. Mosley (Ala.) 1012.

To establish a claim against a decedent's estate for money said to have been confided to him and not accounted for, specific allegations and clear proof are necessary.—Barrow v. Grant's Estate (La.) 220.

§ 3. Distribution of estate.

A judgment recognizing heirs and decreeing that they are entitled to receive the estate from the executrix does not close the succession or authorize the heirs to partition the property.—Succession of Landry (La.) 490.

Where the only assets of the estate of a deceased wife were the proceeds of the sale of certain timber, the assignee of the husband entitled to a share thereof could maintain a bill for the distribution of the funds in the hands of the administrator.—McIntosh Bros. v. Rutland (Miss.) 372.

§ 4. Actions.

*In an action against an administrator for services rendered decedent by a member of her family, certain evidence *held* not to show liability.—Patteson v. Carter (Ala.) 133.

A replication to a plea in an action against an executrix for a claim against the estate of the decedent *held* designed to justify the further maintenance of the suit and is permissible.—Odom v. Moore (Ala.) 162.

*Under Code 1896, §§ 3185, 3187, an executor *held* authorized to file a bill in his own name to sell lands for partition in the chancery court.—Schuessler v. Goodhue (Ala.) 958.

An allegation in a declaration that "W. G. B. was duly appointed administrator of the estate of said R. B. deceased," is equivalent to an allegation that such administrator was appointed according to law.—Bowden v. Jacksonville Electric Co. (Fla.) 400.

Under Const. art. 5, § 17, giving a county judge general power to grant letters of administration, an allegation in a declaration that a named person was duly appointed administrator of the estate of a named deceased minor is a sufficient allegation of the granting of such letters.—Bowden v. Jacksonville Electric Co. (Fla.) 400.

*Point annotated. See syllabus.

§ 5. Accounting and settlement.

A personal representative administering a solvent estate *held* not entitled to defeat a suit against him by subsequently settling the estate and obtaining a discharge.—*Odom v. Moore* (Ala.) 162.

Pleas in an action against an executrix *held* not in bar of the suit, but in bar of its further maintenance.—*Odom v. Moore* (Ala.) 162.

*Where an administrator being an attorney finds it necessary to institute a suit in behalf of the estate and associates another attorney with him, and he and the other attorney jointly render professional services to the estate, an administrator *held* entitled to a credit on the settlement of the administration in the probate court for reasonable value of certain attorneys' services.—*John v. Sharpe* (Ala.) 635; *John v. Pickett* (Ala.) 638.

In order for an administrator who was also an attorney to obtain an allowance for professional services of himself and another attorney *held* not necessary for him to have actually paid himself and his associate or for him to produce a receipt evidencing payment.—*John v. Sharpe* (Ala.) 635; *John v. Pickett* (Ala.) 638.

Where a widow as natural tutrix administered the succession of her husband and obtained a judgment homologating a provisional account filed by her as natural tutrix administering the succession, the account is that of an administrator and not of a tutrix.—*Succession of Guillebert* (La.) 653; *In re Grenier*, Id.

EXEMPLARY DAMAGES.

For malicious prosecution, see "Malicious Prosecution," § 1.

For trespass, see "Trespass," § 2.

EXEMPTIONS.

See "Homestead."

Conclusiveness of adjudication as to, see "Judgment," § 5.

Fraudulent conveyances of exempt property, see "Fraudulent Conveyances," § 1.

§ 1. Nature and extent.

*Const. art. 244, exempting from seizure on execution two work horses, exempts mules.—*McElveen v. Goings* (La.) 229.

Property belonging to wife consisting of a small house and lot and a small stock of goods and movables, the whole amounting in value to less than \$2,000, *held* exempt under Const. 1898, art. 244; the house being occupied by the husband, the wife, and seven children, and the goods therein employed by the wife in carrying on a small trade through which the whole family is supported.—*Ginsberg v. Groner* (La.) 569.

*While the husband so long as the marriage continues is in one sense the head of the family, under Const. 1898, art. 244, the duty of supporting the family may, under Civ. Code, art. 2435, rest on the wife, entitling her to exemption, and that fact is not affected because the husband may give his time and attention to the conducting of the wife's business.—*Ginsberg v. Groner* (La.) 569.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 11.

In criminal prosecutions, see "Criminal Law," § 14.

EXPROPRIATION.

See "Eminent Domain."

EXTENSION.

Of time for payment of mortgage, see "Mortgages," § 4.

Of time for settlement or signing bill of exceptions, see "Exceptions, Bill of," § 2.

EXTRADITION.

Habeas corpus for release from custody by virtue of, see "Habeas Corpus," § 2.

FACTORS.

See "Brokers"; "Principal and Agent."

Breach of contract with factor, see "Contracts," § 4.

FALSE IMPRISONMENT.

See "Malicious Prosecution."

Injury to health of mother caused by malicious arrest of child, see "Parent and Child."

§ 1. Civil liability.

Statement as to liability of officer for false imprisonment.—*Vice v. Holley* (Miss.) 7.

FEES.

Of attorney, see "Attorney and Client," § 3.

FELLOW SERVANTS.

See "Master and Servant," §§ 6, 9.

FENCES.

Railroad cattle guards, see "Railroads," § 2.

FILING.

Declaration of intention to claim land adversely, see "Adverse Possession," § 1.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 10.

FIRES.

Liability of water company for failure to furnish sufficient water to extinguish, see "Waters and Water Courses," § 2.

Loss by fire, of goods in hands of carrier, see "Carriers," § 4.

FISH.

Effect of decision on appeal on power of lower court to reform deed relating to fishing rights, see "Appeal and Error," § 24.

Where a stream is navigable, a club, the owner of land abutting thereon, will be enjoined from preventing persons not members of the club from fishing in its waters.—*Burns v. Crescent Gun & Rod Club* (La.) 249.

FIXTURES.

*An iron safe of great weight owned by the commissioners' court of a county *held* not so attached to the realty as to become a fixture.—*Parker v. Blount County* (Ala.) 923.

*Point annotated. See syllabus.

*The owner of a safe located in a building and the purchaser of the realty may agree that the safe shall be considered a chattel subject to be removed from the building regardless of the manner in which it is affixed thereto.—*Parker v. Blount County (Ala.)* 923.

FOLLOWING TRUST PROPERTY.

See "Trusts," § 4.

FOOD.

Licenses to dealers in, see "Licenses," § 1.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

Best and secondary evidence, see "Evidence," § 5.

Declarations as evidence, see "Evidence," § 7.
Harmless error, see "Appeal and Error," § 19.
Removal of cause from justice's court to court of record, see "Justices of the Peace," § 3.
Res gestæ, see "Evidence," § 4.

§ 1. Civil Liability.

A judgment creditor of a mortgagor having complied with Code 1896, §§ 3507, 3510, relating to redemption of land sold under mortgage foreclosure, *held* authorized to maintain writ of unlawful detainer against the purchaser under section 3513.—*Ford v. Lewis (Ala.)* 144.

In forcible entry and detainer, request to charge that, if defendants' possession was a scrambling possession when obtained, the jury should find a verdict for plaintiff, *held* properly refused.—*Fowler v. Prichard (Ala.)* 667.

In forcible entry and detainer, an instruction *held* properly refused for failure to hypothesize knowledge of fraud in the making of a deed and facts necessary to constitute adverse possession.—*Fowler v. Prichard (Ala.)* 667.

*In forcible entry and detainer under Code 1896, § 2149, the only issue is as to the manner of defendant's entry, and not as to how he held possession after he entered.—*Fowler v. Prichard (Ala.)* 667.

In an action of forcible entry and detainer, the fact that a previous suit had been brought for the same property *held* irrelevant.—*Fowler v. Prichard (Ala.)* 667.

*The mere opening of a gate on entering premises is not such force as in law will constitute a forcible entry.—*Fowler v. Prichard (Ala.)* 667.

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 4.
Of mortgage, see "Mortgages," §§ 5, 6.

FOREIGN CORPORATIONS.

See "Corporations," § 8.

FORFEITURES.

For causing death, see "Death," § 1.
Jurisdiction of equity to enforce, see "Equity," § 1.
Of insurance, see "Insurance," § 6.

*Point annotated. See syllabus.

FORGERY.

Evidence of other offenses, see "Criminal Law," § 9.

Opinion evidence, see "Criminal Law," § 14.

Evidence examined, and *held* sufficient to support a conviction of forgery.—*Pittman v. State (Fla.)* 385.

FORMER ADJUDICATION.

See "Judgment," §§ 4, 5.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 5.

FORMS OF ACTION.

See "Action," § 2; "Assumpsit, Action of"; "Detinue"; "Ejectment"; "Trespass," § 2; "Trove and Conversion."

FORNICATION.

See "Incest"; "Seduction," § 1.

FORTHCOMING BONDS.

See "Attachment," § 3.

FRAUD.

See "Fraudulent Conveyances."

Curing erroneous instructions on issue of, see "Trial," § 12.

Effect on limitations in equity, see "Equity," § 2.

By particular classes of persons, or persons in particular relations.

See "Notaries."

In particular classes of conveyances, contracts, transactions, or proceedings.

See "Judgment," § 3; "Sales," §§ 3, 4, 6.

Lease, see "Landlord and Tenant," § 1.

Particular remedies.

See "Cancellation of Instruments," §§ 1, 2; "Reformation of Instruments," § 2.

Parol or extrinsic evidence to establish see "Evidence," § 10.

Quashing venire, see "Jury," § 4.

§ 1. Actions.

In an action for fraud practiced by a vendee on the vendor, whereby land was conveyed for an inadequate consideration, the evidence *held* sufficient to sustain a finding that defendant's representations were false and fraudulent.—*Jones v. Coan (Ala.)* 757.

*In an action for fraud, *held*, that the affirmative charge for defendant was not warranted. Code 1896, § 2813.—*Jones v. Coan (Ala.)* 757.

*Fraud *held* insufficiently pleaded by a general averment.—*Baker v. Hutchinson (Ala.)* 809.

FRAUDS, STATUTE OF.

§ 1. *Requisites and sufficiency of writing.*

A contract of guaranty *held* sufficient within the statute of frauds. Code 1896, § 2152.—*Marx v. Ely (Ala.)* 411.

§ 2. Pleading, evidence, trial, and review.

*A plea in an action on a note, setting up the statute of frauds, *held* sufficient as against the ground of demurrer assigned.—*Noble v. Anniston Nat. Bank* (Ala.) 138.

FRAUDULENT CONVEYANCES.

Estoppel to sue to set aside, see "Estoppel," § 2. Retention of possession of mortgaged goods by mortgagor, see "Chattel Mortgages," § 4.

§ 1. Transfers and transactions invalid.

*A deed to the grantor's children for the recited consideration of \$1 *held* on its face voluntary and void against the grantor's existing creditors.—*Folmar v. Lehman-Dur Co.* (Ala.) 750.

*For one who has sold a horse to rescind the contract of sale and take the horse back in settlement of the purchase-money note *held* not a fraud on another creditor of such debtor.—*Baker v. Drake* (Ala.) 845.

*Subsequent creditors *held* bound to establish an actual fraudulent intent, participated in by both mortgagor and mortgagee, in order to set aside a mortgage.—*Rike v. Ryan* (Ala.) 959.

*Transfer of property by a debtor the value of which is less than the amount limited by the exemption laws *held* not subject to attack by his creditors.—*Rike v. Ryan* (Ala.) 959.

*A debtor may prefer his creditors, if the debt be bona fide, the payment absolute and the property conveyed is not materially in excess of the debt.—*Rike v. Ryan* (Ala.) 959.

*A mortgage executed to secure previous loans when the mortgagee had no reason to believe the mortgagor was embarrassed *held* not fraudulent.—*Rike v. Ryan* (Ala.) 959.

That a mortgage is made on \$18,000 worth of property to secure a debt of \$4,400 does not establish a fraudulent intent in the execution of the mortgage.—*Mercantile Exch. Bank v. Taylor* (Fla.) 22.

Chattel mortgage of a married woman *held* not void as hindering, delaying, or defrauding other creditors.—*Mercantile Exch. Bank v. Taylor* (Fla.) 22.

*A deed from a husband to his wife is not voluntary when the wife has relinquished her right of dower in other lands and agreed to relinquish her right of dower in still other lands.—*Pettit v. Coachman* (Fla.) 401.

Where a husband has conveyed land to his wife by deed for a valuable consideration, the land is not subject to sale on an execution against the husband in an action brought after the deed was recorded.—*Pettit v. Coachman* (Fla.) 401.

*A deed from a husband to a wife, where the conveyance is not voluntary, conveys the title, and mere failure to record the deed *held* not to render it void as to a simple creditor of the husband.—*Pettit v. Coachman* (Fla.) 401.

*Mortgage and note *held* void as to creditors, and it is immaterial whether the mortgagor was at the time of its execution solvent or insolvent.—*Ullman v. Lockhart* (Fla.) 452.

*To defeat the right of a husband to make a transfer to his wife through a dation en paiement it is not necessary that it should be shown that the husband was insolvent; the fact that though he was solvent the wife and husband colluded together to defraud creditors of the husband being sufficient to avoid it.—*Pelletier v. State Nat. Bank* (La.) 640.

*Point annotated. See syllabus.

§ 2. Remedies of creditors and purchasers.

*Where certain conveyances were made with intent to defeat the collection of defendant's claim, he was entitled to have the same set aside, though the grantee might not have had knowledge of the existence of a mortgage on the land securing such debt.—*New v. Young* (Ala.) 523.

Sales annulled at the instance of a creditor as fraudulent.—*Dallas Brewery v. Holmer* (La.) 48.

GAME.

See "Fish."

GAMING.

Examination of witnesses, see "Witnesses," § 3. Harmless error in prosecution for, see "Criminal Law," § 44.

Reception of evidence in prosecution for, see "Criminal Law," § 21.

§ 1. Criminal responsibility.

Where a building in which certain games were played in alleged violation of Code 1896, § 4792 was not per se a public place evidence of other games played there *held* proper to establish that the building was a public place.—*Winston v. State* (Ala.) 174.

A building used as a private residence or lodging house, when certain games were played therein, *held* not per se a "public place," within Code 1896, § 4792.—*Winston v. State* (Ala.) 174.

*Place in private yard shut off from view from highway *held* not a public place within gaming laws.—*Walker v. State* (Ala.) 176.

That place where game was played was in yard of boarding house *held* not to make it a public one.—*Walker v. State* (Ala.) 176.

*Playing cards within 15 steps of a public road *held* played in a public place within the statute.—*Davis v. State* (Ala.) 404.

On a prosecution for betting at a game played with cards at a public place the burden is on the state to prove beyond a reasonable doubt that the place was a public one.—*Bradford v. State* (Ala.) 1024.

On a prosecution for betting at a game played with cards at a public place evidence *held* insufficient to show the place a public one.—*Bradford v. State* (Ala.) 1024.

*An indictment charging defendant with keeping a gambling table is not defective because it fails to set forth the nature of the table that he is charged with keeping.—*Irvin v. State* (Fla.) 785.

*Evidence that defendants played a joint game *held* necessary for their conviction under an indictment charging them with having played a game together.—*Reno v. State* (Miss.) 7.

GARNISHMENT.

See "Attachment."

Certiorari to review judgment, see "Certiorari," § 1.

Operation of judgment in as bar to another action, see "Judgment," § 4.

§ 1. Persons and property subject to garnishment.

*Under Code 1896, § 764, a bill *held* maintainable to attach by process of garnishment the interest of cestui que trust in a trust estate in the hands of the trustee, and subject the same to the payment of plaintiff's debt.—*Riordan v. Schlicher* (Ala.) 842.

§ 2. Proceedings to support or enforce.

*A valid judgment nisi in garnishment proceedings *held* necessary to support a valid final judgment.—*Ex parte National Lumber Mfg. Co. (Ala.)* 10.

*A contest to a garnishee's answer *held* not demurrable.—*Brookside Dry Goods Co. v. City Furniture Co. (Ala.)* 659.

GIFTS.

Charitable gifts, see "Charities."

Testimony as to transactions with persons since deceased in suit to establish, see "Witnesses," § 2.

§ 1. Inter vivos.

*In order to constitute a completed gift of personal property it is necessary that the article be delivered.—*Thomas v. Tilley (Ala.)* 854.

*The burden of establishing a valid gift by a person since deceased *held* on the alleged donee.—*Thomas v. Tilley (Ala.)* 854.

In a suit to establish a gift *inter vivos* after the death of an alleged donor, evidence *held* not sufficient to establish the gift.—*Thomas v. Tilley (Ala.)* 854.

*The admissions of a deceased donor, while admissible, are insufficient to establish a completed gift.—*Thomas v. Tilley (Ala.)* 854.

Where an alleged gift is not asserted until after the donor's death, the proof must be as convincing as in a gift *causa mortis*.—*Thomas v. Tilley (Ala.)* 854.

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 3; "Sales," § 4; "Vendor and Purchaser," § 4.

GRAND JURY.

See "Indictment and Information."

The order for a grand jury, organized at an adjourned term, showing by its terms that it was not made under Code 1896, § 5000, conferring the only authority for organizing a second grand jury at the same term, but under section 5001 applicable only to special terms, an indictment found by it is invalid and should be quashed.—*Fray v. State (Ala.)* 172; *Hall v. Same (Ala.)* 173.

Accused *held* not entitled to an inspection of the records, etc., of the grand jury on the claim that immaterial, irrelevant, and illegal evidence was introduced before that body, where it was not claimed that there was not sufficient evidence to justify the indictment.—*Gaines v. State (Ala.)* 865.

*Under Code 1896, § 5023, where the number of grand jurors was reduced below 15, the trial court was authorized to complete the same though the number was increased beyond 15.—*Walker v. State (Ala.)* 878.

Under Act Dec. 7, 1900 (Acts 1900-01, p. 217), amendatory of the act to establish a criminal court of Jefferson County, § 10, the opinion of the court as to the necessity of drawing and summoning a grand jury *held* valid though not expressed in writing.—*Dix v. State (Ala.)* 924.

There is nothing in the law requiring a grand jury investigating a crime to obtain permission to visit the scene of the crime, within its territorial jurisdiction, or from meeting at other places in the parish than the courthouse.—*State v. Johnson (La.)* 117.

*Point annotated. See syllabus.

A grand juror is not incompetent because charged with violation of a municipal sanitary ordinance, which is not a crime within Acts 1898, p. 216, No. 135, § 1.—*State v. Calhoun (La.)* 360.

That a grand juror was charged with a breach of a municipal ordinance does not disqualify him.—*State v. Bush (La.)* 793.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

Confused instructions in action on, see "Trial," § 8.

Of goods sold, see "Sales," § 5.

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Discharge of guarantor.

The acceptance of a portion of a claim as a payment thereon with knowledge of a guarantor thereof *held* not to have discharged him.—*Marx v. Ely (Ala.)* 411.

§ 2. Remedies of creditors.

Where defendant guaranteed the payment of an indebtedness of a decedent, it was not requisite to the creditor's right to recover to show that the estate of the defendant had been adjudged insolvent.—*Marx v. Ely (Ala.)* 411.

In an action on a guaranty, questions as to fraud or misrepresentation could not be raised in the absence of a plea thereof.—*Marx v. Ely (Ala.)* 411.

GUARDIAN AND WARD.

Guardian ad litem for infant, see "Infants," § 3.

Tutor ad hoc for adopted child, see "Adoption."

§ 1. Custody and care of ward's person and estate.

Where a widow constructed a building, a portion of the material for which the husband purchased before his death, the children as usufructuaries of the property were chargeable with the expenses of the improvement.—*Gaspard v. Coco (La.)* 326.

Where a widow furnished support for her children after she had remarried and lost her right to the income to certain property, she was on settlement of the succession entitled to an allowance for the support of the children.—*Gaspard v. Coco (La.)* 326.

§ 2. Accounting and settlement.

In a settlement of a succession, the court properly excluded the personal accounts between the parties after their majority as not connected with the settlement of the succession, nor with the settlement of the tutrix.—*Gaspard v. Coco (La.)* 326.

The usufructuary is entitled to fruits and revenues from day to day.—*Gaspard v. Coco (La.)* 326.

A minor on reaching majority is not entitled to appeal from the homologation of a provisional tableau.—*Succession of Gullebert (La.)* 654; *In re Grenier, Id.*

HABEAS CORPUS.**§ 1. Nature and grounds of remedy.**

*Where a provision of an act on which a charge is made is void, a conviction is also

void, and persons held under such judgment will be discharged on habeas corpus.—*Ex parte Knight* (Fla.) 786.

*Habeas corpus cannot be used to review a conviction if the judgment is merely erroneous; but, where it is assailed as void the validity of the statute defining the offense may be determined.—*Ex parte Knight* (Fla.) 786.

§ 2. Jurisdiction, proceedings, and relief.

On an application for a writ of habeas corpus for the petitioner's discharge from an officer's custody holding him on requisition papers, the court did not err in refusing to discharge the petitioner in view of the evidence.—*Harris v. State* (Ala.) 416.

On habeas corpus to procure bail, the state has the right to open and conclude the argument.—*Wray v. State* (Ala.) 878.

*Statement of extent of relief on habeas corpus proceedings by a convict hired out to labor, where the contract of hiring has been annulled.—*Ossie v. State* (Ala.) 945.

*Changes in conditions between the time a writ of habeas corpus is allowed and the time of the trial are to be considered.—*Ossie v. State* (Ala.) 945.

The certification of the transcript of the record on appeal in a habeas corpus case held sufficient under Code 1896, § 4314.—*State v. Fuller* (Ala.) 990.

Under Code 1896, § 4817, held that a petition for habeas corpus, where petitioner was confined in the penitentiary in Elmore county, was properly addressed to the chancellor of the northeastern chancery division.—*State v. Fuller* (Ala.) 990.

Under Code 1896, § 4819, a writ of habeas corpus held properly returnable before the chancellor of the northeastern chancery division at Anniston.—*State v. Fuller* (Ala.) 990.

A defendant held not entitled to object that a prosecution for felony against him was not properly in the county court of Cleburne county under Acts 1896-97, p. 814, § 31, and that such statute was violative of Const. 1901, § 143.—*State v. Fuller* (Ala.) 990.

The power of the Supreme Court to review by habeas corpus convictions in the municipal court is restricted, and where the findings of that court show a violation of an ordinance and the sentence is within its penalty further findings may be rejected.—*Logan v. Childs* (Fla.) 197.

Under Const. art. 93, the writ of habeas corpus issues from the Supreme Court in any case where the court may have appellate jurisdiction.—*State v. Kiernan* (La.) 55; *In re Kiernan*, Id.

*The Supreme Court being without appellate jurisdiction in a criminal case, an application for habeas corpus will be dismissed.—*State v. Kiernan* (La.) 55; *In re Kiernan*, Id.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," §§ 17-20.

In criminal prosecutions, see "Criminal Law," § 44; "Homicide," § 16.

HEALTH.

Health laws as exercise of police power, see "Constitutional Law," § 2.

Municipal system of sanitation, see "Municipal Corporations," § 4.

§ 1. Boards of health and sanitary officers.

Const. art. 15, § 3, conferring "supervision" of matters of public health upon the state board, subject to legislative control, has no application when it is shown the board declines to interfere with a municipal ordinance.—*Logan v. Childs* (Fla.) 197.

HEARING.

In equity, see "Equity," § 5.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 8.

In criminal prosecutions, see "Criminal Law," § 12.

HIGHWAYS.

See "Bridges"; "Dedication," § 1; "Navigable Waters," § 1.

Accidents at railroad crossings, see "Railroads," § 6.

Gaming near highway, see "Gaming," § 1.

Imposition of servitudes on in exercise of power of eminent domain, see "Eminent Domain," § 2.

Issues in action to enjoin obstruction, see "Pleading," § 7.

Restraining cutting of trees in, see "Injunction," § 1.

§ 1. Establishment, alteration, and discontinuance.

*A highway can only be established in Alabama by proceedings by the board of revenue or county commissioners, by dedication or by prescription.—*Cross v. State* (Ala.) 875.

*A highway by prescription is not created by user of a roadway over public lands authorized by Rev. St. U. S. § 2477 [U. S. Comp. St. 1901, p. 1567].—*Cross v. State* (Ala.) 875.

§ 2. Taxes, assessments, and work on highways.

The payment of street taxes in an incorporated town or city is a substitute for the performance of road duty, and one is not liable to both for the same period.—*Taylor v. State* (Ala.) 776.

In a prosecution for failure to work on roads, certain evidence held competent on the question of whether or not defendant was simply a sojourner.—*Taylor v. State* (Ala.) 776.

One paying his street tax in an incorporated town wherein he resides, and only temporarily absent for the purpose of working out a fine or indebtedness, with the intention of then returning and continuing his residence in said town, is not liable to road duty at the place of his temporary sojourn.—*Taylor v. State* (Ala.) 776.

Under Ann. Code 1892, § 3931, a municipality working its streets exclusively by municipal authority held entitled to one-half the tax levied by the county for road purposes.—*Lincoln County v. City of Brookhaven* (Miss.) 449.

§ 3. Regulation and use for travel.

*A landowner held entitled to injunctive relief against a public nuisance in a highway.—*Sloss-Sheffield Steel & Iron Co. v. Johnson* (Ala.) 907.

HOGS.

Right to keep in city, see "Municipal Corporations," § 4.

*Point annotated. See syllabus.

HOMESTEAD.

Acknowledgment of conveyance of, see "Acknowledgment," § 1.
 Class legislation relating to, see "Constitutional Law," § 5.
 Titles of statutes relating to descent of, see "Statutes," § 3.

§ 1. Nature, acquisition, and extent.

Property belonging to wife consisting of a small house and lot and a small stock of goods and movables, the whole amounting in value to less than \$2,000, *held* exempt, under Const. 1898, art. 244; the house being occupied by the husband, the wife, and seven children, and the goods therein employed by the wife in carrying on a small trade through which the whole family is supported.—*Ginsberg v. Groner* (La.) 569.

While the husband so long as the marriage continues is in one sense the head of the family, under Const. 1898, art. 244, the duty of supporting the family may, under Civ. Code, art. 2435, rest on the wife, entitling her to exemption, and that fact is not affected because the husband may give his time and attention to the conducting of the wife's business.—*Ginsberg v. Groner* (La.) 569.

*A homestead in a town or village *held* measured by its value.—*Stevens v. Wilbourn* (Miss.) 66.

§ 2. Rights of surviving husband, wife, children, or heirs.

*Laws 1899, p. 119, c. 4730, providing that on death of a head of a family, leaving a widow but no children the homestead shall descend to the widow *held* not in conflict with Const. 1885, art. 3, § 16, or article 10, §§ 1, 4, providing that nothing in the article shall prevent the holder of a homestead from alienating the same.—*Saxon v. Rawls* (Fla.) 594.

*Children of decedent *held* not entitled to partition or an accounting as to exempt property of decedent, so long as his widow occupies or uses it.—*Stevens v. Wilbourn* (Miss.) 66.

HOMICIDE.

Argument and conduct of counsel, see "Criminal Law," § 23.

Confessions as evidence, see "Criminal Law," § 15.

Declarations as evidence, see "Criminal Law," § 12.

Demonstrative evidence, see "Criminal Law," § 11.

Dismissal of appeal, see "Criminal Law," § 43.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 13.

Impeachment of witnesses, see "Witnesses," § 4.

Impeachment of witnesses, "Witnesses," § 4.

Instructions in general, see "Criminal Law," §§ 25-32.

New trial in general, see "Criminal Law," § 36.

Opinion evidence, see "Criminal Law," § 14.

Parties committing homicide, see "Criminal Law," § 2.

Province of court and jury, see "Criminal Law," § 24.

Quashing indictment, see "Indictment and Information," § 3.

Relevancy of evidence, see "Criminal Law," § 8.

Requisites and sufficiency of indictment in general, see "Indictment and Information," § 3.

Res gestæ, see "Criminal Law," § 8.

Venue of prosecution, see "Criminal Law," § 4.

Verdict in general, see "Criminal Law," § 34.

§ 1. Murder.

*The means with which a homicide was committed is not a constituent element of the crime.—*Gaines v. State* (Ala.) 865.

§ 2. Assault with intent to kill.

*It is not sufficient that "circumstances are apparently dangerous to a reasonable man" to justify a person in shooting in self-defense.—*Dawson v. State* (Ala.) 803.

§ 3. Excusable or justifiable homicide.

*Defendant cannot excuse his failure to retreat, unless the circumstances would have impressed his mind as a reasonable man that his peril would have been increased, and he was so impressed.—*Patterson v. State* (Ala.) 157.

*In a prosecution for homicide, defendant *held* not entitled to invoke the doctrine of self-defense.—*Stallworth v. State* (Ala.) 184; *Untrein v. State* (Ala.) 285.

*Evidence *held* to show one charged with homicide guilty of some degree of homicide.—*Outler v. State* (Ala.) 460.

*No necessity for the taking of deceased's life *held* to have existed.—*Hill v. State* (Ala.) 621.

*The rule as to the revival of the right of self-defense after provoking a conflict stated.—*Collock v. State* (Ala.) 727.

*Circumstances under which a peace officer, endeavoring to arrest one resisting an arrest, would have been justified in first firing upon the offender, stated.—*Hammond v. State* (Ala.) 761.

*The rule of defense of habitation has no application as against persons attempting to eject accused from certain premises under a writ of possession.—*Williams v. State* (Ala.) 992.

§ 4. Indictment and information.

In an indictment for murder, *held*, that the homicidal act or efficient cause of death is charged to have been perpetrated from a premeditated design to effect death, though the words "from a premeditated design to effect death" are not repeated when the mortal wound is charged.—*Daniels v. State* (Fla.) 609.

*An indictment for murder not charging that the infliction of the mortal wound was from a premeditated design to effect death is fatally defective.—*Daniels v. State* (Fla.) 609.

*In a prosecution under Rev. St. § 791, for having cut another with a dangerous weapon with intent to murder, evidence that the weapon was a razor *held* admissible though it was not so alleged in the indictment.—*State v. Stewart* (La.) 798.

§ 5. Evidence—Admissibility in general.

*Evidence as to whether defendant saw a certain hand ax at a mill in the morning of the day the homicide occurred *held* admissible.—*Patterson v. State* (Ala.) 157.

*On a trial for homicide, evidence of a declaration made by accused *held* admissible on the status of his mind with respect to decedent.—*Morris v. State* (Ala.) 274.

On a trial for homicide, certain evidence *held* inadmissible because of leading the jury to infer the existence of a conspiracy.—*Morris v. State* (Ala.) 274.

*On a trial for homicide it is competent to prove by witnesses who examined the body of decedent as to where and when they first saw the body, that it had wounds on it, together with the appearance and location of the wounds.—*Hill v. State* (Ala.) 621.

*In a prosecution for murder, certain evidence *held* properly admitted.—*Glass v. State* (Ala.) 727.

*Point annotated. See syllabus.

In a prosecution for murder, certain gun shells *held* properly admitted in evidence.—Fuller v. State (Ala.) 774.

*Testimony as to pending litigation between deceased and defendant at the time of the homicide is not inadmissible because it was not shown that there was any personal feeling or words between them.—Maloy v. State (Fla.) 791.

*Where the difficulty was precipitated by a threat of deceased to defendant to take possession of a hog on the latter's premises, claimed by each, testimony as to the general reputation of the deceased for being unable to distinguish between his own hogs and those of others is irrelevant.—Maloy v. State (Fla.) 791.

On trial for manslaughter, where defendant sought to prove that he was on a peaceable mission at the time of the homicide, evidence to show trespass introduced on the part of the state was admissible.—State v. Crump (La.) 229.

§ 6. — Admissibility of evidence as to intent, malice, deliberation, and premeditation.

*In a prosecution for homicide, evidence of a previous difficulty was properly limited to the bare fact, exclusive of details.—Stallworth v. State (Ala.) 184.

*On a trial for homicide, certain evidence *held* admissible when taken in connection with the proof of accused's declaration made after the difficulty.—Morris v. State (Ala.) 274.

*On a trial for homicide, the declaration of accused that he would kill every person by the name of decedent *held* admissible.—Morris v. State (Ala.) 274.

*On a trial for homicide, certain evidence *held* admissible as showing malice.—Morris v. State (Ala.) 274.

*Evidence that about half an hour before the shooting defendant borrowed a pistol was competent, as tending to show preparation on defendant's part.—Glass v. State (Ala.) 727.

*Certain declarations of defendant *held* admissible as to show a malevolent spirit on his part.—Glass v. State (Ala.) 727.

*Evidence of a threat uttered by defendant nearly a year prior to the homicide *held* admissible.—Williams v. State (Ala.) 992.

*In a prosecution for homicide, testimony showing a personal feeling between the accused and the deceased and disclosing a motive for the crime is admissible.—Maloy v. State (Fla.) 791.

§ 7. — Admissibility of evidence of circumstances preceding act.

*On a prosecution for murder, it was competent to prove that on the day of the killing defendant was seen with a shotgun, about a mile from the scene of the crime.—Richardson v. State (Ala.) 82.

*Evidence that defendant left a store and went to the place of the homicide, together with what took place between defendant and deceased at the time of the killing, *held* admissible.—Stallworth v. State (Ala.) 184.

*On a trial for homicide, evidence of what was said or done by accused in reference to decedent on the day of the difficulty and leading up to the difficulty was competent.—Morris v. State (Ala.) 274.

*In a prosecution for homicide, difficulties between deceased and defendant's brother and deceased and defendant *held* not separable and distinct, so that it was competent to show all that transpired from the beginning of the form-

er until the end of the latter.—Untreiner v. State (Ala.) 285.

*In a prosecution for murder, certain evidence of occurrences and conversations shown to be parts of a continuous transaction *held* admissible.—Glass v. State (Ala.) 727.

Where homicide occurred as the result of an attempted ejection of defendant from certain land, a writ of possession *held* admissible without direct proof that the lands described therein were the same as those from which defendant was sought to be ejected.—Williams v. State (Ala.) 992.

Evidence of a conversation between the accused and the father of deceased a short time before the day the homicide was committed *held* admissible.—State v. Crump (La.) 229.

§ 8. — Admissibility of evidence of subsequent incriminating or exculpatory circumstances.

On a prosecution for murder, *held* proper to admit evidence as to the following of a trail from the scene of the crime by dogs trained in tracking human beings.—Richardson v. State (Ala.) 82.

*On a trial for homicide, certain evidence *held* admissible as showing a common purpose between accused and his son to kill decedent.—Morris v. State (Ala.) 274.

*On a trial for homicide, certain evidence *held* admissible as showing the feeling on the part of accused.—Morris v. State (Ala.) 274.

In a prosecution for homicide, evidence as to who gave the gun to the witness after the difficulty was over *held* irrelevant and immaterial.—Untreiner v. State (Ala.) 285.

*It was proper to admit evidence that a crowd and the police chased defendant after the killing.—Benjamin v. State (Ala.) 739.

§ 9. — Admissibility of evidence as to excuse or justification.

*In a prosecution for homicide, evidence of the particulars of a previous difficulty between defendant and deceased *held* properly excluded.—Patterson v. State (Ala.) 157.

Evidence as to how deceased's manner and appearance when drunk would impress a stranger or one who had but slight acquaintance with him, etc., *held* inadmissible.—Jackson v. State (Ala.) 178.

*Evidence that deceased was in the habit of carrying a concealed weapon *held* admissible only in connection with evidence that such fact was known to defendant prior to the homicide.—Jackson v. State (Ala.) 178.

*Evidence that a policeman examined deceased immediately after he was shot, and found no weapon on him, *held* admissible.—Jackson v. State (Ala.) 178.

*On a trial for homicide, evidence of the crippled condition of decedent *held* admissible on the issue of self-defense.—Hill v. State (Ala.) 621.

*On a prosecution for murder, defendant having been a peace officer and claimed to have been acting in the discharge of his duty at the time of the killing, *held* proper to admit proof of charges against decedent for violation of ordinances, but proper to exclude details as to decedent's conduct on which the charges were based.—Hammond v. State (Ala.) 761.

*On a prosecution for murder, *held* error not to admit evidence tending to show threats against defendant and to show that decedent was turbulent, etc.—Hammond v. State (Ala.) 761.

*Point annotated. See syllabus.

In a prosecution for homicide, requests to charge *held* properly refused as leading the jury to believe that defendant was entitled to repudiate an accusation made by deceased in language calculated to provoke or encourage a difficulty.—*Hanners v. State* (Ala.) 973.

Where, on trial for manslaughter, defendant attempts to show self-defense, the state can show that accused had committed aggravated trespass on the day of the homicide and on days before the homicide.—*State v. Crump* (La.) 229.

*On a prosecution for murder, *held* error not to permit accused to show the character of decedent when he was under the influence of cocaine.—*Moseley v. State* (Miss.) 384.

§ 10. — Dying declarations.

*A statement by decedent that she could not live, that she had been murdered, *held* a sufficient predicate to render her dying declarations admissible.—*Walker v. State* (Ala.) 878.

*In a trial for murder a certain statement of the deceased *held* properly admitted as dying declarations.—*Newton v. State* (Fla.) 19.

§ 11. — Weight and sufficiency.

*The state on a trial for homicide need not prove a motive for its commission.—*Morris v. State* (Ala.) 274.

*Statement as to proof of intent on prosecution under Code 1896, § 4346, for assault with intent to murder.—*Ray v. State* (Ala.) 519.

In a prosecution for homicide, an instruction premitting consideration of evidence of conspiracy *held* properly refused as misleading.—*Hanners v. State* (Ala.) 973.

*A charge is properly refused that holds out the idea that the state must prove expressly by affirmative evidence that the homicide was without justification, and the burden is on the state to establish by proof every material element of the crime beyond a reasonable doubt.—*Blanton v. State* (Fla.) 789.

§ 12. Trial—Instructions in general.

*An instruction on a trial for homicide *held* erroneous for failing to hypothesize an aiding and abetting by conduct.—*Morris v. State* (Ala.) 274.

*An instruction on a trial for homicide *held* erroneous as invading the province of the jury.—*Morris v. State* (Ala.) 274.

An instruction on a trial for homicide committed by the son of accused *held* erroneous in hypothesizing that the son must have had knowledge that the acts done or words said by accused were for the purpose of encouraging him in killing decedent.—*Morris v. State* (Ala.) 274.

In a prosecution for homicide, an instruction that certain evidence, if believed, showed defendant guilty of murder, regardless of certain previous statements made by deceased, *held* error.—*Stevenson v. State* (Ala.) 526.

On a prosecution for murder, instructions on the presumption of malice from the character of the weapon *held* erroneous.—*Benjamin v. State* (Ala.) 739.

*Where in a prosecution for homicide the killing was murder or nothing, instructions on murder in the second degree and manslaughter were properly refused.—*Gordon v. State* (Ala.) 847.

*In charging a jury upon the law of murder, the separate elements essential to constitute the crime should be clearly stated to the jury, and in such manner as not to render it possible for the jury to think that any disputed fact is thereby assumed to be true.—*Newton v. State* (Fla.) 19.

*Point annotated. See syllabus.

Where the court charged fully as to circumstantial evidence, a charge "that in a murder case circumstantial evidence must be received with great caution" is properly refused.—*State v. Le Blanc* (La.) 105.

Instructions that, where a husband is charged with the murder of his wife, there is a strong presumption of his innocence, which presumption is in addition to the legal presumption in favor of innocence, is properly refused.—*State v. Le Blanc* (La.) 105.

§ 13. — Instructions as to excuse or justification.

*A request to charge on self-defense *held* properly refused for failure to hypothesize that defendant did not willingly enter into the difficulty.—*Patterson v. State* (Ala.) 157.

*An instruction on self-defense *held* properly refused for failure to hypothesize freedom from fault on defendant's part in bringing on the difficulty, the imminence of the danger, and defendant's ability to retreat.—*Patterson v. State* (Ala.) 157.

An instruction that, if deceased brandished a hand ax at defendant and stated he was going to split defendant's head open, etc., defendant was entitled to defend himself, *held* properly refused.—*Patterson v. State* (Ala.) 157.

*In a prosecution for homicide, instructions on the subject of self-defense *held* properly refused, as ignoring the question of defendant's duty to retreat.—*Jackson v. State* (Ala.) 178.

*An instruction on self-defense *held* properly refused for failure to hypothesize defendant's belief that he was in imminent peril.—*Jackson v. State* (Ala.) 178.

An instruction on a trial for homicide *held* erroneous for failing to negative a willingness on the part of accused to enter into a difficulty with decedent at the time of the killing.—*Morris v. State* (Ala.) 274.

*An instruction, on a trial for homicide, relating to self-defense, *held* erroneous.—*Morris v. State* (Ala.) 274.

*An instruction on self-defense *held* erroneous for failing to define the elements thereof.—*Morris v. State* (Ala.) 274.

*An instruction on a trial for homicide *held* properly refused because omitting the proper postulation as to accused's freedom from fault in bringing on the difficulty.—*Outler v. State* (Ala.) 460.

In prosecution for homicide, an instruction on self-defense failing to set out the elements thereof *held* properly refused.—*Allen v. State* (Ala.) 624.

*In a prosecution for murder, certain requested instructions on the law of self-defense *held* properly refused.—*Glass v. State* (Ala.) 727.

In a prosecution for assault with intent to murder, a requested charge *held* a mere argument and properly refused.—*Pearson v. State* (Ala.) 733.

*On a prosecution for murder, requested instructions *held* properly refused for failing to hypothesize good faith on the part of defendant in carrying a weapon.—*Hammond v. State* (Ala.) 761.

In a prosecution for assault with intent to murder, an instruction on defense of habitation *held* properly refused as misleading.—*Dawson v. State* (Ala.) 803.

*In a prosecution for assault with intent to kill, an instruction that, if defendant was assaulted while at the home of another on invitation, he was not bound to retreat before

striking in self-defense, *held* properly refused.—*Dawson v. State* (Ala.) 803.

In a prosecution for homicide, an instruction on self-defense *held* properly refused as premitting consideration of defendant's freedom from fault as well as his duty to retreat.—*Hanners v. State* (Ala.) 973.

*In a prosecution for homicide, a request to charge on self-defense *held* properly refused as premitting defendant's freedom from fault and duty to retreat.—*Hanners v. State* (Ala.) 973.

*An instruction on self-defense *held* objectionable for failure to postulate that the circumstances justifying a killing in self-defense must be such as must have impressed defendant with the belief that he was in great and imminent peril.—*Williams v. State* (Ala.) 992.

In a prosecution for homicide, instructions *held* properly refused as misleading.—*Williams v. State* (Ala.) 992.

*A charge that the evidence shows that defendant was justified in taking the life of deceased *held* properly refused as invading the province of the jury.—*Maloy v. State* (Fla.) 791.

On prosecution for murder, an instruction on self-defense *held* erroneous.—*Moseley v. State* (Miss.) 384.

§ 14. — Instructions as to grade or degree of offense.

*In a prosecution for homicide, a charge on involuntary manslaughter *held* not required.—*Ware v. State* (Ala.) 181.

An instruction on a trial for homicide committed by the son of accused, that, unless the killing of decedent was done under such circumstances as to render the son guilty of murder, the jury could not find accused guilty of murder, was misleading, as he might be convicted of manslaughter.—*Morris v. State* (Ala.) 274.

An instruction on a trial for homicide, relating to malice, *held* misleading where defendant might be convicted of manslaughter.—*Morris v. State* (Ala.) 274.

An instruction that, if defendant is guilty of manslaughter in the first degree, his punishment may be fixed at imprisonment for not less than 1 or more than 10 years, or hard labor for the county for not less than a year and a day, *held* properly refused.—*Untreiner v. State* (Ala.) 285.

An instruction defining manslaughter in the first and second degrees, which was erroneous in its definition of manslaughter in the second degree, *held* properly refused.—*Untreiner v. State* (Ala.) 285.

*Instruction that in the absence of malice accused could not be guilty of murder in either degree or any higher grade of offense than manslaughter in the first degree *held* erroneously refused.—*Untreiner v. State* (Ala.) 285.

A charge on prosecution for assault with intent to murder *held* erroneous.—*Ray v. State* (Ala.) 519.

*In a prosecution for assault with intent to murder, an instruction with reference to defendant's intent and his right to invoke the doctrine of self-defense *held* properly refused.—*Grisham v. State* (Ala.) 997.

*Where the evidence is such that the jury might reasonably convict the defendants of a lower degree of unlawful homicide than murder in the first degree, it is erroneous to so charge the jury as practically to restrict them to a verdict of murder in the first degree, or to one of acquittal.—*Newton v. State* (Fla.) 19.

*On trial for murder in the first degree, it is not error to refuse an instruction tending to mislead the jury into the idea that unless the evidence makes out a case of murder in the first degree they must wholly acquit.—*Blanton v. State* (Fla.) 789.

*In all trials for murder, the judge must charge the jury that they may find a verdict for manslaughter.—*State v. Cook* (La.) 434.

§ 15. New trial.

A motion for new trial after conviction of homicide because the jury found a verdict in 15 minutes suggests no illegality in such verdict.—*State v. Le Blanc* (La.) 105.

§ 16. Appeal and error.

In a prosecution for homicide, evidence of a witness that he heard a pistol fired, and that the hole in deceased's forehead was caused by a bullet from a pistol, if error, *held* harmless.—*Stallworth v. State* (Ala.) 184.

*Where, on a trial for homicide, accused was convicted of manslaughter, the correctness of instructions relating to murder in either degree will not be considered.—*Morris v. State* (Ala.) 274.

*An error in an instruction defining malice *held* harmless on accused being found guilty of manslaughter.—*Morris v. State* (Ala.) 274.

*Accused having been acquitted of murder in the first degree, the erroneous refusal of an instruction defining murder in that degree *held* harmless.—*Untreiner v. State* (Ala.) 285.

*Admission of part of res gestæ on prosecution for assault with intent to murder, though immaterial, *held* not ground for reversal.—*Ray v. State* (Ala.) 519.

*Under Cr. Code 1896, § 4333, a conviction of murder would not be reversed for failure of the indictment to allege the means in the absence of proof of prejudice.—*Gaines v. State* (Ala.) 865.

Objection to dying declarations, which did not point out the grounds of inadmissibility, will not be considered on appeal.—*State v. Crump* (La.) 229.

On trial for manslaughter, the fact that the evidence tended to show malice is not ground for setting aside the verdict.—*State v. Crump* (La.) 229.

*A ruling excluding evidence of threats or dangerous character of deceased will not be disturbed unless it appears that the trial judge has abused the sound and legal discretion vested in him.—*State v. Rambo* (La.) 359.

On appeal from a conviction of manslaughter on a charge of murder, a bill of exceptions *held* to furnish no ground for reversal.—*State v. Ashworth* (La.) 550.

§ 17. Sentence and punishment.

*Where accused was convicted of murder in the second degree, he was thereby acquitted of murder in the first degree.—*Stallworth v. State* (Ala.) 184.

Where defendant was found guilty of manslaughter and recommended to mercy, the quantum of punishment is confined to the sound discretion of the trial judge.—*State v. Cook* (La.) 434.

HOMOLOGATION.

Of account of tutor, parties on appeal, see "Appeal and Error," § 5.
Of accounts of personal representative, see "Executors and Administrators," § 5.

*Point annotated. See syllabus.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Bigamy"; "Divorce."

Competency as witnesses, see "Witnesses," § 2.
Election by widow between testamentary provisions and other rights, see "Wills," § 5.

Fraudulent conveyances, see "Fraudulent Conveyances," § 1.

Liability of married women as stockholders of corporation, see "Corporations," § 4.

Liability of wife's property to lien for labor and materials furnished under contract with husband, see "Mechanics' Liens," § 1.

Parol or extrinsic evidence as to contract of wife, see "Evidence," § 10.

Pleading in action for causing death of spouse, see "Death," § 1.

Recovery of payment by wife of husband's debt, see "Payment," § 1.

Right of wife to quiet title against deed given as security for debt of husband, see "Quieting Title," § 1.

Rights of survivor, see "Homestead," § 2.

Trespass causing injury to married women, see "Trespass," § 1.

Trust for benefit of wife, in land conveyed to husband, see "Trusts," § 4.

§ 1. Mutual rights, duties, and liabilities.

*A husband has the exclusive right to select the matrimonial domicile, and the wife is bound to follow him.—*Birmingham v. O'Neil* (La.) 323.

*A husband must provide for his wife and children at the matrimonial domicile, and that obligation is not discharged if by his cruelty the wife is compelled to seek shelter with her children at the residence of her father in a neighboring parish.—*In re Baurens* (La.) 442; *State v. Baurens*, Id.

§ 2. Marriage settlements.

Donations made by one of the spouses to the other under Civ. Code, art. 1753, where a spouse marries a second time, fall to the children of the first marriage.—*Didlake v. Cappel* (La.) 112.

§ 3. Wife's separate estate.

The lender's declaration that he would let a husband have the money on a mortgage executed by his wife on her land *held* to mean that he would let the husband have the money "for the wife."—*Gibson v. Wallace* (Ala.) 960.

*Where a note and mortgage were signed by both husband and wife, the burden was on the wife to show that she executed the instruments only as his surety.—*Gibson v. Wallace* (Ala.) 960.

In a bill to foreclose a mortgage on a wife's land, evidence *held* to establish that the wife was a principal debtor.—*Gibson v. Wallace* (Ala.) 960.

Under Const. 1885, art. 11, § 2, and Rev. St. 1892, §§ 1956, 2072, a married woman can mortgage her separate statutory estate to secure a debt to a bank for money borrowed for the purpose of carrying on a mercantile business.—*Mercantile Exch. Bank v. Taylor* (Fla.) 22.

While a wife cannot be held as surety for the payment of her husband's debts, if she chooses to dispose of her property in his interest, she cannot have such disposal annulled to the prejudice of persons without notice who have dealt with the husband on the faith which recorded deeds give rise to.—*Clark v. Whitaker* (La.) 580.

*Point annotated. See syllabus.

§ 4. Actions.

*Under Code 1896, §§ 2523, 2527, a wife *held* entitled to sue for an injury to her person caused by one entering the dwelling house occupied by herself and her husband irrespective of the question of the ownership of the house.—*Engle v. Simmons* (Ala.) 1023.

§ 5. Community property.

*Civ. Code, arts. 1749, 3478, must be held to mean that interspousal donations shall always be revokable save as against third possessors acquiring property by prescription of 10 years.—*Leverett v. Loeb* (La.) 584.

§ 6. Separation and separate maintenance.

Wife refusing to return to husband except on condition that he send away a girl whom they have adopted *held* not entitled to alimony.—*Hilton v. Hilton* (Miss.) 262.

§ 7. Abandonment.

The duty of a husband and father to provide for his wife and minor children is not discharged as to the offense of neglecting to provide, etc., under Acts 1902, p. 42, No. 34, when they from his cruelty seek shelter at the residence of the wife's father in a neighboring parish.—*In re Baurens* (La.) 442; *State v. Baurens*, Id.

Acts 1902, p. 42, No. 34, contemplates that a man shall at all times provide for the support of his minor children, and each neglect to do so is a distinct offense, as to which a plea of former conviction for precedent neglect is not good.—*In re Baurens* (La.) 442; *State v. Baurens*, Id.

The Supreme Court is without authority to review the findings in criminal prosecution on questions of fact, and will not undertake such review on conviction for failure to support a wife, under Acts 1902, p. 42, No. 34.—*In re Baurens* (La.) 442; *State v. Baurens*, Id.

The pendency of an appeal of an action by the husband for separation from bed and board cannot affect the execution of a sentence imposed on the husband for neglect to provide for the support of his wife.—*In re Baurens* (La.) 442; *State v. Baurens*, Id.

IDEM SONANS.

See "Names."

ILLEGITIMATE CHILDREN.

See "Bastards."

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 4.

IMPEACHMENT.

Of witness, see "Witnesses," §§ 3, 4.

IMPLIED CONTRACTS.

See "Assumpsit, Action of."

IMPRISONMENT.

See "Arrest"; "False Imprisonment."

Escape of prisoner, see "Escape."
Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Allowance or recovery of compensation, see "Ejectment," § 4.
 Compensation for on partition, see "Partition," § 2.
 Liability of ward, see "Guardian and Ward," § 1.
 Liens, see "Mechanics' Liens."
 Public improvements, see "Municipal Corporations," § 3.
 Recovery for, in real actions, see "Real Actions."

INADEQUATE DAMAGES.

See "Damages," § 4.

INCEST.

*The crime of incest may be committed with a female who has not arrived at puberty.—*Dixon v. State* (Ala.) 734.

*Under Code 1896, § 4889, an indictment for incest *held* not objectionable because it described the female as being a "girl" instead of a "woman."—*Dixon v. State* (Ala.) 734.

*Under Act 1884, p. 101, No. 78, the concurrence of parties is not essential to incest.—*State v. Freddy* (La.) 436.

INCOMPETENT PERSONS.

See "Insane Persons."

INCORPORATION.

See "Corporations," § 1.

INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INDEMNITY.

See "Guaranty"; "Principal and Surety."
 Against mechanic's lien, see "Mechanics' Liens," § 4.

INDICTMENT AND INFORMATION.

See "Grand Jury."
 Defects in, as ground for motion in arrest of judgment, see "Criminal Law," § 37.
 Harmless error in rulings on, see "Criminal Law," § 44.
 Information for manslaughter as constituting jeopardy, see "Criminal Law," § 5.
 Objections for purpose of review, see "Criminal Law," § 39.
 Use of assumed name in indictment, see "Names."

For particular offenses.

See "Burglary," § 2; "Gaming," § 1; "Homicide," § 4; "Incest"; "Larceny," § 2; "Rape," § 2.

Offenses in use of weapons, see "Weapons."

§ 1. Necessity of indictment or presentment.

Acts 1898-1899, p. 257, *held* not to give county court of Elmore county jurisdiction to try, without indictment, defendant tried before justice of the peace and bound over for violation of Code 1896, § 5505, as amended by Act 1901, p. 1215, relating to interference with employment.—*Ware v. State* (Ala.) 152.

§ 2. Formal requisites of indictment.

*Indorsement of the nature of a crime is not necessary to the validity of an indictment.—*State v. Pointdexter* (La.) 688.

§ 3. Requisites and sufficiency of accusation.

*A person may acquire an assumed name by reputation which may be used to identify him in an indictment.—*Stallworth v. State* (Ala.) 184.

*Under Code 1896, § 4902, *held* not necessary to aver in an indictment for bigamy that the bigamous cohabitation occurred in the state or in the county.—*Caldwell v. State* (Ala.) 473.

Under Code 1896, §§ 4906, 4911, an allegation of the means by which the offense was committed *held* a necessary averment in a valid indictment.—*Gaines v. State* (Ala.) 865.

*In an indictment for homicide, the state *held* entitled to designate deceased by different names in different counts.—*Walker v. State* (Ala.) 878.

*An indictment under Cr. Code 1896, § 4762, for knowingly selling a horse having the disease of "choking" *held* required to aver that the offense was committed with the intent to defraud.—*Wester v. State* (Ala.) 969.

*A count in an indictment attempting to charge grand larceny, but failing to allege whether a railroad company, the owner of the property, was a corporation, partnership or natural person, *held* fatally defective.—*Burrow v. State* (Ala.) 987.

*An indictment for murder in such language as to enable a person of common understanding to know what was intended, and sufficient to prevent a second indictment for the same offense, is, under the operation of our curative statutes, sufficient to withstand a motion in arrest of judgment.—*Newton v. State* (Fla.) 19.

§ 4. Joinder of parties, offenses, and counts, duplicity, and election.

Motion to require state to elect between counts of indictment for violation of liquor law *held* properly denied.—*Untreiner v. State* (Ala.) 170.

*When a statute makes either of two distinct acts connected with the same general offense, and subject to the same punishment, indictable as distinct crimes, they may be coupled in one count.—*Irvin v. State* (Fla.) 785.

*Under Code 1892, § 1089, count of indictment charging the receipt of deposits from several persons without informing them of insolvent condition of bank *held* demurrable for joinder of several offenses in single count.—*State v. Walker* (Miss.) 8; *Same v. Starling*, Id.

§ 5. Motion to quash or dismiss, and demurrer.

*Where the grand jury as organized did not contain more than the number provided by law, the fact that more were drawn did not invalidate indictments returned by such grand jury.—*Untreiner v. State* (Ala.) 285.

*Under Code 1896, § 5269, failure of the jury commissioners to take the special oath required by section 4977, *held* not cause for quashing the indictment.—*Sims v. State* (Ala.) 413.

*That more than 21 names were drawn from which to form the grand jury is no ground for quashing the indictment.—*Sanders v. State* (Ala.) 466.

*Under Code 1896, § 5269, an indictment *held* not subject to a motion to quash because 24 instead of 21 names were drawn and returned in to court from which to organize the grand jury.—*Stevenson v. State* (Ala.) 526.

*Point annotated. See syllabus.

The omission to aver the means employed to commit the offense alleged must be taken advantage of by demurrer.—*Gaines v. State* (Ala.) 865.

*The filing of a motion to quash an indictment after pleading to the merits is within the discretion of the court.—*State v. Rester* (La.) 231.

*An indictment for assault with intent to kill, charging the accused with "willfully shooting at M," instead of an express averment that he had "made an assault on M," is sufficient on motion to quash.—*State v. Rester* (La.) 231.

*An objection that the name of accused was "Rigby" and stated "Rigley" in the indictment held no ground for quashing the same.—*State v. Pointdexter* (La.) 688.

*Motion to quash indictment for incompetency of grand juror comes too late after plea.—*State v. Bash* (La.) 793.

§ 6. Issues, proof, and variance.

*There is no variance between an indictment alleging the name of a third person and the proof showing the name of such person.—*Caldwell v. State* (Ala.) 473.

*On a criminal prosecution held error not to permit defendant to show that as to an offense shown by the evidence there was no evidence before the grand jury. Code 1896, § 4901.—*Lee v. State* (Ala.) 677.

*A variance in the name of a person who is charged to have been the owner of money alleged to have been embezzled, held not material within Code 1896, § 4333.—*Knight v. State* (Ala.) 911.

§ 7. Waiver of defects and objections, and alder by verdict.

*Cr. Code 1896, § 4895, declaring that an indictment shall not be held insufficient for a defect in form, held inapplicable to an objection to an indictment for failure to allege the means by which the offense was committed.—*Gaines v. State* (Ala.) 865.

*Where an indictment is complained of for duplicity, the defendant must object by demurrer or motion to quash before verdict.—*Irvin v. State* (Fla.) 785.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," §§ 2, 3.

On indictment, see "Indictment and Information," § 2.

INFANTS.

See "Adoption"; "Guardian and Ward"; "Parent and Child."

Administration of estate of deceased minor, see "Executors and Administrators," § 1.

As necessary parties in actions involving their estates, see "Parties," § 1.

Competency as witness, see "Witnesses," § 2.

Contributory negligence on part of children, see "Negligence," § 3.

Effect of infancy on limitations, see "Limitation of Actions," § 1.

Injuries to infant employes, see "Master and Servant," §§ 2, 7, 10, 11.

Instructions as to capacity to commit crime, see "Criminal Law," § 25.

Right of minor co-tenant to recover for services, see "Tenancy in Common," § 2.

Weight and sufficiency of evidence as to capacity to form criminal intent, see "Criminal Law," § 17.

§ 1. Property and conveyances.

*The defense of infancy held personal to the infant, and unavailable to the infant's assignees or privies in estate.—*Riley v. Dillon & Pennell* (Ala.) 768.

§ 2. Contracts.

*An infant entering into a contract falsely representing himself of full age held estopped from denying that he is not of age when the contract is sought to be enforced against him.—*Commander v. Brazil* (Miss.) 497.

§ 3. Actions.

*Only the regular guardian of an infant and neither the next friend by whom the infant sues, nor the attorney representing him in the action, has authority to receive payment of the judgment, and enter satisfaction thereof.—*Collins v. Gillespy* (Ala.) 930.

*A guardian ad litem cannot admit or waive anything adverse or prejudicial to the infant.—*Mote v. Morton* (Fla.) 607.

*The formal answer of a guardian ad litem should submit the rights of the infant to the determination of the court and leave the complainant to strict proof.—*Mote v. Morton* (Fla.) 607.

Though the answer of the guardian ad litem admits the allegations of the bill of complaint to be true, the proper practice is to refer the cause to a master to take the proof and report thereon.—*Mote v. Morton* (Fla.) 607.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INITIAL CARRIERS.

See "Carriers," § 6.

INJUNCTION.

Conclusiveness of former adjudication on right to injunction, see "Judgment," § 5.

Dismissal of bill for, see "Equity," § 4.

Interference with fishing rights, see "Fish."

Issues presented by pleading, see "Pleading," § 7.

Jurisdiction of equity in general, as to granting, see "Equity," § 1.

Mandamus to compel setting aside of order refusing to issue, see "Mandamus," § 1.

Multifariousness in pleading in injunction suit, see "Equity," § 3.

Procedure in courts of appellate jurisdiction, see "Courts," § 5.

Relief against particular acts or proceedings.

Assessment for public improvements, see "Municipal Corporations," § 3.

Changing location of railroad, see "Railroads," § 3.

Enforcement of taxes, see "Taxation," § 3.

Nuisance in highway, see "Highways," § 3.

Unauthorized acts of municipal officers, see "Municipal Corporations," § 7.

Review of proceedings for injunction.

Disposition of cause on appeal, see "Appeal and Error," § 24.

Review of discretion of trial court, see "Appeal and Error," § 15.

Review of interlocutory decisions, see "Appeal and Error," §§ 12-23.

Suspensive appeal, see "Appeal and Error," § 7.

§ 1. Nature and grounds in general.

*The remedy at law held sufficient so that injunction will not lie against the cutting of

*Point annotated. See syllabus.

trees in a highway in construction of a telephone line.—*Hobbs v. Long Distance Telephone & Telegraph Co. (Ala.) 1003*; *Horton v. Same (Ala.) 1006*; *Richardson v. Same, Id.*; *Pryor v. Same, Id.*

*The insolvency of the debtor is never a sufficient reason of itself for the exercise of the extraordinary power of the court by way of injunction.—*Godwin v. Phifer (Fla.) 597*.

Where the court of appeal granted a right of passage over the lands of defendant to the nearest public road, and remanded the cause for further evidence on the question of damages, the judgment was in abeyance, and it would be time enough when it became executory to consider B's right to enjoin its enforcement on the ground of abatement by reason of the alleged opening of another public road extending to lands of plaintiff.—*Lewis v. D'Albor (La.) 31*; *In re Lewis, Id.*

*A second injunction will not be granted while the first is in force, though at the suit of another party.—*Police Jury of Avoyelles v. Town of Mansura (La.) 251*; *Same v. Town of Marksville (La.) 252*.

§ 2. Subjects of protection and relief.

*An injunction will lie to restrain the continuous throwing of rocks, by blasting, upon complainant's residence and grounds, though there is no showing of negligence, and though no personal injuries have ensued.—*Central Iron & Coal Co. v. Vanderheuk (Ala.) 145*.

*Suit to enjoin action of ejectment *held* maintainable to let in the equitable defense of improvements made with the knowledge and acquiescence of the landowner.—*South & N. A. R. Co. v. Alabama Great Southern R. Co. (Ala.) 307*.

*Cross-bill *held* to state a cause of action for equitable relief by injunction to restrain waste.—*Webster v. De Bardeleben (Ala.) 831*.

*Residents of a parish, but not within a municipality therein, having no property interest therein, have no right to restrain the citizens of the town from enacting ordinances touching local option.—*Marshall v. Town of Mansura (La.) 56*.

Plaintiffs, citizens and taxpayers of a parish, have no standing in their private capacity to an injunction against defendant town to have declared a nullity an ordinance of the town council fixing licenses for the sale of liquors.—*Marshall v. Town of Marksville (La.) 57*.

*Chancery court *held* to have jurisdiction to enjoin election in violation of Constitution and laws, but not otherwise.—*Conner v. Gray (Miss.) 186*.

Where act providing for election as to creation of new county complies with Const. § 260, chancery court *held* not to have power to stop the election or prevent returns being made to the Secretary of State.—*Conner v. Gray (Miss.) 186*.

Justice of the peace and members of board of supervisors of county *held* not to have right to maintain bill to enjoin election with reference to creation of new county.—*Conner v. Gray (Miss.) 186*.

§ 3. Actions for injunctions.

*Where a bill alleges that respondents are endeavoring to unlawfully subject land of complainant to public use as a street, and the answer avers a dedication of the lands to public use, respondents have the burden of proving it.—*McGourin v. Town of De Funiak Springs (Fla.) 541*.

*Where a bill to enjoin a city from opening up a public street alleges that complainant is seized

and possessed of the land, and the sworn answer denies such seisin and possession, the burden is on complainant to prove it.—*McGourin v. Town of De Funiak Springs (Fla.) 541*.

*Complainant must allege in his bill every fact, clearly and definitely, that is necessary to entitle him to relief, especially in bills for injunction.—*Godwin v. Phifer (Fla.) 597*.

*Allegations in the bill for an injunction must be verified by an affidavit, and where any of the material allegations in the bill are stated upon information there should be annexed the additional affidavit of the person from whom the information is derived, verifying the truth of the information thus given.—*Godwin v. Phifer (Fla.) 597*.

*Where a bill to restrain partners of the complainants from ousting him from participation in the business failed to state any facts showing whether a partnership existed, and where a contract between the parties is inconsistent with the existence of a real partnership, a demurrer to the bill is properly sustained.—*Collier v. Dasher (La.) 269*.

§ 4. Preliminary and interlocutory injunctions.

*On an application to dissolve a temporary injunction on defendant's sworn denials, it was incompetent for complainant to support his bill by *ex parte* affidavits and a copy of a deed.—*Roman v. Long Distance Telephone & Telegraph Co. (Ala.) 292*.

An offer to support the allegations of a bill by extrinsic evidence on a motion to dissolve an injunction on the denials in its answer must be seasonably made on timely notice.—*Roman v. Long Distance Telephone & Telegraph Co. (Ala.) 292*.

*Where the allegations of a bill are fully denied in the answer, a preliminary injunction issued thereon should be dissolved.—*Webster v. De Bardeleben (Ala.) 831*.

*In a suit for an injunction, affidavits are admissible in support of the allegations of the bill in cases of waste and where irreparable injury might ensue if the injunction was not granted.—*Webster v. De Bardeleben (Ala.) 831*.

*New matter not responsive to an injunction bill cannot be considered on a motion to dissolve.—*Town of New Decatur v. Scharfenberg (Ala.) 1025*.

*In a suit by the owner of property abutting on a street to restrain a change of the grade, no compensation having been awarded him, *held* proper to dissolve the preliminary injunction on the making of a cash deposit and the execution of a bond.—*Town of New Decatur v. Scharfenberg (Ala.) 1025*.

If it is plainly apparent that the bill is without equity, an injunction should not be granted in the first instance, but, if granted, should be dissolved at the earliest opportunity by the court and the bill ordered dismissed.—*Godwin v. Phifer (Fla.) 597*.

An affidavit to or an allegation in a bill for an injunction asserting simply that notice to the defendant of the application for injunction will accelerate the injury apprehended, without stating how or why it will do so, *held* not a sufficient excuse to dispense with notice.—*Godwin v. Phifer (Fla.) 597*.

*Writ of injunction *held* to be granted only on notice required by equity rule 46, unless the provisions therein for dispensing with notice have been strictly followed.—*Godwin v. Phifer (Fla.) 597*.

*Application for a temporary injunction or restraining order, without notice to the defend-

*Point annotated. See syllabus.

ant, *held* to be granted when a clear case is made by the bill therefor, and it has been clearly made to appear that it is a case of urgent necessity and one in which irreparable mischief will be produced if the aid of the court is denied.—*Godwin v. Phifer* (Fla.) 597.

*Even where all the equities of the bill are denied by the answer, it is not a matter of course to dissolve the injunction; both the granting and continuing of injunctions resting largely in the sound judicial discretion of the court.—*Godwin v. Phifer* (Fla.) 597.

*An ancillary injunction necessarily falls with the main suit.—*Day v. Bailey* (La.) 448.

INNKEEPERS.

Gaming in boarding house, see "Gaming," § 1.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INQUISITION.

Of lunacy, see "Insane Persons," § 1.

INSANE PERSONS.

Death of party pending appeal from judgment of interdiction, see "Appeal and Error," § 5.
Effect of death of interdict pending appeal on liability for costs, see "Costs," § 3.
Filing plea of not guilty by reason of insanity on day of trial, see "Criminal Law," § 7.
Sale of interest of interdict for purpose of affecting partition, see "Partition," § 2.

§ 1. Inquisitions.

Civ. Code, art. 404, is not necessarily in conflict with Civ. Code, art. 395, ordering the issue of a provisional execution, and Code Prac. art. 580, providing that the appointment of a curator should be executed provisionally, so that, where an appeal is taken from a judgment of interdiction, the Supreme Court will not, while the appeal is pending, issue orders to appoint a curator.—*In re Jones* (La.) 80; *In re Mitchell*, Id.

§ 2. Property and conveyances.

*The guardian of an incompetent who executed a mortgage on the latter's property under a decree *held* authorized to apply to the court for instructions in the execution of his trust.—*Montgomery v. Perryman & Co.* (Ala.) 838.

Until a judicial sale of a ward's property under order of court has been confirmed by the court it is insufficient to confer rights on the purchaser.—*Montgomery v. Perryman & Co.* (Ala.) 838.

A mortgage on property of an incompetent not confirmed by the court under whose order it was executed *held* void.—*Montgomery v. Perryman & Co.* (Ala.) 838.

*It is only where the purpose is to effect a partition by the sale of the whole property that the interest of an interdict can be alienated at private sale.—*Gallagher v. Lurges* (La.) 60.

A proceeding which has for its purpose only the private sale to one of the plaintiffs of the interest of an interdict in property held in common *held* unauthorized.—*Gallagher v. Lurges* (La.) 60.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Ground for jurisdiction of equity, see "Injunction," § 1.

Indictment for receiving deposits in bank without disclosing insolvency, see "Indictment and Information," § 4.

Of corporation, see "Corporations," §§ 4, 7.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," §§ 6-12.

In criminal prosecutions, see "Criminal Law," § 24; "Homicide," §§ 12-14.

INSURANCE.

Curing erroneous instructions in action on policy, see "Trial," § 12.

Estoppel to deny unconditional character of insurance notes, see "Estoppel," § 2.

Reformation of policy, see "Reformation of Instruments," § 1.

Taking case or question from jury in action on policy, see "Trial," § 5.

§ 1. Insurance companies.

Under resolution of the directors of insurance corporation, whereby some of the shareholders gave notes to the company, *held* that on a dissolution a collection of the notes and distribution of the proceeds among the stockholders was not authorized.—*Anderson v. Buckley* (Ala.) 748.

§ 2. Insurance agents and brokers.

Agency to make a contract *held* sufficiently shown.—*New York Life Ins. Co. v. Mills* (Fla.) 603.

§ 3. The contract in general.

*Under the facts, a life insurance company *held* estopped to deny the insurance.—*New York Life Ins. Co. v. McIntosh* (Miss.) 381.

§ 4. Cancellation, surrender, abandonment, or rescission of policy.

In an action on a life insurance policy *held*, that the beneficiary was entitled to a verdict.—*New York Life Ins. Co. v. Mills* (Fla.) 603.

§ 5. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

*Grantee of land *held* sole and unconditional owner within provision in fire policy, though payments are still due therefor.—*Insurance Co. of North America v. Pitts* (Miss.) 5.

§ 6. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

*Fire policy *held* not to have become void because property was unoccupied for more than 10 days, where it was destroyed afterwards while occupied.—*Insurance Co. of North America v. Pitts* (Miss.) 5.

§ 7. Actions on policies.

That one was a stockholder in a fire insurance company had no bearing on his right to recover on a policy.—*Mississippi Fire Ass'n v. Stein* (Miss.) 66.

In an action on a life policy, a complaint alleging an agreement for days of grace in the payment of premiums *held* sufficient.—*Boyd v. Fidelity Mut. Life Ins. Co.* (Miss.) 268.

§ 8. Mutual benefit insurance.

A mutual aid association, organized under Code 1896, § 1116 et seq., *held* to have no authority to issue policies under which assessments are to be returned at the expiration of a certain time less benefits paid.—*Boyd v. Southern Mut. Aid Ass'n* (Ala.) 164.

*Point annotated. See syllabus.

INTENT.

Criminal, see "Criminal Law," § 1.
 Element of homicide, see "Homicide," § 11.
 Fraudulent, see "Fraudulent Conveyances," § 1.
 To dedicate, see "Dedication," § 1.

INTERDICTION.

See "Insane Persons," § 1.
 Death of party pending appeal from judgment of, see "Appeal and Error," § 5.
 Effect of death of interdict pending appeal on liability for costs, see "Costs," § 3.
 Sale of interest of interdict for purpose of affecting partition, see "Partition," § 2.

INTEREST.

Award of in verdict, see "Trial," § 13.
 On money wrongfully collected as taxes, see "Taxation," § 3.
 On price of land, see "Vendor and Purchaser," § 4.

§ 1. Time and computation.

*Facts held insufficient to establish a payment or tender of a mortgage debt sufficient to discharge the debt or stop the running of interest.—Hughes v. Clifton (Ala.) 998.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 4.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.
 Review on appeal or writ of error, see "Appeal and Error," §§ 12-23.

INTERROGATORIES.

To witnesses, see "Depositions."

INTERSPOUSAL DONATIONS.

See "Husband and Wife," § 5.

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTER VIVOS.

Gifts, see "Gifts," § 1.

INTOXICATING LIQUORS.

Argument and conduct of counsel in prosecution for offenses against liquor laws, see "Criminal Law," 23.
 Dispensary commissioners, see "Officers," § 1.
 Election between counts in indictment for offenses against liquor laws, see "Indictment and Information," § 4.
 Evidence of other offenses, see "Criminal Law," § 9.
 Mandamus to compel performance of duties under dispensary act, see "Mandamus," § 1.
 Mandamus to control action of police jury relating to, see "Mandamus," § 2.
 Regulations of interstate commerce in, see "Commerce," § 1.
 Restraining licensing sale of intoxicating liquors, see "Injunction," § 2.
 Summary trial for offenses against liquor laws, see "Criminal Law," § 6.
 Titles of statutes, see "Statutes," §§ 3, 4.

§ 1. Power to control traffic.

*There is no inherent right in any citizen to sell intoxicating liquors by retail.—City of New Orleans v. Smythe (La.) 33.

Town charter held not to authorize an ordinance prohibiting persons from soliciting, receiving, accepting, or transmitting orders for intoxicating liquors within the corporate limits, and imposing a punishment for violation thereof.—Town of Homer v. Brown (La.) 711.

§ 2. Constitutionality of acts and ordinances.

Ordinance of the city of New Orleans relative to saloon permits adopted by the city council under City Charter 1896, § 21 (Laws 1896, p. 55, No. 45), held not unconstitutional as conferring arbitrary powers on the property holders and council.—City of New Orleans v. Smythe (La.) 33.

§ 3. Local option.

*A license in proper form to sell intoxicating liquors cannot be collaterally impeached by evidence that the powers of the corporation had been divested by an election in favor of prohibition.—State v. Lewis (La.) 63.

§ 4. Licenses and taxes.

The provision of Montgomery City charter (Acts 1892-93, p. 377, § 20), exempting persons procuring a liquor license from the city from paying any tax or license to the county, held repealed by Gen. Act March 4, 1903 (Gen. Acts 1903, p. 184), and not revived by Act Sept. 30, 1903 (Gen. Acts 1903, p. 298, § 4), Const. 1901, § 10.—Gaston v. O'Neal (Ala.) 742.

*City Charter 1896, § 21 (Laws 1896, p. 55, c. 45), providing that council shall not grant a permit for opening a barroom without the consent of property owners, held not to vest in the council absolute control, and where the refusal to grant such a permit is arbitrary the applicant has his remedy by mandamus.—City of New Orleans v. Smythe (La.) 33.

A prosecution under Rev. St. 1870, § 910, for retailing intoxicating liquors without a license, fails where the accused produces a license in due form.—State v. Lewis (La.) 63.

§ 5. Regulations.

The dispensary act (Gen. Acts 1898-99, p. 110) is not made to apply to a particular locality merely by the repeal, after the enactment of the dispensary act, of a statute which existed at the time the dispensary act was passed and prohibited the sale of liquor in that locality.—Rose v. Lampley (Ala.) 521.

Under Gen. Acts 1898-99, p. 110, authorizing the establishment of dispensaries, it was not the intention of the Legislature that dispensaries should be established at places where the sale of liquors was prohibited, restrained, or restricted by statute.—Rose v. Lampley (Ala.) 521.

There is no law in the state conferring on police juries the power to prohibit the sale of intoxicating liquors, and where the state grants to them (Acts 1898, p. 168, No. 115) the power to license and regulate, such power is exceeded when used to prohibit.—State ex rel. Lisso v. Police Jury of Red River Parish (La.) 85.

§ 6. Offenses.

*Facts held not to constitute a sale of liquor without a license.—Mitchell v. State (Ala.) 951.

One who on a sale of liquor merely acts in the transaction as the purchaser or agent of the purchaser of the liquor sold, cannot be convicted.—Hiers v. State (Fla.) 881.

One who, in violation of law, sells liquor as the servant of another, is liable personally, though he acted without compensation.—Hiers v. State (Fla.) 881.

*Point annotated. See syllabus.

A mere purchaser of liquor for one's self or for another does not in so purchasing violate the laws against the sale of liquors.—*Hiers v. State* (Fla.) 881.

§ 7. Criminal prosecutions.

On a trial for selling liquor without a license, evidence *held* to prove a sale.—*Duke v. State* (Ala.) 170.

Under Laws 1901, p. 58, c. 4930, § 3, making proof of delivery of liquor and receipt of money therefor only *prima facie* evidence that the party delivering the liquor and receiving the money is the owner of the liquor, an instruction to that effect should be given on trial for such sale.—*Hiers v. State* (Fla.) 881.

Evidence that defendant kept liquors on storage belonging to various persons subject to withdrawal by them *held* immaterial on a prosecution for illegal sale of liquors.—*Donald v. State* (Miss.) 4.

ISSUES.

In civil actions, see "Pleading," § 7.

In criminal prosecutions, see "Indictment and Information," § 6.

Presented for review on appeal, see "Appeal and Error," § 4.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 5.

JOINDER.

Of offenses in indictment, see "Indictment and Information," § 4.

Of parties, see "Parties," § 3.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

Authority to sign bill of exceptions in criminal prosecutions, see "Criminal Law," § 41.

Harmless error in remarks of judge at trial, see "Appeal and Error," § 17.

Mandamus, see "Mandamus," §§ 1, 2.

Power to annul contract of hiring of convicts, see "Convicts."

Suspensive appeal from judgment as to recusal of judge, see "Appeal and Error," § 8.

§ 1. Special or substitute judges.

*The act creating the office of supernumerary judge is constitutional.—*Sims v. State* (Ala.) 413.

§ 2. Disqualification to act.

Appointment by recused judge of district court of a lawyer having the qualifications of a judge of his court to try a case is in strict conformity to Laws 1880, p. 39, Act 40, § 2.—*Murphy v. Police Jury of St. Mary* (La.) 216; *In re Murphy*, *Id.*

*An averment in a cross-petition, filed under Ann. Code 1892, c. 8, in relation to assignments for the benefit of creditors, that the chancellor was disqualified to take charge of the assignment proceedings because a party to the suit and interested therein *held* insufficient.—*Metcalfe v. Merchants' & Planters' Bank* (Miss.) 377.

JUDGMENT.

Decisions of courts in general, see "Courts," § 2.

Enforcement by creditors' suit, see "Creditors' Suit."

Obtaining judgment as condition precedent to suit to subject stock subscription to payment of corporate debt, see "Corporations," § 4.

Sales under judgment, see "Judicial Sales."

In actions by or against particular classes of persons.

See "Corporations," § 6; "Infants," § 3; "Municipal Corporations," § 7.

In particular civil actions or proceedings.

See "Detinue"; "Ejectment," § 3; "Garnishment," § 2.

Decree in equity, see "Equity," § 7.

On appeal or writ of error, see "Appeal and Error," § 24.

To enforce mechanic's lien, see "Mechanics' Liens," § 4.

In criminal prosecutions.

See "Criminal Law," § 37; "Homicide," § 17.

For non-support, see "Husband and Wife," § 7.

Review.

See "Appeal and Error"; "Criminal Law," § 38.

Necessity of objections to, for purpose of review, see "Appeal and Error," § 4.

§ 1. Nature and essentials in general.

*Where a petition for mandamus was fatally defective, it was error for the court to grant the relief prayed on the striking of a demurrer to the petition from the files.—*Commissioners' Court of Chilton County v. State* (Ala.) 463, 465.

§ 2. On trial of issues.

A judgment entry *held* to show a proper judgment sustaining a demurrer.—*State v. Kitchens* (Ala.) 871.

A board and its officer not being parties to a record, the court should not undertake to define the officer's powers.—*Logan v. Childs* (Fla.) 197.

§ 3. Equitable relief.

Where judgment is obtained against an administrator by collusion with him or want of diligence, chancery will relieve the heirs, unless it was for a valid and subsisting claim.—*Paterson v. Carter* (Ala.) 133.

*In order to set aside a judgment for fraud, complainant must prove that he had a meritorious defense which could be established by evidence on another trial, and that there was no negligence on his part.—*Collier v. Parish* (Ala.) 772.

In a suit to set aside a judgment taken against complainant through the fraud of defendant, evidence *held* insufficient to show the fraud or to show that complainant was free from negligence.—*Collier v. Parish* (Ala.) 772.

§ 4. Merger and bar of causes of action and defenses.

Judgment in garnishment against stockholders under Code 1896, § 2182, to enforce liability for unpaid stock subscription, *held* *res judicata* against plaintiff's right to enforce such alleged liability by a bill in equity under section 823, except as to a garnishee as to whom plaintiff took a nonsuit.—*Montgomery Iron Works v. Roman* (Ala.) 811.

*A final decree in the probate court for partition, whether in kind or by sale, *held* conclusive until reversed on appeal, excluding equity jurisdiction in the absence of special ground for interposition of equity.—*Finch v. Smith* (Ala.) 819.

*A judgment in an action on some of the notes given for a stock of goods *held* not a bar to the seller's right to sue on the other notes, or to the buyer's right to allege failure of consideration.—*Fenney v. Corey* (Ala.) 978.

*Point annotated. See syllabus.

*A decree sustaining a demurrer to a bill *held* to be a final adjudication, and a bar to a second suit.—*Weatherby v. Pearl River Lumber Co.* (Miss.) 65.

§ 5. Conclusiveness of adjudication.

A judgment in favor of plaintiff against one of the defendants in another action *held* not to affect the other defendant, where a joint plea of not guilty is filed.—*Posey v. Gamble* (Ala.) 416.

A judgment on a claim of exemptions in favor of the execution defendant is conclusive in an action for wrongful seizure under the execution.—*Stallings v. Gilbreath* (Ala.) 423.

*Proceedings in another suit *held* properly excluded as not affecting all the parties to the pending suit.—*Ryan v. Young* (Ala.) 954.

Where, in a petition by an adjudicatee to enjoin a sale *a la folle enchere*, the petitioner alleges that he was a party defendant in a suit by the owner of the property for the same purpose, and in such former suit he appeared through counsel, such petitioner cannot be heard, for the purpose of defeating the plea of *res judicata*, to say that he was not a party to such former judgment because of an omission by the clerk of court to file his answer.—*McLellan v. Rosser* (La.) 97.

*In a suit to annul a tax sale, a judgment dismissing the suit after trial on issue joined by general denial concludes plaintiff.—*Fluker v. De Grange* (La.) 591.

*A judgment of a federal court is conclusive upon the parties thereto in a subsequent action in a state court as to all matters pleaded, or that might have been pleaded.—*Thornton v. City of Natchez* (Miss.) 498.

A decree for defendants in a suit to cancel clouds and for partition *held* no bar to a subsequent suit between the same parties and for the same relief.—*Scottish-American Mortg. Co. v. Bunckley* (Miss.) 502.

§ 6. Payment, satisfaction, merger, and discharge.

*Under the facts *held* that a motion by defendant to have a judgment against him satisfied should have been granted.—*Pilcher v. Hickman* (Ala.) 741.

§ 7. Actions on judgments.

*Variance between complaint and proof as to date of judgment sued on *held* fatal.—*Fulenwider v. Ridgway* (Ala.) 846.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

On execution, see "Execution," § 3.

A return or offer to return consideration *held* under the circumstances not a condition precedent to a suit to set aside judicial sale of land.—*Austin v. Jones* (Ala.) 408.

*A confirmed sale of property under a chancery decree will not be set aside in a collateral proceeding unless the party seeking such relief acquits himself of want of diligence in resisting confirmation.—*Harris v. Stephenson* (Ala.) 1008.

JURISDICTION.

Amount in controversy, see "Appeal and Error," §§ 1, 2.

Want of, ground for dismissal of appeal, see "Appeal and Error," § 11.

*Point annotated. See syllabus.

Jurisdiction of particular actions or proceedings.

See "Habeas Corpus," § 2; "Partition," § 2. Criminal prosecutions, see "Criminal Law," §§ 3, 4.

For causing death, see "Death," § 1.

Jurisdiction of particular species of property or estates.

Estates of insane persons, see "Insane Persons," § 2.

Special jurisdictions and jurisdictions of particular classes of courts.

See "Equity," § 1.

Appellate jurisdiction, see "Appeal and Error," § 1; "Criminal Law," §§ 38-45.

Particular courts, see "Courts."

JURY.

See "Grand Jury."

Discharge of jury as acquittal, see "Criminal Law," § 5.

In proceedings for assessment of damages for taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

Instructions in civil actions, see "Trial," §§ 6-12.

Instructions in criminal prosecutions, see "Criminal Law," § 24.

Mistake in list of jurors as ground for continuance in criminal prosecution, see "Criminal Law," § 18.

Objections to form of oath of jury for purpose of review, see "Appeal and Error," § 4.

Questions for jury in civil actions, see "Trial," § 5.

Questions for jury in criminal prosecutions, see "Criminal Law," § 24.

Removal of juror during prosecution as ground for sustaining plea of former jeopardy, see "Criminal Law," § 5.

Service of list of jurors before trial in criminal prosecution, see "Criminal Law," § 19.

Taking case or question from jury at trial, see "Trial," § 5.

Verdict in civil actions, see "Trial," § 13.

Verdict in criminal prosecutions, see "Criminal Law," §§ 20, 34.

§ 1. Right to trial by jury.

*Under Acts 1901, p. 112, § 8, a demand for a trial by jury in a criminal case *held* too late.—*Jones v. State* (Ala.) 299.

§ 2. Qualifications of jurors and exemptions.

*Oath administered to jury commissioners *held* to carry with it an obligation to discharge and perform the duties imposed by Acts 1898, p. 216, No. 135, relating to the duties of jury commissioners, without specific mention of that act.—*State v. Stewart* (La.) 798.

§ 3. Summoning, attendance, discharge, and compensation.

Code 1896, § 5004, relating to the drawing of jurors in a capital case, *held* mandatory.—*Morris v. State* (Ala.) 274.

In selecting a jury for the trial of a criminal case from a special venire, it was proper for the court to swear six as their names were drawn, and permit them all to answer the qualifying questions asked of each at one and the same time.—*Untreiner v. State* (Ala.) 285.

*A variance in the middle initial of the names of certain jurors constituted no ground for discharging them.—*Untreiner v. State* (Ala.) 285.

*A variance in the name of a juror between the list served on accused and that drawn from

the hat *held* no ground for discarding such juror.—*Untreiner v. State* (Ala.) 285.

*Under Code 1896, § 5004, *held* not necessary that the presiding judge in drawing a special jury for a capital case announce the names of the jurors as drawn from the box.—*Hammond v. State* (Ala.) 761.

*Under Code 1896, § 4333, *held* that a failure to comply strictly with section 5004, relating to drawing jurors in capital cases was, under the circumstances, not prejudicial to accused.—*Hammond v. State* (Ala.) 761.

The court has no authority to substitute a venireman for one discharged from service on a criminal case "for good and sufficient cause."—*Gaines v. State* (Ala.) 865.

*The court has power to excuse a juror for "good and sufficient cause."—*Gaines v. State* (Ala.) 865.

*Cr. Code 1896, § 5009, requiring the names of jurors summoned for the trial of a capital case to be written on slips of paper, etc., *held* not to require the slips to be numbered.—*Gaines v. State* (Ala.) 865.

Under Code 1896, § 4982, a jury list containing names selected only from certain beats *held* fatally defective.—*Hanners v. State* (Ala.) 973.

*The court was authorized to excuse a juror because of his wife's condition, which demanded his personal attention.—*Williams v. State* (Ala.) 902.

Under Acts 1898, p. 222, No. 135, § 11, where the sheriff, in disregard of his instructions, returns talesmen from the neighborhood in which the crime was committed, the judge may order them to stand aside.—*State v. Thompson* (La.) 107.

Under Act 1898, p. 216, No. 135, as amended by Act 1904, p. 136, No. 58, the process verbal of each successive drawing of jurors must show the names of the jurors then drawn, and also the names of those who have died or become exempt or disqualified. *Held*, that whether the names of those dead or disqualified are stricken from the existing list by being obliterated in some way, or checked so as to indicate to the commissioners that they are no longer available, is immaterial, provided enough new names are added to keep the number of jurors approximately at the number of 300.—*State v. Johnson* (La.) 117.

A jury commissioner cannot impeach the return made by him under the sanctity of his official oath.—*State v. Johnson* (La.) 117.

*A motion to quash venire, no fraud having been committed and no injury done, *held* not such as to justify the court in sustaining the motion, under Acts 1898, p. 223, No. 135, § 15.—*State v. Stewart* (La.) 798.

§ 4. Competency of jurors, challenges, and objections.

*Under Cr. Code 1896, § 5018, it was proper for the court to sustain a challenge for cause against a juror who stated that he was opposed to capital punishment, though he would hang some men.—*Untreiner v. State* (Ala.) 285.

Failure of the jury commissioners to take the special oath prescribed by Code 1896, § 4997, is no ground for quashing the special venire in the absence of any charge of fraud in the drawing.—*Sims v. State* (Ala.) 413.

Motion to quash venire for failure to summon certain jurors *held* properly overruled.—*Porter v. State* (Ala.) 421.

Motion to quash venire *held* in time where made after announcement of ready for trial,

but before commencement of trial.—*Porter v. State* (Ala.) 421.

*By the express provisions of Code 1896, § 5007, a mistake in the name of a juror for the trial of a capital case in the venire or list of jurors delivered to defendant is not necessarily sufficient cause to quash the venire, or to delay or continue the trial.—*Hammond v. State* (Ala.) 761.

*Under Act March 2, 1901 (Acts 1900-01, pp. 2003, 2004), that a juror called in a capital case was not a resident householder or freeholder of the county *held* not a valid ground of challenge for cause.—*Gaines v. State* (Ala.) 865.

*Jurors *held* not subject to challenge for cause because of their statement that they had a fixed opinion which would bias their verdict and which it would take evidence to remove.—*Walker v. State* (Ala.) 878.

A jury drawn from the box at the end of the calendar year to serve for the ensuing week of a regular term, *held* not disqualified by the fact that before a case is actually called a new jury box has been prepared for the year.—*Thompson v. State* (Fla.) 899.

*Under Acts 1898, p. 216, No. 135, § 1, the rejection of a juror by the judge, though erroneous, gives no legal ground of complaint.—*State v. Thompson* (La.) 107.

The fraud which, under Acts 1898, p. 223, No. 135, § 15, authorizes the quashing of the venire, is actual fraud, or such nonobservance of the statute as will justify the inference of actual injury to accused.—*State v. Johnson* (La.) 117.

*It is no ground for recusing a juror that he is the brother of one of the counsel.—*Louisiana Ry. & Navigation Co. v. Morere* (La.) 236.

*Where a juror declares that he thinks he is incompetent, but further says that if sworn as a juror he will try the case according to the law and the evidence he is competent.—*State v. Bush* (La.) 793.

The question of the competency of a juror is for the court.—*State v. Bush* (La.) 793.

*Where before the jury was impaneled the court after examination was satisfied that a juror was prejudiced against accused, the removal of him from the panel was proper.—*State v. Pointdexter* (La.) 688.

JUSTICES OF THE PEACE.

§ 1. Appointment, qualification, and tenure.

*An attachment issued by a justice of the peace after his term of office had expired and before he had given bond as required by Gen. Acts 1903, p. 238, *held* void.—*Smith v. Hilton* (Ala.) 747.

§ 2. Rights, duties, and liabilities.

Justice of the peace instructing constable *held* liable for wrongful acts of constable only if constable were influenced by the instruction.—*Stallings v. Gilbreath* (Ala.) 423.

Justice of the peace instructing constable to make wrongful levy *held* liable as joint tortfeasor.—*Stallings v. Gilbreath* (Ala.) 423.

§ 3. Procedure in civil cases.

*Under Code 1896, §§ 2147, 2149, a defendant in forcible entry and detainer, having removed the cause from a justice to the circuit court, *held* not entitled as of right to a separate trial of the issue of force vel non before trial of the question of title.—*Fowler v. Prichard* (Ala.) 667.

*Point annotated. See syllabus.

§ 4. Review of proceedings.

Misdescription of party in petition for certiorari *held* but a defect in proceedings before the justice of the peace within Code 1896, § 488, and so no ground for dismissal of the certiorari.—*Baker v. Drake* (Ala.) 845.

JUSTIFICATION.

Of homicide, see "Homicide," §§ 3, 9, 13.
Of libel, see "Libel and Slander," § 3.

KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.
Element of estoppel, see "Estoppel," § 2.

LACHES.

Effect in equity, see "Equity," § 2.

LANDLORD AND TENANT.

Application of maxims of equity as affected by breach of lease, see "Equity," § 1.
Cancellation of lease, see "Cancellation of Instruments," § 2.
Confused or misleading instructions in action for rent, see "Trial," § 8.
Liability of sheriff for wrongful levy on property of tenant, see "Sheriffs and Constables," § 1.
Options for sale of land to lessee, see "Vendor and Purchaser," § 3.
Reformation of lease, see "Reformation of Instruments," § 1.
Sale distinguished from lease, see "Vendor and Purchaser," § 1.

§ 1. Leases and agreements in general.
Inadequacy of consideration is not of itself a sufficient ground for canceling a lease unless it is so gross that it shocks the conscience and furnishes satisfactory evidence of fraud.—*Smith v. Collins* (Ala.) 825; *Abel v. Same* (Ala.) 826.

§ 2. Landlord's title and reversion.

*A tenant during his lease cannot change the character of his possession and oust his lessor by purchasing or leasing from a third person.—*Moullierre v. Coco* (La.) 113.

§ 3. Premises, and enjoyment and use thereof.

*A landlord *held* not liable for injuries sustained by a tenant whose infant child became infected with a contagious disease in consequence of a person having prior to the tenancy infected the premises with such disease.—*Finney v. Steele* (Ala.) 976.

The head of the family represents the family, and if he as a tenant is without a right of action because of his failure to make repairs, although he had the right to make them, the members of the family occupying the dwelling are equally concluded.—*Brodman v. Finerty* (La.) 329.

*Under Civ. Code, arts. 2693, 2694, a lessee who has neglected to make necessary repairs not amounting to vices or defects in the premises cannot recover for personal injuries caused by the premises being out of repair.—*Brodman v. Finerty* (La.) 329.

*A lessee of property abutting on street during his term has all rights as to ingress and egress that the fee owner would have, except as to the extent of damage.—*Coleman v. Holden* (Miss.) 374.

§ 4. Rent and advances.

In action against sublessee for rent, instruction that, if plaintiff paid principal lessee for the privilege of making a wall on premises, this is evidence of damage to the party in possession, *held* erroneous.—*McConnell v. Adair* (Ala.) 419.

Property of landlord, mixed with that of tenant subject to a landlord's lien, *held* chargeable therefor in the hands of a third person.—*Maddox v. Maddox* (Ala.) 426.

A landlord, having represented to plaintiffs that his tenant was to have the land rent free for the year, *held* estopped to set up a claim as landlord for rent or advances as against plaintiff's claim against the crops grown for advances.—*Chancellor v. Law & Edmonds* (Ala.) 514.

Where the only heir of a lessee assented to the taking of goods to pay debt of the lessee to the lessor, the lessor is not entitled to retain any part of the goods for debt of a sublessee.—*Poindexter v. Cunningham Bros.* (Miss.) 3.

Under agreement between parties, lessee *held* not liable to lessor for advances to sublessee.—*Poindexter v. Cunningham Bros.* (Miss.) 3.

§ 5. Renting on shares.

*Under Code 1896, §§ 2712, 2760, a certain contract *held* not a contract of hire, but to create a joint tenancy in a crop raised pursuant thereto.—*Hendricks v. Clemmons* (Ala.) 306.

LANDS.

See "Public Lands."

LARCENY.

See "Embezzlement."

Admissions as evidence, see "Criminal Law," § 12.

Opinion evidence, see "Criminal Law," § 14.

Res gestæ, see "Criminal Law," § 8.

Sufficiency of indictment in general, see "Indictment and Information," § 3.

§ 1. Offenses and responsibility therefor.

*Facts *held* to show defendant guilty of larceny.—*Daniels v. State* (Ala.) 525.

§ 2. Prosecution and punishment.

*On a trial for larceny accused *held* entitled to explain his possession of the stolen property.—*Echols v. State* (Ala.) 298.

*On a prosecution for larceny, requested instructions hypothesizing counts of the indictment, *held* erroneously refused.—*Hamilton v. State* (Ala.) 940.

*Counts in an indictment for larceny *held* not demurrable as not sufficiently describing the money taken.—*Hamilton v. State* (Ala.) 940.

*Where the verdict found the accused simply "guilty of larceny," and no objection was made to its form until after the jury had been discharged, refusal to arrest judgment on the ground that it did not show the value of the property stolen *held* not error.—*State v. James County* (La.) 702.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 23.

LEASES.

See "Landlord and Tenant."

*Point annotated. See syllabus.

LEGACIES.

See "Wills."

LEGITIMACY.

See "Bastards," § 1.

LETTERS PATENT.

For public lands, see "Public Lands," § 1.

LEVEES.

Embankment in lake for levee purposes as public land, see "Public Lands," § 2.

LEVY.

Of taxes, see "Taxation," § 2.

LIBEL AND SLANDER.

Liability of corporation for libel, see "Corporations," § 6.

Right of parent to recover for libel against daughter, see "Parent and Child."

§ 1. Words and acts actionable, and liability therefor.

Where defendants published that plaintiff was unfit to be district attorney or even to practice law because his brother had not done certain things, referring to reprehensible conduct on the part of the brother, *held*, that the imputation was that plaintiff had participated in some way in this misconduct.—*Luzenberg v. O'Malley* (La.) 41.

*Published words, to the effect that a factory girl was discharged for a reason that the manager preferred not to disclose, constitute an actionable libel.—*Pattison v. Gulf Bag Co.* (La.) 224.

§ 2. Privileged communications, and malice therein.

A newspaper has no greater privilege than an ordinary person to publish false and defamatory statements.—*Luzenberg v. O'Malley* (La.) 41.

Where a newspaper published of plaintiff that he was unfit to be district attorney or to practice law for numerous reasons, the demand of plaintiff that he should name such reasons was not a license to publish defamatory falsehoods.—*Luzenberg v. O'Malley* (La.) 41.

§ 3. Actions.

*In an action for libel, the justification of a different charge from that made in the publication *held* no justification.—*Luzenberg v. O'Malley* (La.) 41.

§ 4. Criminal responsibility.

Rev. St. §§ 804, 982, providing for the punishment of any person making or publishing any manner of libel, *held* not superseded by Acts 1902, p. 181, No. 107, § 4, providing that whoever shall by spoken words maliciously defame, etc., shall be fined.—*State v. Kiernan* (La.) 55; *In re Kiernan*, *Id.*

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," §§ 3, 4.

Injuries to licensees, see "Railroads," § 5.
Law imposing privilege tax as deprivation of due process of law, see "Constitutional Law," § 7.

Procedure in appellate court in proceedings involving validity of license tax, see "Courts," § 3.

*Point annotated. See syllabus.

Restraining grant of municipal license, see "Injunction," § 2.

To remove timber, see "Logs and Logging."

§ 1. For occupations and privileges.

The business of a broker engaged in buying and selling cotton on margin *held* not interstate commerce, and properly chargeable with the tax imposed by Acts 1903, p. 207.—*Ware v. Mobile County* (Ala.) 153; *Same v. State* (Ala.) 156.

The fact that contracts made by a broker engaged in buying and selling cotton were sometimes discharged by delivery of cotton *held* not to affect the liability of the broker for the tax imposed by Gen. Acts 1903, p. 207.—*Ware v. Mobile County* (Ala.) 153; *Same v. State* (Ala.) 156.

The provision of a city ordinance imposing a tax on wholesale dealers in kerosene oil *held* not unconstitutional as discriminative.—*Mefford v. City Council of Sheffield* (Ala.) 970.

*In Laws 1903, p. 9, c. 5106, § 16, providing that wholesale dealers in fresh meats shall pay a license tax, *held*, that the word "dealer" does not comprehend a person who buys a commodity in one form, and by his skill and labor converts it into an entirely different commodity.—*Florida Packing & Ice Co. v. Carney* (Fla.) 190.

A license tax imposed by Laws 1903, p. 9, c. 5106, § 16, is on the wholesale dealer in fresh meats only, and the meat must be in that state where it can properly be termed "fresh meat," as distinguished from cured or salted, in order to render him liable for the license tax.—*Florida Packing & Ice Co. v. Carney* (Fla.) 190.

Meats technically known as "cured" from having been treated with salt, smoke, etc., are not within Laws 1903, p. 9, c. 5106, § 16, imposing a license tax on wholesale dealers in fresh meats.—*Florida Packing & Ice Co. v. Carney* (Fla.) 190.

An agent for several nonresident steamship companies, selling transportation, receiving the price, and giving orders for tickets to be delivered in New York, is liable to a license tax under Acts 1898, p. 412, No. 171, § 12, as carrying on the business of selling or dealing in railroad or steamship tickets.—*State v. Orfila* (La.) 227; *In re Fitzpatrick*, *Id.*

The decision of the Supreme Court as to the effect of a change of the officers of the tax department of the original construction of a license law *held* not to extend in favor of parties who made no inquiry, but who by reason of such construction had not been called upon for a license; but only relieves them from the payment of interest and attorney's fees after a judicial demand for a license.—*State v. C. C. Hartwell Co.* (La.) 444.

Work executed by a corporation for other persons through contracts made by those persons and the corporation renders the latter liable for a license tax under Acts 1898, p. 415, No. 171, § 14, as amended by Act 1900, p. 160, No. 103, as a "contractor who employs assistants."—*State v. C. C. Hartwell Co.* (La.) 444.

LIENS.

Defective mortgage as equitable lien, see "Mortgages," § 1.

Record on appeal in proceedings to enforce, see "Appeal and Error," § 9.

Liens acquired by particular remedies or proceedings.

See "Attachment," § 1.

Particular classes of liens.

See "Chattel Mortgages," §§ 3, 4; "Mechanics' Liens."

Agricultural liens, see "Agriculture."

Attorney's lien, see "Attorney and Client," §§ 1, 3.

For labor and material on public improvements, see "Municipal Corporations," § 3.

Landlord's lien for rent, see "Landlord and Tenant," § 4.

Mortgage, see "Chattel Mortgages," § 2.

Pledge, see "Pledges."

Vendor's lien on lands sold, see "Vendor and Purchaser," § 4.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Laches, see "Equity," § 2.

Operation of limitations against co-tenant, see "Tenancy in Common," § 2.

Particular actions or proceedings.

For injuries caused by exercise of power of eminent domain, see "Eminent Domain," § 4.

Probate proceedings, see "Wills," § 3.

To enforce stockholders' liability, see "Corporations," § 4.

To try tax title, see "Taxation," § 5.

§ 1. Computation of period of limitation.

*The statute of limitations will not run against a grantor, in favor of an entryman, executed while the grantor was insane, during the grantor's disability.—*Fowler v. Prichard* (Ala.) 667.

*Prescription of 10 years does not run against minors.—*Scovell v. St. Louis Southwestern Ry. Co.* (La.) 723; *In re St. Louis Southwestern Ry. Co.*, Id.

LIMITATION OF LIABILITY.

Of carrier, see "Carriers," § 5.

LIQUOR SELLING.

See "Intoxicating Liquors."

LITIGIOUS RIGHTS.

Contracts of attorneys for contingent fees, see "Attorney and Client," § 3.

LIVE STOCK.

Carriage of, see "Carriers," § 3.

Injuries from operation of railroads, see "Railroads," § 8.

LOAN ASSOCIATIONS.

See "Building and Loan Associations."

LOCAL LAWS.

See "Statutes," § 2.

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors," § 3.

LOGS AND LOGGING.

Co-tenancy in standing timber, see "Tenancy in Common," § 1.

Evidence of damages for breach of logging contract, see "Damages," § 5.

Liability for act of servant in cutting trees, see "Master and Servant," § 12.

Rescission of sale of timber, see "Sales," § 3.

*One entitled to enter on the land of another and cut and haul away standing timber, pursuant to a verbal contract, *held* not liable as for breach of contract, for failing to go forward with the execution of the contract.—*Colby-Hinkley Co. v. Jordan* (Ala.) 962.

*An oral contract for the sale of standing timber *held* to give the buyer only a revocable license to enter on the premises to cut and take away the timber.—*Colby-Hinkley Co. v. Jordan* (Ala.) 962.

LOST INSTRUMENTS.

Best and secondary evidence of, see "Evidence," § 5.

LUMBER.

See "Logs and Logging."

LUNATICS.

See "Insane Persons."

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 3.

MAINTENANCE.

See "Champerty and Maintenance."

MALICE.

Element of homicide, see "Homicide," §§ 6, 12.

MALICIOUS PROSECUTION.

See "False Imprisonment."

Injury to health of mother from malicious arrest of child, see "Parent and Child."

§ 1. Nature and commencement of prosecution.

Where defendant caused the arrest of two minor children, charging them with malicious mischief, and they were tried and acquitted, the children could recover exemplary damages.—*Sperler v. Ott* (La.) 323.

MALICIOUS TRESPASS.

See "Trespass," § 3.

MANDAMUS.

Decisions reviewable, see "Appeal and Error," § 2.

Dismissal of appeal, see "Appeal and Error," § 11.

Judgment in general, see "Judgment," § 1.

To compel execution of writs of possession, see "Assistance, Writs of."

§ 1. Nature and grounds in general.

*A repealed statute cannot support a proceeding for mandamus.—*Browne v. State* (Ala.) 407.

Under the dispensary act (Gen. Acts 1896-99, p. 110), mayor of a city *held* not entitled to mandamus to compel the county judge to perform certain duties imposed upon him by the act.—*Rose v. Lampley* (Ala.) 521.

*Point annotated. See syllabus.

*Mandamus held not a proper remedy to compel a trial court to refuse to recognize a change of attorneys until relators' services had been paid or their payment secured.—*Kelly & Middleton v. Horsley* (Ala.) 902.

*Mandamus will not lie to compel the district judge to issue an injunction against the further prosecution of a suit between the same parties in the same or another court.—*Lewis v. D'Albor* (La.) 31; *In re Lewis*, Id.

*Mandamus will not issue until other remedies are exhausted.—*State ex rel. Perez v. Whitaker* (La.) 218.

*Where the trial judge is vested with discretion as to issuing an injunction, the appellate court will not assume jurisdiction in mandamus and direct him to set aside his order declining to issue the writ.—*Hanson v. Police Jury of St. Mary Parish* (La.) 321.

*Mandamus will not generally lie if there is a right of appeal.—*Hanson v. Police Jury of St. Mary Parish* (La.) 321.

§ 2. Subjects and purposes of relief.

*Where a claim against a county was properly verified and presented, mandamus was maintainable to compel the commissioners to audit the same, as required by Code 1896, § 1416.—*Commissioners' Court of Chilton County v. State* (Ala.) 463, 465.

*Where a claim against a county has been audited and allowed, the probate judge's duty to issue a warrant therefor under Code 1896, § 1416, is ministerial, the performance of which may be enforced by mandamus.—*Smith v. McCutchen* (Ala.) 619.

*Under Code 1896, §§ 1416, 1417, mandamus will lie to compel a probate judge to draw a warrant for a claim against a county only when the claim is for a definite fixed sum.—*Smith v. McCutchen* (Ala.) 619.

Where the police jury, having power only to license and regulate the sale of liquors, used such power to prohibit the sale by the enactment of certain ordinances, the police jury will be directed by mandamus to repeal the same.—*State ex rel. Liso v. Police Jury of Red River Parish* (La.) 85.

*Where the taxing power of a city has been exhausted, and its estimated revenues are not more than sufficient to meet the necessary and usual charges for the year, mandamus will not lie to compel the appropriation of money to pay a judgment out of undetermined surplus.—*State ex rel. Lorenz v. City Council of New Orleans* (La.) 115.

MANDATE.

See "Mandamus."

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 24.

MANSLAUGHTER.

See "Homicide," §§ 5, 9, 14, 15, 17.

MANUFACTURES.

Duty of proprietor to keep mill in safe condition, see "Negligence," § 1.

MAPS.

Best and secondary evidence of, see "Evidence," § 5.

*Point annotated. See syllabus.

MARRIAGE.

See "Bigamy"; "Divorce"; "Husband and Wife."

Parties on appeal as affected by marriage of infant, party pending suit, see "Appeal and Error," § 5.

MARRIAGE SETTLEMENTS.

See "Husband and Wife," § 2.

MARRIED WOMEN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

Of insolvent corporation, see "Corporations," § 4.

Where a single first mortgage rests on two plantations, owned by A. and B., but the entire debt is due by A., the plantation of B. cannot be made to contribute to the payment thereof, unless the proceeds of the sale of A.'s plantation are insufficient.—*Blanchard v. Naquin* (La.) 99.

Where two plantations, owned by A. and B., respectively, are covered by a single mortgage, and the titles show that A. has assumed the debt, neither A. nor any creditor of his, who was party to the contracts by which the titles were acquired, or who claim under a mortgage inscribed after the registry of those titles, can take anything from the fund realized by the sale under the first mortgage, until B. is reimbursed for sale of his plantation.—*Blanchard v. Naquin* (La.) 99.

*A creditor holding collateral security may be required to exhaust such security before being allowed to participate in the distribution of a common fund which is insufficient to pay in full the debts of the common debtor.—*Campbell v. J. I. Campbell Co.* (La.) 696.

A creditor of the maker of a note and the payee thereof was not obliged to discuss collaterals deposited by the latter in order to receive his proportional share of the assets of the former when insolvent.—*Campbell v. J. I. Campbell Co.* (La.) 696.

MASTER AND SERVANT.

Admissions as evidence in action for injuries to servant, see "Evidence," § 6.

Aider of pleading by verdict in action for injuries to servant, see "Pleading," § 8.

Amendment of pleading in action for injuries to servant, see "Pleading," § 5.

Applicability of instructions to pleading and evidence in action for injuries to servant, see "Trial," § 9.

Contracts of employment in general, see "Contracts," § 2.

Evidence of damages in action for injuries to servant, see "Damages," § 5.

Measure of damages for injuries to servant, see "Damages," § 3.

Necessity of indictment in prosecution for interference with employment, see "Indictment and Information," § 1.

Opinion evidence in action for injuries to servant, see "Evidence," § 11.

Province of court and jury in action for injuries to servant, see "Trial," § 6.

§ 1. The relation.

One learning the duties of a railroad brakeman held a servant and not a licensee.—*Alabama Great Southern R. Co. v. Burks* (Ala.) 638.

§ 2. Master's liability for injuries to servant—Nature and extent in general.

Negligence of a master *held* not the proximate cause of injury to an employé.—*Richards v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 288.

*Mere minority of a servant does not necessarily impose on the master any greater degree of care than the master is bound to exercise toward a servant of full age.—*Decatur Car Wheel & Mfg. Co. v. Terry (Ala.)* 839.

*A servant *held* not entitled to recover for any negligence of a superintendent which did not contribute to the injury.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*In an action for injuries, plaintiff *held* not entitled to recover on the theory that he was defendant's servant.—*Dallas Mfg. Co. v. Townes (Ala.)* 988.

*An instruction that defendant was liable for the death of plaintiff's intestate, if he was put to work at an occupation that was dangerous to a boy of intestate's experience, age, and capacity *held* error.—*Moss v. Mosley (Ala.)* 1012.

§ 3. — Tools, machinery, appliances, and places for work.

*A master must provide a safe place for the workman.—*Foreman v. Eagle Rice Mill (La.)* 555.

*Machinery that can be easily and cheaply incased, and that is dangerous without casing, should be incased.—*Foreman v. Eagle Rice Mill Co. (La.)* 555.

*Where a railroad company gave a lumber company the right to use its track, and the conductor was injured by the giving way of a defective bridge, the lumber company was not liable for the injuries sustained.—*Hamilton v. Louisiana & N. W. R. Co. (La.)* 560.

*A railroad company owes its servants operating trains a duty to keep the track in a safe condition which cannot be delegated.—*Mississippi Cent. R. Co. v. Hardy (Miss.)* 505.

Facts *held* to establish negligence on the part of a railroad company in failing to keep a steam shovel on which plaintiff was employed in proper repair.—*Southern Ry. Co. v. Wiley (Miss.)* 511.

§ 4. — Methods of work, rules, and orders.

*A rule of a railroad company prohibiting employes from going between moving cars to couple or uncouple them while in motion is reasonable.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*A custom among railroad employes of violating a rule prohibiting them from going between cars to make couplings *held* not binding on the master unless known and acquiesced in.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

§ 5. — Warning and instructing servant.

*A master *held* not required to instruct an employé 19 years old how to board an ore car drawn by a mule.—*Richards v. Sloss-Sheffield Steel & Iron Co. (Ala.)* 288.

*Where a servant was employed, and a few hours afterwards met with the accident causing his death, and had not been warned, and the accident could have been avoided by incasing a shaft, the master is liable.—*Foreman v. Eagle Rice Mill Co. (La.)* 555.

§ 6. — Fellow servants.

*To create a liability under Code 1896, § 1749, subd. 2, *held* necessary to show that the employé injured in consequence of the negligence of another employé was injured while the latter was exercising his duties of superintend-

ence.—*Smith v. Pioneer Min. & Mfg. Co. (Ala.)* 475.

Under Code 1896, § 1749, subd. 2, an employer *held* not liable for injuries received by an employé in consequence of the negligence of another employé.—*Smith v. Pioneer Min. & Mfg. Co. (Ala.)* 475.

*In an action for injuries to a brakeman, an instruction on the circumstances under which plaintiff could recover for the negligence of the engineer *held* proper.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

§ 7. — Risks assumed by servant.

*A minor, on entering service, assumes the risks as fully as does an adult.—*Decatur Car Wheel & Mfg. Co. v. Terry (Ala.)* 839.

An order given a brakeman by a superintendent *held* not to have amounted to an order to go between cars to couple them.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*A minor employé *held* to assume such risks of the business in which he engages as would be obvious to a person of intestate's apparent age, intelligence, and capacity.—*Moss v. Mosley (Ala.)* 1012.

*A servant does not assume the risk of injuries resulting from defects in the instrumentalities provided by the master which are not obvious.—*Southern Ry. Co. v. Wiley (Miss.)* 511.

§ 8. — Contributory negligence of servant.

*A servant of a railroad company *held* guilty of contributory negligence as a matter of law in dumping a slate car contrary to orders while it was moving at some speed before it reached the dumping ground.—*Redus v. Milner Coal & R. Co. (Ala.)* 604.

In an action for injuries to a servant, plaintiff *held* guilty of contributory negligence.—*King v. Southern R. Co. (Ala.)* 639.

*In an action for injuries to a brakeman while coupling cars, certain facts *held* to show no negligence on the part of the engineer.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*A brakeman *held* guilty of contributory negligence in going between moving cars.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*Contributory negligence *held* to preclude recovery for injuries to a brakeman while between cars.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*A servant acting under orders of master will not be held to have assumed the risk unless so evident that no prudent person would have obeyed the order.—*Hunley v. A. L. Patterson & Co. (La.)* 54.

*A servant may to some extent trust to the knowledge and care of his master.—*Foreman v. Eagle Rice Mill Co. (La.)* 555.

*Defendant *held* not guilty of contributory negligence in continuing to work on a defective crane by which he was subsequently injured.—*Southern Ry. Co. v. Wiley (Miss.)* 511.

§ 9. — Pleading in actions for injuries.

In an action for injuries to a servant, a plea *held* not subject to the grounds of demurrer assigned.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

In an action for injuries to a brakeman, a plea charging contributory negligence in going between cars *held* sufficient.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

In an action for injuries to a brakeman, a demurrer to a replication to a plea *held* properly sustained.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*Point annotated. See syllabus.

In an action for death of a servant, an allegation that defendant's superintendent knew that plaintiff's intestate was an inexperienced boy in and about the business *held* a material allegation which plaintiff was bound to prove.—*Moss v. Mosley* (Ala.) 1012.

*In an action for death of a servant, the complaint *held* not defective for failure to allege that intestate was killed while in the discharge of the duties of his employment.—*Moss v. Mosley* (Ala.) 1012.

*In an action for death of an inexperienced servant, the complaint *held* not fatally defective for failure to aver that the dangers were not obvious, or that he was not warned or cautioned as to their existence.—*Moss v. Mosley* (Ala.) 1012.

In an action for death of a servant, the complaint *held* not demurrable for indefiniteness of the allegations of negligence nor for failure to allege that intestate was in the discharge of his duty at the time he was injured.—*Moss v. Mosley* (Ala.) 1012.

In an action by a servant to recover for personal injuries, petition *held* to state a cause of action.—*Davis v. Queen City Furniture Mfg. Co.* (La.) 318.

A declaration for death of a locomotive fireman, charging merely negligence of the engineer in running the locomotive, *held* to show no liability of the railroad company.—*Hyatt v. Southern Ry. Co.* (Miss.) 3.

A declaration for injury to an employé *held* to charge negligence of the superintendent, and not of fellow servants.—*Morris v. Brookhaven & P. R. R. Co.* (Miss.) 267.

§ 10. — Evidence in actions for injuries.

*That plaintiff was injured by being thrown from a slate car *held* insufficient to establish a prima facie case of negligence on the part of plaintiff's employer.—*Redus v. Milner Coal & R. Co.* (Ala.) 604.

In an action for injuries to a servant, evidence *held* insufficient to sustain the averment of negligence pleaded.—*King v. Southern R. Co.* (Ala.) 639.

*In an action for injuries to a brakeman while between cars endeavoring to couple them, it was proper to permit plaintiff's superintendent to testify as to what he told plaintiff about going between cars the day he started to work and of his calling plaintiff's attention to rules whereby servants were forbidden to go between cars.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

In an action for injuries to a brakeman while between cars endeavoring to couple them, *held* proper to permit a witness to testify as to the condition of certain cars and their couplings.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

In an action for death of a minor employé, evidence *held* admissible as bearing on the question whether plaintiff's intestate was inexperienced with respect to the particular work assigned him.—*Moss v. Mosley* (Ala.) 1012.

In an action for death of a servant, an instruction that if it was not a part of intestate's duty to do what he was doing when he was killed, plaintiff could not recover, *held* properly refused.—*Moss v. Mosley* (Ala.) 1012.

Evidence *held* to show that plaintiff was warned against dangers incident to his occupation.—*Davis v. Queen City Furniture Mfg. Co.* (La.) 318.

In an action to recover for injuries to an employé, evidence *held* not to show that plaintiff was an inexperienced man, so that it was negli-

gent to give him employment on the work at which he was injured.—*Davis v. Queen City Furniture Mfg. Co.* (La.) 318.

In an action for injuries to a servant, evidence *held* to sustain judgment for defendant.—*Davis v. Queen City Furniture Mfg. Co.* (La.) 318.

*In an action to recover for injuries received, plaintiff must prove that needful appliances were wanting, and that the accident was caused thereby.—*Davis v. Queen City Furniture Mfg. Co.* (La.) 318.

§ 11. — Trial of actions for injuries.

An instruction that, if plaintiff emptied a slate car at the place of derailment, he was guilty of contributory negligence, *held* sufficiently covered by a plea that plaintiff was guilty of contributory negligence, in that he "dumped the car."—*Redus v. Milner Coal & R. Co.* (Ala.) 634.

*In an action for injuries to a minor servant, evidence *held* to require submission to the jury of the question whether the danger was such as to require warning from the master.—*Decatur Car Wheel & Mfg. Co. v. Terry* (Ala.) 839.

In an action for injuries to a brakeman, a requested instruction *held* properly refused as seeking a recovery, irrespective of whether a certain defect in appliances was the proximate cause of the injury.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

*In an action for injuries to a brakeman, *held* a question for the jury whether there was negligence on the part of plaintiff's superior employé in failing to signal the engineer to stop or slacken the speed of the engine and cars before striking detached cars which plaintiff was between endeavoring to make a coupling.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

*A servant who does not resort to the least dangerous way of performing the duties of his employment is not guilty of negligence as a matter of law.—*Moss v. Mosley* (Ala.) 1012.

In an action for death of a servant, an instruction that plaintiff could not recover unless intestate was inexperienced in the work he was doing when killed *held* improperly refused.—*Moss v. Mosley* (Ala.) 1012.

In an action for death of a minor employé, it was error for the court to refuse to charge that unless the work when performed in the usual way was necessarily dangerous, plaintiff could not recover.—*Moss v. Mosley* (Ala.) 1012.

In an action for death of a servant, an instruction that if he failed to use the least dangerous way to perform the work, plaintiff could not recover, *held* properly refused.—*Moss v. Mosley* (Ala.) 1012.

An instruction in an action for death of a servant, failing to hypothesize that his act, charged to constitute contributory negligence, contributed to his injury, *held* properly refused.—*Moss v. Mosley* (Ala.) 1012.

*In an action for injuries to a servant, *held* a question for the jury whether he had assumed the risk of a defective appliance.—*O'Neal v. Refuge Cotton Oil Co.* (Miss.) 67.

§ 12. Liabilities for injuries to third persons.

*Act of defendant's servant *held* not to render defendant liable for the penalty imposed by Code 1896, § 4137, for willfully and knowingly cutting the trees of another.—*Alabama Mineral Land Co. v. Lathrop-Hatton Lumber Co.* (Ala.) 952.

MASTERS IN CHANCERY.

See "Equity," § 6.

*Point annotated. See syllabus.

MATERIALITY.

Of evidence in civil actions, see "Evidence," § 4.
Of evidence in criminal prosecutions, see "Criminal Law," § 10.

MAXIMS.

Of equity, see "Equity," § 1.

MEASURE OF DAMAGES.

See "Damages," § 3.
For breach of contract, see "Sales," § 7.
For causing death, see "Death," § 1.
For injuries caused by exercise of power of eminent domain, see "Eminent Domain," § 4.
For taking property of co-tenants for public use, see "Tenancy in Common," § 3.
For wrongful conversion, see "Trove and Conversion," § 2.

MECHANICS' LIENS.

Pleading authority of agent in suit to enforce, see "Principal and Agent," § 2.

§ 1. Right to lien.

*Where a married woman, with knowledge of the facts that improvements were being made on her house under a contract with her husband, consented to their being made, *held* that those making them had under the express provisions of the statute a mechanic's lien therefor.—*McGeever v. S. H. Harris & Sons (Ala.)* 930.

*The property of a married woman is subject to a lien for labor and materials furnished in repairing a building owned by her, contracted for by her husband as her agent.—*Saunders v. Tuscumbia Roofing & Plumbing Co. (Ala.)* 982.

§ 2. Proceedings to perfect.

*A verification of the statement of a mechanic's lien *held* sufficient.—*McGeever v. S. H. Harris & Sons (Ala.)* 930.

§ 3. Operation and effect.

Under Acts 1903, p. 78, c. 5143, where a contractor assigns balance due on an uncompleted building contract, and the owner accepts the assignment on condition that the assignee will complete the contract, and before completion and before balance due is paid a materialman's lien is served, it is binding on the property for an amount not greater than the amount unpaid at the time of the service of the notice.—*Carter v. Brady (Fla.)* 539.

Under Acts 1903, p. 78, c. 5143, an assignment by a contractor of a balance to become due under his contract will not defeat a materialman's lien, served before the completion of the building.—*Carter v. Brady (Fla.)* 539.

§ 4. Enforcement.

*A complaint in an action to enforce a mechanic's lien *held* sufficient without describing in detail the facts stated in the statement filed in the office of the probate judge.—*McGeever v. S. H. Harris & Sons (Ala.)* 930.

*Under the express provisions of Code 1896, § 2739, where in an action to establish a mechanic's lien the evidence shows a personal liability on the part of the defendant and that plaintiff is entitled to a lien, a judgment both in personam and in rem is to be rendered.—*McGeever v. S. H. Harris & Sons (Ala.)* 930.

In a suit to enforce a lien for labor and materials in repairing a building owned by a married woman, contracted for by her husband, certain evidence *held* admissible as showing his agency.—*Saunders v. Tuscumbia Roofing & Plumbing Co. (Ala.)* 982.

*Point annotated. See syllabus.

MENTAL SUFFERING.

Caused by failure to deliver telegram, see "Telegraphs and Telephones," § 1.
Element of damages for malicious arrest of child, see "Parent and Child."

MERGER.

Of cause of action in judgment, see "Judgment," § 4.

MINORS.

See "Adoption"; "Infants."

MISREPRESENTATION.

See "Fraud."

MISTAKE.

Effect on right to specific performance, see "Specific Performance," § 1.
Ground for cancellation of contract, see "Contracts," § 3.
Ground for reformation of written instrument, see "Reformation of Instruments," §§ 1, 2.

MOBS.

Effect on appeal in criminal prosecution of hanging of defendant by mob, see "Criminal Law," § 43.

MONEY.

Embezzlement of, see "Embezzlement."

MONEY LENT.

To wife, see "Husband and Wife," § 3.

MONEY RECEIVED.

Recovery of overcharge paid to carrier, see "Carriers," § 7.
Recovery of payment in general, see "Payment," § 1.
Waiver of tort by action for, see "Action," § 2.

MORTGAGES.

See "Insane Persons," § 2.
Amendment of pleading in action to cancel, see "Pleading," § 5.
Application of maxims of equity in suit to cancel, see "Equity," § 1.
By or to married women, see "Husband and Wife," § 3.
Estoppel to claim land mortgaged by another, see "Estoppel," § 2.
In fraud of creditors, see "Fraudulent Conveyances," § 1.
Interest on mortgage debt, see "Interest," § 1.
Laws impairing obligation, see "Constitutional Law," § 4.
Marshaling assets for payment of, see "Marshaling Assets and Securities."
Of personal property, see "Chattel Mortgages."
Parol or extrinsic evidence, see "Evidence," § 10.
Reformation, see "Reformation of Instruments," § 1.
Right of redemptioner to maintain unlawful detainer against mortgagor, see "Forcible Entry and Detainer," § 1.
Setting aside mortgage as cloud on title, see "Quieting Title," § 2.
Taxation of, see "Taxation," § 1.

§ 1. Requisites and validity.

*An instrument *held* to create an equitable lien on land which equity will enforce as against a subsequent purchaser under execution, with notice.—*Markham v. Wallace* (Ala.) 304.

On foreclosure of chattel mortgage given under sale *held* error in denying the defense of partial failure of consideration.—*Otis v. McCaskill* (Fla.) 458.

§ 2. Construction and operation.

*Where a mortgage conveyed "the mineral lands" described in a certain deed and the deed described no lands as "mineral," the mortgage covers the lands described in the deed which were mineral in fact.—*Smith v. Vary* (Ala.) 941.

§ 3. Rights and liabilities of parties.

Where a bank held title to property as security, and only acted as agent for the owner in receiving a part of the price of the timber, it is not liable for the act of a person in taking timber off the land.—*Tucker v. Benedict* (La.) 228.

§ 4. Transfer of property mortgaged or of equity of redemption.

The holder of notes secured by a mortgage containing the pact de non alienando does not lose his mortgage by consenting with the mortgagor, without consulting a third person to whom the mortgagor's property may have been sold, to an extension.—*Blanchard v. Naquin* (La.) 99.

§ 5. Foreclosure by exercise of power of sale.

*Where a mortgage authorized a sale in case of a failure to pay any installment, but only provided for a single sale, a sale for nonpayment of a prior installment extinguished the power, though the mortgagor was entitled to retain enough of the proceeds to satisfy the indebtedness.—*Ford v. Lewis* (Ala.) 144.

*Mortgagor's failure to pay one of the notes secured at maturity *held* not to mature the others, in the absence of a provision in the contract to that effect.—*Ford v. Lewis* (Ala.) 144.

*Where a mortgage provided for a sale in case of a failure to pay the secured indebtedness or "any part thereof when due," it authorized a sale on default of any one of the notes, which default operated as a forfeiture pro tanto.—*Ford v. Lewis* (Ala.) 144.

*The appointment of a substituted trustee in a deed of trust need not be made on the paper itself.—*Watkins v. McDonald* (Miss.) 376.

Where the owner of a trust deed is very feeble, a substitution of trustees *held* sufficient, though not signed with his own hand.—*Watkins v. McDonald* (Miss.) 376.

§ 6. Foreclosure by action.

*When the consideration for a mortgage on realty is the price of personality, partial failure of consideration may be pleaded in a suit to enforce the mortgage.—*Otis v. McCaskill* (Fla.) 458.

An answer to a foreclosure, setting up a partial failure of consideration, casts the burden of proof on the complainant.—*Otis v. McCaskill* (Fla.) 458.

A sheriff's deed *held* not the just title required as the basis of the prescription of 10 years, so that certain persons were possessors in bad faith, liable for rents and revenues, and certain other parties were not estopped to assert the nullity of the title.—*Fontelieu v. Fontelieu* (La.) 120.

§ 7. Redemption.

Gen. Acts 1900-01, p. 164, amending Code 1896, § 2630, relating to contracts for usurious interest, *held* to authorize a borrower to redeem from a mortgage securing a usurious debt without paying any interest.—*Barclift v. Fields* (Ala.) 84.

*Complainant in a suit to redeem from foreclosure *held* not bound to surrender possession as a condition precedent to redemption, unless a demand for possession by the purchaser or his vendee had been made under Code 1896, § 3506.—*Fuller v. Varnum* (Ala.) 777.

A bill to redeem from foreclosure sale *held* not subject to dismissal for failure to allege who was in possession at the date of foreclosure, or the filing of the bill, but was amendable in that regard.—*Fuller v. Varnum* (Ala.) 777.

Bill to redeem land from foreclosure sale *held* not subject to dismissal for failure to allege that the amount tendered included the price of the land with 10 per cent. thereon.—*Fuller v. Varnum* (Ala.) 777.

MOTIONS.

Presentation in appeal record of questions relating to rulings, see "Appeal and Error," § 9.

For particular purposes or relief.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 36.

Direction of verdict in civil actions, see "Trial," § 5.

Dissolution of injunction, see "Injunction," § 4.

New trial in criminal prosecutions, see "Criminal Law," § 36; "Homicide," § 15.

Presentation of objections for review, see "Appeal and Error," § 4.

Quashing deposition, see "Depositions."

Quashing indictment or information, see "Indictment and Information," §§ 5, 7.

Quashing venire, see "Jury," §§ 3, 4.

Quashing venire in proceedings for assessment of damages for taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

Retaxation of costs, see "Costs," § 4.

Satisfaction of judgment, see "Judgment," § 6.

Setting aside award, see "Arbitration and Award," § 1.

Striking out bill of exceptions, see "Evidence," § 1.

Striking out evidence, see "Criminal Law," § 22; "Trial," § 3.

MOTIVE.

Competency of evidence of, see "Evidence," § 4.

For homicide, see "Homicide," §§ 6, 10.

MULTIFARIOUSNESS.

See "Equity," § 3.

MUNICIPAL CORPORATIONS.

See "Counties."

Assessments for local improvements as denial of due process of law, see "Constitutional Law," § 7.

Authority of police to arrest without warrant, see "Arrest," § 1.

Dedication of streets, see "Dedication," § 1.

Dissolution of injunction to restrain municipal improvement, see "Injunction," § 4.

Establishment of highways, see "Highways," § 2.

Imposition of additional servitudes in streets in exercise of power of eminent domain, see "Eminent Domain," § 4.

*Point annotated. See syllabus.

Imposition of license taxes, see "Licenses," § 1.
 Injunctions affecting, see "Injunction," § 2.
 Issues presented by pleading in suit to enjoin obstruction of street, see "Pleading," § 7.
 Judicial notice as to reasonableness of ordinances, see "Evidence," § 1.
 Jurisdiction of equity of remedy for breach of covenant in deed to city, see "Equity," § 1.
 Liability for injuries from collision between fire wagon and street car, see "Street Railroads," § 1.
 Mandamus, see "Mandamus," § 2.
 Ordinances relating to intoxicating liquors see "Intoxicating Liquors."
 Rights of lessee of property abutting on street, see "Landlord and Tenant," § 3.
 Special laws, see "Statutes," § 2.
 Stock law districts, see "Animals."
 Street railroads, see "Street Railroads."
 Striking out parties in action for injuries to property abutting on street caused by construction of railroad therein, see "Parties," § 2.
 Use of street as constituting nuisance, see "Nuisance," § 2.
 Violations of municipal ordinance as affecting competency of grand juror, see "Grand Jury."
 Water supply, see "Waters and Water Courses," § 2.

§ 1. Governmental powers and functions in general.

*A municipal corporation can exercise only those powers as are expressly granted or fairly implied from the powers expressly granted and essential to the declared objects and purposes of the corporation.—*Cleveland School Furniture Co. v. City of Greenville (Ala.)* 862.

§ 2. Officers, agents, and employés.

Under Acts 1904, p. 43, No. 32, going into effect July 16, 1904, one appointed under Stat. 1898, p. 64, No. 63, to the position of policeman was retained in the same position he held under the old law.—*State ex rel. Perez v. Whitaker (La.)* 218.

Charges and specifications against a policeman for neglect of duty need not be drawn with the precision of an indictment.—*State ex rel. Perez v. Whitaker (La.)* 218.

If a policeman is still in office, he may be removed, though the act charged against him was committed during a previous term.—*State ex rel. Perez v. Whitaker (La.)* 218.

Under Acts 1904, p. 43, No. 32, the inspector of police can remove policeman, subject to an appeal de novo to the board of commissioners.—*State ex rel. Perez v. Whitaker (La.)* 218.

§ 3. Public improvements.

Under Avondale city charter (Acts 1894-95, p. 139) a property owner assessed for a street improvement held entitled to a trial de novo in the city or circuit court after the assessment has been removed there by certiorari.—*Harton v. Town of Avondale (Ala.)* 934.

Under Avondale city charter (Acts 1894-95, p. 139, § 12) it was error for the city council to assess the owners on each side of the street with one-third of the cost of the improvement of the entire street.—*Harton v. Town of Avondale (Ala.)* 934.

*Under Const. 1901, § 223, an assessment for a street improvement held not void solely because each lot was assessed on the basis of the cost of the work done in front of it, instead of first ascertaining the cost of the entire improvement and apportioning the same among the abutting owners.—*Harton v. Town of Avondale (Ala.)* 934.

*The determination of the proportion of the cost of a street improvement that should be

borne by abutting property and by the public, being a matter of legislative discretion, when the Legislature determines that the assessment shall be made by the front foot, it will be presumed that it has determined that such is the proper measure of benefits received.—*Harton v. Town of Avondale (Ala.)* 934.

*The rule that special assessments must be levied on abutting property in proportion to benefits, only requires that there should be some rule of apportionment of the whole charge, having reference to the benefit received by the respective owners.—*Harton v. Town of Avondale (Ala.)* 934.

Const. 1901, § 223, held only to place a limit beyond which special assessments for public improvements should be void, and to authorize the courts to determine whether such limit had been transcended.—*Harton v. Town of Avondale (Ala.)* 934.

Const. 1901, § 223, forbidding special municipal assessments in excess of the increased value of the property, held not to apply to the manner in which such assessments are apportioned.—*Harton v. Town of Avondale (Ala.)* 934.

*Avondale city charter (Acts 1894-95, p. 139) requiring special assessments to be made in proportion to the amount of benefits accruing to the abutting owner, held not in violation of Const. 1901, § 223.—*Harton v. Town of Avondale (Ala.)* 934.

*Under Avondale city charter (Acts 1894-95, p. 139, § 12), the assessment of abutting property owners for the entire cost of guttering a street held erroneous.—*Harton v. Town of Avondale (Ala.)* 934.

*The authority to grade and pave streets and sidewalks being legislative, the ascertainment of the amount of the improvement, its kind and character, cannot be delegated to any official or committee of the city.—*Harton v. Town of Avondale (Ala.)* 934.

Where after the levy of an assessment for street improvement the entire proceeding was ratified by the city council, the assessment was not void because the specifications, material, etc., were left in the first instance to the judgment of the street committee.—*Harton v. Town of Avondale (Ala.)* 934.

*The owner of property abutting on a street, which property is injured by a change of grade, without compensation, held entitled to injunctive relief.—*Town of New Decatur v. Scharfenberg (Ala.)* 1025.

*Where a city has commenced to change the grade of a street without compensation to the abutting owner, he may, on a bill for an injunction, have the street restored to its former condition.—*Town of New Decatur v. Scharfenberg (Ala.)* 1025.

*A petition by the owner of property abutting on a street for the paving of the same is not a waiver of damages from a change of grade.—*Town of New Decatur v. Scharfenberg (Ala.)* 1025.

*The owner of a lot abutting on a street held precluded by his conduct from maintaining a suit for an injunction to restrain a change of grade.—*Town of New Decatur v. Scharfenberg (Ala.)* 1025.

*The fact that there was no negligence in changing the grade of a street held not to preclude abutting owner from having the street restored to its former condition.—*Town of New Decatur v. Scharfenberg (Ala.)* 1025.

The fact that there was no negligence in or about the changing of the grade of a street held not to defeat the right of abutting owner who

*Point annotated. See syllabus.

had received no compensation to have the street restored to its former condition.—*Town of New Decatur v. Smith* (Ala.) 1028.

*The owner of property abutting on a street *held* not estopped from maintaining a suit to restrain the change of the grade of the street.—*Town of New Decatur v. Smith* (Ala.) 1028.

*Where a bill for an injunction alleges and the proofs show seisin and possession of land, and an attempt by a town to unlawfully subject it to public use, and the answer avers a dedication of the land, but it is not proven, the injunction should be granted.—*McGourin v. Town of De Funiak Springs* (Fla.) 541.

*A court of equity has jurisdiction to restrain a municipal corporation from opening up as a public street, without the owner's consent, land belonging to an individual.—*McGourin v. Town of De Funiak Springs* (Fla.) 541.

*Under Laws 1903, p. 569, c. 5363, § 24, the incorporation into the advertisement for bids for public works, or into the specifications of the work, upon which bids are predicated, of illegal or unauthorized conditions or obligations upon the contractor, *held* not a letting of such contract within the meaning of the law, and will render the contract illegal and void.—*Anderson v. Fuller* (Fla.) 684.

*Where the charter or incorporating act requires the officers of a city to award contracts for public works to the lowest bidder, a contract made in violation of its requirements *held* illegal and void.—*Anderson v. Fuller* (Fla.) 684.

A certificate of performance of work under a municipal contract issued by the city for a larger amount than due under the rule of computation thereafter laid down by the decision of the Supreme Court may yet hold good for the less amount actually due.—*S. D. Moody & Co. v. Sewerage & Water Board* (La.) 649.

*Under Acts 1876, p. 116, No. 73, the lien for the amount due for a city improvement remains due as a charge on the property, and the city has a full right and the property is sold subject to that right, and under Acts 1888, p. 111, No. 85, the property passes to third persons, adjudicatees, subject to the statutory pledge, but it is different if it be adjudicated to the state under Acts 1888, p. 88, No. 80.—*S. D. Moody & Co. v. Sewerage & Water Board* (La.) 649.

§ 4. Police power and regulations.

The denunciation by statute of certain uses of the contents of cesspools does not inhibit to municipalities the adoption of cesspools as a part of their system of sanitation.—*Logan v. Childs* (Fla.) 197.

*Under Code 1892, § 2928, an ordinance prohibiting generally the keeping of hogs in a city, without regard to their being a nuisance, *held* invalid.—*Comfort v. City of Kosciusko* (Miss.) 208.

§ 5. Torts.

When a municipal corporation confines itself within the limits of its power and jurisdiction it is not liable to an action for consequential damages to private property or persons, where the act complained of was done by it or its officers pursuant to authority conferred by a valid act of the Legislature.—*Anderson v. Fuller* (Fla.) 684.

§ 6. Fiscal management, public debt, securities, and taxation.

Where a city had no power to execute a note binding its general revenues for the payment of school furniture, the retention and use of the furniture did not estop it from denying its liability on the note.—*Cleveland School Furniture Co. v. City of Greenville* (Ala.) 862.

*Point annotated. See syllabus.

*Under Greenville city charter, Act Feb. 25, 1887, and Act Feb. 28, 1887 (Acts 1886-87, pp. 629, 1009), a note executed by the city for furniture used to fit up a school building in the city *held* unenforceable.—*Cleveland School Furniture Co. v. City of Greenville* (Ala.) 862.

*A taxpayer in a city can properly maintain a bill to restrain public officials of the city from paying out public moneys upon void and unauthorized contract.—*Anderson v. Fuller* (Fla.) 684.

Under Const. 1879, art. 242, and Acts 1886, p. 44, No. 35, and Acts 1894, p. 191, No. 153, the petition of property taxpayers, calling for an election on the question of a tax in aid of the construction of a railroad, need not specify the amount to be raised.—*State ex rel. Arkansas Southern R. Co. v. Knowles* (La.) 439.

Under Acts 1890, p. 144, No. 110, the proceeds of the 1 per cent. tax authorized by the act should be paid over to the fiscal agent or depository of the board of liquidation, as directed by, and to the credit of, the board.—*State ex rel. Board of Liquidation of City Debt v. Briede* (La.) 487.

Under Acts 1890, p. 144, No. 110, providing for the payment of certain funds to the board of liquidation of the city of New Orleans, or to a fiscal agent to be selected by them, members of the board, interested in a business way in a bank, are not qualified to act in selecting that bank as the board's fiscal agent.—*State ex rel. Board of Liquidation of City Debt v. Briede* (La.) 487.

§ 7. Actions.

That officers of a municipal corporation, after suit brought to enjoin certain ultra vires acts, abandoned the scheme and revoked the orders under which it was to be performed, *held* no ground for the dismissal of the suit.—*Gillespie v. Gibbs* (Ala.) 868.

An alderman of a town *held* entitled to join in his individual capacity as a taxpayer with other complainants in a suit to enjoin ultra vires acts by the town authorities.—*Gillespie v. Gibbs* (Ala.) 868.

*The officers of a municipal corporation engaged in the perpetration of ultra vires acts on behalf of the corporation and the corporation are proper parties defendant to a suit to enjoin such acts, or to correct them.—*Gillespie v. Gibbs* (Ala.) 868.

In a suit for an injunction against the officers of a town an amendment to the bill *held* not to destroy the equity thereof.—*Gillespie v. Gibbs* (Ala.) 868.

*Judgments against the city of New Orleans can be paid only after statutory, necessary, and usual charges have been provided for in the budget.—*State ex rel. Lorenz v. City Council of New Orleans* (La.) 115.

Under Act No. 5, p. 10, Extra Session of 1870, judgments against a city are payable in the order in which they are filed and registered out of the money appropriated for that purpose in the annual budget.—*State ex rel. Lorenz v. City Council of New Orleans* (La.) 115.

MURDER.

See "Homicide."

MUTUAL AID SOCIETIES.

See "Beneficial Associations."

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 8.

NAMES.

See "Trade-Marks and Trade-Names."
Designation of person by name in indictment, see "Indictment and Information," § 3.
Hearsay evidence as to names, see "Criminal Law," § 12.
Misnomer as ground for quashing indictment, see "Indictment and Information," § 5.
Mistakes in names of jurors, see "Jury," §§ 3, 4.
Relevancy of evidence as to names, see "Criminal Law," § 8.
Variance between allegations and proof as to names, in criminal prosecutions, see "Indictment and Information," § 6.

*A person may acquire an assumed name by reputation which may be used to identify him in an indictment.—*Stallworth v. State* (Ala.) 184.

*Where deceased was referred to in an indictment by an assumed name, such name could not be proved by a hearsay statement made to a witness by a third person.—*Stallworth v. State* (Ala.) 184.

The words "Rigby" or "Rigley" are idem sonans.—*State v. Pointdexter* (La.) 688.

NAVIGABLE WATERS.

See "Waters and Water Courses."
Embankment in lake for levee as public land, see "Public Lands," § 2.
Fishing rights, see "Fish."
Venue of prosecution for offenses committed on, see "Criminal Law," § 4.

§ 1. Rights of public.

*Bayous which contain fresh water and drain prairies are not navigable waters.—*Burns v. Crescent Gun & Rod Club* (La.) 249.

*Where ponds and bayous are grass-choked bodies of water, they are not navigable, and the fact that occasional pirogues and skiffs have been pulled over them is insufficient to show navigability.—*Burns v. Crescent Gun & Rod Club* (La.) 249.

*A stream is not to be considered as navigable, unless its navigability is shown by evidence.—*Burns v. Crescent Gun & Rod Club* (La.) 249.

NAVIGATION.

See "Navigable Waters," § 1.

NEGLIGENCE.

Causing death, see "Death," § 1.
Excessive damages, see "Damages," § 4.
Inadequate damages, see "Damages," § 4.
Measure of damages, see "Damages," § 3.
Opinion evidence in action for, see "Evidence," § 11.
Pleading damages, see "Damages," § 5.

By particular classes of persons.

See "Carriers," §§ 4-6, 9; "Physicians and Surgeons"; "Railroads," §§ 4-8.
Employers, see "Master and Servant," §§ 2-11.
Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See "Electricity"; "Railroads," §§ 4-8; "Shipping," § 1; "Street Railroads," § 1.
Demised premises, see "Landlord and Tenant," § 3.

Contributory negligence.

Argumentative instructions relating to, see "Trial," § 8.
Of passenger, see "Carriers," § 9.
Of person injured by operation of railroad, see "Railroads," §§ 6, 7.
Of person injured by operation of street railroad, see "Street Railroads," § 1.
Of servant, see "Master and Servant," §§ 8-11.

§ 1. Acts or omissions constituting negligence.

Defendant held not liable for permitting escape of animals, in the absence of evidence charging it with knowledge that inclosure was used as horse lot.—*Mobile & O. R. Co. v. Christian Moerlin Brewing Co.* (Ala.) 17.

*The proprietor of a mill in which an independent contractor is placing machinery, owes it to the contractor's servants, to keep the premises in a reasonably safe condition.—*Dallas Mfg. Co. v. Townes* (Ala.) 988.

§ 2. Proximate cause of injury.

Defendant's negligence in permitting animals to escape from inclosure held not the proximate cause of their being killed on a railroad track.—*Mobile & O. R. Co. v. Christian Moerlin Brewing Co.* (Ala.) 17.

§ 3. Contributory negligence.

*Contributory negligence is no defense to a count charging the intentional killing of a person.—*Birmingham Ry., Light & Power Co. v. Jones* (Ala.) 146.

*A child between 7 and 14 years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity.—*Birmingham Ry., Light & Power Co. v. Jones* (Ala.) 146.

*Mere capacity on the part of a child under 14 years of age to know danger is not necessarily sufficient to make him guilty of contributory negligence.—*Birmingham Ry., Light & Power Co. v. Jones* (Ala.) 146.

In an action for negligence causing death contributory negligence of deceased is no defense if defendant was guilty of wanton or willful misconduct.—*Birmingham Ry., Light & Power Co. v. Ryan* (Ala.) 616.

§ 4. Actions.

*Pleas alleging that plaintiff failed to take proper precautions, but not stating facts constituting contributory negligence, held insufficient.—*Forbes & Carliss v. Davidson* (Ala.) 312.

*In an action to recover damages for alleged negligence, the complaint is sufficient if it alleges a duty owing to plaintiff by defendant.—*Nashville, C. & St. L. Ry. v. Reynolds* (Ala.) 1001.

Contributory negligence is an affirmative defense.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY DISCOVERED EVIDENCE.

Ground for new trial in civil actions, see "New Trial," § 1.

NEWSPAPERS.

Libel by, see "Libel and Slander," § 2.

*Point annotated. See syllabus.

NEW TRIAL.

Assignments of error in rulings relating to, see "Appeal and Error," § 10.
 Effect of motion on time for taking proceedings for review, see "Appeal and Error," § 6.
 Harmless error in rulings relating to, see "Appeal and Error," § 17.
 In criminal prosecutions, see "Criminal Law," § 39.
 Presentation in appeal record of questions relating to rulings on motion for, see "Appeal and Error," § 9.
 Remand by appellate court for new trial, see "Appeal and Error," § 24.
 Review of discretion of court in ruling on motion for, see "Criminal Law," § 44.

In particular actions or proceedings.

In criminal prosecutions, see "Criminal Law," § 36; "Homicide," § 15.

§ 1. Grounds.

*Newly discovered evidence held not ground for new trial where cumulative, or where it is not shown that diligence was used to procure it.—*Smith v. Birmingham Ry., Light & Power Co. (Ala.)* 307.

*The granting of a new trial for disregard of instructions by the jury held proper.—*Fleming & Hines v. Louisville & N. R. Co. (Ala.)* 683.

*A new trial held properly granted on account of the erroneous exclusion of evidence.—*Owen v. McDermott (Ala.)* 730.

NOMINAL DAMAGES.

See "Damages," § 1.

NONRESIDENCE.

Effect on limitations in equity, see "Equity," § 2.

NOTARIAL ACT.

Legitimizing child, see "Bastards," § 1.

NOTARIES.

*A certain person held a notary de facto so that acts passed before him had the same validity as acts passed before a notary de jure.—*Davenport v. Davenport (La.)* 240.

*Money intrusted to a notary for a loan is not received in the discharge of his duty or under color of his office, and the surety on his official bond is not liable therefor.—*Nolan v. Labatut (La.)* 713.

Under Acts 1890, p. 34, No. 42, amended by Acts 1898, p. 217, No. 136, and Acts 1902, p. 367, No. 187, a notary and his surety are liable to any one who may sustain loss by reason of his failure to faithfully discharge his duties as notary, or by his wrongful acts committed by virtue of his office.—*Nolan v. Labatut (La.)* 713.

Where a notary procured money to be loaned, representing that an act of mortgage has been passed by him, pointing to his official paraph on the note, he gives currency to the note by means of his official paraph, and where it is forged the surety on his bond is responsible.—*Nolan v. Labatut (La.)* 713.

*Where a notary represents that some one wants to borrow money and delivers a note paraphed as a notary by him for identification with a forged act of mortgage, for the fraud of the notary the surety on his bond is responsible.—*Nolan v. Labatut (La.)* 713.

*Point annotated. See syllabus.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Necessity of notice of indictment previous to arraignment, see "Criminal Law," § 19.

As affecting particular classes of persons.

See "Carriers," § 5.

Purchaser of bill or note, see "Bills and Notes," § 3.

Purchaser of land, see "Vendor and Purchaser," § 4.

Purchaser of mortgaged goods, see "Chattel Mortgages," § 2.

Of particular facts, acts, or proceedings not judicial.

Sale for taxes, see "Taxation," § 4.

Of particular judicial proceedings.

See "Trial," § 1.

Application for injunction, see "Injunction," § 4.

Proceedings before master in chancery, see "Equity," § 6.

Supplemental pleading, see "Pleading," § 5.

NUISANCE.

In highway, see "Highways," § 3.

§ 1. Private nuisances.

*One who conducts a business so as to inflict unnecessary injury upon others is liable in damages, and more so when the business is otherwise unlawfully conducted.—*Kuhl v. St. Bernard Rendering & Fertilizing Co. (La.)* 361.

§ 2. Public nuisances.

*A railway track constructed on a public street by an individual for his own use may be decreed a nuisance at the suit of a citizen and taxpayer whose personal comfort and property rights are affected.—*Kuhl v. St. Bernard Rendering & Fertilizing Co. (La.)* 361.

OATH.

Failure of jury commissioners to take special oath as ground for quashing indictment, see "Indictment and Information," § 5.

OBJECTIONS.

Necessity for purpose of review, see "Appeal and Error," § 4.

To evidence at trial, see "Trial," § 3.

To instructions to jury, see "Trial," § 11.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 4.

OBSTRUCTIONS.

Of highways, see "Highways," § 3.

OFFER.

Of proof, see "Trial," § 3.

OFFICERS.

Bills or notes executed by person in official capacity, see "Bills and Notes," § 1.

Injunctions affecting, see "Injunction," § 2.

Judicial notice of, see "Evidence," § 1.

Mandamus, see "Mandamus," § 2.
Quo warranto, see "Quo Warranto."

Particular classes of officers.

See "Judges"; "Justices of the Peace"; "Notaries"; "Receivers"; "Sheriffs and Constables."

Corporate officers, see "Corporations," §§ 5, 6.

Health officers, see "Health," § 1.

Jury commissioners, see "Jury," §§ 2, 3.

Municipal officers, see "Municipal Corporations," § 2.

§ 1. Rights, powers, duties, and liabilities.

*Commissioners acting under color of Acts 1900-01, p. 800, establishing a liquor dispensary, *held* not personally liable for liquors bought for the dispensary.—*Schloss & Kahn v. McIntyre* (Ala.) 11.

Record evidence should be kept of the fact that on account of the absence of an executive officer his chief clerk or deputy acted in his place.—*State ex rel. Board of Liquidation of City Debt v. Briede* (La.) 487.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 11.

In criminal prosecutions, see "Criminal Law," § 14.

OPTIONS.

For sale of realty, see "Vendor and Purchaser," § 1.

Specific performance of, see "Specific Performance," § 2.

ORDER OF PROOF.

At trial, see "Trial," § 3.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Judicial notice of, see "Evidence," § 1.

Municipal ordinances, see "Municipal Corporations," §§ 3, 4.

OUSTER.

Of co-tenant, see "Tenancy in Common," § 2.

OVERCHARGE.

By carrier, see "Carriers," § 7.

OWNERSHIP.

Declarations as evidence of, see "Evidence," § 7.

PARENT AND CHILD.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants."

Applicability of instructions to pleading and evidence in action for death of child, see "Trial," § 9.

Fraudulent conveyances between, see "Fraudulent Conveyances," § 1.

Instructions in action for causing death of child, see "Death," § 1.

Parties on appeal in action by or against child, see "Appeal and Error," § 5.

Requests for instructions in action for death of child, see "Trial," § 10.

Right of mother to maintain action for death of child, see "Death," § 1.

A father individually cannot recover damages for a libel against his daughter, a minor aged 19 years.—*Pattison v. Gulf Bag Co.* (La.) 224.

In an action for malicious arrest of minor children, defendant is not responsible for the consequences of mental shock on the health of the mother of the children.—*Sperier v. Ott* (La.) 323.

A parent cannot recover for mental shock on account of the unlawful arrest of his minor children on a charge of malicious mischief.—*Sperier v. Ott* (La.) 323.

In a controversy over the custody of a minor child between a husband and his divorced wife, the judgment of divorce alleged but not offered in evidence cannot be considered.—*State ex rel. Curtis v. Thompson* (La.) 367.

In a suit by an alleged father for the custody of a minor child, the court *held* to have properly dismissed the action under Acts 1894, p. 91, No. 79, empowering judges to remove children from the custody of the parents under certain circumstances.—*State ex rel. Curtis v. Thompson* (La.) 367.

PARISHES.

See "Counties," § 2.

PARKS.

Damages for failure to reserve park engaged, see "Damages," § 2.

PAROL EVIDENCE.

In civil actions, see "Evidence," §§ 5, 10.

PARTICULARS.

Bill of, see "Pleading," § 6.

PARTIES.

Rights and liabilities as to costs, see "Costs," § 2.

In actions by or against particular classes of persons.

See "Attorney and Client," § 2; "Executors and Administrators," § 4; "Municipal Corporations," § 7; "Partnership," § 2.

In particular actions or proceedings.

See "Death," § 1; "Detinue"; "Quo Warranto," § 2.

Criminal prosecutions, see "Criminal Law," § 2.

To restrain ultra vires acts of municipal officers, see "Municipal Corporations," § 7.

Will contest, see "Wills," § 3.

Judgment and relief as to parties, and parties affected by judgments or proceedings thereon.

Persons concluded by judgment, see "Judgment," § 5.

Review as to parties, and parties to proceedings in appellate courts.

On appeal or writ of error, see "Appeal and Error," §§ 3, 5.

Persons entitled to allege error, see "Appeal and Error," § 13.

To conveyances, contracts, or other transactions.

See "Bills and Notes," § 1.

*Point annotated. See syllabus.

§ 1. Defendants.

*Where a minor is a party from whose estate the judgment appealed from is to be satisfied, he should have been a party to the proceeding in which the judgment was obtained.—*Driscoll v. Pierce* (La.) 568.

§ 2. New parties and change of parties.

Under Civ. Code 1896, § 3331, defendant in an action for damages to a lot abutting on a street owing to the construction of a railroad therein by defendant *held* not entitled to a judgment because some of the plaintiffs who jointly owned the property were stricken from the complaint.—*Birmingham Ry., Light & Power Co. v. Oden* (Ala.) 129.

*Where, in an action on a contract against defendant and agent through whom the contract was made, the evidence showed no individual liability of the agent, it was proper to amend by striking out the agent's name as defendant.—*Eagle Iron Co. v. Baugh* (Ala.) 663.

§ 3. Defects, objections, and amendment.

Where one of two plaintiffs is entitled to bring the action, the fact that the other party plaintiff is not an essentially necessary party is no ground for dismissal.—*St. Geme v. Bolmaré* (La.) 557.

PARTITION.

Concurrent jurisdiction of courts, see "Courts," § 6.

Disposition of cause on appeal, see "Appeal and Error," § 24.

In action to remove cloud on title, see "Quiet-
ing Title," § 2.

Jurisdiction of probate court in partition, see "Courts," § 4.

Of homestead, see "Homestead," § 2.

Of property of decedent's estate, see "Executors and Administrators," § 4.

Operation of judgment in as bar to another action, see "Judgment," § 4.

§ 1. By acts of parties.

Where a father died in 1872, and a widow and four of the five children in 1890 made amicable division of decedent's land, and each possessed the portions allotted to them until the death of the mother in 1902, they owe no accounting to each other for revenues or for taxes and repairs.—*Faure v. Faure* (La.) 494.

§ 2. Actions for partition.

On an issue as to whether decedent, under whom complainants claimed, had owned any land except that involved at the time of his death, evidence *held* insufficient to show such land all that he owned.—*Carroll v. Fulton* (Ala.) 741.

*In partition the burden of proof as to certain facts *held* upon complainants.—*Carroll v. Fulton* (Ala.) 741.

Where property sought to be partitioned can be equitably divided, but the remedy by allotment in the probate court is ineffectual, the party should proceed for a division in chancery.—*Finch v. Smith* (Ala.) 819.

On a petition in the probate court for partition under Code 1896, § 3178, the fact of equitable division of the property in specie cannot be determined by the efficiency or otherwise of the mode of allotment provided by section 3169.—*Finch v. Smith* (Ala.) 819.

*Where land sought to be partitioned cannot be equitably divided in kind, a proceeding may be maintained either in the probate or chancery court for a sale of the property.—*Finch v. Smith* (Ala.) 819.

Under Code 1896, § 3178, an averment in a petition for partition in the probate court that the land cannot be equitably divided *held* jurisdictional, so that a failure of proof thereof required a dismissal of the petition.—*Finch v. Smith* (Ala.) 819.

*Code 1896, § 3161, *held* to confer on the probate court jurisdiction of a petition for the partition of personalty owned by the petitioner and another as tenants in common.—*Colby-Hinkley Co. v. Jordan* (Ala.) 962.

*It is only where the purpose is to effect a partition by the sale of the whole property that the interest of an interdict can be alienated at private sale.—*Gallagher v. Lurges* (La.) 60.

Where a judgment has been entered recognizing heirs and decreeing that they are entitled to receive the estate, and the heirs partition the property, the executrix has, under Code Prac. arts. 1003, 1007, a right to oppose the partition and retain the property until her final account has been homologated.—*Succession of Landry* (La.) 490.

A judgment recognizing heirs and decreeing that they are entitled to receive the estate from the executrix does not close the succession or authorize the heirs to partition the property.—*Succession of Landry* (La.) 490.

*Where heirs have claims for improvements enhancing the value of the land belonging to the estate, such improvements should be appraised separately, either before or immediately after the partition sale.—*Faure v. Faure* (La.) 494.

*In partition of the separate estate of deceased father, the only accounts to be settled are those between the heirs and his succession.—*Faure v. Faure* (La.) 494.

Where on partition sale certain adjudicatees did not complete their purchase, a proceeding by one of the plaintiffs in partition was a measure toward the execution of the judgment ordering the partition, and was properly instituted by rule.—*Decuir v. Decuir* (La.) 563.

Where the sheriff and several adjudicatees at a partition sale fail to consummate the adjudications, and one of the plaintiffs and an adjudicatee proceeded against them by rule making his coplaintiffs parties defendants, *held*, that between the adjudicatee who had joined in the prayer of the rule and the coplaintiffs an issue was joined on the merits, and the case could not be dealt with as if it stood simply between the adjudicatee and the plaintiff in rule.—*Decuir v. Decuir* (La.) 563.

PARTNERSHIP.

Restraining acts of partners, see "Injunction," § 3.

§ 1. The relation.

*Where officers and members of a foreign mercantile corporation, with capacity to do business only in certain named counties of a foreign state, attempt to establish the corporation under another name in Louisiana, the effect as to third parties is the establishment of a partnership.—*Campbell v. J. I. Campbell Co.* (La.) 696.

§ 2. Rights and liabilities as to third persons.

An attachment *held* to run against a firm, so that it could not be levied on individual property of the partners.—*Hass v. Cook* (Ala.) 731.

*Where a bill was against a partnership and service had on one, complainant was entitled to amend by converting the suit to one against the partners individually and striking out the names

*Point annotated. See syllabus.

of those not served. Code 1896, § 40.—*Levystein v. Gerson, Seligman & Co. (Ala.)* 774.

§ 3. Retirement and admission of partners.

Where a firm was succeeded by another firm, and the partners in the succeeding firm gave their individual notes to a creditor of the original firm, it was not a partnership transaction.—*Theus v. Armistead (La.)* 95.

§ 4. Dissolution, settlement, and accounting.

*A partnership for the cultivation of a plantation is dissolved by the seizure of an undivided interest in the plantation, whereby the partnership is deprived of the control of the plantation.—*Borah v. O'Niell (La.)* 29; *In re Borah, Id.*

*A petition which alleges a partnership and good reasons why it should be dissolved, and prays for dissolution and judgment for the specific debts due by one partner and for further relief, shows a cause of action.—*Borah v. O'Niell (La.)* 29; *In re Borah, Id.*

An allegation in a petition for dissolution of a partnership and for recovery of debts alleged to be due by defendant *held* not to change the nature of the petition as one in settlement of the partnership.—*Borah v. O'Niell (La.)* 29; *In re Borah, Id.*

A member of a dissolved firm, who has paid one of its obligations, has no right of action against his partner for reimbursement, save by a suit for a settlement of the partnership.—*Theus v. Armistead (La.)* 95.

PARTY WALLS.

*Under a party wall agreement, one of the parties *held* liable to pay for one-half the wall when he constructed a building on his lot, whether he used the wall or not.—*Jebeles & Colias Confectionery Co. v. Brown (Ala.)* 626.

*A covenant respecting a party wall *held* to run with the land and be binding on successive owners.—*Jebeles & Colias Confectionery Co. v. Brown (Ala.)* 626.

PASSENGERS.

See "Carriers," § 9.

PATENTS.

For public lands, see "Public Lands," § 1.
Use of trade-mark to identify patented article, see "Trade-Marks and Trade-Names," § 1.

PAVING.

Streets in cities, see "Municipal Corporations," § 3.

PAYMENT.

See "Accord and Satisfaction."

Recovery of overcharge paid to carrier, see "Carriers," § 7.

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.
See "Mortgages," § 4.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Judgment in favor of infant, see "Infants," § 3.

Price of land sold, see "Vendor and Purchaser," § 3.

Subscriptions to corporate stock, see "Corporations," § 3.

§ 1. Recovery of payments.

*A payment made by a wife of a debt of her husband to prevent the sale of certain property, under the erroneous belief that it belonged to her, will not justify her in recovering it when its effect was to cause the seizure of the property to fall and the writ of the seizure creditor to be returned.—*Pelletier v. State Nat. Bank (La.)* 640.

PERSONAL INJURIES.

Particular causes or means of injury.

See "Assault and Battery," § 1; "Negligence": "Shipping," § 1.

Operation of railroads, see "Railroads," §§ 5-7.

Operation of street railroads, see "Street Railroads," § 1.

Particular classes of persons injured.

Employe, see "Master and Servant," §§ 2-11.

Married women, see "Husband and Wife," § 4.

Passenger, see "Carriers," § 9.

Tenant, see "Landlord and Tenant," § 3.

Traveler on highway crossing railroad, see "Railroads," § 6.

Remedies.

Admissions as evidence in action for, see "Evidence," § 6.

Applicability of instructions to pleading and evidence in action for, see "Trial," § 9.

Demurrer to pleading, see "Pleading," § 4.

Excessive damages, see "Damages," § 4.

Harmless error, see "Appeal and Error," § 19.

Inadequate damages, see "Damages," § 4.

Measure of damages, see "Damages," § 3.

Opinion evidence in action for, see "Evidence," § 11.

Pleading damages, see "Damages," § 5.

Province of court and jury, see "Trial," § 6.

Reception of evidence, see "Trial," § 3.

PETITORY ACTION.

See "Real Actions."

Action to try tax title, see "Taxation," § 5.

Establishment of trust in, see "Trusts," § 4.

In support of title derived from sale under execution, see "Execution," § 3.

Presentation in lower court of grounds of review, see "Appeal and Error," § 4.

Suspensive appeal, see "Appeal and Error," § 8.

PHYSICIANS AND SURGEONS.

Harmless error in prosecution for illegally practicing medicine, see "Criminal Law," § 44.

Under Code 1896, §§ 3262, 5333, the medical association of the state *held* authorized to prescribe rules and regulations governing the issuance of certificates to medical practitioners.—*Brooks v. State (Ala.)* 156.

A medical certificate issued subsequent to 1899, not signed by the senior censor of the state medical association, as required by rule adopted under Code 1896, §§ 3262, 5333, *held* insufficient to authorize the holder to practice.—*Brooks v. State (Ala.)* 156.

In a prosecution against a physician for practicing without a certificate countersigned by the senior censor of the state medical association, in violation of Code 1896, § 5333, proof of defendant's diploma and the time he had practiced medicine *held* inadmissible.—*Brooks v. State (Ala.)* 156.

In a prosecution of a physician for practicing without a certificate, evidence that other physi-

*Point annotated. See syllabus.

cians were practicing without certificates, and had not taken examinations, *held inadmissible*.—*Brooks v. State* (Ala.) 156.

Where an attendant at a sanitarium was not sufficiently careful, and the physicians did not see to it that the medicines prescribed were properly administered, and to an extent neglected the patient, they are liable for resulting injuries.—*Stanley v. Schumpert* (La.) 565.

In an action against certain owners or managers of a sanitarium for negligence, where two of the defendants show that they were not connected with the sanitarium at the time of the injury, they are not liable.—*Stanley v. Schumpert* (La.) 565.

PICNICS.

Damages for failure to reserve park engaged for picnic, see "Damages," § 2.

PLEA.

In civil actions, see "Equity," § 3; "Pleading," §§ 2, 4, 7.

In criminal prosecutions, see "Criminal Law," § 7.

PLEADING.

Applicability of instructions to pleadings, see "Trial," § 9.

Estoppel by, see "Estoppel," § 1.

Operation of judgment on demurrer as bar to subsequent action, see "Judgment," § 4.

Sufficiency to sustain judgment, see "Judgment," § 1.

Allegations as to particular facts, acts, or transactions.

See "Damages," § 5.

Claims against decedent's estate, see "Executors and Administrators," § 2.

Disqualification of judge, see "Judges," § 2.

Statute of frauds, see "Frauds, Statute of," § 2.

In actions by or against particular classes of persons.

See "Carriers," §§ 3, 6, 9; "Executors and Administrators," § 4; "Master and Servant," § 9; "Principal and Agent," § 2; "Railroads," §§ 2, 5, 6; "Sheriffs and Constables," § 1.

Insurance company, see "Insurance," § 7.

Telegraph companies, see "Telegraphs and Telephones," § 1.

Trustees, see "Trusts," § 3.

In particular actions or proceedings.

See "Detinue," "Ejectment," § 2; "Equity," § 3; "Fraud," § 1; "Garnishment," § 2; "Injunction," §§ 2, 3; "Negligence," § 4; "Partition," § 2; "Quieting Title," § 2; "Quo Warranto," § 2; "Specific Performance," § 2; "Trespass," § 2; "Trove and Conversion," § 2.

Actions for causing death, see "Death," § 1.

Condemnation proceedings, see "Eminent Domain," § 3.

For conversion of mortgaged chattels, see "Chattel Mortgages," § 3.

For damages caused by exercise of power of eminent domain, see "Eminent Domain," § 4.

Foreclosure, see "Mortgages," § 6.

For failure of carrier to deliver goods, see "Carriers," § 3.

For failure to deliver message, see "Telegraphs and Telephones," § 1.

For injuries from surface waters, see "Waters and Water Courses," § 1.

For loss of or injury to shipment, see "Carriers," § 6.

For personal injuries, see "Carriers," § 9; "Master and Servant," § 9; "Railroads," §§ 5, 6; "Street Railroads," § 1.

For price of goods, see "Sales," § 6.

Indictment or criminal information or complaint, see "Indictment and Information."

On bill or note, see "Bills and Notes," § 4.

On detinue bond, see "Detinue," § 2.

On guaranty, see "Guaranty," § 2.

On insurance policy, see "Insurance," § 7.

On judgment, see "Judgment," § 7.

Pleas in criminal prosecutions, see "Criminal Law," § 7.

Probate proceedings, see "Wills," § 3.

To dissolve partnership, see "Partnership," § 4.

To enforce stockholders' liability, see "Corporations," § 4.

To enjoin acts of municipal officers, see "Municipal Corporations," § 7.

To enjoin assessment for public improvements, see "Municipal Corporations," § 3.

To establish boundaries, see "Boundaries," § 1.

To establish trust, see "Trusts," § 4.

To foreclose lien, see "Mechanics' Liens," § 4.

To redeem from foreclosure, see "Mortgages," § 7.

To transfer cause from probate to chancery court, see "Courts," § 6.

To vacate sale on execution, see "Execution," § 3.

Review of decisions and pleading in appellate courts.

Appealability of decisions relating to, see "Appeal and Error," § 2.

Application for certiorari in criminal prosecutions, see "Criminal Law," § 40.

Effect in lower court of decision in appellate court, see "Appeal and Error," § 24.

Effect of decision on former appeal, see "Appeal and Error," § 23.

Harmless error in rulings relating to, see "Appeal and Error," §§ 17, 18.

Presentation in lower court of questions relating to, for purpose of review, see "Appeal and Error," § 4.

Presentation in record of rulings on plea and demurrer in criminal prosecution for purpose of review, see "Criminal Law," § 41.

Presentation in record on appeal of questions relating to, see "Appeal and Error," § 9.

Presumptions as to rulings relating to, see "Appeal and Error," § 14.

§ 1. Form and allegations in general.

*Under Const. § 227, the complaint in an action against a corporation for damages to a property owner from the construction of a railroad embankment in the street on which the property abutted *held* demurrable.—*Birmingham Ry., Light & Power Co. v. Oden* (Ala.) 129.

Where a letter written by plaintiffs to defendant lacked the essential quality of a consideration to make it an option, its character could not be changed by a reference thereto as such in the pleading.—*Comstock Bros. v. North* (Miss.) 374.

§ 2. Plea or answer, cross complaint, and affidavit of defense.

Plea termed by defendant a "plea of recoupment" *held* not demurrable, where good as a plea of set-off.—*Thomas v. Thomas* (Ala.) 141.

Under Code 1896, §§ 3271, 4205, 4207, and circuit court rule of practice 12 (Code 1896, p. 1197), a corporation *held* entitled to file a plea in abatement to the jurisdiction during trial.—*Eagle Iron Co. v. Baugh* (Ala.) 603.

*A plea of set-off *held* in action for breach of contract of sale, not demurrable.—*J. D. Belote & Son v. Wilcox* (Ala.) 673.

*Point annotated. See syllabus.

*Where defendant gave notes for fertilizers sold under a void contract, he was not estopped by his plea of payment by the execution of such notes to counts based on a quantum valebat to deny the validity of the contract.—*Boyet v. Standard Chemical Oil Co. (Ala.)* 758.

§ 3. Replication or reply and subsequent pleadings.

Rev. St. 1892, § 1031, does not inhibit the plaintiff from filing the replication at any time after the plea is filed, and it could be filed on the same day.—*Flournoy v. Munson Bros. Co. (Fla.)* 398.

§ 4. Demurrer or exception.

*Counts of a complaint for injuries sufficient to charge simple negligence *held* not demurrable because they attempted to charge a willful or wanton injury, and were insufficient for that purpose.—*Montgomery St. Ry. Co. v. Lewis (Ala.)* 736.

*Where a plea is bad, the sufficiency of a replication to it will not be considered.—*Broadwood v. Southern Express Co. (Ala.)* 769.

*Defenses which must be sustained, or which may be rebutted by evidence, must be presented by plea and cannot be presented by demurrer.—*Williams v. Finch (Ala.)* 834.

Demurrers to a complaint filed before the addition of a count *held* not reinterposed to such count by a subsequent demurrer.—*Fulenwider v. Ridgway (Ala.)* 846.

*An improper claim of damages in a complaint cannot be reached by demurrer.—*Central of Georgia Ry. Co. v. Keyton (Ala.)* 918.

A demurrer to a replication for failure to aver that plaintiff's claim was presented as required by law within 12 months after the grant of letters of administration on defendant's estate *held* only to present the question of time within which the claim was presented.—*Moss v. Mosley (Ala.)* 1012.

Rule 33 of the rules of circuit court (14 Fla. 14) has no applicability to pleas which have been filed prior to the beginning of the term, and it expressly confers upon the court the power to hear and dispose of any demurrer which is interposed during the term within its discretion.—*Flournoy v. Munson Bros. Co. (Fla.)* 398.

A general exception of no cause of action should not be sustained when a judgment of some kind can be legally rendered on the allegations.—*Davis v. Arkansas Southern R. Co. (La.)* 587.

It has never been exacted that objections should be set out specifically, but the court should see that each exception should be made to perform the function properly appertaining to it, and not be allowed to have another substituted for it, and be lost and confounded.—*Davis v. Arkansas Southern R. Co. (La.)* 587.

§ 5. Amended and supplemental pleadings and repleader.

Bill in a suit to set aside a note and mortgage as without consideration *held* not objectionable on the ground that certain amendments constituted a departure.—*Phillips v. Bradford (Ala.)* 657.

In an action for injuries to a servant, *held* proper to have permitted a certain amendment to the complaint.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*The limitations upon the right of a plaintiff to amend the complaint at any time before the cause is finally submitted to the jury stated.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*The tendency of modern practice is to permit as far as practicable amendments of pleadings

*Point annotated. See syllabus.

which work no injury and prevent useless delay and costs.—*Davis v. Arkansas Southern R. Co. (La.)* 587.

It is not necessary that plaintiff have notice of supplemental answer otherwise than by its filing.—*Fluker v. De Grange (La.)* 591.

§ 6. Bill of particulars and copy of account.

*In an action before the court, defendant was entitled to demand specified allegations on the subject of damages before going to trial.—*Davis v. Arkansas Southern R. Co. (La.)* 587.

§ 7. Issues, proof, and variance.

In a suit to enjoin the obstruction of a street, a general denial of allegations that the land was dedicated to public use at a certain time, and that pursuant to the dedication it was open as a street and used by the public, was sufficient to put the truth of the allegations in issue.—*City of Mobile v. Fowler (Ala.)* 468.

Where plaintiff took issue on an immaterial plea of nonclaim filed by defendant, defendant *held* not entitled to an affirmative charge on such plea, in the absence of evidence either tending to support or controvert its allegations.—*Moss v. Mosley (Ala.)* 1012.

When a replication ignores certain facts in a plea, and the defendant files a general rejoinder to the replication, the facts so ignored cease to be issues of the case.—*New York Life Ins. Co. v. Mills (Fla.)* 603.

§ 8. Defects and objections, waiver, and aid by verdict or judgment.

In an action for injuries to a servant, the declaration *held* sufficient to sustain a verdict for plaintiff.—*Mississippi Cent. R. Co. v. Hardy (Miss.)* 505.

PLEDGES.

Of bill or note, see "Bills and Notes," § 2.

Under Code 1896, § 947, *held*, that one transferring a debt, but not the collateral held therefor, must exhaust the collateral before proceeding against the transferee.—*Folmar v. Lehman-Durr Co. (Ala.)* 750.

POLICE.

See "Municipal Corporations," § 2.

POLICE JURY.

See "Counties," § 2.

Review of assessments by, see "Taxation," § 2.

POLICE POWER.

See "Constitutional Law," §§ 2, 3.

Of municipality, see "Municipal Corporations," § 4.

POLICY.

Of insurance, see "Insurance."

POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," § 3.

To support action for trespass, see "Trespass," § 2.

To sustain action to quiet title, see "Quieting Title," §§ 1, 2.

Writ of assistance, see "Assistance, Writ of."

POSSESSORY ACTION.

Presentation in lower court of grounds of review, see "Appeal and Error," § 4.

POST OFFICE.

Embezzlement by mail carrier, see "Embezzlement."

POWERS.

Of attorney, see "Principal and Agent."
Of sale in mortgage, see "Mortgages," § 5.

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Assumpsit, Action of"; "Contempt," § 2;
"Detinue"; "Divorce," § 2; "Ejectment";
"Habeas Corpus," § 2; "Quo Warranto," § 2;
"Real Actions"; "Trove and Conversion," § 2.

Accounting by executor or administrator, see "Executors and Administrators," § 5.

Condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions.

See "Assistance, Writ of"; "Costs"; "Damages," § 5; "Depositions"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Stipulations"; "Trial."

Verdict, see "Trial," § 13.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.

See "Criminal Law."

For offenses against liquor laws, see "Intoxicating Liquors," § 7.

Procedure in exercise of special or limited jurisdiction.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 3.

Procedure on review.

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 4; "New Trial."

PRECATORY TRUSTS.

Creation by will, see "Wills," § 4.

PREFERENCES.

In fraudulent conveyance, see "Fraudulent Conveyances," § 1.

PREJUDICE.

Ground for change of venue in criminal prosecution, see "Criminal Law," § 4.

Ground for reversal in civil actions, see "Appeal and Error," §§ 17-20.

PRELIMINARY EXAMINATION.

On criminal charge, see "Criminal Law," §§ 6, 16.

PRELIMINARY INJUNCTION.

See "Injunction," § 4.

PRESCRIPTION.

See "Limitation of Actions."

Acquisition of rights, see "Adverse Possession," § 1.

Establishment of highways, see "Highways," § 1.

PRESENTMENT.

By grand jury, see "Indictment and Information."

Of claims against estate of decedent, see "Executors and Administrators," § 2.

PRESUMPTIONS.

In civil actions, see "Evidence," § 2.

On appeal or error, see "Appeal and Error," § 14; "Criminal Law," § 44.

PRINCIPAL AND ACCESSORY.

See "Criminal Law," § 2.

In commission of homicide, see "Homicide," § 12.

PRINCIPAL AND AGENT.

Acceptance of orders for goods taken by agent subject to approval, see "Sales," § 1.

Agency in sale of intoxicating liquors, see "Intoxicating Liquors," § 6.

Effect on principal of proof of custom among agents, see "Customs and Usages."

Fiscal agent of municipality, see "Municipal Corporations," § 6.

Opinion evidence as to authority of agent, see "Evidence," § 11.

Striking out agent as party in action against principal and agent, see "Parties," § 2.

Agency in particular relations, offices, or occupations.

See "Attorney and Client"; "Brokers."

Corporate agents, see "Corporations," §§ 5, 6.

Insurance agents, see "Insurance," § 2.

§ 1. The relation.

*In an action against a building association by a stockholder who claimed that maturity of his stock in 72 months was guaranteed by defendant solicitor, the burden held on him to show the agency, and that the guaranty was within its scope.—*Ebersole v. Southern Building & Loan Ass'n* (Ala.) 150.

*Agency cannot be proved by the mere statement of the agent.—*Smiley v. Hooper* (Ala.) 660.

§ 2. Rights and liabilities as to third persons.

In action against building association by stockholder on guaranty by a solicitor, burden held to be on stockholder to show that the guaranty was within scope of solicitor's agency.—*Ebersole v. Southern Building & Loan Ass'n* (Ala.) 150.

*The authority of an agent cannot be established by his statements or admissions.—*Eagle Iron Co. v. Baugh* (Ala.) 663.

*On an issue as to the existence of an agency, any declaration by the agent as to his authority is admissible when other evidence exists from which authority may be inferred.—*Eagle Iron Co. v. Baugh* (Ala.) 663.

*Whether a traveling salesman with authority to take orders subject to approval told a buyer, when he took an order, that he would have to send it to the manufacturer for acceptance, was incompetent as against the manufacturer.—*Gould v. Cates Chair Co.* (Ala.) 675.

*Point annotated. See syllabus.

*A principal may maintain an action in his own name for breach of a contract to transmit a telegram, made by his agent, though the principal's name was not disclosed.—*Western Union Telegraph Co. v. Manker* (Ala.) 850.

*A complaint in an action to enforce a mechanic's lien held to sufficiently allege that defendant's husband made the contract in question as her authorized agent.—*McGeever v. S. H. Harris & Sons* (Ala.) 930.

In an action to hold a third party as the undisclosed principal on a 12-month bond, signed by H. individually, under an adjudication made to him individually at a judicial sale, evidence held to sustain judgment for defendants.—*Drew v. Caffall* (La.) 233.

Defendant held to acquire title to articles as against plaintiff, who, by contract reserving title, turned them over to H. to sell; H. turning them over to defendant, a creditor, to sell and distribute the proceeds pro rata to defendant and H.'s other creditors.—*Parry Mfg. Co. v. I. Lowenberg & Co.* (Miss.) 65.

PRINCIPAL AND SURETY.

See "Guaranty."

Liability on bonds of notaries, see "Notaries."
Parol or extrinsic evidence to show suretyship, see "Evidence," § 10.

Wife as surety for payment of husband's debts, see "Husband and Wife," § 3.

§ 1. Creation and existence of relation.

A contract entered into to secure funds deposited, and the accompanying bond, should clearly set forth the extent of the liability of principal and surety.—*State ex rel. Board of Liquidation of City Debt v. Briede* (La.) 487.

§ 2. Discharge of surety.

A change in the site of a dwelling house, to be constructed under a contract, from one place to another in the same square, without causing any additional expense to the contractor, is not such an alteration of the contract as will discharge the surety of the contractor.—*Segari v. Mazzei* (La.) 245.

§ 3. Remedies of creditors.

*A surety is not entitled to set-off the amount collected on collaterals given by the principal against the creditor's demand.—*Noble v. Anniston Nat. Bank* (Ala.) 136.

PRIORITIES.

Of claims against estate assigned for creditors, see "Assignments for Benefit of Creditors," § 1.
Of mechanics' liens, see "Mechanics' Liens," § 3.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVILEGE.

Crop privilege, see "Agriculture."

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 2.
Disclosure by witness, see "Witnesses," § 2.

PROBATE.

Of will, see "Wills," § 3.

PROBATE COURTS.

See "Courts," § 4.

Operation of judgment in as bar to action in other court, see "Judgment," § 4.

Power to annul contract of hiring of convicts, see "Convicts."

PROCESS.

To procure attendance of witness, see "Witnesses," § 1.

In particular actions or proceedings.

In criminal prosecutions, see "Criminal Law," § 6.

Particular forms of writs or other process.

See "Arrest"; "Assistance. Writ of"; "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Quo Warranto."

PRO CONFESSO.

Decree in equity, see "Equity," § 7.

PROFITS.

As damages, see "Damages," § 5.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

Reception of evidence in absence of accused as ground for, see "Criminal Law," § 21.

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

Constitutional guaranties of rights of property, see "Constitutional Law," § 7.

Particular species of property.

See "Animals"; "Fish"; "Fixtures"; "Logs and Logging"; "Trade-Marks and Trade-Names."

Remedies involving or affecting property.

Protection of rights of property by injunction, see "Injunction," § 2.

Transfers and other matters affecting title.

See "Adverse Possession."

Dedication to public use, see "Dedication."

Taking for public use, see "Eminent Domain."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 6.

In criminal prosecutions, see "Criminal Law," § 24.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 2.

Of injury, see "Negligence," § 2.

Of injury to servant, see "Master and Servant," §§ 2, 11.

Of injury to shipment, see "Carriers," § 4.

PUBLIC BUILDINGS.

See "Counties," § 2.

*Point annotated. See syllabus.

PUBLIC DEBT.

See "Municipal Corporations," § 6.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 3.

PUBLIC LANDS.

Parol or extrinsic evidence of receiver's receipts, see "Evidence," § 10.

§ 1. Survey and disposal of lands of United States.

A state patent to land as "swamp" does not per se prove that the title passed to the state under acts of Congress 1849 and 1850, commonly known as the "Swamp Land Grants."—*Moullierre v. Coco* (La.) 113.

Where the United States granted land that had passed to the state under the swamp land grants to the state in aid of a railroad, and the General Land Office refused to confirm the land under the swamp land grants, and the state nevertheless issued a patent as for land belonging to her under the swamp land grants, which became in opposition to the title under the subsequent grant, the latter will prevail.—*Railroad Lands Co. v. City of Shreveport* (La.) 443.

Where a grant by the United States of land that had passed to the state under the swamp land grants of 1849 and 1850 was made to the state in aid of a railroad, and the state accepted the grant, and granted the land to a railroad company, such action is a ratification and confirmation of the latter grant.—*Railroad Lands Co. v. City of Shreveport* (La.) 443.

A grant by the United States of land that had passed to the state under the swamp land grants of 1849 and 1850 may be ratified by the state.—*Railroad Lands Co. v. City of Shreveport* (La.) 443.

Acts 1857, p. 239, No. 239, fixing at \$1.25 per acre the minimum price at which public school lands may be sold, is superseded by Rev. St. 1870, § 2960.—*Board of Directors of Parish of Livingston v. Lanier* (La.) 583.

§ 2. Disposal of lands of the states.

An embankment in a lake, built with earth from the bottom of the lake, to serve as a public levee, is not subject to entry as public land, under Acts 1902, p. 206, No. 124, § 1, though the bed of the lake belonged to the state.—*State ex rel. Turner v. Blanchard* (La.) 363.

PUBLIC NUISANCE.

See "Nuisance," § 2.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain," § 1.

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 2.

PUNISHMENT.

See "Criminal Law," § 46.

For homicide, see "Homicide," § 17.

*Point annotated. See syllabus.

PUNITIVE DAMAGES.

For injuries from surface waters, see "Waters and Water Courses," § 1.

QUALIFICATION.

Of jurors in proceedings for taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

QUANTUM MERUIT.

See "Assumpsit, Action of."

QUASHING.

Indictment or information, see "Indictment and Information," §§ 5, 7.

Venire, see "Jury," § 3.

Venire in proceedings for assessment of damages for taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 5.

In criminal prosecutions, see "Criminal Law," § 24.

QUIETING TITLE.

To lands sold for taxes, see "Taxation," § 5.

§ 1. Right of action and defenses.

*Constructive possession existing in the holder of title to land held sufficient possession on which to maintain a bill to quiet title under Code 1896, § 809.—*Kyle v. Alabama State Land Co.* (Ala.) 174.

*Under Code 1896, § 809, an action to determine title thereto cannot be maintained by one whose possession is not peaceable.—*Johnson v. Johnson* (Ala.) 522.

*A married woman held not entitled to maintain a bill to set aside a deed given to secure the debt of her husband in violation of Code 1896, § 2529; her remedy by ejectment being adequate and complete.—*Patterson v. Simpson* (Ala.) 842.

Where a conveyance has been made by a husband to his wife on a valuable consideration, and the land has been sold under execution against the husband, such sale held a cloud on the title of the wife, which equity may remove.—*Pettit v. Coachman* (Fla.) 401.

§ 2. Proceedings and relief.

*Bill in suit to quiet title held not demurrable.—*Southern Ry. Co. v. Hall* (Ala.) 135.

In a suit to quiet title, in which there was no evidence of actual possession by the complainant, a void tax deed was not admissible in evidence.—*Southern Ry. Co. v. Hall* (Ala.) 135.

In suit to quiet title, payment of taxes held not evidence of possession.—*Southern Ry. Co. v. Hall* (Ala.) 135.

*In a suit to quiet title, testimony of the complainant that he is in possession and is the owner of the land, without more, is sufficient evidence of possession.—*Southern Ry. Co. v. Hall* (Ala.) 135.

*A bill to restrain tax proceedings construed, and held not to show equity as a bill filed with respect to Code 1896, c. 16, art. 13, providing for actions to quiet title.—*City of Ensley v. McWilliams* (Ala.) 296.

In a suit to set aside a mortgage as a cloud on title *held* error to decree complainant the rent of an interest acquired by him for a period prior to the time of such acquisition.—*Scottish-American Mortg. Co. v. Bunckley* (Miss.) 502.

Partition *held* properly refused in a suit to set aside a mortgage as a cloud on title.—*Scottish-American Mortg. Co. v. Bunckley* (Miss.) 502.

QUO WARRANTO.

§ 1. Nature and grounds.

**Quo warranto held* maintainable under Code 1896, § 3429, to test respondent's title to the office of school district trustee (Gen. Acts 1903, p. 289), which it was alleged he was disqualified to hold.—*State v. Kitchens* (Ala.) 871.

§ 2. Jurisdiction, proceedings, and relief.

*A petition in *quo warranto* proceedings *held* to sufficiently indicate that petitioner was joined with the state as a party plaintiff, as required by Code 1896, § 3426.—*State v. Kitchens* (Ala.) 871.

An appeal in *quo warranto* proceedings *held* taken within the time prescribed by Code 1896, § 3437.—*State v. Kitchens* (Ala.) 871.

RAILROADS.

See "Street Railroads."

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Curing erroneous instructions in action for injuries caused by operation of, see "Trial," § 12.

Evidence of damages from overflow of railroad drain, see "Damages," § 5.

Evidence of similar facts in action for injuries from overflow from railroad drain, see "Evidence," § 4.

Exercise of power of eminent domain, see "Eminent Domain," §§ 1-4.

Grants of public land in aid of, see "Public Lands," § 1.

Levy of taxes in aid of railroad, see "Taxation," § 2.

Liability for injuries from obstruction of flow of surface waters, see "Waters and Water Courses," § 1.

Matters of fact or conclusions in pleading in action for injuries to abutting owner from construction of embankment, see "Pleading," § 1.

Measure of damages for injuries caused by operation, see "Damages," § 3.

Municipal taxes in aid of, see "Municipal Corporations," § 6.

Opinion evidence as to method of coupling cars, see "Evidence," § 11.

Opinion evidence in action for injuries from overflow of railroad drain, see "Evidence," § 11.

Regulations of, as denial of due process of law, see "Constitutional Law," § 7.

Regulations of, as denial of equal protection of laws, see "Constitutional Law," § 6.

Striking out parties in action for injuries to property caused by construction, see "Parties," § 2.

Taking case or question from jury in action for injury to animal by defect in crossing, see "Trial," § 5.

Titles of statutes, see "Statutes," § 3.

Trespass by, see "Trespass," § 1.

§ 1. Right of way and other interests in land.

A deed to a railroad company *held* not subject to cancellation on the ground that the road had not been constructed as understood between the

parties.—*Mobile, J. & K. C. R. Co. v. Kamper* (Miss.) 513.

*Where land was conveyed to a railroad company for railroad purposes only, and thereafter the road abandoned some of the land, the grantor was entitled to recover that part of the land abandoned.—*Mobile, J. & K. C. R. Co. v. Kamper* (Miss.) 513.

§ 2. Construction, maintenance, and equipment.

In an action for injuries to plaintiff's crops by stock entering through defendant's defective cattle guards, a plea that the cattle guards were of standard make, but failing to charge that they were reasonably sufficient, *held* fatally defective.—*Seaboard Air Line Ry. Co. v. Wright* (Ala.) 461.

§ 3. Sales, leases, traffic contracts, and consolidation.

On a second appeal by a railroad company in a suit to enjoin it from changing the course of a line with which it was allowed to consolidate on the strength of a promise to operate it as a part of the main line, the railroad company *held* not entitled to contend that a provision of its charter gave it a right to change the course.—*Mobile, J. & K. C. R. Co. v. State* (Miss.) 259.

A railroad company *held* bound by an agreement to broaden and standardize a narrow-gauge road with which it was allowed to consolidate.—*Mobile, J. & K. C. R. Co. v. State* (Miss.) 259.

§ 4. Operation—Companies and persons liable for injuries.

*Where a railroad company granted to a lumber company the privilege of running a logging train on its roadway, and the train was derailed and the conductor injured, the railroad company is liable in damages.—*Hamilton v. Louisiana & N. W. R. Co.* (La.) 560.

§ 5. — Injuries to licensees or trespassers in general.

A variance between the declaration and proof *held* to require affirmative charge for defendant.—*Alabama Great Southern R. Co. v. Burks* (Ala.) 638.

§ 6. — Accidents at crossings.

*The running of a railroad train over a crossing at illegal speed *held* not willful or wanton misconduct, unless the operatives of the train had knowledge that injury would probably result.—*Louisville & N. R. Co. v. Muscat & Lott* (Ala.) 302.

*The protruding of an iron spike above the surface of a railroad crossing on which horses would be liable to stumble *held* a breach of the railroad's duty to repair.—*Louisville & N. R. Co. v. Hubbard* (Ala.) 814.

*A railroad company *held* bound to keep the approaches and crossings of its railroad over a public highway in proper repair.—*Louisville & N. R. Co. v. Hubbard* (Ala.) 814.

*In an action against a railroad company for injuries to plaintiff's horse at a railroad crossing, instructions on plaintiff's contributory negligence *held* properly refused.—*Louisville & N. R. Co. v. Hubbard* (Ala.) 814.

In an action against a railroad for injuries to plaintiff's horse at a crossing, an instruction excusing defendant if it maintained the crossing so as not "unnecessarily" to impair the usefulness of the public road *held* properly refused.—*Louisville & N. R. Co. v. Hubbard* (Ala.) 814.

*In an action for injuries to plaintiff's horse at a public railroad crossing, evidence that there were show cars on defendant's side track

*Point annotated. See syllabus.

of the main line *held* admissible.—Louisville & N. R. Co. v. Hubbard (Ala.) 814.

*In an action for injuries to plaintiff's horse at defendant's railroad crossing, proof that the railroad had signposts at the crossing was admissible to establish the public character of the crossing.—Louisville & N. R. Co. v. Hubbard (Ala.) 814.

*In an action for injuries to plaintiff's horse while crossing defendant's railway track at a crossing, the complaint alleging negligence in the movement of defendant's engine, and that the horse struck a spike negligently permitted to protrude above the crossing, *held* not objectionable as joining two causes of action.—Louisville & N. R. Co. v. Hubbard (Ala.) 814.

*A complaint for injuries to plaintiff's horse while passing over a railroad crossing *held* not objectionable for plaintiff's failure to allege freedom from contributory negligence.—Louisville & N. R. Co. v. Hubbard (Ala.) 814.

*The complaint for the killing of intestate by a car *held* to charge simple negligence merely and not wantonness.—Southern Ry. Co. v. Haywood (Ala.) 949.

In an action for injuries to plaintiff by his mules becoming frightened by defendant's railroad train at a crossing, certain pleas filed by defendant *held* subject to the grounds of demurrer alleged.—Nashville, C. & St. L. Ry. v. Reynolds (Ala.) 1001.

In an action for injuries to plaintiff by his mules becoming frightened at a railroad train as they approached a crossing, counts of the complaint *held* not subject to the grounds of demurrer alleged.—Nashville, C. & St. L. Ry. v. Reynolds (Ala.) 1001.

*Though plaintiff was negligent in attempting to cross defendant's track at a sharp curve, defendant railroad company will be *held* liable where the engineer saw the danger in time to avoid the accident.—Ross v. Sibley, L. B. & S. Ry. Co. (La.) 93.

§ 7. — Injuries to persons on or near tracks.

*Where a party on a dark night, where there is no public crossing, steps on the track, within three feet of an approaching train and is injured, he cannot recover for the injuries received.—Seaboard Air Line Ry. Co. v. Barwick (Fla.) 70.

*In an action for the death of plaintiff's husband on defendant's tracks, the court is not warranted, in disposing of an exception of no cause of action filed by defendant, to deal with plaintiff's husband as a trespasser on defendant's tracks, when she alleges that he was without fault and his killing was due to reckless negligence.—Davis v. Arkansas Southern R. Co. (La.) 587.

§ 8. — Injuries to animals on or near tracks.

*In an action against a railroad for killing mules, the question of the engineer's negligence *held* one for the jury.—Hoge v. Southern Ry. Co. (Ala.) 425.

*In an action against the railroad for killing mules, evidence that a horse was killed at the same time was inadmissible.—Hoge v. Southern Ry. Co. (Ala.) 425.

In an action against a railroad for the killing of mules, evidence as to their speed in their lifetime was properly excluded.—Hoge v. Southern Ry. Co. (Ala.) 425.

*In an action against a railroad for the killing of animals, certain facts *held* to show negligence as a matter of law.—Western Ry. of Alabama v. Mitchell (Ala.) 427.

*In an action against a railroad for the killing of animals, facts *held* to show gross negligence on the part of the engineer.—Western Ry. of Alabama v. Mitchell (Ala.) 427.

*In an action against a railroad for the killing of animals, a count of the complaint *held* not demurrable.—Western Ry. of Alabama v. Mitchell (Ala.) 427.

RAPE.

Admissions as evidence, see "Criminal Law," § 12.

Instructions in general, see "Criminal Law," §§ 25, 30.

Relevancy of evidence, see "Criminal Law," § 8.

§ 1. Offenses and responsibility therefor.

*In a prosecution for carnally knowing a girl under 14, certain instruction *held* correct.—Sims v. State (Ala.) 413.

§ 2. Prosecution and punishment.

Under Code 1896, §§ 5447, 5448, an indictment for carnal knowledge of a girl under 14 *held* uncertain and insufficient to support a conviction.—Sims v. State (Ala.) 413.

*In a prosecution for carnally knowing or abusing a female under 10 years of age, it was not error to permit the mother of the child to testify she seemed excited and looked as if she had been crying.—Sims v. State (Ala.) 413.

In a prosecution for rape, a question to prosecutrix as to what time her menses came on was properly excluded.—Sanders v. State (Ala.) 466.

*In a prosecution for rape, evidence that the prosecutrix had told her foster father what defendant had done, and the particulars, was not competent.—Sanders v. State (Ala.) 466.

In a prosecution for rape, an instruction that, if the private parts of prosecutrix were torn and bleeding, this was a corroborative fact, while argumentative, was not erroneous.—Sanders v. State (Ala.) 466.

RATIFICATION.

Of assessments for public improvements, see "Municipal Corporations," § 3.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1.

Petitory action in support of title derived from execution sale, see "Execution," § 3.

Presentation in lower court of questions for review, see "Appeal and Error," § 4.

Stay of proceedings pending appeal, see "Appeal and Error," § 8.

*Proofs of an outstanding title better than plaintiff's is a good defense to a petitory action.—City of Shreveport v. Marks (La.) 444.

*The evicted possessor in good faith is entitled to the value of his useful improvements, under Rev. Civ. Code, art. 508, unless plaintiff elect to pay, and show by evidence the enhanced value of the soil.—Foster v. Meyers (La.) 551.

*Plaintiff holding the regular patent from the United States shows a perfect title, which cannot be affected by an alleged mistake in the description of the land patented to defendant's authors.—Foster v. Meyers (La.) 551.

In a petitory action allegations of warrantors in their answer are not binding on defendant.—Lisso & Bro. v. Giddens (La.) 1029.

*Point annotated. See syllabus.

REAL ESTATE AGENTS.

See "Brokers."

REASONABLE DOUBT.

Instructions as to, see "Criminal Law," § 27.

REBUTTAL.

Evidence, see "Trial," § 3.

RECEIPTS.

Parol or extrinsic evidence of, see "Evidence," § 10.

RECEIVERS.

Of corporations in general, see "Corporations," § 7.

Records of former suit as evidence on trial of opposition to receivers accounts, see "Evidence," § 12.

§ 1. Nature and grounds of receivership.

*A receiver should not be appointed if any other remedy would afford adequate protection to the applicant.—Hayes v. Jasper Land Co. (Ala.) 909.

*That the officers of a corporation are fraudulently misappropriating the assets does not alone constitute ground for the appointment of a receiver, if such officers are solvent.—Hayes v. Jasper Land Co. (Ala.) 909.

*The purchase by the president of a corporation of stock in the same with funds thereof in violation of his trust as president held not to authorize, under ordinary circumstances, on the application of a minority stockholder, the appointment of a receiver.—Hayes v. Jasper Land Co. (Ala.) 909.

*The power to appoint a receiver will only be exercised in extreme cases and where without it plaintiff will sustain irreparable loss.—Hayes v. Jasper Land Co. (Ala.) 909.

*To justify the appointment of a receiver in limine it must appear that there is a reasonable probability that complainant will succeed, and that danger to the property, the subject of the suit, is imminent.—Hayes v. Jasper Land Co. (Ala.) 909.

§ 2. Management and disposition of property.

*Where a creditor of a corporation holds a vast majority of claims against it, his request to the receiver, on its insolvency, for a sale of its assets in bulk, will be granted, unless there is some conclusive reason to the contrary.—Wenar v. Leon L. Schwartz (La.) 360.

§ 3. Allowance and payment of claims.

*All claims on receiver's account, when opposed, must be proved with legal certainty.—Zeigler v. Interior Decorating Co. (La.) 59.

RECITALS.

In tax deeds, see "Taxation," § 5.

RECORDS.

Estoppel by record, see "Estoppel," § 1.
Of deeds, as affecting title by adverse possession, see "Adverse Possession," § 1.
Presumptions as to facts not shown by record on appeal, see "Appeal and Error," § 14.

*Point annotated. See syllabus.

Of particular facts, acts, instruments, or proceedings not judicial.

See "Chattel Mortgages," § 4; "Deeds," § 2; "Fraudulent Conveyances," § 1.

Acting of deputy for absent officer, see "Officers," § 1.

Transcript on appeal or writ of error, see "Criminal Law," § 41.

Of judicial proceedings.

See "Courts," § 1.

Judgment in criminal prosecution, see "Criminal Law," § 37.

Transcript on appeal or writ of error, see "Appeal and Error," § 9.

Verdict in criminal prosecution, see "Criminal Law," § 34.

Records as evidence, and evidence relating to matters of record.

See "Chattel Mortgages," § 4.

RECOUPMENT.

On cross-bill in equity, see "Equity," § 3.

RECUSATION.

Of juror, see "Jury," § 4.

REDEMPTION.

From mortgage, see "Mortgages," § 7.

REDIRECT EXAMINATION.

Of witness, see "Witnesses," § 3.

REFERENCE.

See "Arbitration and Award."

Appealability of order dismissing petition for, see "Appeal and Error," § 2.

To master or commissioner in equity, see "Equity," § 6.

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

§ 1. Right of action and defenses.

*A void mortgage executed by the guardian of an incompetent cannot be made the basis of a bill for the correction of a mistake therein.—Montgomery v. Perryman & Co. (Ala.) 838.

A fire policy held properly reformed.—Mississippi Fire Ass'n v. Stein (Miss.) 66.

*A grantor held entitled to reformation of a provision in a deed that the lessor should have the exclusive right to oysters.—Barataria Canning Co. v. Ott (Miss.) 378.

§ 2. Proceedings and relief.

*Statement of showing necessary for reformation of an instrument.—Folmar v. Lehman-Durr Co. (Ala.) 750.

In a suit to reform a deed, evidence held not to establish fraud, error, or mutual mistake sufficient to authorize a reformation.—Jones v. Jones (Miss.) 373.

*One seeking to reform a deed must establish, practically to the exclusion of every other reasonable hypothesis, that mutual mistake, fraud, or error occurred in the making of the deed.—Jones v. Jones (Miss.) 373.

REFRESHING MEMORY.

See "Witnesses," § 3.

REGISTRATION.

See "Deeds," § 2.

REHEARING.

See "New Trial."

REJOINDER.

In pleading, see "Pleading," § 7.

RELEASE.

See "Accord and Satisfaction"; "Payment."

§ 1. **Requisites and validity.**

A release of a simple contract debt may be by parol.—*Hand Lumber Co. v. Hall* (Ala.) 78.

§ 2. **Construction and operation.**

*A receipt for damages sustained by the construction of a sewer held a discharge of all claims plaintiff had at the time against defendants except damages caused by stock to crops which were brought about by defendants' negligence.—*Murphy v. Black & Laird* (Ala.) 877.

§ 3. **Pleading, evidence, trial, and review.**

Where a receipt was unambiguous, it was the duty of the trial court to interpret it and declare its effect to the jury.—*Murphy v. Black & Laird* (Ala.) 877.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 4.

Of evidence in criminal prosecutions, see "Criminal Law," § 8.

RELIGIOUS SOCIETIES.

Harmless error in actions by or against, see "Appeal and Error," § 19.

Judicial notice as to division of, see "Evidence," § 1.

Under a trust deed for the benefit of the Methodist Church in America, trustees appointed under Code 1896, § 4193, by the register in chancery as trustees of the Methodist Episcopal Church South held to become legal successors to the original trustees and vested with the title of their predecessors.—*Malone v. La Croix* (Ala.) 724.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 24.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1; "Injunction," § 1; "Quieting Title," § 1.

REMITTITUR.

Of cause on appeal or writ of error, see "Appeal and Error," § 24.

REMOVAL.

Of executor or administrator, see "Executors and Administrators," § 1.

Of policeman, see "Municipal Corporations," § 2.

REMOVAL OF CAUSES.

From justice's court to court of record, see "Justices of the Peace," § 3.

REMOVAL OF CLOUD.

See "Quieting Title."

RENT.

See "Landlord and Tenant," § 4.

REPAIRS.

Of demised premises, see "Landlord and Tenant," § 3.

REPEAL.

Of statute, see "Statutes," §§ 5, 6.

REPLEVIN.

See "Detinue."

Replevy bond in attachment, see "Attachment," § 2.

REPLICATION.

See "Pleading," §§ 3, 4.

REPORTS.

Of master or commissioner in chancery, see "Equity," § 6.

REQUESTS.

For instructions in civil actions, see "Trial," § 10.

For instructions in criminal prosecutions, see "Criminal Law," § 32.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

Of contract, see "Contracts," § 8.

Of contract for sale of goods, see "Sales," §§ 3, 4.

Of insurance policy, see "Insurance," § 4.

RES GESTÆ.

In civil actions, see "Evidence," § 4.

In criminal prosecutions, see "Criminal Law," § 8.

RES JUDICATA.

See "Judgment," §§ 4, 5.

RESTRAINT OF TRADE.

See "Contracts," § 1.

RESTRICTIONS.

In deeds, see "Deeds," § 2.

RESULTING TRUSTS.

See "Trusts," §§ 1, 4.

RETAINER.

Of attorney, see "Attorney and Client," § 1.

*Point annotated. See syllabus.

RETROSPECTIVE LAWS.

See "Statutes," § 6.

REVENUE.

See "Taxation."

REVERSAL.

Of judgment on appeal in criminal prosecution, see "Criminal Law," § 45.

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," §§ 38-45; "Justices of the Peace," § 4.

REVOCATION.

Of authority of broker, see "Brokers," § 1.
Of interspousal donations, see "Husband and Wife," § 5.

RIGHT OF WAY.

Of railroads, see "Railroads," § 1.

RISKS.

Assumed by employé, see "Master and Servant," §§ 7, 11.

ROADS.

See "Highways."

ROBBERY.

Limitation of liability of carrier for loss by, see "Carriers," § 5.

RULES.

For work by employés, see "Master and Servant," § 4.

RULES OF COURT.

See "Courts," § 2.

Chancery rules, see "Equity," §§ 3, 6.

Extension of time for signing or settlement of bill of exceptions, see "Exceptions, Bill of," § 2.

Incorporation of evidence in bill of exceptions, see "Exceptions, Bill of," § 1.

SALES.

Harmless error in action for breach of contract, see "Appeal and Error," § 20.

Harmless error in action for price, see "Appeal and Error," § 17.

In fraud of creditors, see "Fraudulent Conveyances," § 2.

Laws prohibiting sale of diseased horses as interference with personal civil rights, see "Constitutional Law," § 3.

Mortgage of realty as security for purchase price, see "Mortgages," § 1.

Parol or extrinsic evidence, see "Evidence," § 10.

Pleading set-off in action for breach of contract, see "Pleading," § 2.

Regulations as to sale of goods as interference with interstate commerce, see "Commerce," § 1.

Rescission of sale as fraud on creditors, see "Fraudulent Conveyances," § 1.

Time for performance of contract by seller, see "Contracts," § 2.

Sales by or to particular classes of persons.

See "Receivers," § 2.

Foreign corporations, see "Corporations," § 8.

Sales of particular species of, or estates or interests in, property.

See "Intoxicating Liquors."

Corporate assets, see "Corporations," § 7.

County courthouse, see "Counties," § 2.

Mortgaged chattels, see "Chattel Mortgages," § 8.

Property held adversely, see "Cuiusmodi and Maintenance."

Property of insane persons, see "Insane Persons," § 2.

Realty, see "Vendor and Purchaser."

Sales on judicial or other proceedings.

See "Judicial Sales"; "Partition," § 2.

By sheriff on execution, see "Sheriffs and Constables," § 1.

Foreclosure, see "Mortgages," § 6.

On execution, see "Execution," § 3.

On foreclosure of mortgage, see "Mortgages," § 5.

Tax sales, see "Taxation," §§ 2, 4.

§ 1. Requisites and validity of contract.

Circumstances held such that a sale of wood passed title to the purchaser.—*Smiley v. Hooper* (Ala.) 660.

*A manufacturer employing a traveling salesman with authority to take orders subject to approval held to have sufficiently indicated its nonacceptance of an order.—*Gould v. Cates Chair Co.* (Ala.) 675.

*The act of a manufacturer employing a salesman with authority to take orders subject to approval held not to constitute an acceptance of an order made by the salesman.—*Gould v. Cates Chair Co.* (Ala.) 675.

*An order indicating a sale of goods by a traveling salesman held not to constitute a contract in the absence of an acceptance by employer.—*Gould v. Cates Chair Co.* (Ala.) 675.

Where a firm contracted with a corporation to furnish a dredgeboat and do certain dredging work, and the dredge was pledged to secure the execution of the work, neither the fact that the company kept agents on the dredge to look after its interests, nor that it paid claims against the dredge to prevent its being stopped from work by legal process, renders the company liable to merchants for goods sold to the firm while working the dredge.—*Etoniah Canal & Drainage Co. v. Husband* (Fla.) 456.

Certain correspondence held to show an absolute sale by plaintiff to defendant of all the property described on certain pages of a stock book referred to in the correspondence.—*W. W. Bierce v. Davies* (La.) 314.

Under a contract for the sale of timber on land owned by a husband and wife, proceeds of such sale accruing after the death of the wife descended to the husband and a minor daughter.—*McIntosh Bros. v. Rutland* (Miss.) 372.

§ 2. Construction of contract.

*Contract of sale of millinery goods held an executed, and not an executory, contract.—*Thomas v. Thomas* (Ala.) 141.

*Contract of sale of coal at a certain sum per bushel held to fix the place of measurement at the place of delivery.—*Shelby Iron Co. v. Dupree* (Ala.) 182.

*Where goods sold are deliverable in installments and the price is payable in installments,

*Point annotated. See syllabus.

default by either party with reference to any one installment will not ordinarily entitle the other to abrogate the contract.—*Rock Island Sash & Door Works v. Moore & Handley Hardware Co. (Ala.)* 806.

*An order for one car load of sash, with the privilege of three, *held* severable so that defendant could not escape liability for failure to furnish specifications for the first car within the time limited.—*Rock Island Sash & Door Works v. Moore & Handley Hardware Co. (Ala.)* 806.

§ 3. Modification or rescission of contract.

Where a seller sold goods at various times, a fraud justifying a rescission of the sale of goods bought at one time was not sufficient to authorize a recovery of goods bought at another time, free from fraudulent concealment or representation.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*To authorize a rescission of a sale of goods and a recovery thereof on the ground of fraud the seller *held* required to prove certain facts.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*A seller requesting a payment from the buyer does not thereby waive his right to rescind the sale and recover the goods in the hands of a third person on the ground of fraud of the buyer.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*A seller seeking to rescind a sale *held* to have the burden of proving the facts necessary to a recovery.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

Instruction, given for the plaintiff, pretermittin inquiry into whether the alleged fraud of the buyer induced the seller to sell, *held* improper and erroneous.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

An instruction in an action to rescind a sale *held* not erroneous, though failing to define the elements constituting a fraudulent sale.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*In an action to rescind a sale, an instruction *held* erroneous because omitting one of the essentials on which a right to rescind is predicated.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*Misrepresentations *held* not material so as to authorize rescission by the purchaser of a contract of sale.—*Brennard Mfg. Co. v. Citronelle Mercantile Co. (Ala.)* 671.

The failure of a purchaser of timber to pay the balance of the purchase money therefor at the time stipulated in the contract does not of itself furnish sufficient ground for a cancellation of the contract.—*Godwin v. Phifer (Fla.)* 597.

§ 4. Operation and effect.

Where a buyer committed no fraud in his purchase, the fact that a purchase by a third person from him was made with intent to defraud the creditors of the buyer did not authorize the seller to recover the goods on rescinding the sale.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*Where one *held* goods under a secret trust for a buyer guilty of conduct justifying the seller in rescinding the sale, the seller *held* entitled to rescind the sale as against him.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*One claiming under a buyer guilty of conduct justifying the seller in rescinding the sale and recovering the goods must show that he is in fact a purchaser from the buyer, and that he paid value for the goods or took them in

payment of a debt.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*Where one bought goods for value without notice of the fraudulent conduct of his seller in buying the goods from a third person, the fact that the price paid was less than the value of the property *held* immaterial.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*A seller seeking to recover goods in the hands of one claiming as purchaser from a fraudulent buyer *held* required to prove notice of the fraud at the time of the purchase or before the purchase money was paid.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

*Purchaser *held* to acquire no better title than seller had, though he purchased without notice of the true owner's title and for a valuable consideration.—*W. J. Bennett & Co. v. Brooke (Ala.)* 149.

*A purchaser of property sold to a company in consideration of it organizing a stock corporation, who has knowledge of the equities of the seller, is liable to the seller.—*A. J. Cranor Co. v. Miller (Ala.)* 678.

§ 5. Warranties.

*A contract of sale containing an express warranty excludes the idea of any other warranty.—*Thomas v. Thomas (Ala.)* 141.

*Where a mechanical apparatus is guaranteed on a certain condition, the condition must be complied with in order to enforce the guaranty.—*Payne & Joubert v. Bowie Lumber Co. (La.)* 431.

§ 6. Remedies of seller.

Fraud, justifying rescission of sale of goods at one time, *held* not to authorize recovery of goods bought at another time without fraud.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

Seller, requesting payment for goods, *held* not to waive right to rescind and recover goods from third person on ground of fraud of buyer.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

Seller, seeking to recover goods, *held* to have burden of proving facts necessary to recovery.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

Instruction in action to recover goods sold *held* not erroneous, though failing to define elements constituting fraudulent sale.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

Instruction in action to recover goods sold, pretermittin inquiry into whether alleged fraud of buyer induced sale, *held* improper.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

In action to recover goods sold, instruction *held* erroneous because omitting one of the essentials on which the right of recovery is predicated.—*Pelham v. Chattahoochee Grocery Co. (Ala.)* 12.

In action for price of patterns, where defendant pleaded set-off for patterns returned, written agreement as to time for return of patterns *held* admissible in evidence.—*Butterick Pub. Co. v. Cranford Mercantile Co. (Ala.)* 80.

Where the only pleas were the general issue and a plea of set-off, evidence of breach of warranty or of fraud *held* inadmissible.—*Thomas v. Thomas (Ala.)* 141.

In an action for breach of a contract to purchase a quantity of wood, evidence as to the sum received by the seller for wood which the buyer refused to take under the contract was admissible.—*Eagle Iron Co. v. Baugh (Ala.)* 663.

Objections in an action for the price that mechanical plant had not been completed accord-

*Point annotated. See syllabus.

ing to contract *held* not sustained.—Payne & Joubert v. Bowie Lumber Co. (La.) 431.

§ 7. Remedies of buyer.

*The measure of damages, in an action by the purchaser of potatoes, against the seller, for breach of contract, stated.—J. D. Belote & Son v. Wilcox (Ala.) 673.

§ 8. Conditional sales.

*Note, given for part of the price of a mare, declaring that the title remained in the sellers until the note was paid, *held* a contract of conditional sale.—Riley v. Dillon & Pennell (Ala.) 768.

*Where a mare was sold under a conditional contract reserving the title in the seller, the latter on the buyer's default was entitled to recover the mare from a purchaser of the buyer without offering to place either in statu quo.—Riley v. Dillon & Pennell (Ala.) 768.

SATISFACTION.

See "Accord and Satisfaction"; "Payment"; "Release."

Of judgment, see "Judgment," § 6.

SCHOOL LANDS.

See "Public Lands," § 1.

SCHOOLS AND SCHOOL DISTRICTS.

Quo warranto to test title to office of school trustee, see "Quo Warranto," § 1.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

SEDUCTION.

§ 1. Criminal responsibility.

*In a prosecution for seduction, evidence as to whether prosecutrix had ever consented to have intercourse with a third person *held* irrelevant.—Knight v. State (Ala.) 850.

*Prosecutrix's reputation for chastity having been impeached, evidence as to her general character for virtue and chastity *held* admissible.—Knight v. State (Ala.) 850.

In a prosecution for seduction, evidence *held* to require submission of the question whether the intercourse was the result of force or seduction to the jury.—Knight v. State (Ala.) 850.

SELF-DEFENSE.

Instructions as to law of, see "Criminal Law," § 32.

Justification of assault with intent to kill, see "Homicide," §§ 2, 13.

Justification of homicide, see "Homicide," §§ 3, 9, 13.

SENTENCE.

In criminal prosecutions, see "Criminal Law," § 37; "Homicide," § 17.

In prosecution for nonsupport, see "Husband and Wife," § 7.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 3.

SEPARATION.

See "Husband and Wife," § 6.

*Point annotated. See syllabus.

SEQUESTRATION.

Liability for cost of execution of writ, see "Costs," § 3.

SET-OFF AND COUNTERCLAIM.

Pleading matter of set-off or counterclaim, see "Pleading," § 2.

Recoupment on cross-bill in equity, see "Equity," § 3.

In particular actions or proceedings.

See "Ejectment," § 4.

Against surety, see "Principal and Surety," § 3.

For price of goods, see "Sales," § 6.

On bill or note, see "Bills and Notes," § 4.

SETTLEMENT.

See "Accord and Satisfaction"; "Payment"; "Release."

By executor or administrator, see "Executors and Administrators," § 5.

By guardian of infant, see "Guardian and Ward," § 2.

By partners, see "Partnership," § 4.

Marriage settlements, see "Husband and Wife," § 2.

Of bill of exceptions, see "Criminal Law," § 41; "Exceptions, Bill of," § 2.

SEVERABLE CONTRACTS.

See "Sales," § 2.

SHERIFFS AND CONSTABLES.

Hearsay as evidence in action against sheriff for wrongful sale under execution, see "Evidence," § 8.

Homicide in making arrest, see "Homicide," §§ 3, 9.

Liability for false imprisonment, see "False Imprisonment," § 1.

Liability of justice for wrongful acts of constable, see "Justices of the Peace," § 2.

Materiality of evidence in action for refusal of constable to seize property, see "Evidence," § 4.

Sufficiency of instructions in action for wrongful execution sale by sheriff, see "Execution," § 8.

§ 1. Powers, duties, and liabilities.

Plaintiff, having alleged that defendant, a constable, "did refuse and wholly fail" to execute certain writs, *held* bound to prove both the constable's failure and refusal.—Reeder v. Huffman (Ala.) 177.

Sale of property under execution after filing and before trial of claim of exemptions *held* conversion by the officer and others who aided him.—Stallings v. Gilbreath (Ala.) 423.

*Where a constable made a wrongful levy on plaintiff's cotton and delivered the same to plaintiff's landlord, who sold it, that plaintiff was indebted to his landlord to an amount exceeding the value of the cotton *held* no defense to the constable's liability for wrongful levy.—Smith v. Hilton (Ala.) 747.

*An attachment levied by a sheriff on property situated outside his county is void.—Jones v. Baxter (Ala.) 781.

A sheriff *held* not liable as a trespasser ab initio to the mortgagee of chattels attached by him.—Ryan v. Young (Ala.) 954.

Evidence *held* to show that a sheriff made proper return of a writ of attachment.—Ryan v. Young (Ala.) 954.

SHIPPING.**§ 1. Liabilities of vessels and owners in general.**

In an action for injuries to a draw tender by collision of defendant's boat with the draw, evidence *held* to show that there was a sufficient space at the draw through which it would have been possible for the colliding boat to have passed.—*Stoker v. Hodge Fence & Lumber Co. (La.)* 211.

In an action for collision of defendant's boat with a draw, evidence *held* to show no delay in opening the draw, but that the boat could have passed it, if the usual channel had been followed.—*Stoker v. Hodge Fence & Lumber Co. (La.)* 211.

In an action for collision of defendant's boat with a draw, whereby the plaintiff was injured, evidence *held* not to show that the bridgekeepers were closing, instead of opening, the draw at the moment of the accident.—*Stoker v. Hodge Fence & Lumber Co. (La.)* 211.

In an action for personal injuries received by collision between defendant's boat and a draw, evidence *held* to show that the draw was half open and there was space for the boat to pass.—*Stoker v. Hodge Fence & Lumber Co. (La.)* 211.

In an action for injuries by collision of defendant's boat with a draw, evidence as to the safest method of towing boats through a draw was admissible.—*Stoker v. Hodge Fence & Lumber Co. (La.)* 211.

In an action for injuries to a draw tender by collision of defendant's boat with the draw, evidence of the custom in towing schooners and barges through bridges was admissible.—*Stoker v. Hodge Fence & Lumber Co. (La.)* 211.

SIGNATURES.

Judicial notice of signatures of officers, see "Evidence," § 1.

To certificates to practice medicine, see "Physicians and Surgeons."

To substitution of trustees under deed of trust, see "Mortgages," § 5.

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Estoppel by, see "Estoppel," § 2.

SLANDER.

See "Libel and Slander."

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See "Carriers," § 9.

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See "Statutes," § 2.

SPECIFIC PERFORMANCE.

Of contract to devise or bequeath, see "Wills," § 1.

§ 1. Contracts enforceable.

A promise of sale amounts to a sale, and specific performance of it will be enforced.—*Girault v. Feucht (La.)* 572.

*In the absence of fraud or deception, it is incumbent on a lessor, on signing a contract of to read it carefully or have it read, and to stop and listen, and take no chances touching the contents of the act.—*Murphy v. Hussey (La.)* 692.

§ 2. Proceedings and relief.

*Where, in a suit for specific performance, defendant claimed a balance of the price un-

paid, the case should be referred to the register to ascertain any balance.—*Falkner v. Hudson (Ala.)* 844.

*To a bill for specific performance of a contract, framed on the theory that a written instrument is a bill of sale, a plea that such instrument is a mortgage is good.—*Smith v. Hope (Fla.)* 69.

Conversation of witnesses between themselves at the moment of the signing of the contract is not admissible where no fraud has been alleged.—*Murphy v. Hussey (La.)* 692.

In an action by a lessee to enforce an option in the lease for the sale of the property, evidence *held* insufficient to sustain the defense that the lessor signed the contract not knowing that it contained the option.—*Murphy v. Hussey (La.)* 692.

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See "Intoxicating Liquors."

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Parol or extrinsic evidence of legislative journals, see "Evidence," § 10.

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Right of review by state as affecting inheritance taxes of judgment sending heirs into possession, see "Appeal and Error," § 3.

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See "Adoption"; "Adverse Possession," § 1; "Agriculture"; "Animals"; "Appeal and Error," §§ 2, 3, 6, 8, 11, 13, 16; "Arbitration and Award," § 1; "Assignments for Benefit of Creditors," § 1; "Attorney and Client," § 2; "Bankruptcy," § 1; "Bastards," § 1; "Burglary," §§ 1, 2; "Carriers," §§ 2, 7, 9; "Chattel Mortgages," § 4; "Commerce," § 1; "Counties," § 1; "Courts," § 3; "Cred-

*Point annotated. See syllabus.

itors' Suit"; "Depositions"; "Eminent Domain," §§ 1, 4; "Equity," § 7; "Exceptions, Bill of," § 2; "Execution," § 1; "Executors and Administrators," §§ 2, 4; "Forcible Entry and Detainer," § 1; "Gaming," § 1; "Garnishment," § 1; "Grand Jury," § 1; "Habeas Corpus," § 2; "Highways," §§ 1, 2; "Homestead," §§ 1, 2; "Homicide," §§ 4, 11, 16; "Indictment and Information," § 1; "Intoxicating Liquors," § 1; "Judges," § 1; "Jury," §§ 1, 3, 4; "Justices of the Peace," § 4; "Landlord and Tenant," §§ 3, 5; "Libel and Slander," § 4; "Master and Servant," §§ 6, 12; "Mechanics' Liens"; "Municipal Corporations," §§ 2-5; "Partition," § 2; "Physicians and Surgeons"; "Pleading," §§ 2, 3; "Public Lands," §§ 1, 2; "Quieting Title," § 2; "Quo Warranto," § 1; "Rape," § 2; "Street Railroads," § 1; "Trespass," § 3; "Trusts," § 1; "Vagrancy"; "Wills," §§ 1, 3, 5; "Witnesses," §§ 1, 2, 4.

Assessments for public improvements, see "Municipal Corporations," § 3.

Contracts for public improvements, see "Municipal Corporations," § 3.

Damages for causing death, see "Death," § 1. Dispensaries for sale of intoxicating liquors, see "Intoxicating Liquors," § 5.

Keeping hogs in city, see "Municipal Corporations," § 4.

Laws affecting personal, civil and political rights, see "Constitutional Law," § 3.

Liability of stockholders for corporate debts, see "Corporations," § 4.

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Recovery of costs taxed, see "Costs," § 4.

Statute of frauds, see "Frauds, Statute of."

§ 1. Enactment, requisites, and validity in general.

*Invalidity of provision in Acts 1880-81, p. 170, that all fines shall go to the informant, *held* not to affect remainder of act.—*Chaney v. State* (Ala.) 172.

*Provisions clearly not embraced in the subject as expressed in the title or in matter properly connected therewith are inoperative.—*Ex parte Knight* (Fla.) 786.

Acts 1894, p. 242, No. 190, relating to contempt, never became a law by reason of the fact that it was vetoed by the Governor, and it was never thereafter passed by the General Assembly.—*Fellman v. Mercantile Fire & Marine Ins. Co.* (La.) 49; *In re Cooke*, *Id.*

§ 2. General and special or local laws.

*Act March 4, 1901 (Acts 1900-01, p. 2323), establishing a recorder's court in a city, *held* not to amend its charter to which it makes no reference, though giving to such court exclusively jurisdiction which the mayor had under the charter; so that Act Oct. 6, 1903 (Loc. Acts 1903, p. 512), repealing the Act of March 4, 1901 (Acts 1900-01, p. 2323), does not contravene Const. § 104, subd. 18, prohibiting the amending of a city charter by a special private local law.—*State v. Hubbard* (Ala.) 903.

§ 3. Subjects and titles of acts.

That the local prohibition acts (Acts 1880-81, p. 169; Acts 1884-85, p. 601) contain provisions relating to keeping liquors for sale and to intoxicating bitters, which subjects are not expressed in the titles of the acts, does not affect the validity of their remaining provisions.—*Untreiner v. State* (Ala.) 170.

Acts 1880-81, p. 170, prohibiting manufacture and disposition of liquor, *held* not invalid as containing independent subjects.—*Chaney v. State* (Ala.) 172.

That legislative grants have at various times been included in acts with titles too restrictive

is not sufficient to force the courts to disregard a plain mandate of the Constitution.—*Wade v. Atlantic Lumber Co.* (Fla.) 72.

*Laws 1893, p. 223, c. 4267, being entitled "An act to incorporate the Atlantic Suwanee River & Gulf Railroad Company," *held* not to show that a land grant will be included thereunder.—*Wade v. Atlantic Lumber Co.* (Fla.) 72.

*Laws 1899, p. 119, c. 4730, regulating the descent of homesteads, is not a violation of Const. 1885, art. 3, § 16, providing that each law shall embrace but one subject, expressed in the title.—*Saxon v. Rawls* (Fla.) 594.

When the subject expressed in the title is restricted, only those provisions fairly included in such restricted subject and matter properly connected therewith can legally be incorporated in the body of the act.—*Ex parte Knight* (Fla.) 786.

*Under Const. art. 3, § 16, relating to the subject and title of an act, only such provisions can be validly incorporated in the body of the act as are fairly included in one subject and matter properly connected therewith.—*Ex parte Knight* (Fla.) 786.

*The purpose of Const. art. 3, § 16, providing that each law shall embrace but one subject and matter properly connected therewith, which shall be briefly expressed in the title, is to render inoperative any provision in an act not fairly included in the title or not germane to the subject of the act.—*Ex parte Knight* (Fla.) 786.

*In Acts 1895, p. 177, c. 4416, preventing the cutting or removing of any timber from lands sold for taxes, a provision to prevent the gathering of any turpentine extracted from the pine timber cut or boxed on the lands is not included within the title and is void.—*Ex parte Knight* (Fla.) 786.

§ 4. Amendment, revision, and codification.

*Loc. Acts 1898-99, pp. 1632, 1633, relating to sale of intoxicating liquors *held* in violation of Const. § 45, prohibiting the extension of any act by reference to its title.—*Rose v. Lampley* (Ala.) 521.

§ 5. Repeal, suspension, expiration, and revival.

Act Feb. 23, 1899, (Loc. Acts 1898-99, pp. 1632, 1633), entitled "An act to repeal the prohibition act approved February 26, 1887, so far as the same relates to the town of Georgiana," and by the first section expressly repealing the act mentioned in the title, did not repeal Act Feb. 20, 1889 (Acts 1888-89, p. 512).—*Rose v. Lampley* (Ala.) 521.

§ 6. Construction and operation.

*Where the journals of the Legislature speak as to the title of an act, and the enrolled bill contains a variance therefrom, the journals must control.—*Wade v. Atlantic Lumber Co.* (Fla.) 72.

*Where an action is brought to restrain defendants from organizing as a board of levee commissioners under a statute and from enforcing it, and pending the action the statute is repealed, the suit abates.—*Doss v. Board of Com'rs of Mementau Levee Dist.* (La.) 720.

§ 7. Pleading and evidence.

*Courts will not hear evidence outside the journals of the house to sustain or defeat a statute.—*State v. Brodie* (Ala.) 180.

Under Const. § 106, an affidavit as to the publication of notice of intention to apply for the enactment of a local law *held* not proof that a sufficient notice was published.—*State v. Brodie* (Ala.) 180.

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An instruction in an action against a street railway company for the death of a child struck by a car *held* erroneous for failing to hypothesize that the failure of the motorman to act as a reasonably prudent person would have done proximately caused the injury.—*Birmingham Ry., Light & Power Co. v. Jones* (Ala.) 146.

A complaint in an action against a street railway company for the death of a child struck by a car *held* to sufficiently charge simple negligence in the management of the car.—*Birmingham Ry., Light & Power Co. v. Jones* (Ala.) 146.

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*One injured by being struck by a street car *held* guilty of contributory negligence.—*Hooks v. Huntsville Ry., Light & Power Co.* (Ala.) 273.

In an action against a street railroad company for personal injuries, an instruction as to discovered peril *held* not cause for reversal, even if abstract.—*Birmingham Ry., Light & Power Co. v. Ryan* (Ala.) 616.

In an action against a street railroad company for personal injuries, certain instructions *held* not reversible error.—*Birmingham Ry., Light & Power Co. v. Ryan* (Ala.) 616.

*That a person is guilty of negligence in going on a street railroad track in close proximity to an approaching car does not, as a matter of law, show that his conduct was the proximate cause of his being struck by the car.—*Birmingham Ry., Light & Power Co. v. Ryan* (Ala.) 616.

*In an action against a street railroad company for personal injuries, an allegation of negligence in the complaint *held* sufficient.—*Birmingham Ry., Light & Power Co. v. Ryan* (Ala.) 616.

*If a person goes on a street railroad track in close proximity to an approaching car without stopping, looking, and listening, and is run over, it must be presumed that his conduct contributed to his death.—*Birmingham Ry., Light & Power Co. v. Ryan* (Ala.) 616.

Code 1896, § 3441, requiring operators of trains to stop 100 feet before crossing another railroad track, *held* applicable to street railroads.—*Montgomery St. Ry. Co. v. Lewis* (Ala.) 736.

*It is the duty of the operators of street cars to keep them under reasonable control and to look out for persons who may go or be on the tracks in the streets and on seeing any person in danger to use diligence to avoid injuring him.—*Birmingham Ry., Light & Power Co. v. Clarke* (Ala.) 829.

*Where a traveler without looking turns onto the track so suddenly that it is impossible for the motorman to check his car, the street car company is not liable for the consequences.—*Birmingham Ry., Light & Power Co. v. Clarke* (Ala.) 829.

*The driver of a vehicle killed in a collision with a street car *held* guilty of contributory negligence precluding a recovery.—*Birmingham Ry., Light & Power Co. v. Clarke* (Ala.) 829.

*Where, after the driver of a vehicle had driven within the zone of danger from an approaching street car, the operator negligently failed to do all in his power to avoid killing him, the driver's negligence was no defense to the negligence of the motorman.—*Birmingham Ry., Light & Power Co. v. Clarke* (Ala.) 829.

*Point annotated. See syllabus.

*In an action for death of plaintiff's intestate from a collision between intestate's buggy and defendant's street car, complaint *held* sufficient to show the relation of the parties from which a duty could be inferred.—*Birmingham Ry., Light & Power Co. v. Clarke* (Ala.) 829.

In an action for injuries received in a collision between a fire hose carriage going to a fire and a street car, defendant company *held* not liable.—*Wood v. New Orleans Ry. & Light Co.* (La.) 436.

STREETS.

See "Highways"; "Municipal Corporations," § 3.

Imposition of additional servitudes in exercise of power of eminent domain, see "Eminent Domain," § 4.

SUBROGATION.

*One of two debtors in solido, on payment of a judgment against both, *held* subrogated to the rights of the judgment creditor against his codefendant.—*Theus v. Armistead* (La.) 95.

SUBSCRIPTIONS.

To corporate stock, see "Corporations," § 3.

SUCCESSION.

See "Executors and Administrators"; "Guardian and Ward," § 2.

Parties on appeal from judgment homologating provisional account of tutrix, see "Appeal and Error," § 5.

SUIT.

See "Action."

SUNDAY.

Exclusion of Sundays in computation of time, see "Time."

SUPERNUMERARY JUDGES.

See "Judges," § 1.

SUPPLEMENTAL PLEADING.

See "Pleading," § 5.

SUPREME COURTS.

See "Courts," §§ 3, 5.

Appellate jurisdiction in criminal cases, see "Criminal Law," §§ 38-45.

SURETYSHIP.

See "Principal and Surety."

SURFACE WATERS.

See "Waters and Water Courses," § 1.

SUSPENSIVE APPEAL.

See "Appeal and Error," §§ 7, 8, 12-23.

SWAMP LANDS.

See "Public Lands," § 1.

TABLEAU.

Of tutrix, see "Guardian and Ward," § 2.

TALESMEN.

See "Jury," § 3.

TAXATION.

Bill to restrain tax proceedings as bill to quiet title, see "Quieting Title," § 2.
Check executed by tax collector in official capacity, see "Bills and Notes," § 1.
Conclusiveness of judgment in suit to annul tax sale, see "Judgment," § 5.
Jurisdiction of appellate court in action to recover taxes paid, see "Courts," § 5.
Laws relating to, as denial of due process of law, see "Constitutional Law," § 7.
Sufficiency of tax title to sustain action to quiet title, see "Quieting Title," § 2.

Local or special taxes.

See "Highways," § 2.

Assessments for municipal improvements, see "Municipal Corporations," § 3.

Occupation or privilege taxes.

See "Intoxicating Liquors," § 4; "Licenses," § 1.
Corporation privilege taxes, see "Corporations," § 1.

§ 1. Liability of persons and property.

Gen. Acts 1903, p. 227, imposing a privilege tax on recorded mortgages, held to repeal Code 1896, § 3911, subd. 7, subjecting all moneyed capital to an ad valorem tax, etc.—*Barnes v. Moragne* (Ala.) 947; *Clay v. State* (Ala.) 949; *Hooper v. Same*, Id.

Moneyed credits exempted from ad valorem taxation by Gen. Acts 1903, p. 227, held not subject to taxation under Code 1896, § 3911, subsec. 14.—*Barnes v. Moragne* (Ala.) 947; *Clay v. State* (Ala.) 949; *Hooper v. Same*, Id.

§ 2. Levy and assessment.

The police jury, as a board of reviewers, has no authority to reduce assessments of its own motion, in the absence of a contest by a taxpayer, as provided by Acts 1890, p. 129, No. 106, § 19.—*Police Jury of Concordia Parish v. Campbell* (La.) 358.

Where, under Const. 1879, art. 242, and Acts 1886, p. 44, No. 35, Acts 1894, p. 191, No. 153, on the petition of property taxpayers, and after a special election, a tax of 5 mills is levied for 10 years in aid of a railroad, such tax is to be collected each year during the term thus fixed on the basis of the assessment of each year.—*State ex rel. Arkansas Southern R. Co. v. Knowles* (La.) 439.

Where property was sold to the state for the taxes of a certain year, it could not be again sold at a later year as property of the tax debtor, but should have been assessed as the property of the state, under Act 1888, p. 88, No. 80.—*Lisso & Bro. v. Giddens* (La.) 1029.

§ 3. Collection and enforcement against persons or personal property.

Proceedings by a city to sell property for taxes held not to constitute a cloud on title, so as to authorize restraint thereof by injunction.—*City of Ensley v. McWilliams* (Ala.) 296.

*Injunction will not lie to restrain the collection of taxes unless there are special circumstances bringing the case within some recognized head of equity jurisprudence.—*City of Ensley v. McWilliams* (Ala.) 296.

*Point annotated. See syllabus.

*Where a tax collector, without authority, and against the protest of a party, collects from him taxes which such party is under no legal obligation to pay, and which such officer had no legal authority to demand, such party can recover from the officer individually the sum so collected, with interest.—*Florida Packing & Ice Co. v. Carney* (Fla.) 190.

§ 4. Sale of land for nonpayment of tax.

Under Laws 1893, p. 3, c. 4115, a sale of lands in 1894 for the 1893 tax assessment was authorized.—*Smith v. Philips* (Fla.) 527.

Where property is assessed as the property of "Valentine Dollar, Assignee," and sold as the property of "Valentine Dallen Association," the tax deed is void.—*Ropes v. Minshaw* (Fla.) 538.

*The advertisement of a tax sale in the last week of the 30 days must be published before the date and hour fixed for the sale.—*Buckingham v. Negrotto* (La.) 54.

*A sale in 1897 for the taxes of 1896 is void where the taxes had in fact been paid.—*Lisso & Bro. v. Giddens* (La.) 1029.

§ 5. Tax titles.

Tax deed failing to recite that probate court had rendered decree for sale of land, as required by Code 1896, § 4056, held void.—*Southern Ry. Co. v. Hall* (Ala.) 135.

The statutory form of the tax deed does not make provision for an assignment, and the burden is upon the claimant, under a tax deed, who was not the purchaser at the sale, to prove the assignment.—*Smith v. Philips* (Fla.) 527.

The use in a tax deed of the words "done in the presence of" two witnesses, in lieu of "signed and sealed in presence of," as prescribed in the form of tax deed in Laws 1893, p. 3, c. 4115, does not render the deed void.—*Smith v. Philips* (Fla.) 527.

The mere omission from the description of lands embraced in a tax deed, of the words "Tallahassee meridian," held not to render a tax deed void.—*Smith v. Philips* (Fla.) 527.

A tax deed, after reciting separate sales of two 40's to the same purchaser, held not to show conclusively a joint sale by the recital therein.—*Smith v. Philips* (Fla.) 527.

The insertion by the clerk into the statutory form of a tax deed of the words "the required thirty days' notice having been given" held not to render the deed void on its face.—*Smith v. Philips* (Fla.) 527.

*Where a purchaser at a tax sale made under Acts 1884, p. 104, No. 82, to satisfy taxes of 1879 and previous years, does not pay the taxes of 1880 and subsequent years, but merely promises to pay them, he acquires no title.—*Fluker v. De Grange* (La.) 591.

Where vacant lands belonging to a succession are adjudicated to the state for taxes, and thereafter assessed to the deceased owner, and later, to a purchaser, under Acts 1884, p. 104, No. 82, and still later are sold by the auditor, and the heirs of the former owner pay no taxes and take no steps to be put in possession, that at one time the property may have been occupied by a third person with the alleged consent of the heirs will not prevent the running of the prescription against proceedings to set aside tax sales.—*Crillen v. New Orleans Terminal Co.* (La.) 645; *In re Crillen*, Id.

Though property may have been assessed in the name of one not the owner, a sale for taxes, predicated on such assessment, falls within Const. art. 233, as a basis of prescription.—*Crillen v. New Orleans Terminal Co.* (La.) 645; *In re Crillen*, Id.

In a suit to obtain possession under a title derived from a tax sale and for the quieting of such title, *held* that there is no such inconsistency of allegation in the answer as to estop defendant from proving the nullity of the tax sale.—*Doullut v. Smith* (La.) 913; *In re Smith, Id.*

Where the auditor issued a certificate of redemption for the taxes for which plaintiff claims the property was sold, the state did not transfer the property for which the certificate issued, though after the time for redemption.—*Lisso & Bro. v. Giddens* (La.) 1029.

Where property was not assessed separately for taxes, as required by Act 1888, p. 133, No. 85, § 61, the title acquired by tax sale under such assessment was void.—*Lisso & Bro. v. Giddens* (La.) 1029.

Where, in a petitory action, evidence shows that defendant has always been in possession, plaintiff cannot claim prescription under Const. art. 233.—*Lisso & Bro. v. Giddens* (La.) 1029.

Evidence *held* insufficient to show any notice given to the taxpayer, as required by Act 1888, p. 126, No. 85, § 41.—*Lisso & Bro. v. Giddens* (La.) 1029.

TELEGRAPHS AND TELEPHONES.

Discrimination between telegraph companies by carrier, see "Carriers," § 7.

Exercise of power of eminent domain by telegraph or telephone company, see "Eminent Domain," §§ 1-3.

Res gestæ in action for delay in delivery of telegram, see "Evidence," § 4.

Right of undisclosed principal to sue for breach of contract to transmit telegram, see "Principal and Agent," § 2.

Trespass by telegraph company, see "Trespass," § 2.

§ 1. Regulation and operation.

*In an action for failure to deliver a telegram, plaintiff *held* to have sustained loss to the extent of the charges paid, and therefore entitled to recover for mental suffering in addition.—*Western Union Telegraph Co. v. Krichbaum* (Ala.) 16.

In an action for failure to deliver a telegram, evidence *held* to establish defendant's negligence.—*Western Union Telegraph Co. v. Krichbaum* (Ala.) 16.

*In an action for failure to deliver a message, plaintiff was entitled to introduce in evidence the message delivered to him by defendant.—*Collins v. Western Union Telegraph Co.* (Ala.) 160.

*In an action against a telegraph company, *held*, that any conditions on the form employed by the sender tending to defeat the action should be brought into the case by plea.—*Collins v. Western Union Telegraph Co.* (Ala.) 160.

*A delivery of a telegram *held* as a matter of law no delivery to the sendee.—*Western Union Telegraph Co. v. Whitson* (Ala.) 405.

*If a telegraph company is unable to make a personal delivery, it is its duty to deliver the message to sendee's authorized agent.—*Western Union Telegraph Co. v. Whitson* (Ala.) 405.

*A complaint in an action against a telegraph company for the nondelivery of a message *held* not bad for failing to allege an affirmative defense.—*Western Union Telegraph Co. v. Whitson* (Ala.) 405.

*A sendee of a telegram suing for nondelivery *held* required to prove that his residence or place of business was within the established

free-delivery limits.—*Western Union Telegraph Co. v. Whitson* (Ala.) 405.

In an action against a telegraph company for the nondelivery of a message, certain evidence *held* inadmissible as showing that a person was an agent of the sendee to receive the message.—*Western Union Telegraph Co. v. Whitson* (Ala.) 405.

In an action for delay in delivering a message, evidence that plaintiff often received telegrams and letters at the witness' house, where she boarded, *held* admissible.—*Western Union Telegraph Co. v. Manker* (Ala.) 850.

In an action for delay in delivering a telegram, evidence that, if the messenger boy used reasonable effort to find plaintiff and deliver the telegram, plaintiff could not recover, *held* properly refused.—*Western Union Telegraph Co. v. Manker* (Ala.) 850.

*In an action ex contractu for defendant's delay in delivering a telegram, damages for mental suffering *held* recoverable by way of aggravation.—*Western Union Telegraph Co. v. Manker* (Ala.) 850.

*Plaintiff in an action for nondelivery of telegram *held* entitled to recover for mental anguish.—*Western Union Telegraph Co. v. Long* (Ala.) 965.

*A verdict for \$500 *held* not excessive in an action for nondelivery of a telegram.—*Western Union Telegraph Co. v. Long* (Ala.) 965.

TENANCY IN COMMON.

Decree pro confesso in action by or against tenants in common, see "Equity," § 7.

§ 1. Creation and existence.

Under Code 1896, §§ 2712, 2760, a certain contract *held* not a contract of hire, but to create a joint tenancy in a crop raised pursuant thereto.—*Hendricks v. Clemmons* (Ala.) 306.

*An owner selling standing timber, and the buyer, *held* tenants in common of the timber cut, pursuant to the contract of sale.—*Colby-Hinkley Co. v. Jordan* (Ala.) 962.

§ 2. Mutual rights, duties, and liabilities of co-tenants.

*Where a minor performed services in raising a crop, to one-half of which he was entitled under his contract with the owner of the land on which it was raised, neither he nor his parent could recover from the owner of the land for the minor's services.—*Hendricks v. Clemmons* (Ala.) 306.

*The giving of a mortgage on the fee by one of several co-tenants, where no possession was taken under the mortgage, does not amount to an ouster, so as to start the running of limitations against the other tenants.—*Scottish-American Mortg. Co. v. Buncley* (Miss.) 502.

§ 3. Rights and liabilities of co-tenants as to third persons.

*In an action by five of seven tenants in common for damages to the land from construction of a railroad embankment in a street on which the land abutted, the measure of recovery by the five *held* five-sevenths of the total damage.—*Birmingham Ry., Light & Power Co. v. Oden* (Ala.) 129.

TENDER.

Effect of tender on running of interest, see "Interest," § 1.

Of price named in contract for sale of realty, see "Vendor and Purchaser," § 3.

*Point annotated. See syllabus.

TERMS.

Of courts, see "Courts," § 2.

TESTAMENT.

See "Wills."

THEFT.

See "Larceny."

THREATS.

Evidence of, in prosecution for homicide, see "Homicide," § 6.

TIMBER.

See "Logs and Logging."

On mortgaged land, see "Mortgages," § 3.

TIME.

Insufficiency of time to prepare for trial as ground for continuance in criminal prosecution, see "Criminal Law," § 18.

For particular acts in or incidental to judicial proceedings.

Amendment of pleading in equity, see "Equity," § 4.

Appeal in criminal prosecutions, see "Criminal Law," § 40.

Appeal in quo warranto proceedings, see "Quo Warranto," § 2.

Appeal or writ of error in civil actions, see "Appeal and Error," § 6.

Holding court, see "Courts," § 2.

Motion to quash indictment, see "Indictment and Information," § 5.

Motion to quash venire in proceedings for assessment of damages for taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.

Objections to evidence, see "Trial," § 3.

Objections to instructions for purpose of review, see "Criminal Law," § 39.

Plea in equity, see "Equity," § 3.

Presentation allowance or filing bill of exceptions, see "Exceptions, Bill of," § 2.

Signing or settling bill of exceptions in civil action, see "Appeal and Error," § 9.

Signing or settling bill of exceptions in criminal prosecution, see "Criminal Law," § 41.

For particular acts not judicial.

Payment of interest, see "Interest," § 1.

Performance of contract, see "Contracts," § 2.

*In computing the five days allowed the Governor by Const. art. 76 in which to return a bill to the General Assembly after it has been presented to him, Sundays are to be excluded.—*Fellman v. Mercantile Fire & Marine Ins. Co. (La.) 49; In re Cooke, Id.*

TITLE.

Color of title, see "Adverse Possession."

Declarations as evidence of, see "Evidence," § 7.

Necessary to support dedication, see "Dedication," § 1.

Removal of cloud, see "Quieting Title."

Retention of apparent title by grantor, see "Fraudulent Conveyances," § 1.

Tax titles, see "Taxation," § 5.

Title of lessor, see "Landlord and Tenant," § 2.

Particular matters affecting title.

See "Estoppel," § 2; "Sales," § 1.

Foreclosure sale, see "Mortgages," § 6.

Sale on execution, see "Execution," § 3.

*Point annotated. See syllabus.

Title necessary to maintain particular actions.
See "Ejectment," § 1; "Partition," § 2; "Quieting Title," § 2; "Trespass," § 2.

Titles of particular acts or proceedings.
See "Statutes," §§ 1, 3.

TOLLS.

See "Bridges," § 1.

TORTS.

Form of action, whether on contract or in tort, see "Action," § 2.
Justice of the peace directing wrongful levy as joint tortfeasor with officer making levy, see "Justices of the Peace," § 2.

Liabilities of particular classes of persons.

See "Municipal Corporations," § 5.

Employés, see "Master and Servant," § 12.

Liabilities respecting particular species of property or instrumentalities.

Vessels, see "Shipping," § 1.

Particular torts.

See "Assault and Battery," § 1; "False Imprisonment," § 1; "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion." Causing death, see "Death," § 1.

Remedies for torts.

See "Trespass," § 2; "Trove and Conversion," § 2.

Excessive damages, see "Damages," § 4.

Inadequate damages, see "Damages," § 4.

Measure of damages, see "Damages," § 3.

Pleading damages, see "Damages," § 5.

TOWNS.

See "Counties"; "Municipal Corporations."

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors," § 1.

TRADE-MARKS AND TRADE-NAMES.

§ 1. *Title, conveyances, and contracts.*

*Where during the life of a monopoly created by a patent a trade-mark has been used to identify the patented article, exclusive right to the trade-mark ceases with the expiration of the patent.—*Whann v. Whann (La.) 38.*

TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 41.

TREES.

See "Logs and Logging."

TRESPASS.

Application of maxims of equity to action for, see "Equity," § 1.

Competency of evidence in prosecution for, see "Criminal Law," § 10.

Disposition on appeal of suit to enjoin trespasses, see "Appeal and Error," § 24.

Ejection of trespasser, see "Carriers," § 9.

Injuries to trespassers, see "Railroads," § 5.

Interest and bias of witnesses, see "Witnesses," § 4.

Res gestæ, see "Evidence," § 4.

Restraining acts of trespass, see "Injunction," § 2.
 Titles of statutes, see "Statutes," § 3.
 To the person, see "Assault and Battery," § 1;
 "False Imprisonment."
 Wrongful levy of execution as trespass, see "Execution," § 4.

§ 1. Acts constituting trespass and liability therefor.

Railroad company not a party to the taking of wood *held* not a trespasser, though subsequently notified by the owners not to ship it.—*Nashville, C. & St. L. Ry. v. Walley* (Ala.) 134.

One *held* liable for the bodily pain suffered by a married woman in consequence of his wrongful conduct though no physical violence was inflicted.—*Engle v. Simmons* (Ala.) 1023.

§ 2. Actions.

*Where a trespass on land is attended with aggravating circumstances of wantonness or malice, exemplary damages may be awarded.—*Western Union Telegraph Co. v. Dickens* (Ala.) 469.

*In an action for trespass on land *held*, that the jury were authorized in inferring wantonness or malice authorizing exemplary damages.—*Western Union Telegraph Co. v. Dickens* (Ala.) 469.

In an action against a telegraph company for trespass on land, a plea *held* not to show justification.—*Western Union Telegraph Co. v. Dickens* (Ala.) 469.

Facts which merely go in mitigation of damages need not be specially pleaded.—*Western Union Telegraph Co. v. Dickens* (Ala.) 469.

*A count of a complaint in an action for trespass on lands *held* not demurrable on the ground that it did not sufficiently describe the premises.—*Western Union Telegraph Co. v. Dickens* (Ala.) 469.

Exemplary damages *held* allowable in trespass to personality where the trespass was unlawful and perpetrated in a reckless manner, accompanied by circumstances of aggravation.—*Terry v. Williams* (Ala.) 804.

Where in trespass for the taking of plaintiff's furniture she contended that a contract of conditional sale was executed to secure a loan, evidence that defendants were pawnbrokers *held* admissible.—*Terry v. Williams* (Ala.) 804.

In trespass to personal property plaintiff *held* not bound to prove either that the title was in her or that it was not in any other person.—*Terry v. Williams* (Ala.) 804.

*In a possessory action, plaintiff must prove possession at the time of the disturbance and during the year preceding, and that the disturbance occurred within a year before the action.—*Garland v. Wunderlich* (Ga.) 644.

*In an action for trespass on land, *held* prejudicial error to permit plaintiff to testify as to deterioration in value from trespasses after the filing of the declaration.—*Gulf & C. Ry. Co. v. Hartley* (Miss.) 382.

*In an action for trespass on land, evidence as to trespasses committed after the filing of the declaration was inadmissible.—*Gulf & C. Ry. Co. v. Hartley* (Miss.) 382.

§ 3. Criminal responsibility.

An affidavit for trespass *held* to conform to the form prescribed by Code 1896, § 4600, as amended by Acts 1903, p. 283, and to sufficiently describe the land.—*Mayhall v. State* (Ala.) 290.

On a trial for trespass, certain evidence *held* proper.—*Mayhall v. State* (Ala.) 290.

*One entering on land after a warning not to go thereon *held* guilty of criminal trespass.—*Davis v. State* (Ala.) 681.

*In a prosecution for trespass after warning, the fact that prosecutor gave another permission to use the highway in question after warning defendant not to go thereon *held* immaterial.—*Cross v. State* (Ala.) 875.

*In a prosecution for trespass after warning, evidence of a conversation between prosecutor and R. with reference to a highway in question *held* inadmissible.—*Cross v. State* (Ala.) 875.

TRESPASS TO TRY TITLE.

See "Ejectment."

TRIAL.

See "New Trial"; "Witnesses."

Adverse possession as question for jury, see "Adverse Possession," § 3.

Breach of contract as question for jury, see "Contracts," § 4.

Effect of release as question for jury, see "Release," § 3.

Estoppel to allege error in instructions, see "Appeal and Error," § 13.

Exceptions to cross-examination of witness by court for purpose of review, see "Criminal Law," § 39.

Exceptions to instructions for purpose of review, see "Criminal Law," § 39.

Harmless error in instructions, see "Appeal and Error," §§ 17, 20; "Homicide," § 16.

Instructions as to adverse possession, see "Adverse Possession," § 3.

Objections to instructions for purpose of review, see "Criminal Law," § 39.

Presentation in lower court of questions relating to instructions for purpose of review, see "Appeal and Error," § 4.

Presentation in record of objections to court's excusing juror for purpose of review, see "Criminal Law," § 41.

Presumptions on appeal as to instructions, see "Criminal Law," § 44.

Review of discretion of lower court as to reception of evidence, see "Appeal and Error," § 15.

Trial of right to property levied on, see "Execution," § 2.

Proceedings incident to trials.

Entry of judgment after trial of issues, see "Judgment," § 2.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 3.

Trial of actions by or against particular classes of persons.

See "Carriers," § 9; "Landlord and Tenant," § 4; "Master and Servant," § 11; "Railroads," §§ 5, 6, 8.

Telegraph companies, see "Telegraphs and Telephones," § 1.

Trial of particular civil actions or proceedings.

See "Assault and Battery," § 1; "Ejectment," § 3; "Forcible Entry and Detainer," § 1; "Fraud," § 1; "Habeas Corpus," § 2; "Injunction," § 4; "Trove and Conversion," § 2.

For breach of contract, see "Contracts," § 4.

For causing death, see "Death," § 1.

For delay in delivery of telegram, see "Telegraphs and Telephones," § 1.

For ejection of passenger, see "Carriers," § 9.

For injuries to animals on or near railroad, see "Railroads," § 8.

For personal injuries, see "Carriers," § 9; "Master and Servant," § 11; "Railroads," §§ 5, 6; "Street Railroads," § 1.

For rent, see "Landlord and Tenant," § 4.

*Point annotated. See syllabus.

For wrongful execution, see "Execution," § 4.
 On bill or note, see "Bills and Notes," § 4.
 Suits in equity, see "Equity," § 5.
 Suits to try tax titles, see "Taxation," § 5.
 To recover goods sold, see "Sales," § 6.
 To rescind sale, see "Sales," § 3.
 To review assessments for public improvements, see "Municipal Corporations," § 3.

Trial of criminal prosecutions.

See "Assault and Battery," § 2; "Burglary," § 2; "Criminal Law," §§ 18-35; "Embezzlement"; "Homicide," §§ 12-14; "Larceny," § 2; "Rape," §§ 1, 2; "Seduction," § 1.
 For carrying concealed weapons, see "Weapons."
 For offenses against liquor laws, see "Intoxicating Liquors," § 7.

§ 1. Notice of trial and preliminary proceedings.

*Where defendant had due notice that a demurrer to his pleas would be called up for hearing on a day during the term, it was his duty, as well as that of his counsel, to be present, so that after such demurrer was heard and overruled, though defendant and his counsel were not present, and plaintiff filed a replication, the court could properly proceed to trial.—*Flournoy v. Munson Bros. Co. (Fla.)* 398.

§ 2. Course and conduct of trial in general.

*In the conduct of trials much must be left to the discretion of the trial court.—*Wilson v. Johnson (Fla.)* 395.

Where defendant had due notice that a demurrer to his pleas would be called up for hearing on a day during the term, it was his duty, as well as that of his counsel, to be present, so that after such demurrer was heard and overruled, though defendant and his counsel were not present, and plaintiff filed a replication, the court could properly proceed to trial.—*Flournoy v. Munson Bros. Co. (Fla.)* 398.

§ 3. Reception of evidence.

*An objection to a responsive answer by a witness is too late where the question was not objected to.—*Southwestern Alabama Ry. Co. v. W. C. Maddox & Son (Ala.)* 9.

*Where a question to a witness was not objected to, a motion to exclude the answer was properly denied.—*Smith v. Birmingham Ry., Light & Power Co. (Ala.)* 307.

An objection to a question before it was finished held not effective as against an answer to the completed question, in the absence of a motion to exclude.—*Redus v. Milner Coal & R. Co. (Ala.)* 634.

*A party held to have availed himself of the first opportunity to have evidence excluded on the ground of hearsay, requiring the court to exclude it.—*Theodore Land Co. v. Lyon (Ala.)* 682.

*An objection to two questions asked a witness, one of which was proper, was properly overruled.—*Theodore Land Co. v. Lyon (Ala.)* 682.

*In an action to recover possession of lands, defendant held not to have lost the benefit of an exception to the sustaining of an objection to the introduction of a deed in evidence by offering one of the grantors as a witness.—*Midlebrooks v. Stephens (Ala.)* 735.

*Error cannot be predicated on the court's refusal to admit proposed evidence, part of which is incompetent.—*Holman v. Clark (Ala.)* 765.

*It is too late to object to evidence after the argument of counsel has begun.—*Terry v. Williams (Ala.)* 804.

*It is within the discretion of the court to allow evidence in rebuttal which might have been offered in chief.—*Terry v. Williams (Ala.)* 804.

*In an action for injuries to a street car passenger, a question asked plaintiff held objectionable as not proper rebuttal.—*Cutcliffe v. Birmingham Ry., Light & Power Co. (Ala.)* 873.

*A motion to strike out from the evidence several documents or instruments as an entirety should be denied, if any of said instruments was properly admitted.—*Hoodless v. Jernigan (Fla.)* 194.

Objections interposed to the introduction in evidence of written instruments which do not appear upon the face thereof, but would have to be proved by extraneous evidence, should be overruled, unless such extraneous evidence has been previously introduced.—*Hoodless v. Jernigan (Fla.)* 194.

*After parties have rested the admission or exclusion of further evidence is in the discretion of the judge.—*Wilson v. Johnson (Fla.)* 395.

*Where evidence has been introduced by a party, but in the conception of the opposite party falls short for the want of proof of other necessary facts, the proper practice is to ask for an appropriate instruction.—*Wilson v. Johnson (Fla.)* 395.

*Objections to the introduction in evidence of a written instrument, which would have to be proved by extraneous evidence, should be overruled.—*Wilson v. Johnson (Fla.)* 395.

§ 4. Arguments and conduct of counsel.

Where receipts had been introduced in evidence, it was competent for counsel to read them to the jury for the first time on the argument.—*Terry v. Williams (Ala.)* 804.

§ 5. Taking case or question from jury.

*Where the evidence was in conflict in respect to the averments of the complaint, an affirmative charge for plaintiff was properly refused.—*Reeder v. Huffman (Ala.)* 177.

*Where, in an action for injuries to plaintiff's horse by an alleged defect in a railroad crossing, the evidence, without conflict, established that the crossing was a public highway crossing, the court was authorized to assume that such was the fact.—*Louisville & N. R. Co. v. Hubbard (Ala.)* 814.

*Where issue was joined on defendant's plea and the evidence conflicting, it was error to give an affirmative charge for plaintiff.—*Wilson v. Taylor (Ala.)* 824.

A party demurring to the evidence must set forth on the record all of the evidence intended to be admitted thereby.—*Skinner Mfg. Co. v. Wright (Fla.)* 28.

*In an action on a life insurance policy, where witness testified that there was an excess in value over loan value of policy, the court may properly so charge.—*New York Life Ins. Co. v. Mills (Fla.)* 603.

§ 6. Instructions to jury—Province of court and jury in general.

*It is not reversible error to assume in an instruction an undisputed fact.—*Birmingham Ry., Light & Power Co. v. Jones (Ala.)* 146.

An instruction in ejectment held a charge on the effect of the testimony, in violation of Code 1896, § 3326.—*Theodore Land Co. v. Lyon (Ala.)* 682.

In an action for injuries to a brakeman, certain instruction as to the abandonment of rules prohibiting going between cars held not error.—*Huggins v. Southern Ry. Co. (Ala.)* 856.

*Point annotated. See syllabus.

§ 7. — Necessity and subject-matter.

A request to charge merely for the purpose of answering an argument of opposing counsel was properly refused.—*Moss v. Mosley* (Ala.) 1012.

An instruction that plaintiff's intestate was a bright boy of more than average mental capacity *held* properly refused as asserting no proposition of law.—*Moss v. Mosley* (Ala.) 1012.

*Where a tax deed to premises sued for has been introduced in evidence by plaintiff, under Tax Law 1893, p. 36, c. 4115, § 61, and subsequently defendant introduced testimony showing the tax deed to be void, it was error to refuse to instruct on the effect of the evidence so introduced by defendant.—*Ropes v. Minshew* (Fla.) 538.

§ 8. — Form, requisites, and sufficiency.

In an action on a contract of guaranty, an instruction *held* properly refused as unintelligible.—*Marx v. Ely* (Ala.) 411.

*In action for rent, instruction that, if the jury do not believe the evidence, they must find for defendant, *held* erroneous under the evidence.—*McConnell v. Adair* (Ala.) 419.

*An instruction in a civil action *held* to require too high a degree of proof on the part of the adverse party.—*Lawrence v. Doe ex dem. Alabama State Land Co.* (Ala.) 612.

In an action against a sheriff for selling under execution against another wood belonging to plaintiff, an instruction as to the degree of proof required of plaintiff *held* erroneous.—*Smiley v. Hooper* (Ala.) 660.

An instruction *held* not cause for reversal on the ground that it was calculated to mislead the jury.—*Kelly v. Louisville & N. R. Co.* (Ala.) 870.

*An instruction on contributory negligence of a servant *held* properly refused as argumentative.—*Moss v. Mosley* (Ala.) 1012.

A requested instruction having special reference to the testimony of a certain witness was properly refused.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

§ 9. — Applicability to pleadings and evidence.

Instruction in action of trover *held* abstract, and properly refused.—*Nashville, C. & St. L. Ry. v. Walley* (Ala.) 134.

An instruction in an action against a street railway company for the death of a child struck by a car which ignores the duty of the motorman to keep a lookout for persons on the track is properly refused.—*Birmingham Ry., Light & Power Co. v. Jones* (Ala.) 146.

In an action against a street railroad company for personal injuries certain requested charges ignoring the question of willful and wanton misconduct on the part of the motorman *held* properly refused.—*Birmingham Ry. Light & Power Co. v. Ryan* (Ala.) 616.

*An instruction *held* properly refused as not supported by the evidence, and therefore abstract.—*Fowler v. Prichard* (Ala.) 667.

*An instruction in part addressed to a count in the complaint, which had been withdrawn, and which was bad in form, was properly refused.—*Louisville & N. R. Co. v. Hubbard* (Ala.) 814.

*In an action for injuries to a servant a requested instruction on willful negligence *held* properly refused as inapplicable to the evidence.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

*Instructions assuming facts contrary to the proof *held* properly refused.—*American Cent. Ins. Co. v. Antram* (Miss.) 257.

§ 10. — Requests or prayers.

It is not error to refuse a request to charge properly covered by instructions given.—*Louisville & N. R. Co. v. Hubbard* (Ala.) 814; *Hoyle v. Mann* (Ala.) 835; *Saunders v. Tusculumbia Roofing & Plumbing Co.* (Ala.) 982; *Moss v. Mosley* (Ala.) 1012; *Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

*An instruction *held* not error, in view of the fact that defendant failed to request an explanatory charge.—*Birmingham Ry., Light & Power Co. v. Oden* (Ala.) 129.

In an action against a street railway company for the death of a child struck by a car, the company *held* required to request a charge explanatory of the effect of contributory negligence on a count in the complaint charging simple negligence.—*Birmingham Ry., Light & Power Co. v. Jones* (Ala.) 146.

In an action for death of the driver of a vehicle in a collision with a street car, an instruction *held* insufficient to cover a proper request as to the motorman's right to presume that intestate would keep to the right side of the street until he showed some indication of his intent to do otherwise.—*Birmingham Ry., Light & Power Co. v. Clarke* (Ala.) 829.

*Where an instruction on a material issue is correct, if the party desires any further explanation it is its duty to request explanatory charges.—*Birmingham Ry., Light & Power Co. v. Clarke* (Ala.) 829.

§ 11. — Objections and exceptions.

*Where the only error urged in the giving of charges is that they are misleading and tend to confuse the jury, they do not present ground for reversal.—*Smith v. Birmingham Ry., Light & Power Co.* (Ala.) 307.

§ 12. — Construction and operation.

An error in an instruction *held* cured by another instruction.—*Birmingham Ry., Light & Power Co. v. Jones* (Ala.) 146.

In an action against a railroad company for injuries at a crossing, error in an instruction as to wanton and willful misconduct *held* not cured by ensuing instruction.—*Louisville & N. R. Co. v. Muscat & Lott* (Ala.) 302.

Any error in modifying an instruction in action on insurance policy as to fraud *held* cured by another instruction.—*American Cent. Ins. Co. v. Antram* (Miss.) 257.

Instructions are sufficient where taken together they announce the law of the whole case.—*Mississippi Cent. R. Co. v. Hardy* (Miss.) 505.

§ 13. Verdict.

Where verdict awarded damages slightly in excess of amount claimed in complaint, excess *held* to be referred to interest.—*Southern Ry. Co. v. Webb* (Ala.) 420.

TRIAL OF RIGHT OF PROPERTY.

See "Execution," § 2.

TROVER AND CONVERSION.

See "Larceny."

Conversion as set-off in action on note, see "Bills and Notes," § 4.

Opinion evidence, see "Evidence," § 11.

Waiver of conversion by action on contract, see "Action," § 2.

Conversion of particular species of property.

Mortgaged chattels, see "Chattel Mortgages," § 3.

*Point annotated. See syllabus.

§ 1. Acts constituting conversion and liability therefor.

Persons who participated in the sale of property wrongfully levied on, though they were not liable as trespassers, were guilty of conversion.—*Stallings v. Gilbreath* (Ala.) 423.

§ 2. Actions.

Under evidence in action of trover, court should have charged that, if the defendant paid for the wood taken and plaintiffs accepted the pay, they cannot recover.—*Nashville, C. & St. L. Ry. v. Walley* (Ala.) 134.

In view of evidence given in action for conversion, burden *held* to be on defendant to prove that wood taken by him had been paid for.—*Nashville, C. & St. L. Ry. v. Walley* (Ala.) 134.

*The highest market price between the time of the conversion and the trial may be awarded as damages in trover.—*Posey v. Gamble* (Ala.) 416.

In an action for conversion, a summons and complaint in a former suit in assumpsit, in which defendant was treated as a purchaser, *held* admissible under the pleadings.—*Southern Ry. Co. v. City of Attalla* (Ala.) 664.

One *held* not deprived of a right to maintain an action for conversion of property furnished a third person for its exclusive use, and who was paid by defendant for the property taken.—*Southern Ry. Co. v. City of Attalla* (Ala.) 664.

*To support an action of trover, the right to property, general or special, and possession or an immediate right of possession, must concur in the plaintiff at the time of the conversion.—*Southern Ry. Co. v. City of Attalla* (Ala.) 664.

*A complaint for the conversion of water *held* to show ownership and possession by plaintiff until converted by defendant.—*Southern Ry. Co. v. City of Attalla* (Ala.) 664.

A plea in an action for conversion, setting up the institution of a prior suit in assumpsit, *held* bad as a plea in bar.—*Southern Ry. Co. v. City of Attalla* (Ala.) 664.

Evidence in an action of conversion by a chattel mortgagee *held* to authorize a finding of more than nominal damages.—*Baker v. Hutchinson* (Ala.) 809.

*Where in trover plaintiff's title is based on a mortgage the measure of damages is the amount of the mortgage debt and interest, not to exceed the value of the property.—*Ryan v. Young* (Ala.) 954.

*If the evidence shows fluctuations in value after the conversion the jury may fix the value of the highest price at any time between the conversion and trial.—*Ryan v. Young* (Ala.) 954.

*The measure of damages in trover as a general rule stated.—*Ryan v. Young* (Ala.) 954.

*In trover the plea of not guilty puts in issue every matter pleadable in bar except a release.—*Ryan v. Young* (Ala.) 954.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Charitable trusts, see "Charities."

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Creation by will, see "Wills," § 4.

Effect of trust on limitations in equity, see "Equity," § 2.

Garnishment of property in hands of trustee, see "Garnishment," § 1.

*Point annotated. See syllabus.

Presentation in lower court of questions for review in action to cancel conveyances made under trust deed, see "Appeal and Error," § 4.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

Trust funds in hands of assignee for creditors, see "Assignments for Benefit of Creditors," § 1.

§ 1. Creation, existence, and validity.

*The common-law rule that a consideration was necessary in a deed to prevent a resulting trust *held* abolished by statute.—*Campbell v. Noble* (Ala.) 745.

§ 2. Construction and operation.

Stockholders in a corporation under a declaration of trust *held* to have acquired a proportionate interest in the trust property measured by the extent of their stockholdings.—*Riordan v. Schlicher* (Ala.) 842.

*A cestui que trust has power to assign his equitable interest in the trust fund to secure a valid indebtedness as against other creditors.—*Riordan v. Schlicher* (Ala.) 842.

§ 3. Management and disposal of trust property.

A bill by a trustee failing to allege facts showing that the trust was an active one *held* fatally defective.—*Roman v. Long Distance Telephone & Telegraph Co.* (Ala.) 292.

§ 4. Establishment and enforcement of trust.

*The doctrine that, so long as trust property can be followed, the property into which it has been converted remains subject to the trust, applies to moneys deposited in a bank and to the debt thereby created.—*Hutchinson v. National Bank of Commerce* (Ala.) 143.

*So long as trust property can be followed, the property into which it has been converted *held* subject to the trust.—*Hutchinson v. National Bank of Commerce* (Ala.) 143.

*A holder of a draft sending it to a bank for collection *held* to trace the proceeds thereof into the hands of the assignee of the bank, and to charge the same with a trust for his benefit.—*Hutchinson v. National Bank of Commerce* (Ala.) 143.

*A bill by a wife to establish a resulting trust in land conveyed to her husband, *held* insufficient for failing to aver the facts out of which the alleged trust originated.—*Gilbreath v. Farrow* (Ala.) 1000.

Where, in a petitory action, plaintiffs propounded interrogatories to defendant to prove that defendant and his author held the title in trust under parol agreement, and defendant answered under oath denying the alleged trust agreement, the answers stand as part of the pleadings, and an exception of no cause of action was properly sustained.—*Wells v. Wells* (La.) 316.

Parol evidence is never admissible to prove title in an ancestor, either directly or indirectly.—*Wells v. Wells* (La.) 316.

TUTORS.

See "Executors and Administrators," § 5; "Guardian and Ward."

Of adopted children, see "Adoption."

Parties on appeal from judgment homologating accounts of, see "Appeal and Error," § 5.

UNDISCLOSED AGENCY.

See "Principal and Agent," § 2.

UNITED STATES.

Public lands, see "Public Lands," § 1.

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USAGES.

See "Customs and Usages."

USURY.

Laws relating to, as impairment of obligation of contract, see "Constitutional Law," § 4.
Redemption from foreclosure of mortgage securing usurious debt, see "Mortgages," § 7.

VACATION.

Of particular acts, instruments, or proceedings.
See "Attachment," § 3; "Injunction," § 4.
Sale on execution, see "Execution," § 3.

Proceedings during vacation of courts.
Stay of execution, see "Execution," § 1.

VAGRANCY.

Statute relating to vagabondage as repeal of statute relating to burglary, see "Burglary," § 1.

Gen. Acts 1903, p. 244, held not to apply where accused left his wife and children before passage of the act, though remaining away from them thereafter.—*Crawley v. State* (Ala.) 175.

VALUE.

Best and secondary evidence of, see "Evidence," § 5.
Evidence of similar facts to show value, see "Evidence," § 4.
Expert testimony of, see "Evidence," § 11.
Extent of homestead right, see "Homestead," § 1.
Limits of jurisdiction, see "Appeal and Error," §§ 1, 2; "Courts," § 5.
Of property taken or injured in exercise of power of eminent domain, see "Eminent Domain," § 3.
Opinion evidence as to, see "Criminal Law," § 14.

VARIANCE.

Between pleading and proof in criminal prosecutions, see "Indictment and Information," § 6.

VENDOR AND PURCHASER.

See "Sales."
Depositaries of purchase price of realty, see "Depositaries."
Jurisdiction of equity to enforce forfeitures under contracts for sale of realty, see "Equity," § 1.
Parol or extrinsic evidence of contract for sale of land, see "Evidence," § 10.
Right to fixtures, see "Fixtures."
Specific performance of contract, see "Specific Performance."
Time for performance of contract by seller, see "Contracts," § 2.

Sales by or to particular classes of persons.
See "Counties," § 2.

Sales of particular species of, or estates or interests in, property.

County court house, see "Counties," § 2.
Property of insane persons, see "Insane Persons," § 2.

Sales on judicial or other proceedings.

See "Judicial Sales"; "Partition," § 2.
Sale on execution, see "Execution," § 3.
Tax sale, see "Taxation," § 5.

§ 1. **Requisites and validity of contract.**
*A contract between plaintiff and the owner of certain land held a lease so long as it remained executory, and on completion of the payments it became a contract of sale.—*Heard v. Heard & Lee* (Ala.) 827.

*As between the parties to a private sale, the description, "the property and all improvements thereon situated in square bounded by S., T., R., and B. streets, and known as Nos. 500 to 508 B. street" held sufficient.—*Girault v. Feucht* (La.) 572.

The performance of certain acts by defendant in examining land held insufficient to constitute a consideration supporting a contract for an option thereon by plaintiffs.—*Comstock Bros. v. North* (Miss.) 374.

Contracts for options must be supported by a sufficient consideration.—*Comstock Bros. v. North* (Miss.) 374.

In an action to clear title to land, a certain letter held to constitute a mere offer to sell land, and not an option.—*Comstock Bros. v. North* (Miss.) 374.

§ 2. **Construction and operation of contract.**

In a promise of sale, a clause stipulating that part of the price is to be deposited in bank in the joint names of the parties until the title is examined, and to be paid to the vendor when the act of sale is passed, or to be returned to the vendee if the title is rejected, means only that the sale is subject to examination of titles.—*Girault v. Feucht* (La.) 572.

§ 3. **Performance of contract.**

*A lessee accepting an option in the lease for the purchase of the property need not tender any other amount that he owes the lessor than that named in the option.—*Murphy v. Hussey* (La.) 692.

*Where a lessor refused to recognize the binding effect of an option in the lease for the sale of the property, it was not necessary for the lessee, in order to complete his tender, to deposit it.—*Murphy v. Hussey* (La.) 692.

Under an option in a lease for the balance of the premises to the lessee, tender by lessee held sufficient where the lessor refused to recognize the binding effect of the contract.—*Murphy v. Hussey* (La.) 692.

§ 4. **Rights and liabilities of parties.**

*A grantee and those deraigning title through him held put on inquiry, which would lead to knowledge, by the joinder in the deed of one having no record title, but who had given a mortgage which was recorded.—*Creel v. Keith* (Ala.) 780.

*A vendor's lien defined.—*Rewis v. Williamson* (Fla.) 449.

*Land held sold subject to vendor's lien.—*Rewis v. Williamson* (Fla.) 449.

*In an action to compel a purchaser to accept title to real estate and pay the price, the defendant should be condemned to pay interest only from the date of the judgment, where he had reasonable ground to defend the suit.—*Fluker v. De Grange* (La.) 591.

*Point annotated. See syllabus.

VENUE.

Of criminal prosecutions, see "Criminal Law," § 4.

VERDICT.

Directing verdict in civil actions, see "Trial," § 5.

In civil actions, see "Trial," § 13.

In criminal prosecutions, see "Criminal Law," §§ 20, 34.

Operation and effect as curing defects in pleadings, see "Pleading," § 8.

Setting aside, see "New Trial," § 1.

VERIFICATION.

Of pleading, see "Equity," § 3.

Of statement of mechanic's lien, see "Mechanics' Liens," § 2.

VETO.

Of act by governor, see "Statutes," § 1.

VICE PRINCIPALS.

See "Master and Servant," §§ 9, 11.

VILLAGES.

See "Municipal Corporations."

WAIVER.

See "Estoppel."

Authority of attorney to waive appeal, see "Attorney and Client," § 1.

Of tort by action on contract, see "Action," § 2.

Of objections to particular acts, instruments, or proceedings.

See "Indictment and Information," § 7.

Assignments of error in criminal prosecution, see "Criminal Law," § 44.

Error waived in appellate court, see "Appeal and Error," § 21.

Of rights or remedies.

Notice of claim for damages to shipment, see "Carriers," § 6.

Right not to be twice put in jeopardy, see "Criminal Law," § 5.

Right to appeal, see "Appeal and Error," § 3.

Right to copy of indictment, see "Criminal Law," § 19.

Right to poll jury in criminal prosecution, see "Criminal Law," § 34.

Right to recover goods sold, see "Sales," § 6.

Right to rescind sale, see "Sales," § 3.

WARDS.

See "Guardian and Ward."

WAREHOUSEMEN.

Carrier as warehouseman, see "Carriers," § 4.

WARNING.

Servant, see "Master and Servant," § 10.

WARRANTY.

On sale of goods, see "Sales," §§ 5, 6.

*Point annotated. See syllabus.

WATERS AND WATER COURSES.

See "Navigable Waters."

Evidence of damages for injuries from overflow of drain, see "Damages," § 5.

Evidence of similar facts in action for injuries from overflow, see "Evidence," § 4.

Opinion evidence in action for injuries from overflow, see "Evidence," § 11.

Wrongful conversion of water, see "Trove and Conversion," § 2.

§ 1. Surface waters.

*A landowner has no right to make embankments whereby the flowage of rainfall is averted from his land, and accumulated on the land of his neighbor.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

*A railroad company *held* bound to protect adjoining landowners against water collected by its embankments except as against flowage caused by extraordinary rainfall.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

Where a railroad company maintained an insufficient sewer under its right of way, it was immaterial to the railroad's liability for damages that it did not construct the sewer.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

Where there was evidence justifying a finding that a railroad company was guilty of gross negligence or wantonness in maintaining a drain, to plaintiff's injury, the jury if they so found *held* entitled to award punitive damages.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

*In an action for the overflow of defendants' drain evidence that when the water subsided a stench was left in plaintiff's houses *held* admissible as bearing on the diminution in rental value of the property.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

In an action for damage to plaintiff's property by the overflow of a drain maintained by defendant railroad company, evidence concerning other rainfalls than that pleaded *held* inadmissible.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

In an action for injuries to land caused by the insufficiency of a railroad's culvert, a plea that the overflow was caused by water turned into the ditch by the town *held* demurrable for failure to allege that defendant could not reasonably have enlarged the culvert to receive the additional flow.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

In an action against a railroad company for damages caused by an alleged insufficient culvert a plea alleging that the overflow on plaintiff's property resulted from water and debris from the streets of a certain city, *held* objectionable.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

*In an action against a railroad company for damages from the insufficiency of the sewer under its embankment, the complaint *held* not objectionable as omitting to allege that the water was diverted from its natural course.—Central of Georgia Ry. Co. v. Keyton (Ala.) 918.

§ 2. Public water supply.

*Water company *held* not liable to resident of city for loss by fire caused by failure to furnish supply of water.—Lovejoy v. Bessemer Waterworks Co. (Ala.) 76.

*A water company placing its pipes in the streets under a franchise contract with the city does so in subordination to the superior rights of the public, and the city in such a case has no authority to burden itself or its taxpayers with the payment of damages necessarily consequent

upon the reasonably careful and skillful execution of its authorized public works.—*Anderson v. Fuller* (Fla.) 684.

WAYS.

Public ways, see "Highways."

WEAPONS.

Opinion evidence as to nature of weapon, see "Criminal Law," § 14.

An indictment alleging that accused presented a firearm at a person named *held* sufficient.—*Hughes v. State* (Ala.) 427.

*Whether the pistol which accused was shown to have carried, was carried so as not to be discernible by ordinary observation, is for the jury.—*Hainey v. State* (Ala.) 968.

On a trial for carrying a concealed weapon, the admission of evidence that accused was drunk, was prejudicial.—*Hainey v. State* (Ala.) 968.

A witness for the state on a trial for carrying a concealed weapon, *held* properly allowed to state what he was doing when he saw accused with the weapon.—*Hainey v. State* (Ala.) 968.

On a trial for carrying a concealed weapon, evidence that accused was a brother of a person whom the officers sought to arrest for drunkenness, *held* inadmissible.—*Hainey v. State* (Ala.) 968.

WILLS.

See "Executors and Administrators."

Charitable bequests and devises, see "Charities."

Courts of probate, see "Courts," § 4.
Repugnancy in pleading in will contest, see "Equity," § 3.

Review of decisions of intermediate courts in proceedings for probate of will, see "Appeal and Error," § 22.

§ 1. Contracts to devise or bequeath.

*A person may make a valid agreement to dispose of his property by will in a particular way, which equity will enforce.—*Allen v. Bromberg* (Ala.) 771.

*A contract to execute a will containing certain provisions *held*, under Code 1896, § 4264, not enforceable by setting aside a will made in violation of the contract and probating a previous will.—*Allen v. Bromberg* (Ala.) 771.

*A contract for the execution of a will containing certain provisions *held* not enforceable until a will executed in violation of the contract had been probated.—*Allen v. Bromberg* (Ala.) 771.

§ 2. Requisites and validity.

*The executor is a competent witness to the will in which he is named executor.—*Davenport v. Davenport* (La.) 240.

§ 3. Probate, establishment, and annulment.

A administrator *held* not entitled to file a separate contest of an alleged will of his decedent while a previous contest was in progress of trial.—*Rainey v. Ridgway* (Ala.) 632.

*Where contestant's husband was testatrix's sole heir, and contestant was the sole heir of her husband, she was a "party interested" and entitled to contest the probate of testatrix's will.—*Rainey v. Ridgway* (Ala.) 632.

*That some of the heirs at law of a testatrix were barred under Code 1896, §§ 4298, 4299, from contesting a will in chancery, *held*

not to affect the right of a complainant not barred.—*Ellis v. Crawson* (Ala.) 942.

*A bill filed under Code 1896, §§ 4298, 4299, to contest a will *held* demurrable for stating conclusions rather than facts.—*Ellis v. Crawson* (Ala.) 942.

*In contesting a will under Code 1896, §§ 4287, 4298, 4299, contestant *held* not confined to any one ground of contest.—*Ellis v. Crawson* (Ala.) 942.

In a suit under Code 1896, §§ 4298, 4299, to contest a will, etc., the question as to the extent of complainant's relief and the character thereof, *held* not such that it could be raised by demurrer.—*Ellis v. Crawson* (Ala.) 942.

Where a witness to a will signs by a name slightly different from that given by him in the testament, parol evidence is admissible to show the two to be the same person.—*Davenport v. Davenport* (La.) 240.

Where a universal legacy is attacked on the ground that the legatee is a minister who professionally attended testatrix in her last illness, when the will was made, the petition discloses no cause of action in the absence of allegation that there was no tie of consanguinity between the testatrix and legatee.—*Succession of Herber* (La.) 559.

§ 4. Construction.

*Will construed, and *held* to make independent provision for the wife without the creation of a precatory trust.—*Rector v. Alcorn* (Miss.) 370.

§ 5. Rights and liabilities of devisees and legatees.

Rev. St. 1892, §§ 1830, 1833, give a widow the right to elect whether she shall take dower or a child's part in the estate.—*Saxon v. Rawls* (Fla.) 594.

WITNESSES.

See "Depositions"; "Evidence."

Absence of as ground for continuance in criminal prosecution, see "Criminal Law," § 18.
Exceptions to cross-examination of witness by court, for purpose of review, see "Criminal Law," § 39.

Experts, see "Evidence," § 11.

Instructions as to credibility in criminal prosecution, see "Criminal Law," § 26.

Instructions giving undue prominence to particular testimony, see "Trial," § 8.

Objections to questions to, see "Trial," § 3.

Opinions, see "Evidence," § 11.

Review of discretion of lower court as to leading questions, see "Appeal and Error," § 15.
To execution of will, see "Wills," § 2.

§ 1. Attendance, production of documents, and compensation.

Laws 1903, p. 71, c. 5182, prescribing the requisites to be complied with by parties charged with crime in applications for the procurement of witnesses for their defense, is not in conflict with either section 11 or section 14 of the Declaration of Rights of Constitution 1885.—*Pittman v. State* (Fla.) 385.

*Applications under Laws 1903, p. 71, c. 5132, for the procurement of witnesses, at the cost of the county, for the defense of parties charged with crime, should be made at the earliest reasonable opportunity.—*Pittman v. State* (Fla.) 385.

*Under Acts 1894, p. 78, No. 67, where defendant files an affidavit as to what he expects to prove by a witness, he is entitled to summon witnesses beyond the statutory six as a matter of right.—*State v. Freddy* (La.) 436.

*The right to compulsory process referred to in the Constitution *held* to be the right of ac-

*Point annotated. See syllabus.

cused persons to demand the issuing of subpoenas for their witnesses and of having the same served, not to have attachments issued.—*State v. Stewart* (La.) 798.

§ 2. Competency.

*In an action against an administrator for services rendered decedent, plaintiff is incompetent to testify to transaction with decedent, under Code 1896, § 1794.—*Patteson v. Carter* (Ala.) 133.

*A letter from a husband to his wife *held* competent evidence against him as prosecution for crime.—*Caldwell v. State* (Ala.) 473.

*A child 12 years of age *held* properly permitted to testify, though she did not understand a question as to whether she knew the nature of a judicial oath.—*Gordon v. State* (Ala.) 847.

*In a suit to establish a gift, the alleged donee *held* incompetent to testify, under Code 1896, § 1794, to what occurred between himself and the donor since deceased.—*Thomas v. Tilley* (Ala.) 854.

*A witness need not have heard the entire conversation, but may testify to the part he has heard.—*State v. Freddy* (La.) 436.

§ 3. Examination.

Where evidence is admitted to show the trailing of defendant by dogs, defendant *held* entitled on cross-examination to inquire fully into the breeding and testing of the dogs and circumstances of the hunt.—*Richardson v. State* (Ala.) 82.

*It was not error for the court to permit the state to cross-examine defendant for the purpose of showing flight.—*Untreiner v. State* (Ala.) 285.

*A witness having no personal knowledge of facts set forth in a memorandum, and having no recollection of the facts independent of it, is inadmissible.—*Jones v. State* (Ala.) 299.

*In a criminal prosecution, *held* permissible for the state on redirect examination to show why a witness went away shortly after the crime.—*Sims v. State* (Ala.) 413.

To permit a witness for defendant on trial for homicide to answer a question on cross-examination as to how far he lived from the home of the father of the decedent was within the discretion of the trial court.—*Hill v. State* (Ala.) 621.

*The latitude to be allowed on the cross-examination of a witness *held* largely within the discretion of the trial court.—*Smiley v. Hooper* (Ala.) 660.

*Where, in a prosecution for murder, a state's witness was asked on cross-examination whether he ever had any trouble with defendant and answered, "Yes; in this way"—the state had a right to show whether the trouble was a fight, a personal difficulty, or other kind of trouble, without going into the details.—*Glass v. State* (Ala.) 727.

*In a criminal case, it was within the discretion of the trial court to allow the solicitor for the state to recall witnesses for the defendant for the purpose of laying a predicate for their impeachment by proof of contradictory statements.—*Hammond v. State* (Ala.) 761.

*Defendant *held* to have had the right to cross-examine a witness for plaintiff on a matter on which he had given his opinion on direct examination.—*Huggins v. Southern Ry. Co.* (Ala.) 856.

*Defendant *held* not prejudiced by the exclusion of evidence to prove a fact already testified to by the witness.—*Nashville, C. & St. L. Ry. v. Moore* (Ala.) 984.

*On a prosecution for betting at a game of cards played at a public place *held* proper to ask witnesses if they could testify that the playing at such place could not be seen from any point along a certain public road.—*Bradford v. State* (Ala.) 1024.

*A witness called for the defense in a criminal prosecution, and testifying to his general good character, may be cross-examined as to particular facts.—*State v. Le Blanc* (La.) 105.

Question on cross-examination, "Have you ever heard of a previous attempt by the accused on the life of the deceased?" *held* erroneous.—*State v. Thompson* (La.) 107.

*Where a witness for the state is allowed in order to refresh his memory, to read his testimony on preliminary examination, but his memory is not thereby refreshed, defendant cannot complain.—*State v. Thompson* (La.) 107.

§ 4. Credibility, impeachment, contradiction, and corroboration.

*Questions asked a witness *held* competent to affect his credibility.—*Morris v. State* (Ala.) 274.

*On a trial for homicide, evidence showing that a witness had made threats against decedent *held* competent to impeach him.—*Morris v. State* (Ala.) 274.

*On a trial for homicide the court properly permitted the state to question accused when testifying as a witness with respect to a statement made by him contradicting his testimony.—*Morris v. State* (Ala.) 274.

An affidavit contradictory of a witness' testimony *held* admissible, though he testified it had been procured from him by improper means.—*New v. Young* (Ala.) 523.

In ejectment, an affidavit executed by a witness admitting that defendant loaned her money on the land *held* admissible to contradict her testimony to the contrary.—*New v. Young* (Ala.) 523.

*Certain evidence *held* admissible to show enmity on the part of a witness, thus contradicting his claim of special friendship for deceased.—*Glass v. State* (Ala.) 727.

*The court properly refused to allow a witness to be interrogated with respect to his own general character for truth and veracity.—*Glass v. State* (Ala.) 727.

*Contradictory statements of a witness *held* no ground for excluding his testimony.—*Benjamin v. State* (Ala.) 739.

*The fact that the solicitor for the state in a criminal case recalled witnesses for defendant in order to lay a predicate for impeachment did not make them the state's witnesses.—*Hammond v. State* (Ala.) 761.

*Under Code 1896, § 1795, a conviction for a felony, made so by statute, which was not a crime at common law, may be shown to affect the credibility of a witness.—*Fuller v. State* (Ala.) 774.

*Under Code 1896, §§ 4711, 1795, 1796, a witness for defendant in a prosecution for homicide *held* properly asked if he had been convicted of aiding a prisoner charged with murder to escape from jail.—*Fuller v. State* (Ala.) 774.

*Where a witness admits that he was guilty of a felony for which he was convicted, testimony tending to show that he was not guilty thereof is inadmissible.—*Fuller v. State* (Ala.) 774.

*A witness who has answered a question collateral and irrelevant to the issue may not be

*Point annotated. See syllabus.

contradicted by the party who questioned him.—*Kelly v. Louisville & N. R. Co.* (Ala.) 870.

*In a prosecution for trespass after warning, it was not error for the court to permit the state on defendant's cross-examination to show that he had sworn out a warrant for prosecutor's arrest.—*Cross v. State* (Ala.) 875.

*Where a witness for accused testified that he made no threats against deceased, but that his relations were friendly, evidence of threats made by the witness against deceased long prior to the difficulty *held* admissible.—*Hanners v. State* (Ala.) 973.

An impeaching question, which was outside of the matter laid in the predicate, was properly disallowed.—*Williams v. State* (Ala.) 992.

*For the purpose of discrediting a witness, a wide range of cross-examination is permitted, and the rule applies to the cross-examination of a defendant, when he voluntarily offers himself as a witness.—*Pittman v. State* (Fla.) 385.

*Where accused has testified as a witness, the testimony of other witnesses as to his credibility "as a witness in the case being tried" *held* inadmissible.—*Maloy v. State* (Fla.) 791.

*An accused taking the stand as a witness may as a witness be impeached.—*Maloy v. State* (Fla.) 791.

*It is error to refuse to permit defendant on cross-examination of a state witness to interrogate him as to whether he had made threats against defendant.—*Vaughn v. State* (Fla.) 881.

*Where defense seeks to impeach the credibility of the state's witness as to his general reputation, it should be shown that the witness is so situated as to be properly able to give

testimony on that subject.—*State v. Rester* (La.) 231.

*Evidence was admissible, in behalf of accused, to prove that a female witness for the state, who denied the fact on her cross-examination, was a concubine of the deceased, to show the animus of the witness.—*State v. Craft* (La.) 550.

WORK AND LABOR.

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